The background of the slide features a stylized globe with a grid of latitude and longitude lines. Overlaid on the globe is a pattern of binary code (0s and 1s) in a light, semi-transparent font. The top of the slide has a dark blue horizontal bar, and the bottom has a dark red horizontal bar.

# *Doing Business Internationally: Minimizing FCPA Risk Exposure*

May 21, 2008

GIBSON, DUNN & CRUTCHER LLP

**Deloitte.**

*Topic 1:  
Enforcement Action Is Exploding*

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## DOJ & FBI Warn Of “Increased Vigilance” In Pursuing FCPA Cases

*“The Department continues to enforce vigorously the Foreign Corrupt Practices Act (FCPA), and since 2001 the Department has substantially increased its focus and resources on enforcing this important law.”*

– Attorney General Mukasey, Jan. 30 , 2008

*“A key strategic priority in the United States has been to increase the number and quality of Foreign Corrupt Practices Act . . . cases under investigation, and ultimately resolved, through both reactive and proactive methods.”*

– Alice S. Fisher, Assistant Attorney General of DOJ’s Criminal Division, Nov. 21, 2007

*“Our highest criminal priority is to curb public corruption, whether here or overseas . . . . We recently set up a dedicated team of special agents in our Washington Field Office who are now working all FCPA cases.”*

– James Burrus, former head of FBI’s Criminal Investigative Division, Feb. 5, 2007

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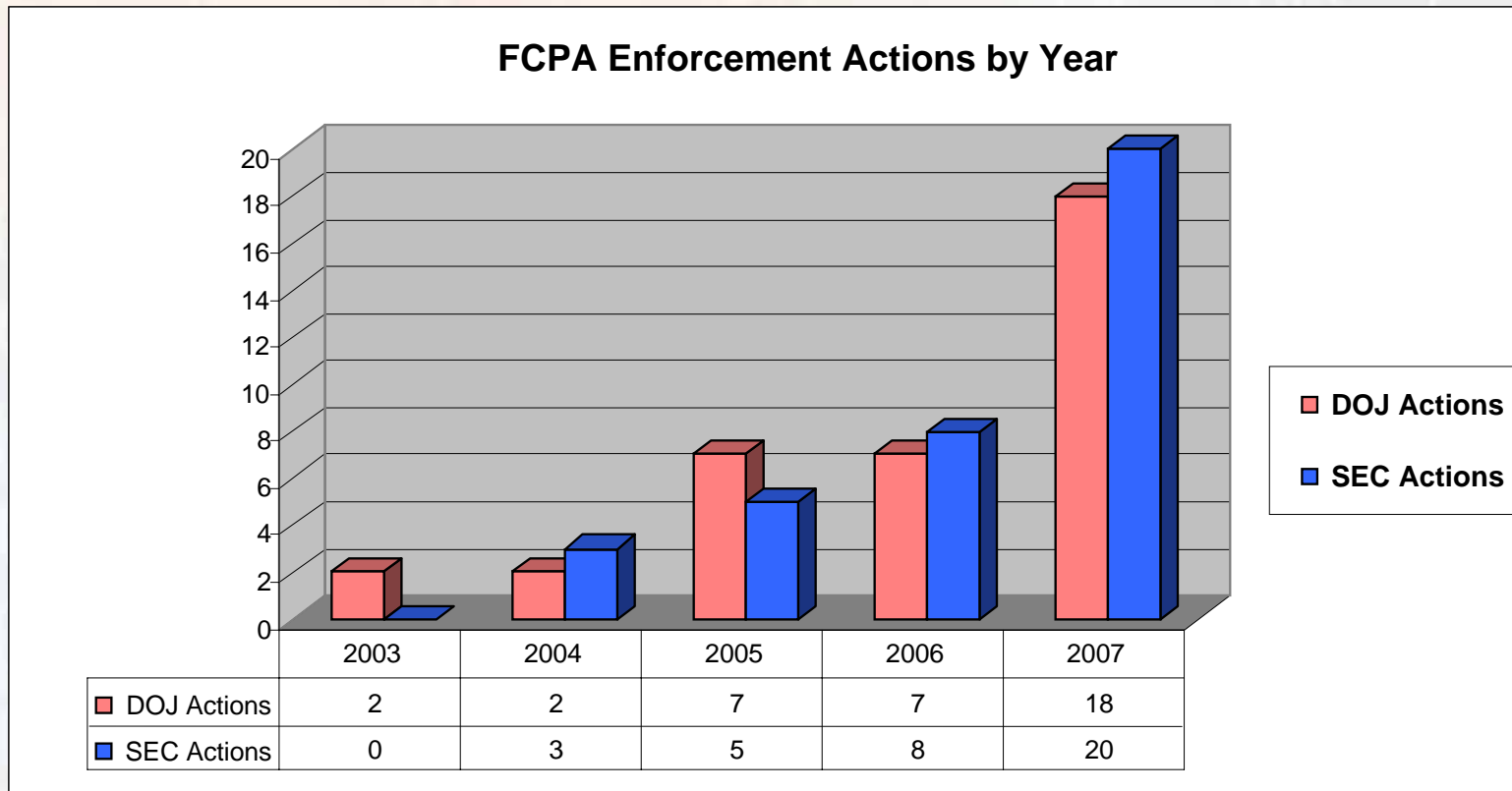
# *Vigorous Enforcement Has Led To Unprecedented Number Of Actions*



