

## The FCPA, Al Capone and the IRS

June 11, 2014



*Uncompromising Quality*

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## Origins of the FCPA?

Congress enacted the U.S. Foreign Corrupt Practices Act (FCPA or Act) in 1977 in response to:

1. SEC discovered that more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials
2. SEC reported that companies were using secret "slush funds" to make illegal campaign contributions in the United States
3. Lockheed, Boeing, and McDonnell Douglas Anti-Trust Violations in the 1970's paved the way for the FCPA



## Prohibitions

- Offering Anything of Value
- To a foreign official in order to influence any act or decision of the foreign official in his or her official capacity;
- or to secure any other improper advantage in order to obtain or retain business.



## Consequences

- Civil and criminal penalties
- Sanctions
- Remedies, including fines, disgorgement, and/or imprisonment



## FCPA Coverage

### A. Anti-bribery

1. Domestic Concerns
2. Issuers
3. Territorial Jurisdiction

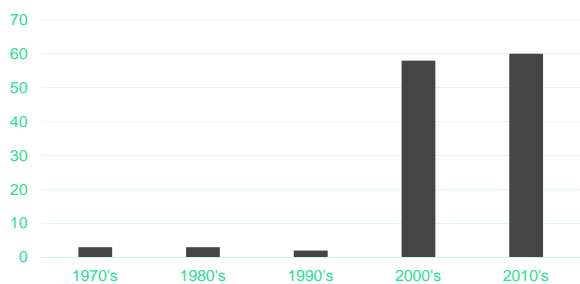
## FCPA Coverage

### B. Accounting Provisions

1. Book and Records
2. Internal Controls

## Current Events

(SEC Enforcement Actions for FCPA Violations)



## Al Capone and the IRS

So, you think you have this FCPA thing figured out?

If so...do you know the story of Al Capone, Eliot Ness and the IRS?

Al thought he had the Feds beat on Bootlegging Charges

What did the Feds bust Al on? Income Tax Evasion!!

How does this pertain to the FCPA?

## Current Events

June 2013 - Mary Jo White..."The SEC is a law enforcement agency,.....we will continue to focus on FCPA violations and financial statement fraud and mischievous accounting...."<sup>1</sup>

December 2012 - SEC called out the internal audit departments at Eli Lilly and Allianz for negligence in failing to properly audit internal controls, books and records<sup>2</sup>

1. Wall Street Journal – June 23, 2013

2. SEC Website – <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> - December 20, 2012

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## Current Events

20% of companies materially manipulate their earnings.<sup>3</sup>

External auditors have reduced their findings of material weaknesses in internal control - no warning signs for Lehman Brothers, Citigroup accounting shenanigans.<sup>4</sup>

C-Suite behaving badly...2012 a record year for corporate criminal fines; insider trading; bribery; conflicts of interest.<sup>5</sup>

3. Iliia Dichev and Shiva Rajgopal of Emory University and John Graham of Duke University, Sept. 9, 2012

4. Forbes, Francine McKenna, October 18, 2012

5. Bloomberg Businessweek, Louis Lavelle, December 13, 2012 and Jeff Kaplan, Conflict of Interest Blog

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## Current Events

On May 23, 2014, Canada sentenced business executive Nazir Karigar to three years in prison for conspiracy to bribe foreign public officials.

This is the first jail sentence handed down under Canada's Corruption of Foreign Public Officials Act (CFPOA) since it came into force in 1999.

All previous prosecutions have been against corporations and were disposed of with guilty pleas and fines.<sup>6</sup>

6. FCPA Compliance and Ethics Blog, June 2, 2014

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## Current Events

March 11, 2014 - The SEC charged AgFeed Industries Audit Committee Chairman, K. Ivan Gothner, with scheming to avoid or delay disclosure of an accounting fraud once he learned about it in 2011.<sup>7</sup>

Bank of America Suspends Buyback & Dividend Increase - Bank of America executives had been using the wrong calculations since 2009. California Teachers Pension calls for No Vote of Audit Committee Members.<sup>8</sup>

7. SEC.gov - Washington D.C., March 11, 2014

8. WSJ – April 28, 2014

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## Internal Controls

- The payment of bribes often occurs in companies that have weak internal control environments
- Internal controls over financial reporting are the processes used by companies to provide reasonable assurances regarding the reliability of financial reporting;
- And the preparation of financial statements

