FCPA and Bribery Act Compliance
Money Management Institute Training

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Roadmap

I. Overview of Anti-Corruption Laws

II. Corruption Risks and Mitigation Strategies for the Financial Industry

III. Enforcement Activity
FCPA, UK Bribery Act, and Other Applicable Laws

LAWS PROHIBITING BRIBERY
U.S. Foreign Corrupt Practices Act (FCPA)

ANTI-BRIBERY PROVISIONS

Prohibit bribery of foreign officials for the purpose of obtaining or retaining business or securing any improper business advantage

ACCOUNTING PROVISIONS

Require SEC-registered or reporting issuers to: (1) make and maintain accurate books and records and (2) implement adequate internal accounting controls
The FCPA prohibits the giving or offering—directly or indirectly—of gifts, payments, or “anything of value” to foreign officials to secure an improper benefit.

- **Giving/Offering:** Includes payments, promises to pay, and authorizations of payments.

- **Anything of Value:** Includes cash, travel expenses, charitable donations, gifts, tickets, hiring of relatives, etc.

- **Improper Benefit:** Includes obtaining/retaining business or securing an improper advantage (actual or attempted).

- **Indirect Action:** Includes making indirect payments, gifts, or contributions via third parties or agents.
“Foreign Officials” include:

- Individuals holding federal, state, or local government positions (legislative, executive, administrative, or judicial)
- Officers and employees of government “instrumentalities” (state-owned/controlled entities)
- Political candidates and officials/employees of political parties
- Individuals acting on behalf of or in the interest of foreign officials
- Officials/employees of public international organizations (e.g., UN, World Bank, IMF)
FCPA – Foreign Official

• Foreign Officials and Government Instrumentalities
  – Government “instrumentalities” are state-owned and state-controlled entities
  – Officers and employees of government instrumentalities are considered foreign officials
  – Whether a particular foreign entity constitutes an “instrumentality” under the FCPA requires a fact-specific analysis of the entity’s ownership, control, status, and function
  – Sovereign wealth funds are generally considered government instrumentalities
Exception – Facilitating Payments

- Facilitating or “grease” payments
  - Payments made to foreign officials to expedite or secure the performance of routine governmental actions
  - Applies only to non-discretionary actions by a foreign official, such as processing government paperwork or providing routine government services
  - Exception has limited application
Affirmative Defense

• Payments related to product demonstration or promotion may be defensible under the FCPA

• The affirmative defense requires that any such payments be reasonable and bona fide expenditures that are directly related to

  1. the promotion, demonstration, or explanation of products/services; or

  2. the execution or performance of a contract
FCPA – Accounting Provisions

• “Books and Records” Provision:
  – Must contain reasonable detail and accurately/fairly reflect transactions
    • Must record all travel, gifts, hospitality, and entertainment expenditures

• “Internal Controls” Requirement:
  – Must maintain accounting controls that reasonably prevent and detect violations of the statute
Books and records violations are a potent enforcement tool

- Corrupt intent is not required
- No materiality threshold
## FCPA – Penalties

### Business Organizations
- $25 million criminal fine per violation (books/records and internal control violations)
- Up to $2 million criminal fine per violation (anti-bribery violations)
- $10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d) (twice the gain or loss)

### Individuals
- 20 years imprisonment and/or $5 million per violation (books/records and internal control violations)
- 5 years imprisonment and/or $250,000 fine per violation (anti-bribery violations)
- $10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d) (twice the gain or loss)
U.K. Bribery Act 2010 (Bribery Act)

• The Bribery Act prohibits:
  – The bribery of UK officials in exchange for the improper performance of an activity
  – The bribery of foreign (non-UK) officials in order to influence a decision or obtain or retain business
  – Acts of commercial (private) bribery
  – The receipt of bribes

• The Bribery Act also contains a corporate offense
  – Strict liability offense for corporations that fail to prevent bribery committed by a person associated with the firm (including employees, agents, and third party businesses working on behalf of the firm, in any capacity, in any jurisdiction)
Bribery Act – Corporate Offense

• Offense: Commercial organization commits an offense if an “associate” of that organization bribes another person intending to obtain/retain business or a business advantage for the organization
  – “Associate”: broadly defined to include personnel, agents, subsidiaries, contractors, subcontractors, and others