- **There has been a recent explosion of enforcement activity by both the SEC and the DOJ, 38 in 2007 alone**
  - 18: DOJ
  - 20: SEC
- **Approximately 100 other companies currently have open FCPA investigations**
- **Mark Mendelsohn, Deputy Chief of the Fraud Section at the DOJ, recently noted that the recent flurry of enforcement actions is “just the tip of the iceberg” and that the DOJ has “many more matters under investigation.” (Sept. 27, 2007)**



# Enforcement Activity Increases Every Year



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# 2008 Enforcement

## Four new cases against corporations:

- Willbros Group, Inc. settled various matters, including bribery of Nigerian and Ecuadorian government officials, with SEC and DOJ for \$32.3 million, plus imposition of monitor. (5/14/2008)
- AB Volvo settled Iraqi Oil-for-Food matter, including FCPA books and records and internal controls charges, with SEC and DOJ for \$19.6 million. (3/20/2008)
- Flowserve Corporation settled Oil-for-Food case, including FCPA books and records and internal control charges, with SEC and DOJ for \$10.5 million. (2/21/2008)
- Westinghouse Air Brake Technologies Corporation (Wabtec) settled FCPA anti-bribery, and books and records and internal control provisions with DOJ and SEC for approximately \$675,000 in combined fees and penalties, plus the imposition of an independent compliance consultant. (2/14/2008)

## *2008 Enforcement*

### **New Standard for Facilitating Payments in Westinghouse Air Brake Technologies ?**

- Non-prosecution agreement statement of facts included:
  - payments made “to insure that [government agency] would schedule and perform inspections”
  - payments made to government product inspectors “in connection with each inspection”
  - payments to product inspectors totaled approximately \$2,175 and ranged from \$67 to \$358 per inspection

# *Aggressive FCPA Enforcement*

## **Broad, Industry-Wide Investigations:**

- More than two dozen companies have announced investigations related to kickbacks paid in connection with the UN Oil for Food Program. Several have settled actions with the DOJ and SEC, including El Paso (February 2007), Textron (August 2007), York International (October 2007), and Akzo Nobel (December 2007).
- The *Wall Street Journal* reported on July 25, 2007, that the DOJ has requested information from nearly a dozen oil and oil services companies relating primarily to the Nigerian oil services business.

# Aggressive FCPA Enforcement

## Expanding Scope of Enforcement:

- Dow Chemical (February 2007): Action against a parent company for payments made by a fifth-tier subsidiary without the parent's knowledge.
- Statoil (October 2006): Action against a foreign issuer
  - Alice Fisher, Assistant Attorney General, has stated: "The Department will not hesitate to enforce the FCPA against foreign-owned companies, just as it does against American companies."  
(October 16, 2006)
- Schnitzer Steel (October 2006): Unlawful conduct included improper recording of payments made to private individuals.

