



The Foreign Corrupt Practices Act: Focus on the Mining and Oil & Gas Industries

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*A Broader Perspective*SM

Presenters



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Topics of Discussion

- Why Companies in the Mining and Oil & Gas Industries Should Prioritize Compliance with the FCPA
- Overview of the FCPA
- Specific Anti-Corruption Issues in the Mining and Oil & Gas Industries
- FCPA Compliance Programs
- Questions and Answers



**Why Companies in the Mining and
Oil & Gas Industries Should Prioritize
Compliance with the FCPA**

How the U.S. Views FCPA Enforcement

- “I want to be clear about one thing with respect to [proposals to amend the FCPA]: we have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.”
- “[T]he United States must continue leading the charge against transnational bribery.”
- “The FCPA is an important mechanism for holding individuals and corporations accountable for fostering corruption abroad, and for motivating others to act responsibly. We must ensure that it stays that way.”

– Lanny Breuer, November 8, 2011

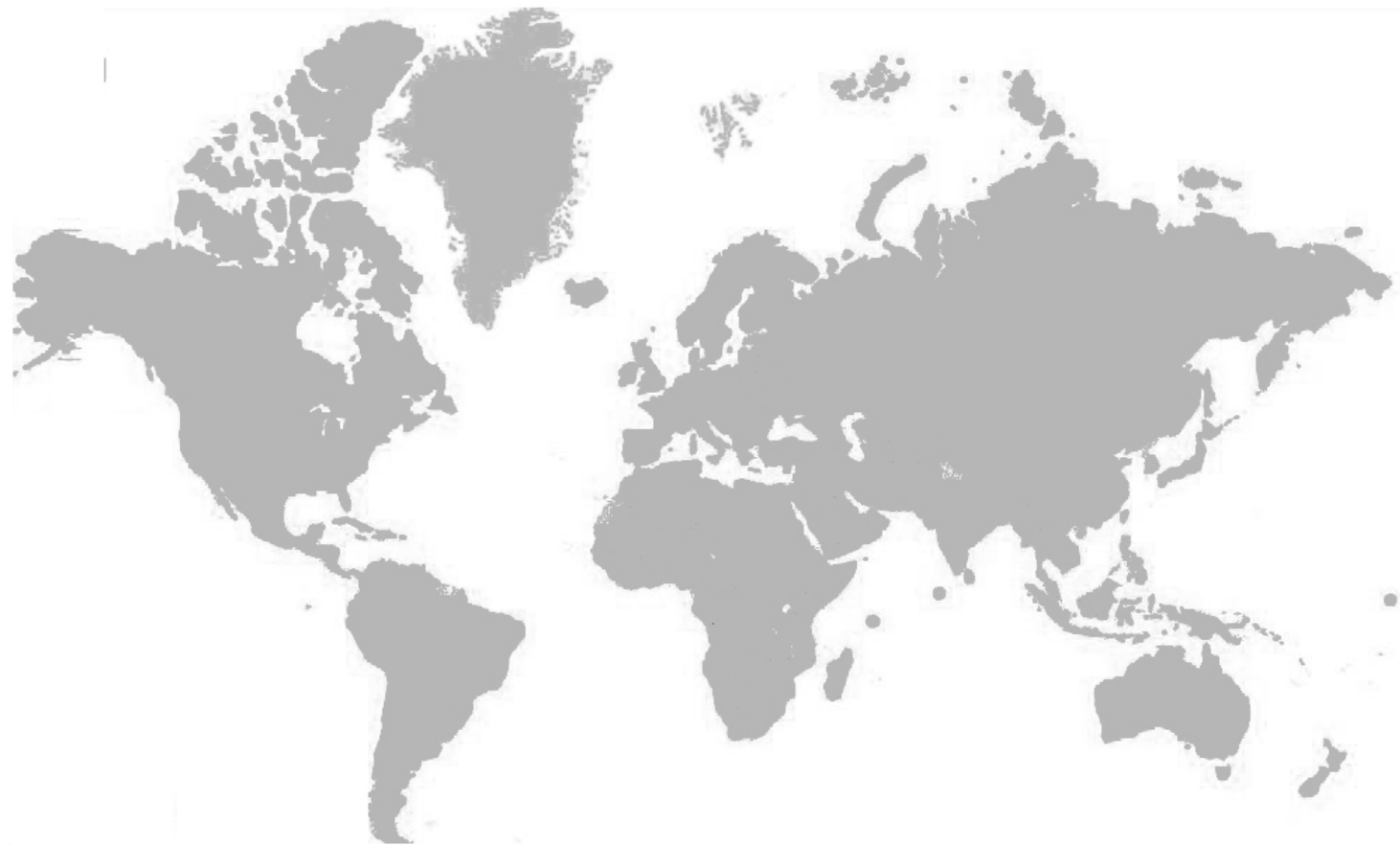
Recent FCPA Enforcement Activity

- In 2010-2011, the U.S. government assessed more than \$2.4 billion in monetary sanctions
- Many large fines are related to the oil & gas/mining industries:
 - Panalpina World Transport (Holding) Ltd. and Panalpina Inc. – \$81.8 million
 - Pride International and Pride Forasol – \$56.1 million
 - SNEPCO – \$48.1 million
- In 2010-2011, the U.S. government indicted, tried or sentenced 77 individuals with criminal violations of the FCPA
- Dodd-Frank Act's whistleblower provisions went into effect in July 2011

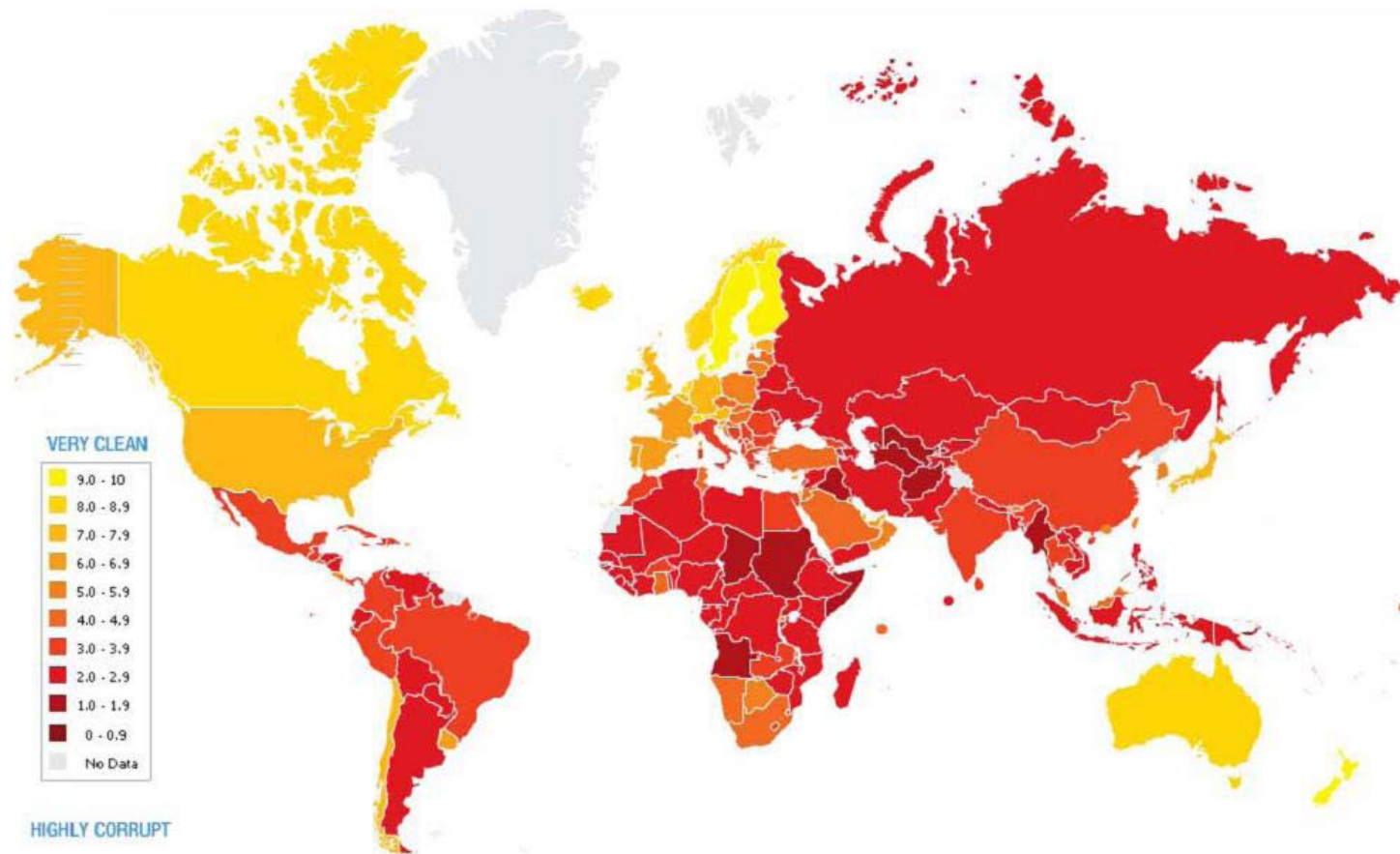
Why Anti-Corruption is an Issue for the Mining and Oil and Gas Industries

