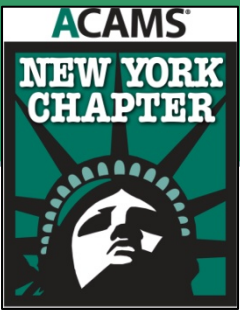


The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

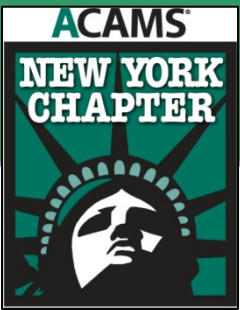
Gregory S. Meredith
SVP and Associate General Counsel
JPMorgan Chase & Co.
September 27, 2010



The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

FCPA Overview

- Foreign Corrupt Practices Act (“FCPA”), 15 U.S.C. §§78dd-1, et seq., enacted 1977, last amended 1998
 - Anti-Bribery
 - 15 U.S.C. §78dd-1 (issuers)
 - 15 U.S.C. §78dd-2 (domestic concerns)
 - 15 U.S.C. §78dd-3 (non-U.S. persons)
 - 15 U.S.C. §78ff (penalties)
 - Books and Records
 - 15 U.S.C. §78m (issuers)



The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

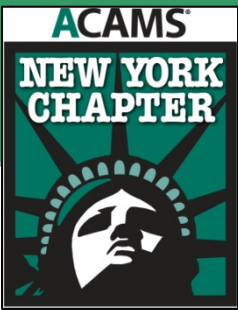
Increased Focus on Enforcement

- Enforcement Actions

	<u>2010 (6/30)</u>	<u>2009</u>	<u>2008</u>	<u>2007</u>	<u>2006</u>
– DOJ	27	26	20	18	7
– SEC	9	14	13	20	8

- Staffing

- DOJ has added prosecutors, cross-designated prosecutors from other working groups and created an FBI squad of agents - 140 open investigations
- SEC has created a new FCPA Unit



The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

Aggressive Enforcement Strategies

- Large Penalties
 - Siemens (\$1.6 billion)
 - Kellogg, Brown & Root (\$579 million)
 - Technip, S.A. (\$338 million)
 - Chevron (\$28 million)

- Prosecution of Individuals
 - Frederick Bourke convicted on the basis of bribes paid by company in which he was principal investor (willful blindness)
 - Gerald Green convicted of paying \$1.8 million in bribes to Thai tourism official to obtain film production contracts
 - Charles Paul Edward Jumet convicted of paying \$212,400 to Panamanian officials to obtain maritime contracts. Sentenced to over 7 years.

- New Enforcement Theories
 - CEO and CFO of a corporation charged based on “control person” theory of liability

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



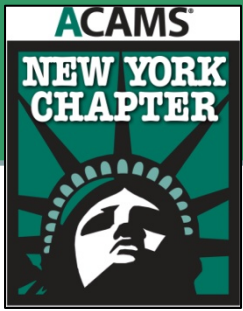
The Foreign Corrupt Practices Act

- Anti-bribery Provisions
 - Prohibits corrupt offers or payments to foreign government officials, political parties, political party officials or candidates, or to any person for payment to such a foreign official or candidate, in order to obtain an improper advantage

- Recordkeeping Provisions
 - Requires accurate books and records
 - Requires adequate accounting and controls systems

- Provides for criminal and civil penalties

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



International Treaties

- Organisation for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
 - Entered into force, February 15, 1999
- Organization of American States Inter-American Convention Against Corruption
 - Entered into force, March 6, 1997
- Council of Europe Criminal Law Convention on Corruption
 - Entered into force, January 7, 2002
- United Nations Convention Against Corruption
 - Entered into force, December 14, 2005

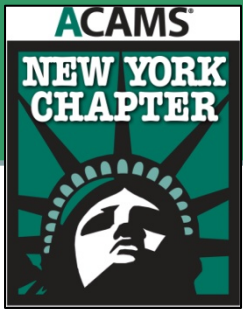


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Countries With Similar Laws

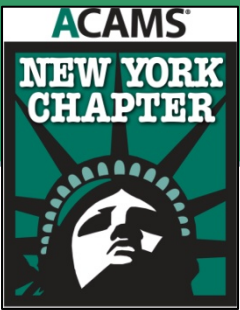
- Argentina
- Australia
- Austria
- Belgium
- Brazil
- Bulgaria
- Canada
- Chile
- China
- Czech Republic
- Denmark
- Finland
- France
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Italy
- Japan
- Korea
- Luxembourg
- Mexico
- Netherlands
- New Zealand
- Norway
- Poland
- Portugal
- Slovak Republic
- Slovenia
- Spain
- Sweden
- Switzerland
- Turkey
- United Kingdom
- United States