• Strict liability offense: No knowledge/intent required

• Defense: Full defense if organization can prove that it had in place “adequate procedures” designed to prevent persons associated with it from undertaking such conduct
FCPA and Bribery Act Compared

**Similarities:**
- Prohibit corrupt payments to foreign officials
- Extraterritorial jurisdiction (Bribery Act considered to be broader)
- Individual and corporate liability
- Severe penalties (fines, disgorgement, imprisonment)

**Differences:**
- Bribery Act applies to all forms of bribery—public, private, foreign, domestic
- Bribery Act covers “active” (bribing) and “passive” (being bribed) conduct
- Bribery Act has a strict liability corporate offense for failing to prevent bribery
- Bribery Act, unlike the FCPA, does not contain an exemption for “facilitating payments”
Other Applicable Laws

- **U.S. Travel Act:**
  - Prohibits “travel[ing] in interstate or foreign commerce or us[ing] the mail or any facility in interstate or foreign commerce” to further “any unlawful activity” recognized under federal/state law

- **Canadian Corruption of Foreign Public Officials Act:**
  - Prohibits giving, offering, or agreeing to give, directly or indirectly, “a loan, reward, advantage, or benefit of any kind” to a non-Canadian public official to influence a decision or obtain or retain business

- **Brazilian Anti-Corruption Law (Law No. 12,846/2013):**
  - Forbids any Brazilian company from engaging in corruption of government officials in Brazil or abroad and imposes strict liability on companies for violations carried out by their directors, officers, employees, and other agents acting on their behalf (Law effective Jan. 28, 2014.)

- **Numerous other anti-corruption laws**
Corruption Risks, Exposure, and Mitigation Strategies

FINANCIAL INDUSTRY
Investment firms face double exposure under the FCPA: *direct* liability for the bad acts of the investment company, and *indirect* liability for corrupt conduct committed by the entities in which it invests.

**Direct liability:**

- The risk that investment firms may directly violate the FCPA has the greatest potential in the context of soliciting foreign investments or in attempting to make investments in foreign companies.

- Large investors may be owned/controlled by foreign governments, departments, agencies, or instrumentalities, rendering their employees “foreign officials” for purposes of the FCPA.

- Gifts, travel, entertainment, and commissions provided to such employees for the purpose of soliciting new investments or retaining existing investments could constitute a corrupt payment in violation of the FCPA.

- Payments to foreign officials for licenses, permits, and other government authorizations can also trigger scrutiny.
Legal Exposure – Indirect

• Indirect liability for investment company’s actions:
  
  – At the portfolio asset level, liability may result from conduct that occurs after the investment firm has invested in the relevant entity
  
  – Investment firms are expected to conduct due diligence of their target companies and take steps to prevent misconduct post-investment/acquisition
Legal Exposure – Indirect

Indirect liability for third-party acts:

- Foreign agents (e.g., business development consultants) engaged by investment firms can cause FCPA liability for those firms.

- An investment firm that enters into an agreement with a third party that makes prohibited payments may be held liable for the conduct of the agent, even if the firm did not have actual knowledge of the corrupt payment.

- “Knowledge” of a corrupt payment can exist if the investment firm is found to have been aware of facts suggesting that there was a high probability that an improper payment would be made, offered, or promised by its third-party agent.
Successor Liability

• “Buying an FCPA violation” has become a reality for some companies that fail to conduct adequate pre-acquisition FCPA diligence or remediate problems identified during the acquisition/investment process
  – **BUT:** Investment in or acquisition of a foreign company not previously subject to the FCPA would not retroactively create liability for the investing/acquiring firm

• An investment firm that owns more than 50 percent of a portfolio company may be liable for the FCPA violations of the portfolio company under traditional agency principles

• Successor liability is not reserved, however, for only those investors acquiring a majority equity stake in a deal
  – The U.S. government has aggressively pursued theories of FCPA liability against investors who acquire less than a 50 percent ownership interest
  – **Key:** level of control exercised by the investor (e.g., if investor has seats on the board of directors or active involvement in managing investment)
The scope and depth of FCPA pre-acquisition due diligence must include an assessment of bribery, books and records, and internal controls risks. The nature and extent of the inquiry depends on factors such as the nature and location of the company’s business.