- Substantial activities in “high risk” locations
- Lucrative, sometimes monopolistic, franchises under the control or influence of government officials; “where the money is”
- Lack of clarity as to whether individuals are acting in “official” or “private” capacities; other cultural differences and “understandings”
- Use of agents; the need to access “local” expertise
- Opportunity: complex transactions involving numerous providers of goods and services
- Historical issues in the industry; authorities assume that similarly-situated companies are engaging in similar conduct

You see



Prosecutors see . . .



2011 Bribe Payers Index Report

- Transparency International ranked Mining 15th and Oil & Gas 16th out of 19 industry sectors
 - 17 – Real estate, property, legal and business services
 - 18 – Utilities
 - 19 – Public works contracts and construction

Other Anti-Corruption Initiatives Relevant to the Mining and Oil & Gas Industries

- Extractive Industries Transparency Initiative (“EITI”)
- World Bank Anti-Corruption Guidelines
- SEC Rules under Section 1504 of Dodd-Frank Act

Bottom line: greater transparency from governments and resource extraction companies

Extractive Industries Transparency Initiative ("EITI")

- EITI Principles
 - “We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability” (#5)
 - “We are committed to encouraging high standards of transparency and accountability in public life, government operations and in business.” (#9)
- EITI Criteria
 - “Regular publication of all material oil, gas and mining payments by companies to governments” (#1)
 - “[P]ayments . . . are the subject of a credible, independent audit, applying international auditing standards.” (#2)

World Bank Anti-Corruption Guidelines

- Borrowers (and other recipients of loan proceeds) must:
 - Take “all appropriate measures to prevent corrupt practices” in connection with the use of loan proceeds
 - Report allegations of corruption; respond appropriately; cooperate with investigations
 - Include implementing provisions in loan documents, including provisions enabling the Bank to inspect relevant records
- Sanctions include ban from Bank-financed projects

SEC Rules under DFA Section 1504

- SEC must issue rules requiring publicly-held “resource extraction” companies annually to report payments made by the company (or any entity controlled by the company) to a foreign government for purposes of commercial development of oil, gas or minerals.
- Extensive commentary; critics emphasize economic and competitive burdens of proposed rules



Overview of the FCPA

Structure of FCPA

Antibribery Provisions

- Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage
- Mainly enforced as criminal violations by the Department of Justice

Books and Records Provisions

- Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls
- Mainly enforced as civil violations by the Securities and Exchange Commission

Antibribery Prohibited Acts

- It is unlawful for
 - an “issuer,” “domestic concern,” or “any person acting within the territory of the United States”
 - with “corrupt intent”
 - directly or indirectly
 - to offer, pay, promise to pay, or authorize payment
 - of “anything of value”
 - to a “foreign official”
 - for the purpose of obtaining or retaining business

To Whom Do the Antibribery Provisions Apply?

- Any “**issuer**” that files reports to the SEC or trades equity or debt on a U.S. exchange
 - Includes any foreign company that trades, for example, American Depositary Receipts (ADRs), on a U.S. exchange.
- Any “**domestic concern**”
 - Includes U.S. citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the United States or a U.S. territory or that has its principal place of business in the United States.
- Any “**person**,” including an organization, wherever located, that, while in the territory of the United States, does any act in furtherance of the prohibited conduct
- If foreign subsidiary is acting as an **agent** of a U.S. issuer or domestic concern, then it is covered

“Corrupt Intent”

- Corrupt intent is required
- Quid Pro Quo – easy enough when payment is made directly to foreign official
- FCPA also prohibits corrupt payments to:
 - **any person**, while **knowing** that all or a portion of such money or thing of value will be offered to foreign official directly or indirectly
- “Willful blindness” instructions allowed

Direct or Indirect Payments Covered by Law

- Statute prohibits unlawful payments directly or indirectly through a third party
- Many enforcement cases involve indirect payments
- Examples of third parties through whom illegal payments have been made:
 - Agents or consultants
 - Distributors
 - Joint venture partners
 - Lawyers/accountants
 - Service providers

Does a Payment Need to Be Made?

