



# **Foreign Corrupt Practices Act Enforcement: 2017 Year-in-Review**

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# Presenters



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# Agenda

- FCPA Statute
- 2017 Enforcement Overview
- 2017 DOJ Update
  - DOJ FCPA Corporate Enforcement Policy
  - DOJ Compliance Counsel
- Court Cases
- 2017 Enforcement Action News
  - Cooperation with Foreign Enforcers
  - Improper Payments
  - Successor Liability
  - Recurring Enforcement
  - State-Owned or Controlled Industries
  - Individuals & Willful Blindness
- The New Administration
- Global Anti-Corruption Update

# FCPA STATUTE

# Structure of the FCPA

## Antibribery Provisions

- Prohibits bribery of foreign government or political officials for the purpose of either:
  - Obtaining or retaining business
  - Securing any improper 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
  - Implement adequate internal accounting controls
- Mainly enforced as civil violations by the Securities and Exchange Commission

# Antibribery Provisions: To Whom Do They 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 U.S. or a U.S. territory or that has its principal place of business in the U.S.
- Any “person,” including an organization, wherever located, that while in a U.S. territory, does any act in furtherance of the prohibited conduct
  - Government argues minimum contacts include emails, telephone calls, transfers through correspondent bank accounts in U.S. intermediary banks

# Antibribery Provisions: 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

# Books and Records Provisions

- Books, records, and accounts must be kept “in reasonable detail”
  - Level of detail that would satisfy prudent officials in the conduct of their own affairs
  - No materiality threshold
  - Bribes are often concealed as legitimate payments, such as consulting fees, marketing expenses, travel and entertainment, or discounts
- System of internal accounting controls
  - The processes in place to ensure accurate financial reporting
  - Includes the organization’s “tone,” risk assessments, and control activities such as approvals, authorizations, segregation of duties, etc.
  - An effective compliance program is a critical component of internal controls
- SEC will look to see if there are any potential reporting and anti-fraud violations that accompany the FCPA violation
- There can be criminal liability for accounting violations



# **2017 ENFORCEMENT OVERVIEW**

# FCPA Statistics: Types of Settlements

- Corporate Settlements (DOJ / SEC)
  - 2017: 13 companies
  - 2016: 27 companies
  - 2015: 11 companies
  - 2014: 10 companies
  - 2013: 12 companies
  - 2012: 12 companies
- Individual Pleas/Indictments (DOJ)
  - 2017: 17 individuals
  - 2016: 12 individuals
  - 2015: 8 individuals
  - 2014: 10 individuals
  - 2013: 12 individuals
  - 2012: 2 individuals

# FCPA Statistics: Monetary Settlements

- Monetary Settlements (DOJ / SEC)
  - 2017: \$1.9 billion
  - 2016: \$2.48 billion
  - 2015: \$133 million
  - 2014: \$1.56 billion
  - 2013: \$731 million
  - 2012: \$259 million
  - 2011: \$509 million
  - 2010: \$1.8 billion
- Largest 2017 Settlement
  - Telia's \$965 million settlement with U.S. & foreign authorities
- Two new additions to the Top Ten List in 2017
  - Second highest enforcement year

# FCPA Top Ten Settlements

1. Telia (Sweden): \$965 million (2017)
2. Siemens (Germany): \$800 million (2008)
3. VimpelCom (Holland) \$795 million (2016)
4. Alstom (France): \$772 million (2014)
5. KBR / Halliburton (U.S.): \$579 million (2009)
6. Teva Pharmaceutical (Israel): \$519 million (2016)
7. Keppel Offshore & Marine (Singapore): \$422 million (2017)
8. Odebrecht/Braskem (Brazil): \$420 million (2016)
9. Och-Ziff (U.S.): \$412 million (2016)
10. BAE (UK): \$400 million (2010)

# 2017 DOJ UPDATE

# FCPA Pilot Program

- Mitigation credit where company meets program's "stringent requirements"
  - Fine reduction – up to 50% reduction
  - Reduced chance of compliance monitor
  - Possible declination of prosecution
- Over 30 self-reported violations
- Declinations with disgorgement
  - New category of FCPA enforcement
  - Seven issued under the Program