- A business model that involves frequent interaction with government regulators or government customers may require more scrutiny than one that does not.
- The nature of the business may require scrutiny of specific areas, including political contributions, lobbying activities, and payments to customs agents.
Risk Mitigation – Due Diligence

Pre-Investment/Acquisition Considerations

• General risk assessment (region, industry, points of contact)
• Current compliance program
• Prior history of bribery or internal investigations
• Internal controls
• Use of agents/intermediaries
• Anti-corruption training
• Employee discipline and hotline reporting
Post-Investment/Acquisition Risk Mitigation

- Development/implementaiton of a post-acquisition compliance program
- Post-acquisition audit (deep dive) of the acquired company’s financials
- Employee training in anti-corruption compliance and the establishment of a channel for employees to report concerns
- Timely disclosure of any FCPA issues uncovered to government regulators
1. **Know your third parties**

   - Understand the qualifications and associations of your third-party partners, including their business reputations and relationships, if any, with foreign officials

   - *Third party’s qualifications and the reasons for its services*
   - *Consider how the third party was identified and whether the third party has any contact/relationships with foreign officials*
2. **Understand** the need
   - Identify services to be provided by the third party
   - Define those services in the contract
   - Identify a way for confirming the provision of those services
   - Define the payment terms and ensure that they comport with industry/regional standards
   - Require the third party to agree in writing to comply with anti-corruption laws
3. **Monitor** your third parties

- Provide your third party with a copy of your Code of Conduct and Anti-Corruption Policy
- Require your third party to regularly certify its compliance with the Company’s Code and Policy, as well as all relevant laws
- Require your third party to report all actual/suspected violations
- Exercise contractual audit rights
- Train your third party
4. **Constantly look** for red flags:
   - Unusual payments or financial arrangements
   - Unusually high commissions
   - Reputation of agent or consultant for corruption
   - Inflated invoices; invoices containing round-dollar amounts; inconsistent invoicing
   - Refusal by a business partner to provide certification that it will not take any action that would violate anti-corruption laws, including the FCPA
4. **Constantly look for red flags** (cont’d)

- Lack of transparency in documenting expenses or other accounting records
- Relationship between the agent/consultant and the foreign government
- Apparent lack of qualifications or resources on the part of the business partner to perform the services offered
- “Recommendations” of business partner that come from an official of a potential government customer
5. **Respond** to red flags and other problems
   - *Terminate corrupt business partners*
   - *Require leadership changes*
Statistics, Trends, and Industry Cases

ENFORCEMENT ACTIVITY
Corruption Perceptions Index

The perceived levels of public sector corruption in 177 countries/territories around the world.
Anti-Corruption Enforcement Trends

- Continued aggressive enforcement by U.S. authorities
- Significant U.S. investigative tools and resources, including Dodd-Frank Act whistleblower provisions
- Expansion of scrutiny into new industries: financial services, retail
- Focus on individual prosecutions
- More international anti-corruption laws: China, Mexico, Brazil, Russia
U.S. Enforcement Statistics

FCPA Enforcement Actions Initiated (2004–2013)
JPMorgan Case – Hiring of Relatives

JPMorgan’s Fruitful Ties to a Member of China’s Elite

By DAVID BARBOZA, JESSICA SILVER-GREENBERG and BEN PROCTER 1:53 AM ET

A contract between JPMorgan Chase and a consulting firm run by the daughter of the former prime minister, Wen Jiabao, points to the bank’s strategy to accumulate its influence in China.

Democrats Threaten to Abandon Obama on Health Provision

Janet L. Yellen, the Federal Reserve nominee.

An Unwise Airline Merger

BY THE EDITORIAL BOARD

The Justice Department’s approval of the American Airlines-US Airways deal may hurt consumers.

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• Op-Ed: India, Where the Gods Live On and On

• Op-Ed: Don’t Give More Patients Status

• Greenhouse: Bring Me a Case
• **JPMorgan under investigation for hiring practices in China**
  - *NYT* Report (Dec. 29, 2013): According to company emails and other confidential documents, “JPMorgan escalated what it called its ‘Sons and Daughters’ hiring program, adding scores of well-connected employees and tracking how those hires translated into business deals with the Chinese government.”