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



FCPA Anti-Bribery Provisions

- The FCPA makes it a civil and criminal offense for:
 - anyone subject to U.S. jurisdiction
 - to offer, promise, give or authorize the giving of
 - anything of value
 - to a non-U.S. official
 - directly or indirectly
 - to secure an improper business advantage

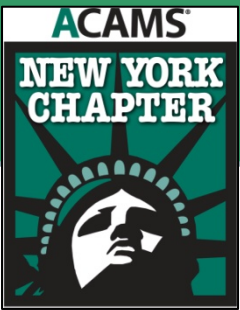


The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

Jurisdiction - Issuers and Domestic Concerns

- Unlawful for any Issuer or Domestic Concern
 - corruptly to do any act in furtherance of a prohibited offer or payment
 - using the mails or any means or instrumentality of interstate (or foreign) commerce

- Unlawful for any U.S. Issuer or U.S. Person (N.B., Agents, etc.)
 - corruptly to do any act
 - outside the United States
 - that would violate the FCPA if done in the U.S.
 - regardless of whether the mails or any means or instrumentality of interstate (or foreign) commerce was used in the furtherance of the unlawful offer, gift, payment, promise, or authorization

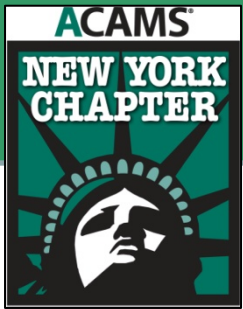


The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

Jurisdiction - Non U.S. Persons

- Unlawful for non-U.S. persons
 - or their officers, directors, employees, agents or stockholders
- While in the United States
- Corruptly
 - to use the mails or any means or instrumentality of interstate (or foreign) commerce
 - or to do any other act
 - in furtherance of a prohibited offer or payment

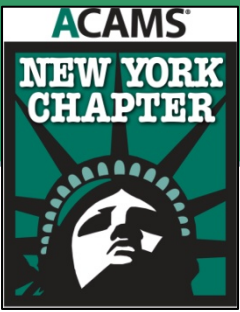
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Non U.S. Official

Includes:

- Any officer or employee of a non-U.S. government department/ agency/instrumentality
- Any employee of a state-owned or state-controlled non-U.S. enterprise
- Any official of a public international organization
- Any non-U.S. political party/party official/candidate
- Any person acting in an official capacity on behalf of any of the above, e.g., consultant for non-U.S. government
- Anyone else if it is “known” that the value will be offered or promised or given to a non-U.S. official

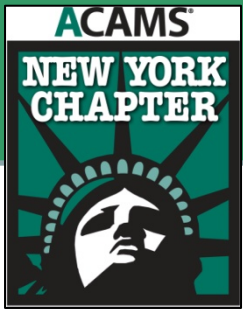


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Knowing

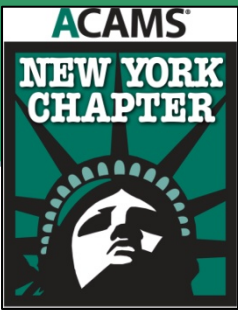
- A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if the person has
 - actual knowledge or
 - a firm belief that the circumstance is substantially certain to occur
- Such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist
- Willful Blindness

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



Prohibited Purposes

- Influencing of any official act or decision, or
- Inducing a foreign official to do or omit to do any act in violation of his/her lawful duty, or
- Securing any improper advantage, or
- Inducing (a prohibited person) to use his/her influence with a foreign government or instrumentality to affect or influence any act or decision of such government or instrumentality
- To obtain or retain business (including the performance of contracts or the carrying out of existing business) for or with, or direct business to, any person

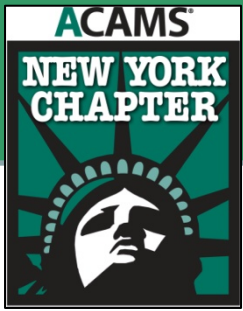


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Exception: Facilitation or "Grease" Payments

- Payments to expedite or secure performance of a routine governmental action by a foreign official, political party or party official
- Routine government action is defined to mean only an action which is ordinarily and commonly performed by a foreign official
- Any decision to make such a payment should be cleared with Legal or Compliance
 - Does not include any decision-making by the official
 - Review of local law
- Payment must be accurately recorded in the company's books and records

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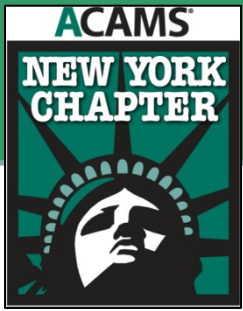