# *Imposition Of Large Penalties*

- Chevron (November 2007): \$30 Million fine related to Oil-for-Food (\$3 million civil penalty, \$25 million in disgorgement of profits, and \$2 million penalty to the Office of Foreign Asset Controls).
- Baker Hughes (April 2007): Largest total fine to date – \$44 million (\$11 million criminal fine, \$10 million civil penalty, and \$23 million in disgorgement of profits) and requirement to retain a compliance monitor.
- Vetco Gray (February 2007): Largest criminal fine to date – \$26 million in combined criminal fines paid by three Vetco subsidiaries and requirement to retain a compliance monitor.
- Statoil (October 2006): \$21 million criminal penalty, disgorgement of profits, and requirement to retain a compliance monitor.
- Schnitzer Steel (October 2006): \$15.2 million criminal penalty, disgorgement of profits, and requirement to retain a compliance monitor
- Titan (March 2005): \$28.5 million fine (\$13 million criminal fine and \$15.5 million civil penalty), in addition to disgorgement of profits.

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# Disproportionate Penalties

- **Immucor Inc.**

- SEC accused Immucor of paying Italian doctor in Milan \$16,000 in exchange for preferential treatment in selection of contracts for supplies and equipment.
- In re Immucor Inc. (N.D. Ga. Oct. 4, 2006): Federal district court refused to dismiss a § 10(b) action based on Immucor's allegedly false and misleading statements in financial statements regarding FCPA violations because the plaintiffs met the heightened pleading requirement for fraud under the PSLRA. Immucor settled the class action for \$2.5 million in May 2007.
- On September 27, 2007, Immucor entered into administrative settlements with SEC charging them with violating FCPA's anti-bribery, books-and-records, and internal controls provisions and ordering them to cease-and-desist from future violations of same.

**\$16,000 in improper payments v. \$2.5 million settlement.**

- **Paradigm B.V.**

- \$22,000 paid to consultant who appeared to provided no actual service.
- Payments to Chinese gas companies to influence employee's procurement process.
- \$12,000 vacation in Napa Valley for the brother of PEMEX official.
- On September 21, 2007, Paradigm entered non-prosecution agreement and paid \$1 million fine.

**\$34,000 in improper payments v. \$1 million fine.**

# Emphasis On Individual Culpability

- The DOJ and SEC enforce the FCPA against *both* corporations and individuals.
- Charges have been brought against executives *and* mid-level employees.
- Since 1990, twice as many individuals have been prosecuted as corporations.
- **Examples:**
  - **ABB:** Regional Sales Manager for West Africa; Senior Vice President of Operations; Vice President of Finance; Former Vice President of Sales
  - **Faheem Salam:** Civilian Translator in Iraq
  - **InVision:** Senior VP for Sales and Marketing and Board Member
  - **Schnitzer Steel:** Former Chairman and CEO; Executive VP of Sales
  - **Syncor International Corp.:** Chairman
  - **Titan:** Titan's Africa President
  - **Gerald and Patricia Green:** Film Studio Executives

## *Emphasis On Individual Culpability*

The trend continues. . . .

- SEC enforcement against four Willbros employees in wide-ranging bribery scheme involving business in Nigeria, Ecuador, and Bolivia.
- Martin Eric Self, former co-owner and executive of Pacific Consolidated Industries (PCI), pled guilty to paying more than \$70,000 in bribes to U.K. Ministry of Defence official. Plea agreement provides for a sentence of 8 months in prison. (5/8/2008)

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# Appointment Of Monitors/Compliance Consultants

- “A monitor’s primary responsibility is to assess and monitor a corporation’s compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation’s misconduct, and not to further punitive goals.”
  - March 7, 2008 Memorandum from Acting Deputy Attorney General Craig S. Morford on the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations
- Factors considered by DOJ in determining whether to require compliance consultant:
  - Strength of company’s existing management and compliance team
  - Pervasiveness of problem/violations
  - Strength of company’s existing FCPA policies and procedures
  - Continuing exposure due to business
- “[A] compliance consultant is an essential component of any deferred prosecution agreement . . . where the company has simply taken a ‘cookie cutter’ approach to FCPA compliance, or has a ‘paper’ program without any real substance.”
  - Alice S. Fisher, Assistant Attorney General, Oct. 16, 2006