• **Industry sweep of investment banks**
  - *NYT* Report (Dec. 29, 2013): Since opening a bribery investigation into JPMorgan this past spring, “authorities have expanded the inquiry to include hiring at other big banks [including] . . . Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs and Morgan Stanley,” as well as UBS.
Direct Access Partners Case

- Direct Access Partners (DAP) employees prosecuted for using bribes to obtain securities investment business from a state-owned Venezuelan bank
  - May 2013: Prosecutors accused employees of the Miami-based affiliate of New York brokerage firm DAP of using $5 million in bribes to obtain the securities investment business of Venezuela’s state-controlled development bank, Banco de Desarrollo Economico y Social de Venezuela (BANDES)
  - August 2013: Three former employees of DAP entered guilty pleas involving FCPA, Travel Act, money laundering, and obstruction charges
Important takeaways from the DAP case:

1. Investigation was initiated by a periodic SEC examination
   - *Regulators identified a suspicious trade involving BANDES buying and selling almost $100 million of the same bonds in a single day that resulted in markups generating more than $10 million in profits*

2. Employees of state-owned economic development banks considered “foreign officials” for purposes of the FCPA

3. Prosecutors increasingly relying on other tools (e.g., Travel Act, money-laundering statutes) to prosecute acts of foreign bribery
   - *Prosecutors have charged a foreign official (BANDES VP Maria Gonzales) with conspiring to violate and violating the Travel Act*

4. Case is further evidence of regulators’ willingness to prosecute individuals for FCPA violations independent of their employers
Omega Advisors (Bourke) Case

- **Omega Advisors** case reveals the FCPA risks faced by institutional investors
  - Mid-1990s: Azerbaijan instituted a program in the mid-1990s to privatize some of its state-owned industries, including the State Oil Company of the Azerbaijan Republic
  - 1997: Victor Kozeny invested heavily in the Azeri privatization program through two companies he controlled, Oily Rock Group Ltd. (Oily Rock) and Minaret Group Ltd. (Minaret)
  - 1997-98: Kozeny recruited investors to invest in the privatization program, including hedge fund Omega Advisors. Omega invested more than $100 million in the Azeri privatization program in 1998 through a “co-investment agreement” with Oily Rock and Minaret
Omega Advisors (Bourke) Case

- 2004: Former Omega partner Clayton Lewis (the company’s point of contact on the Azeri investment) pled guilty to conspiracy to violate the FCPA and violating the FCPA.

- 2007: Omega acknowledged that prior to investing in an Azeri privatization program, Lewis learned of arrangements to provide Azerbaijani officials with financial interests in the venture in return for the award of privatization rights.

- RESULT: Omega lost all of its investment (over $100 million) and agreed to enter into a non-prosecution agreement that required a civil forfeiture of $500,000.
Questions?

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Rethink FX

Execution • Yield • Diversification

FX, Asset Management and Fiduciary Responsibility
FX In The News...Why?

U.S. Investigates Currency Trades by Major Banks
- NY Times Dealbook (11/14/13)

Forex Probe Uncovers Collusive Behavior
- Wall Street Journal (12/19/13)

Another Banking Scandal: World’s Biggest Banks Investigated for Rigging World’s Biggest Market
- NY Times (11/21/13)

The Next Big Financial Scandal: A mounting investigation into the FX market could be the next black eye for the financial industry
- Financial Policy (11/15/13)

Traders in FX Probe Face FCA Taping of Lawyer Interviews
- Bloomberg (12/4/13)

Biggest Banks Face Forex Questions
- Financial Times (11/12/13)

Fix Investigation Switches Focus to Real-Money Clients
- EuroMoney (11/18/13)

U.S. Said to Open Criminal Probe of FX Market Rigging
- Bloomberg (10/12/13)
• Senior Management includes – former FX Chief Dealers, buy-side fiduciaries, market platform technology developers

• Leadership team includes experienced FX ECN (“Electronic Communication Network”) liquidity managers and software engineers who have created leading FX platforms in the OTC marketplace today

• Millions of dollars invested to create state of the art FX technology

• Proven diverse capital market experience

• Deep expertise in the institutional FX marketplace

• Independently owned, private company

• Founder/Chairman is a former portfolio manager at RBC Asset Management
The FX Market Today