- **No**
- Offers, promises, or authorizations to make prohibited payments are just as illegal as actually making a prohibited payment
- The simple offer of a payment is enough to create liability

What Qualifies as “Anything of Value”

- Anything of Value = Any Benefit
- Examples include but are not limited to:
 - Cash or the equivalent of cash such as a gift card, voucher, coupon
 - Entertainment or travel
 - Gifts that are more than a mere token or modest in value
 - Educational opportunities
 - Contributions to political parties, causes, candidates, and officials
 - Charitable contributions
 - Investments or property
 - Loan of a vacation home, automobile, or yacht, etc.
 - Giving a job to a family member or someone with a close personal relationship with foreign official

How Is “Foreign Official” Defined?

- Very broadly
- Statutory definition includes:
 - Foreign government employees or officials
 - Political officials or members of their staffs
 - Employees of public international organizations
 - Candidates for political office
- Has also been interpreted by DOJ to include:
 - Employees of government-owned or government-controlled businesses
 - Examples include:
 - Employees of state-owned or state-controlled natural resource companies (e.g., Petrobras, Sinopec)
 - Employees of state-owned or state-controlled media outlets, e.g. Chinese journalists
 - Employees of sovereign wealth funds

What Is an Unfair Business Advantage?

- In order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person
- Focus is on gaining a competitive advantage rather than directly securing a particular contract – you may not secure an improper business advantage
 - Examples include:
 - Obtaining confidential bid information
 - Slotting on planes and faster customs clearance
 - Lowering customs and tax duties
 - Certifications necessary for conducting business
 - Preferential treatment in customs clearance
 - Influence on technical specifications to influence bid
 - Influence over legislation
- The bribe does not need to achieve its intended effect

Facilitating Payments Exception

- Purpose of payment must be to expedite or secure performance of “routine governmental action” by a foreign official
 - *Action must be “ordinarily and commonly performed” by the foreign official*
- Examples
 - Obtaining permits, licenses, or other official documents
 - Processing governmental papers, such as visas and work orders
 - Providing police protection
 - Mail pick-up and delivery
 - Providing phone service, power and water supply
 - Loading and unloading cargo
 - Protecting perishable products
 - Scheduling inspections associated with contract performance or transit of goods across country
- **BUT** some companies no longer allow these types of payments
- **AND** facilitating payments are not always permitted under local foreign law

“Affirmative Defenses” Under the FCPA

- Promotional Payments
 - “Reasonable and bona fide” expenses
 - promotion, demonstration, explanation of products
 - execution or performance of contract
 - Proper documentation of expenditures
- “Lawful” under local law
 - Has never been recognized as a defense to a payment prohibited by the FCPA
 - Recently argued and rejected in *Bourke*

Books and Records

- Books, records, and accounts must be kept in reasonable detail to accurately and fairly reflect transactions and dispositions of assets
- System of internal accounting controls in place to ensure accurate recordkeeping
- Applies to issuers
 - Parent companies may be liable for false or fraudulent entries on any book or record that is ultimately consolidated with an issuer's books and records for financial reporting purposes
 - If issuer holds 50% or less of the voting power of subsidiary, then issuer must proceed in **good faith** to use its influence to cause subsidiary to meet internal accounting controls requirement
- Not limited to "financial records;" e.g., failure to maintain copies of documents relating to "side deals" (What would an auditor need to review?)

