The Foreign Corrupt Practices Act
What’s new
What’s important

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Declination to prosecute now possible if a company: timely and voluntarily self-reports, discloses all relevant facts, proactively and fully cooperates, takes remedial steps--and there are no “aggravating circumstances”

Preserves documents, makes witnesses available, addresses underlying issues, timely and appropriately remediates root causes, implements effective compliance/ethics program

There is a presumption but no guaranty in favor of declination upon voluntary self-disclosure

Aggravating circumstances: senior management involvement, significant profit to company, pervasiveness of misconduct, criminal recidivism

Even when aggravating circumstances exist, 50% off low end of sentencing guidelines is possible

Makes timely decision to cooperate, reasonably promptly after learning facts, before threat of investigation

Generally not required for DOJ to appoint an “independent compliance monitor”

But must still pay: disgorgement, interest, forfeiture, restitution for acts
Why a leniency program? Prior pilot program resulted in higher rates of self-disclosure

SEC, CFTC and other regulators do not have similar leniency programs

Benefits of leniency only intended to benefit company (innocent shareholders). No leniency policy for complicit executives
In January 2017 Unnamed Confectioner (Zippo) agreed to pay a fine of US$13 million imposed by the SEC. It neither admitted nor denied allegations. The incident centers around its subsidiary, Zippo India.

The situation starts with an Unrelated Company (Omega) India which hired a third party agent to obtain over 30 licenses to allow it to increase production of sweets. It hired and paid an agent with no pertinent experience, US$90,000, for a minimum amount of work to consult, complete government application forms. Licenses were issued, one was worth large sums in possible tax exemptions.

Why was Omega India’s conduct later called into question? It failed to conduct appropriate, investigation of its agent, failed to follow its own compliance controls, ie, its own anti-corruption contract language, etc.
Note that Omega India (not Zippo) engaged the agent, and failed to follow its own anti-corruption processes. At all relevant times Zippo did not even own Omega (and therefore did not own Omega India).

Why, then, was Zippo penalized? Coincident with these events, Zippo negotiated with Omega, acquiring Omega, including Omega India. The SEC asserted that Zippo did an inadequate, pre-acquisition, risk based, transactional due diligence review of Omega India, which, if done, would likely have uncovered the conduct of Omega India’s agent. The reasoning is that if a proper DD had been done, the situation could have been timely discovered and remediated.

It is a reminder that the SEC imposes a huge obligation to conduct a proactive, pre-acquisition DD and the need for the acquiring entity to deal with previous unauthorized conduct including unauthorized payments made by target companies.

Importance of DD investigation
For many years foreign banks had programs to hire children of Chinese and Asian government officials.

The Bank’s program which started out as a rigorous policy of careful selection of high quality candidates, became a policy of knowingly hiring less qualified persons if there was a relationship with a government official. “Sons and daughters” did light tasks; the bank openly allocated costs as “marketing expenses”. DOJ aggressively asserted that even giving an unpaid internship was “something of value”, given in return for business “with an intent to wrongfully influence the recipient”.

In November 2016, DOJ, SEC and the Federal Reserve reached settlement, whereby JP Morgan paid a fine of US$264 million for hiring sons and daughters of officials and thereby allegedly gaining millions of dollars in business and profits.

*also JP Morgan Chase
Parallel with the settlement, JP Morgan disciplined 29 employees, fined them US$18.3 million, and instituted a worldwide enhancement of anticorruption practices.

Party must give “something of value” with an “intention to influence”. Intent is important.
Unnamed Hedge Fund*

- DOJ and SEC separately assessed total penalties of US$412 million on a US hedge fund for unauthorized payments to several African governments to attract investments in fund managed funds. It found criminal failure to implement adequate internal accounting controls.

- Despite being aware of high corruption risk posed by dealings with the firm’s business partners (reputation, connections to senior officials), CEO/CFO personally approved/authorized, transactions in which bribes were paid, but recorded as investment loans in the firm’s books and records. Executives consented to settlement.

*combined cases in Africa
Firm’s CEO and its CFO separately settled with SEC: SEC observed that although neither executive personally knew that bribes would be paid, their actions caused books and records and internal controls violations. Without admitting SEC’s allegations, executives consented to settle (penalties and) charges.

This and several other recent investigations, suggest the DOJ’s and SEC’s growing interest in the financial sector.
In September 2016 the SEC imposed a relatively modest settlement on Company X of the US of US$765,688 for a charitable contribution it made in China. The contribution was intended to influence the decision of a Party Official.

The claim revolved around a donation made by Company X, China to a charity. (1) there is no allegation that the charity was not a bona fide charity; (2) there is no allegation that the Party Official involved or any member of his family received a direct financial benefit as a result of the donation; (3) the Party Official involved is alleged to have had only a tenuous connection to the charity; (4) and Company X, US’s internal controls flagged the transaction as high-risk and referred the matter to outside counsel. Even so, the SEC took an aggressive position. The lesson is that even legitimate, charitable contributions, constitute “something of value” when made to satisfy foreign officials.

The history is that, in 2013, Company X, China was under investigation by a provincial entity for alleged violations of the marketing laws. Company X, China believed that an adverse finding would have a negative impact on its business. An employee of Company X, China asked a senior provincial Party Official for the name of a provincial charity to which it could contribute. The Party Official recommended a charity and two days after the contribution, Company X, China was informed that the government would not impose a fine.
Before the contribution, Company X, China referred the matter to Company X, US which requested Company X, China to seek advice from outside counsel. It did so. Outside counsel advised Company X, China to use anti-corruption language in the contribution agreement. It inserted the language, but unknown to Company X, US, the language was removed from the formal signed version before it was signed.

The SEC concluded that Company X, US had insufficient controls in that it did not insure that Company X, China did an adequate due diligence investigation nor take steps to prevent (a charitable) payment clearly intended to influence government officials. Merely instructing its subsidiary what to do was inadequate.

The lesson is that companies need to monitor charitable giving. They also need to follow up their own internal anti-corruption processes.
The accounting provisions of the FCPA impose a two-fold obligation on corporations that fall within the statutory definition of “issuer”—including all companies, the securities of which are publicly traded in the United States. First, a company must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions” of its assets. Second, it must “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” that its transactions are properly carried out and recorded and that the company’s assets are protected.

The accounting provisions are separate from the FCPA’s anti-bribery provisions and are enforced without regard to whether there are connected allegations of foreign bribery.

The breadth of the accounting provisions makes them a powerful enforcement tool.

2 Id., § 78m(b)(2)(B) (Section 13(b)(2)(B) of the Exchange Act).
3 See, eg, SEC v. World-Wide Coin Investment, Ltd, 567 F. Supp. 724 (N.D.Ga. 1983). This was the first litigated decision under the FCPA’s accounting provisions and involved no foreign bribery. 15 Sec. Reg. & L. Rep (BNA) 1037 (June 3, 1983).
Hiring third party consultants:
- Can’t outsource a corrupt payment
- Consultant’s technical qualifications
- Due diligence
- FCPA contract terms
- What will consultant actually do?
- Monitor performance

Red flags in Vietnam:
- Cash payments
- Request for offshore payments
- Consultants with government contacts, but no real technical capability
- Consulting agreements with vague purpose
- Are consulting fees reasonable?
Vietnam General Guidelines

Gifts:
- customary?
- intent, extravagance
- openly given
- properly recorded

Books and records
- Record transactions accurately

Encourage compliance:
- Management commitment
- Company culture
- Internal training
Thank you