**Monitors imposed in numerous cases, including:** ABB, Diagnostic Products, InVision 14  
Technologies, Micrus, Monsanto, Schnitzer Steel, Statoil, Titan, Wabtec, Willbros

# Cooperation With Enforcement Agencies

## Reduced Penalties for Companies that Cooperate:

- **Bristow Group (September 2007)**: Settled an FCPA matter with no monetary penalty. The SEC cited Bristow's self-reporting and cooperation.
- **Paradigm (September 2007)**: Entered into a non-prosecution agreement and paid a \$1 million fine. The DOJ cited Paradigm's prompt disclosure, cooperation, and implementation of remedial measures.
  - Alice Fisher, Assistant Attorney General, noted that: "Paradigm's actions in this matter, including voluntary disclosure and remedial efforts, are consistent with our view of responsible corporate conduct when FCPA violations are uncovered. Accordingly, the Department has resolved this case to permit the company to move forward on sound footing, governed by ethical business practices." (September 24, 2007)
- **Textron (August 2007)**: Entered into a non-prosecution agreement and paid a \$1.15 million fine.
  - The DOJ agreed not to file charges "in recognition of Textron's early discovery and reporting of the improper payments; Textron's thorough review of those payments as well as its discovery and review of improper payments made in other countries, including India, Egypt, and the United Arab Emirates; and the company's implementation of enhanced compliance policies and procedures." (DOJ Press Release, August 23, 2007)

# *Cooperation With Enforcement Agencies*

## **Does Every Violation Have to Be Reported?**

**“If a company has good controls in place; it trains people; it trains them regularly; it tests its controls regularly so it can be satisfied that they are in place and working; it has appropriate disciplinary policies in place and utilizes them; it thoroughly investigates the matter and gets to the bottom of the issue and is satisfied it has done it; it understands how its controls were circumvented in this case and why it is not a broader problem. If you can say those things – investigate, remediate, properly document all of the things I’ve described – then, yes, I think you can responsibly deal with it and not tell us about it. . . There are only so many hours in the day, and I would like to sleep some of them.”**

-- Mark Mendelsohn, Deputy Chief Fraud Section DOJ (Oct. 17, 2007)

### **FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting**

**Requirement to establish Code of Ethics and Business Conduct and to establish and maintain specific internal controls to detect and prevent improper conduct relating to government contracts**

**Requirement to “notify contracting officers without delay whenever they become aware of violations of Federal criminal law with regard to [federal] contracts or subcontracts.”**

*Topic 2:*  
*FCPA – History & Overview*

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# *What Is The FCPA?*

- The FCPA prohibits giving or promising anything of value to a foreign government official, political party or party official with the intent to influence that official in his official capacity or to secure an improper advantage in order to obtain or retain business.
- The FCPA also requires publicly traded U.S. companies to maintain accurate “books and records” and reasonably effective internal controls.

# FCPA – History & Background

- Enacted in 1977 in the wake of reports that numerous U.S. businesses were making large payments to foreign officials to secure business.
- The FCPA makes it illegal to corruptly offer or give money or anything of value, directly or indirectly to foreign officials or political parties or candidates to obtain or retain business.
- The FCPA requires issuers to maintain accurate books and records and to devise and maintain internal controls sufficient to provide reasonable assurances that transactions are recorded properly.

# *FCPA – Books and Records Provisions*

- Section 13(b)(2)(A) of the Exchange Act of 1934
- Requires public companies to maintain accurate books and records
- FCPA focus on books and records:
  - How “bribe” is recorded on the books
  - G/L classification for payment
  - Business purpose reflected in underlying business records

# *FCPA – Internal Controls Provisions*

- Section 13(b)(2)(B) of the Exchange Act of 1934
- Requires public companies to devise and maintain an adequate system of internal controls
- FCPA focus on internal controls:
  - Management authorization
  - Accountability for company's assets
  - Systems to flag possible FCPA violations
  - Follow-up on possible FCPA issues found

# Penalties

## **Corporations:**

- Criminal Penalty: \$2 million fine per violation *or* twice the benefit that the offender sought to obtain, disgorgement of profits, and possible suspension and debarment by the U.S. government
- Civil Penalty: Disgorgement of profits *and* a fine of up to \$500,000