Affirmative Defenses

- Lawful (i.e., expressly authorized) under the written laws and regulation of the host country (almost never a useful defense)

- Reasonable and bona fide expenditures, such as entertainment, travel and lodging, incurred by the foreign official and directly related to:
 - promotion, demonstration or explanation of products or services; or
 - execution or performance of contract with a non-U.S. government agency

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



Penalties

- Companies (issuers and domestic concerns)
 - \$2 million fine
 - or a fine of twice the gross gain or twice the gross loss avoided

- Individuals
 - Willful violations
 - 5 years in jail
 - \$100,000 fine or twice the gross gain or loss

 - Non-willful violations
 - \$10,000 fine; plus possible injunction

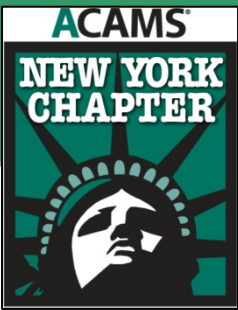
 - Corporate entity may not pay the fines of an individual officer, director, shareholder or agent



The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

Red Flags -Travel, Lodging and Entertainment

- Business purpose is, or seems, incidental to entertainment purpose
- Trip could be seen as quid pro quo for award or retention of business or for improper business advantage
- Official is strategically located to grant business or improper business advantage to company
- Expenses are lavish and/or out of line with company guidelines and/or local customs
- Spouse or children are invited
- Expenses are paid to official personally
- Local counsel is unwilling or unable to give opinion on legality
- Official is unwilling or unable to get written approval for trip/expenses from his/her agency



The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

Due Diligence Process for International Consultants

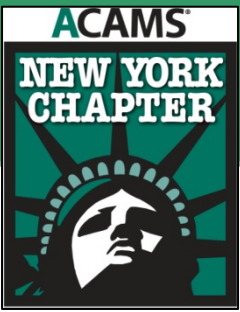
- Elements which may be appropriate in the process for retaining or renewing an international consultant
 - References
 - Disclaimer letter - (letter by which proposed consultant acknowledges he is not authorized to work and won't be paid without written contract)
 - Embassy Check
 - Name check by Financial Intelligence Unit
 - Legal Opinion
 - Senior Country Officer approval
 - Personal interview and review of entire file by Legal or Compliance
 - Sign-off by appropriately senior LOB officer



The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

Due Diligence Process for International Consultants (cont'd.)

- In addition, International Consultant Agreements should contain a number of key provisions to promote FCPA compliance
 - Representations and warranties:
 - No payments or gifts have been or will be made, offered, or promised to improperly influence foreign officials
 - No foreign official has any legal or beneficial interest in the Consultant's business
 - Consultant will keep accurate books and records



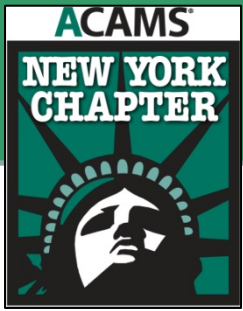
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Red Flags - Business Development Consultants

(Greater scrutiny should be performed when these elements are present)

- Certain high risk countries (as identified in your risk assessment)
- Excessive or unusually high compensation
- Request for increase in compensation during government negotiation
- Request for payments to third countries or third parties
- Request for payments in cash or bearer instrument
- Lack of facilities or qualified staff
- Use of shell companies
- Lack of experience or "track record"
- Questionable reputation of representative or consultant
- Lack of written agreement
- Close relationships to government officials (close relative or financial/ownership interest)
- Consultant recommended by government official
- Violation of local law or policy (e.g., prohibitions on commissions, currency or tax law violations)
- Misrepresentations or inconsistencies in the application or the due diligence process

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



Due Diligence for Investments

- Need for due diligence may be raised either because of type of business or location of operations
 - Significant government contracts or required licensing
 - Operations in high risk countries

- Due diligence should address key concerns
 - Existing or recent internal or external investigations
 - Enforcement actions or other government proceedings
 - Policies and practices regarding payment to or on behalf of government officials (T&E, gifts, etc.)
 - Use of consultants

- Bribery may affect both the transaction itself and the post-acquisition value of the company
 - Significant delay and cost to the acquisition
 - Long and short term damage to the value of portfolio company (penalties, voiding of contracts)



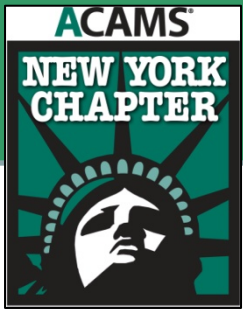
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Enforcement Actions