- FX is the largest and most opaque OTC marketplace $5.3 Trillion/day
- FX swaps most actively traded $2.2 Trillion/day
- Spot trading followed with $2.0 Trillion/day
- Options and out right forwards $1.1 Trillion/day
- OTC FX Market trades Globally 24/5
- 87% of all trades were paired against US Dollar
- Selling desk centers UK, US, Singapore and Japan handle 71% of all trades
- FX OTC is not a regulated marketplace
FX Real Challenges

**Current Environment**

- ECNs
- FX Prime Brokers
- Dark Pools
- Bank FX Trading & Delta One Desks
- Hedge Funds & Opportunistic High Frequency Traders
- Institutional Investors & Asset Managers

**Ramifications of Current Structure**

- **Fragmented, lacking transparency with no certainty of best price execution**
- **Significant barriers to access**
  - Credit, Capital, Legal, Technology, Sophistication / FX market knowledge all represent barriers to accessing the Institutional FX marketplace
- **Largely misunderstood, often abused**
- **Prices not as they appear – Liquidity Mirage**
  - Most platforms allow Liquidity Providers to reject an order AFTER it is matched
  - Many prices are posted to gather information with no intention to execute
Legacy Methods

- **Time-of-Day Fixing**

- **Foreign Exchange valuation in 40 Act Mutual Funds is almost entirely done at one of two rates:**
  1. 4:00pm (GMT) / 11:00am (EST) - WMR fixing (majority)
  2. 4:00pm (EST) / 9:00pm (GMT) - WMR fixing (minority)

- **WMR – “WM Company / Reuters”**
  1. World Markets – Owned by State Street
  2. Reuters – Not the Only Data Used
  3. Currenex (Owned by State Street)
  4. EBS (Owned by ICAP)

- **Indicative Rates**
  1. Rates offered via specified liquidity pools from contributors
  2. Indicative Rates – Not Executable Liquidity, Midpoint
  3. Interest or closed Pool Liquidity
  4. Rates sampled over 1 minute - WMR fixing communicated 8 minutes after fixing

- **Not Executable Rates – WMR Fixing transactions are all principal based (not possible to Agency broker)**
  1. Lopsided interest leads to dealer positioning and price anomalies ahead of (and through) the fixing time
Be Aware

• The majority of businesses and investors regard FX as an administrative function
• They rely on third parties i.e. custodians for execution and benchmarking
• Historically, FX has been a rote process – not an important action or source of alpha
• Increased scrutiny surrounding custodial FX execution
• Benchmark manipulation has challenged the benign neglect that has characterized users of FX
• Fiduciary responsibility should drive a fresh look at FX execution and FX benchmarks
• Businesses and investors must reevaluate their historical approach to FX
FX Investigations will continue worldwide

- The Federal Reserve - Central Banks
- U.S. Department of Justice
- FCA – Financial Conduct Authority
- Britain’s Commission on Banking Standards
- Parliament’s Treasury Select Committee
- Swiss Competition Commission
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<th>Legacy FX Fixing</th>
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• Transparent and fair FX execution

• Benchmarking/Tracking/Indexing that withstands scrutiny

• Discovery of actual cost that separates price from cost of execution

• IOSCO Benchmark Standards

➤ **Insist upon “exchange like” standards for your FX dealings!**
Founded in 2009, Cürex has created the first fully transparent and fair electronic marketplace for FX execution – a “virtual exchange” for foreign exchange. Our platform of patented technologies provides asset owners and managers with unique, executable liquidity provided by the largest global FX institutional dealers in a stable and sustainable marketplace, supported by FTSE governance that includes an audit function to insure that the price of every transaction is the price provided, without price spreading or manipulation.
Why Consider Rethinking FX execution:

- Investigations are just underway and will continue
- Legacy FX pricing for Fiduciary’s are real concerns
- Transparency and Fair Pricing are in demand for Real Money investors
- FTSE/Cürex partnership has created the first real-time streaming currency index series
- Cürex Group is currently working on projects with large institutions that will enhance their FX approach
- Aligning the principle of best execution to FX benchmarks should be an important fiduciary objective going forward, particularly as regulators continue to examine practices in the OTC FX marketplace
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