## **Individuals:**

- Criminal Penalty: Up to 5 years imprisonment *and* \$250,000 fine
- Civil Penalty: Civil penalty of up to \$100,000

## **Penalties for Accounting Provisions Violations:**

- Civil penalties and criminal penalties for “knowingly circumventing” the accounting rules
- Criminal penalties of up to \$25 million for corporations and up to \$5 million and 20 years imprisonment for individuals

*Topic 3:*  
*M&A Considerations*

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# Successor Liability

- Under principles of successor liability, an acquirer can inherit the liability of an acquired subsidiary.
- U.S. enforcement agencies are focusing on FCPA issues that arise in the context of mergers and acquisitions.
  - Mark Mendelsohn, Deputy Chief of the Fraud Section at the DOJ recently noted that there has been a “heightened level of attention to FCPA risk in connection with M&A and foreign joint ventures.” (Sept. 27, 2007)
  - Alice Fisher, Assistant Attorney General, has stated: “I strongly encourage you and your clients to do thorough FCPA due diligence in transactions involving overseas companies.” (Oct. 16, 2006)

## *Successor Liability – Acquiror Inherits Liability*

- ***Baker Hughes*** – liability for acquired subsidiary that failed to ensure payments were not bribes.
- ***Syncor*** – liability for self-reported violations of acquired subsidiary discovered in due diligence.
- ***ABB*** – acquiror of ABB subsidiaries used DOJ opinion process to avoid liability for acquired subsidiaries' prior misconduct.
- ***GE/InVision*** – InVision entered deferred prosecution agreement before merger; post-merger, GE/InVision entered SEC settlement for InVision's conduct.
- ***Tyco*** – liability for conduct of two acquired foreign subsidiaries.

# *Acquisition Liability & Due Diligence*

- Extensive due diligence needed pre-acquisition.
- Focus diligence on companies doing business in corrupt or developing nations.
  - China has world’s fourth-largest economy.
- Ensure complete FCPA compliance at time of purchase – including examining acquiree’s internal controls.
  - Do not allow acquiror or acquiree to continue making potentially illegal payments.
  - Try to halt any benefits derived from past corrupt payments or other FCPA violations.
  - Do not ignore “red flags.”

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# Acquisition Liability & Due Diligence

- Review publicly available sources – news reports, public databases, etc.
- FCPA focus in due diligence
  - Research general business climate in countries where the target does business – are bribes considered necessary to remain competitive?
  - Assess target's corporate culture regarding corruption.
  - Review details of target's relationships with agents and distributors – do target's standard terms contain anti-corruption provisions?
  - Understand target's due diligence of agents.
  - Submit specific questionnaire to target regarding nature of government business and relationships with public officials.
  - Research target's payment of bribes in jurisdictions prior to enactment of anti-corruption statutes.

# *Acquisition Liability & Due Diligence*

- Minimize exposure through deal terms
  - Consider asset versus stock purchase.
  - Consider subsidiary versus merger.
  - Require FCPA/anti-corruption reps, warranties & indemnifications.
  - Impose closing conditions premised on resolution of FCPA issues.

# Acquisition Liability & Due Diligence

## Fisher Transactional Due Diligence Questions

- Alice Fisher, Assistant Attorney General, recently identified five questions that acquirers should ask targets during due diligence
  - Interaction with foreign governments as customers
  - Interaction with foreign governments as JV partners
  - Government licenses and approvals required to operate abroad
  - Requirements relating to customs in foreign countries
  - Relationship with 3rd-party representatives, including how those representatives vetted
- Fisher stated: “The Department has seen each of these areas as fraught with challenging FCPA issues, and, if possible, an acquiring company should be comfortable that it has assessed those risks before closing a deal.”  
(November 2007)

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***Topic 4:***  
***Navigating Business in***  
***Emerging Economies***

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# Distributors, JV Partners & Agents

- Business structure trends
  - Joint ventures
  - Distributorships
- Safe and effective use of agents
  - Thorough due diligence
    - *Oil States International* – Oil States liable for Venezuelan branch office of subsidiary that failed to screen agent fully. (4/27/2006)
  - Fee arrangements (avoid success fees)
  - Relationship building versus expertise
  - Contractual reps and warranties
  - Effective controls