## Internal Controls

### Effective Internal Control Programs Have

1. An effective control environment – Tone at the Top
2. Risk Assessments (FCPA, Fraud, Internal Audit)
3. Control Activities
4. Formal Information and Communication Protocols
5. Monitoring

## Internal Controls

### Companies with ineffective internal controls often face risks of:

1. Embezzlement
2. Self-dealing by Employees
3. Commercial bribery
4. Export control problems
5. Violations of other U.S. and local laws

## Books & Records

- Bribes, both foreign and domestic, are often mischaracterized in companies' books and records
- Consistent with the FCPA's approach to prohibiting payments of any value that are made with a corrupt purpose, there is no materiality threshold under the books and records provision

## Books & Records

- As with the anti-bribery provisions, DOJ's and SEC's enforcement of the books and records provision has typically involved misreporting of either large bribe payments or;
- Widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery

## Books & Records

### Bribes Have Been Mischaracterized As:

- Commissions or Royalties
- Consulting Fees
- Sales and Marketing Expenses
- Scientific Incentives or Studies
- Travel and Entertainment Expenses
- Rebates or Discounts
- After Sales Service Fees

## Books & Records

### Bribes Have Been Mischaracterized As:

- Free Goods
- Intercompany Accounts
- Supplier / Vendor Payments
- Write-offs
- Customs Intervention
- Miscellaneous Expenses
- Petty Cash Withdrawals

## Bribery of a Foreign Official

- In 1998, the FCPA was amended to expand the definition of foreign official
- Includes employees and representatives of public international organizations
- Organizations such as schools and hospitals

## Bribery of a Foreign Official

- Currently, public international organizations include entities such as the World Bank, the International Monetary Fund, and the World Trade Organization
- A comprehensive list of organizations can be found on the U.S. Government Printing Office website at <http://www.gpo.gov/fdsys/>

## Bribery of a Foreign Official

### Examples of Actions Taken to Obtain or Retain Business

- Winning a contract
- Influencing the procurement process
- Circumventing the rules for importation of products
- Gaining access to non-public bid tender information
- Evading taxes or penalties
- Influencing the adjudication of lawsuits or enforcement actions
- Obtaining exceptions to regulations
- Avoiding contract termination

## FCPA High Risk Processes

- Foreign Payroll Advances
- Immigration – fines, work visas, temporary visas
- Customs – devil is in the detail – special handling, other services, expediting services
- Distributors
- Gifts and Charitable Contributions to foreign schools & hospitals

## FCPA High Risk Processes

- Contracts – Should contain provisions for COBC, Anti-Bribery Program, Bank Account, Method of Payment, Fee Structure, Right to Audit, Market Based Compensation
- P-Cards, Credit Cards, Petty Cash
- Permits
- T&E

## FCPA High Risk Processes

- Inter-Company Transactions (Subsidiaries & Joint Ventures)
- Facilitating and Expediting Payments
- Non-PO Purchases
- Agents, Intermediaries, or Foreign Business Associates
- All Cash Transactions

## Acceptable Payments – T&E

- The FCPA allows companies to provide reasonable and bona fide travel and lodging expenses to a foreign official;
- For expenses directly related to the promotion, demonstration, or explanation of a company's products or services;
- Or are related to a company's execution or performance of a contract with a foreign government or agency

## Acceptable Payments

(Facilitating or Expediting)

The FCPA's bribery prohibition contains a narrow exception for facilitating or expediting payments made in furtherance of routine governmental action.

### Examples of Routine Governmental Action

An action which is ordinarily and commonly performed by a foreign official in:

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- Processing governmental papers, such as visas and work orders;

## Acceptable Payments

(Facilitating or Expediting)

- Providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- Actions of a similar nature
- NOTE: Most foreign countries regard facilitating or expediting payments as illegal

## Acceptable Payments

(Be Careful With These)

### Charitable Contributions

- Companies often engage in charitable giving as part of legitimate local outreach.
- The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens.
- Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.



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## Acceptable Payments

(Be Careful With These)

### Gifts

- A small gift or token of esteem or gratitude is often an appropriate way for business people to display respect for each other;
- Appropriate gift-giving is when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law.



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## Questions?



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