Penalties for Violation of FCPA Provisions

- Significant Monetary and Criminal Penalties
 - Antibribery Violations
 - Fines up to \$2 million per violation
 - Culpable individuals may face fines of up to \$250,000 per violation and/or imprisonment for up to five years
 - Books and Records and Internal Control Violations (Willful)
 - Corporate fines in excess of \$25 million for a company
 - Fine up to \$5 million and/or imprisonment for up to 20 years for culpable individuals
 - Alternative Fines Statute, 18 U.S.C. § 3571(d)

Possible Collateral Consequences of FCPA Violations

- Termination of government licenses
- Debarment from government contracting programs
- Disgorgement of a company's profits on contracts secured with improper payments
- Tax implications
- Shareholder litigation
- Foreign enforcement actions
- Appointment of independent compliance monitors



Specific Anti-Corruption Issues in the Mining and Oil & Gas Industries

Common Issues

- Getting the Concession/Contract
 - Using agents, joint ventures and other business partners; bidding processes
 - Social development payments
 - Charitable contributions
 - Training and travel expenses
- After the Concession/Contract
 - Permitting and subsequent development/mining rights
 - Travel/freight forwarding issues
 - Security
 - Requests for additional funds

Using Agents, Joint Ventures and Other Business Partners

- Due diligence before you sign the contract
 - Already have two red flags, so increased pressure for top-notch due diligence
- Understand how and why the company has been asked to do business with this third party
- Consider retaining local law firm
- Determine all associated persons (owners, officers, key employees)
 - Need to run OFAC/AML checks
- Document the due diligence

Important Due Diligence

- Third party's integrity, reputation, competence, and ability
- Third party's relationship with government officials
- Reasonableness and method of payment to third party
- Compliance with local law
- Anticorruption safeguards in contractual agreements
- Continuing oversight of third party's activities

Social Development Payments

- Requirements of law or policy
- Contractual provisions
 - Define social development projects and list criteria for qualifying projects
 - Benefits to the people of the country
 - Ensure review process for each project
- Administration of payments
 - Payments over the life of the contract
 - Payment directly to government v. payment directly to each project

Charitable Contributions

- DOJ Opinion Release No. 95-01
 - \$10 million donation to U.S. charitable organization to go to foreign public liability company to build medical facility
 - Certifications from U.S. and foreign companies
 - No one affiliated with foreign government
 - Audited financial reports confirming disposition of funds
- DOJ Opinion Release No. 97-02
 - \$100,000 payment to the government to assist building school near new utility plant
 - Payment made directly to the government and not to an individual
 - Contract with government guarantees to spend money on school
- SEC v. Schering-Plough Corp. (2004)
 - Charitable foundation's president was also foreign official

Training and Travel Expenses

- DOJ Opinion Release 92-01
 - U.S. oil exploration company wants to enter joint venture agreement with Pakistani ministry and under Pakistani law, company must provide training and travel expenses to Europe and North America
 - Contract to provide minimum \$200,000 per year for such training
 - Training will be related to the efficient performance of duties in connection with the supervision of the Pakistan petroleum industry
 - Will come back to DOJ if expenses go above \$250,000 per year

Permitting and Subsequent Development/Mining rights

- Requirements for obtaining environmental permits and approvals to explore, develop and mine
- Potential stages within the contract with specific deadlines
 - Exploration
 - Feasibility studies
 - Development and mining
- Companies often must obtain approval or extensions for these permits and stages
- Foreign officials often exercise discretion with respect to each permit, each stage and each extension

Travel/Freight Forwarding Issues

- Hiring third party does not immunize you or your company
 - Panalpina
- Compliance with local law
- Leverage economic benefits

Security

- Contractual security with government agencies/military
 - Freeport McMoRan Copper & Gold Inc. disclosed in 2006
 - Payments to Indonesian government for security
- Hiring independent security
- SDN/OFAC/Terrorist list issues
 - Chiquita case
- Extortion v. FCPA violation



Requests for Additional Funds

- Extra-contractual requests for small payments to local government agencies
- Donation of goods and/or services



FCPA Compliance Programs

Elements of an Acceptable FCPA Compliance Program

- Policy and written compliance code
- Commitment from the top
- Compliance standards and procedures covering gifts, travel and entertainment, political and charitable contributions, etc. . .
- Risk assessment
- Review and update of standards and procedures on an at least annual basis

Elements (cont.)

- Senior person responsible for oversight
- Internal controls for accurate books and records
- Communication to employees of policies, standards and procedures
- Effective system to provide advice on an urgent basis
- Appropriate disciplinary procedures for violations
- Appropriate due diligence for retention of agents and business partners

Elements (cont.)

- Standard anticorruption provisions in agreements and contracts
- Regular audit of compliance code, standards and procedures



Questions and Answers

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