## *Control of Agents*

- Hold agents to same high standards as company employees
- Have agents sign regular certifications of FCPA compliance
- Train agents in FCPA
- Develop guidelines and legal review for client travel
- Provide regular review of travel and entertainment expenses of all foreign subsidiaries
  - Paying expenses directly to vendor
- Require documentation of all reimbursed agent expenses <sup>32</sup>

***Topic 5:***  
***Trifecta of Enforcement:***  
***DOJ, SEC & Class Actions***

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# *Trifecta of Enforcers*

- DOJ & SEC
  - Potential civil & criminal liability
  - Over 100 currently active investigations
  - Current focus on business in China, Russia, former Soviet Republics, Indonesia, Nigeria & Brazil
- Securities Class Action Bar
  - Shareholder derivative suits in wake of public disclosures of FCPA violations

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# Shareholder Class Actions

## *In re Immucor* (2006)

- Shareholders brought class action alleging violations of § 10(b) of Exchange Act based on allegedly false and misleading statements regarding FCPA violations of Italian subsidiary.
- Motion to dismiss *denied* by district court: Plaintiffs met heightened pleading requirement for fraud under PSLRA.
- May 2007 – Immucor settled class action lawsuit for \$2.5 million.

# Shareholder Class Actions

## *In re Nature's Sunshine Products Securities Litigation (2007)*

- Shareholders brought class action alleging violations of § 10(b) of Exchange Act based on allegedly false and misleading statements regarding CEO's approval of improper payments in violation of the FCPA.
- Motion to dismiss *denied* by district court: Plaintiffs met heightened pleading requirement for fraud under PSLRA.
- Pleading standard *met even though* plaintiffs did “not go into great detail regarding the alleged fraud” or provide any facts “regarding the amount of money involved” in the improper payment.
- Status: Pending.

# Shareholder Class Actions

## *In re Faro Technologies, Inc. Securities Litigation (2007)*

- In March 2006, Faro delayed indefinitely the release of its annual report, withdrew its 2006 financial estimates and voluntarily notified DOJ and SEC of internal review showing suspicious payments in China.
- Class action lawsuit alleging §10(b)(5) violations filed later that year against Faro, certain officers, and outside auditor.
- All defendants moved to dismiss complaint for failure to state claim under the heightened pleading standards laid out in *Tellabs* and the PSLRA.
- District court denied motion to dismiss by Faro and officers and granted motion to dismiss by outside auditors.
- Faro settled the suit in 2008 for \$6.875 million.

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# *Shareholder Class Actions*

## *BAE Systems PLC Derivative Action (2007)*

- Shareholders brought derivative action for breach of fiduciary duties against BAE Systems Board of Directors for failure to stop on-going violations of the FCPA.
- Allegations stemmed from news reports of 20 years of bribes totaling more than \$2 billion to Saudi royal and government officials to obtain and retain a fighter/bomber plane contract.

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## ***Bahrain v. Alcoa (2008)***

- Entity controlled by government of Bahrain alleges bribes paid to Bahraini government officials led to overpayment.
- Civil complaint filed in Western District of Pennsylvania.
- Civil suit enjoined so that DOJ may pursue criminal investigation. (3/27/08)
- Pension fund sues over bribery allegations. (5/6/08)

***Topic 6:***  
***FCPA Compliance***  
***Programs & Leading Practices***

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# Compliance Program Elements

- Policies and standards, some key elements include:
  - Establish company code of conduct and policies explicitly stating the intent to comply with all FCPA and anti-bribery laws.
  - Use training, town halls, and signage to communicate effectively compliance policies and standards to all employees, or at the very least, to all who would have any possible connection with foreign businesses or officials.
  - Document training provided.
  - Use on-line testing and surveys to confirm that employees understand company’s anticorruption policies.
  - Periodic certification of compliance by all directors, officers, employees, and third party contractors/vendors.
- Reporting system, some key elements include:
  - Create “helpline” available for all employees and third parties.
  - Helpline should work with all languages spoken by employees.
  - Utilize both e-mail/Internet interface and telephone.
- Executive level officer in charge of compliance, some key elements include:
  - Reports directly to Board’s Audit Committee.
  - Has access to senior management, including CEO.
  - Participates in meetings of senior management.
  - Conducts ongoing review of compliance program and reports findings to senior executive and Board.