In Re Schering-Plough - June 2004

- Poland
 - Payments by a foreign subsidiary from 1999 to 2002 of \$76,000 to a charitable foundation headed by a Polish health official responsible for purchase of pharmaceutical products
 - Inaccurate books and records and inadequate controls
 - Civil penalty \$500,000

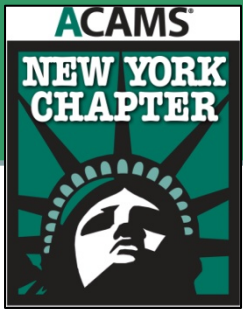
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Enforcement Actions Titan - March 2005

- Benin, Africa
 - Largest FCPA penalty up to that date - \$28M,
 - \$13M criminal penalties, \$15.5M disgorgement and interest
 - Funneled \$2M to incumbent President's election campaign
 - Paid advisor to President of Benin \$3.5M without due diligence or ensuring the agent provided Titan with promised services
 - Claimed bribes as deductible business expenses for tax purposes
 - Compliance monitor assigned

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



Enforcement Actions

Monsanto - January 2005

- Indonesia
 - Monsanto employee paid \$50,000 to senior Indonesian Ministry of Environment official to relax or remove environmental regulation
 - Consulting company used to make payment
 - False invoices created to reimburse consultants
 - Indonesian official did not amend environmental regulation
 - DOJ agreed to a 3 year deferral of prosecution, and to dismiss criminal information if Monsanto complies for all 3 years
 - \$1.5M penalty, compliance monitor assigned

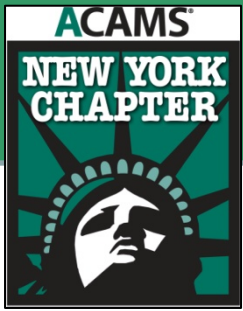
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UK Bribery Act of 2010

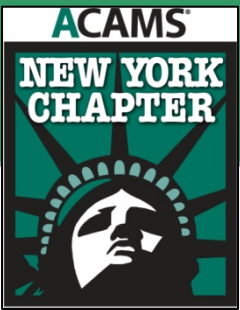
- Recodifies UK anti-bribery laws
- Becomes effective April 2011
- Establishes 3 separate offenses
- Has extremely wide jurisdictional reach
- No exception for facilitation payments

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



UK Bribery Act of 2010 - Offenses

- Paying or receiving a bribe
- Bribing a foreign government official
- Corporate failure to prevent bribery



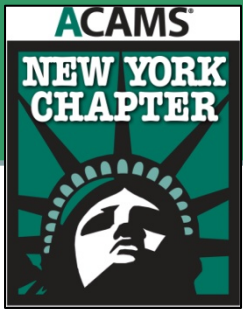
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UK Bribery Act

Paying or Receiving a Bribe

- Applies in both the private and the public sector
- Triggered by offer/payment or request/receipt of any “financial or other advantage”
- Conduct to be influenced is the “improper performance” of the recipient’s function in the course of employment
- “Improper performance” is the breach of expectation:
 - that it would be performed in good faith
 - that it would be performed impartially, or
 - that it would be performed consistent with standards regarding a position of trust

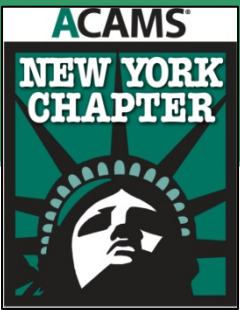
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UK Bribery Act

Bribing of Foreign Government Officials

- Triggered by offering or giving a “financial or other advantage”
- Intending to obtain or retain business or business advantage
- Intending to influence the foreign official decision
- No facilitation payment exception



The Foreign Corrupt Practices Act: New Developments and Compliance Challenges

UK Bribery Act

Corporate Failure to Prevent Bribery

- Triggered by commission of bribery by anyone acting on behalf of the corporation, intending to obtain or retain business for the corporation
- Crime of strict liability
- Only defense for corporation is that it has in place “adequate procedures” designed to prevent bribery by anyone acting on its behalf
- Broadest jurisdictional sweep - includes any company which carries on part of its business in the UK
- Official guidance to be published to help describe “adequate procedures”

The Foreign Corrupt Practices Act: New Developments and Compliance Challenges



UK Bribery Act

Guidance on Adequate Procedures (MOJ Draft - 9/14/2010)

- Established Six Principles
 - Risk Assessment
 - Top Level Commitment
 - Due Diligence
 - Clear, Practical and Accessible Policies and Procedures
 - Effective Implementation
 - Monitoring and Review

- Examples with illustrating questions

- Comments to be provided to MOJ by 11/8/2010