# Compliance Program Elements

Some key compliance elements include:

- Operational tools
  - Perform random assessments of travel expenditures.
  - Perform separate or enhanced assessment of high risk sales teams.
- Independent assessment of compliance program
  - Conduct assessment at least every three years.
  - Include outside counsel and assessors in evaluation.
- Finance and control
  - Establish financial and accounting procedures to maintain accurate records of the company's transactions and disposition of assets.
- Relationships with third parties
  - Include FCPA compliance representations in all agreements, contracts, and renewals of contracts with all foreign agents and business partners.
  - Develop effective procedures for pre-screening and post-retention oversight of foreign consultants and all business partners including comprehensive due-diligence files.

# Compliance Program Risks

## Some Compliance Program Risks include:

- Tone at the top is inconsistent with the compliance program.
- Responsibility for compliance program delegated to persons without adequate knowledge and understanding of FCPA issues.
- Due diligence efforts with respect to agents, business partners, consultants, etc. are not undertaken and/or properly documented.
- Poor training / communication / reporting mechanisms.
- Documented policies are unclear.
- Head in the sand attitude when dealing with agents.
- Poor monitoring of program.
- Program and/or due diligence efforts do not include a review of applicable local laws.
- Insufficient disciplinary measures taken in the event of violations.
- Failure to update program as a result of lessons learned.

# *FCPA Leading Practices – Legal*

- Legal approval of all agents centralized
- All agent relationships captured by legal
- Due diligence review and approval of agents annually
- Adequate due diligence of agents
- Use of consistent contracts
  - Imbed anticorruption clauses in all agent contracts and agreements
  - Imbed anticorruption clauses in all distributor contracts and agreements
- Annual attestation of compliance of FCPA and anticorruption clauses obtained from each agent

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# FCPA Leading Practices – Accounting

## Some Accounting Leading Practices include:

- FCPA risk assessment performed annually
  - Evaluate FCPA risk by country
  - Red flags are known and posted as part of assessment program
  - FCPA controls imbedded into 404 control infrastructure
  - Teams knowledgeable of common vehicles for risk (promotional programs, donations, etc.)
- General
  - Pressure to achieve results tempered by ethical decision-making guidelines
  - FCPA response assessment/legal team in place
- Company programs
  - Effective whistleblower processes in place
  - Internal assessment has specific FCPA risk assessments in place
  - Perform agent, distributor assessments on a rotating basis
  - Regular review of commission/finders fee etc payments
  - FCPA review an integral part of acquisition checklist
- Interview agents annually for FCPA compliance
- Periodic assessment of entertainment expenses
- Assessment Committee discussion of commitment to FCPA compliance and agent exposure

# *FCPA Leading Practices – Finance*

## **Some Finance Leading Practices include:**

- Charge one employee with responsibility to monitor FCPA compliance (e.g., Chief Ethics Officer or Chief Compliance Officer).
- Track entertainment expenses for government employees.
- Set up a separate “facilitation payments” account and use it.
- Segregate, track, and identify government contracts.
- Contracts should be competitively offered and procurement processes should not be circumvented.
- Clearly communicate any allowable exceptions.
- Monitor charitable and political contributions.
- Commissions and bonuses should be in expected and reasonable ranges.
- Scrutinize contracts and billing to confirm expected value is received.
- Identify unusual payments, such as to offshore holding companies.
- Have competent and independent personnel closely evaluate favorable or abnormal credit terms.
- Maintain tight controls on use of petty cash accounts.

# *FCPA Leading Practices – HR*

## **Some HR Leading Practices include:**

- Anticorruption and FCPA guidelines built into global ethics framework
- Local FCPA training and messaging at appropriate levels
- FCPA-specific education packages available, focused on areas and countries of largest risk
- Effective sales force, controllership/finance, and senior management training completed
- Prohibition of slush account or off-book transactions
- Annual compliance attestations from employees
- Training cascaded to sales, legal, accounting, and country management

*Questions?*



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