# FCPA Corporate Enforcement Policy

- Conversion from Pilot Program to permanent guideline announced November 2017
  - Guidelines added to the U.S. Attorney's Manual
- Purpose
  - Encourage companies to self-report FCPA violations
  - Formalize criteria for prosecutors to assess voluntary disclosures
- Presumption of a declination if:
  - Voluntary self-disclosure
  - Full cooperation
  - Timely and appropriate remediation
- Exceptions:
  - Aggravating circumstances
  - Offender is a criminal recidivist

# Program vs. Policy

## Program

- Potential declination
- Criminal resolution “generally should not” require a monitor
- Wrongdoers must disgorge all profits resulting from the misconduct
- Wrongdoers must demonstrate “timely and appropriate remediation”

## Policy

- Declination presumption
- Criminal resolution “generally will not” require a monitor
- Wrongdoers must pay “all disgorgement, forfeiture, and/or restitution resulting from the misconduct”
- Remediation must demonstrate root cause analysis & “appropriate retention of business records”



# Voluntary Self-Disclosure?

- If you voluntarily report:
  - Increased legal fees
  - Disgorgement, forfeiture and/or restitution
  - Potential for expanded investigation
  - Potential for fines/penalties
  - Potential for further monitoring

# DOJ's Compliance Counsel

- Premature resignation of Hui Chen, DOJ Fraud Section's Compliance Counsel
- Independent compliance monitors instituted in two 2017 corporate enforcement actions
  - Both were instituted under the Obama administration
- Three compliance consultants instituted in 2017
  - Two instituted under Obama administration, one under Trump

# COURT CASES

# Kokesh v. SEC

- 5-year statute of limitations on civil fines, penalties or forfeitures
- SEC claimed unlimited look-back on disgorgement, terming it “equitable relief”
- Supreme Court held that disgorgement:
  - Is paid to victim and U.S. Treasury
  - Is compensatory and punitive
  - Must be treated as a penalty for statute of limitations purposes

# United States v. Firtash (N.D. Ill.)

- The allegations:
  - Indian officials bribed in connection with a mining project
- The facts:
  - Project took place entirely in India
  - Carried out by foreign companies with no ties to the U.S.
  - Defendant possesses Ukrainian citizenship
  - Never a citizen of, visitor to, or even a visa applicant for the U.S.
  - No allegation of illicit acts occurring in or affecting the U.S.

# United States v. Firtash (N.D. Ill.)

- Claimed nexus to the U.S. through co-conspirators:
  - Transferred funds through U.S. correspondent banks
  - Traveled within the U.S.
  - Used internet and email accounts hosted on U.S. servers
  - Used a U.S.-located cellular phone on a U.S. network
- No allegation that the acts were in furtherance of a conspiracy
- Motion to Dismiss the Indictment filed May 9

# United States v. Hoskins (D. Conn.)

- **Indictment alleges that Hoskins:**
  - Performed functions and services for other Alstom subsidiaries, including Alstom Power, Inc., located in the U.S.
  - Authorized payments to consultants that were used as bribes to obtain a contract in Indonesia to build power stations for Indonesia's state-owned and controlled electricity company
- **Court held:**
  - Non-resident foreign national, who is not an agent of a domestic concern or issuer, cannot be subject to criminal liability under the FCPA under an accomplice theory of liability where he or she is not an agent of a domestic concern and does not commit acts while physically present in US territory
- **On appeal to the Second Circuit; oral argument held March 2**

# **2017 ENFORCEMENT ACTION NEWS**



# Recent DOJ Declinations with Disgorgement

- In June 2017, the DOJ closed two investigations without prosecution
- Case 1: Misconduct led by executives re: Georgian deal
- Case 2: Indian sub used subcontractors to pay bribes
- DOJ's rationale:
  - Remediation
  - Prompt voluntary self-disclosure of misconduct
  - Full cooperation
  - Termination of employees involved in the corruption
  - Disgorgement of profits
  - Thorough investigation

# Cooperation with Foreign Enforcers

- \$965 million settlement with Telia Company AB (Sept. 2017)
  - Uzbek subsidiary
  - Recipient was Uzbek president, via family member
  - \$331 million paid to a shell company
- Cooperative investigation among corruption authorities in the U.S., Sweden, and the Netherlands
- DPA for Telia, plea for Uzbek subsidiary
  - Received some mitigation credit

# Cooperation with Foreign Enforcers

- \$422 million settlement with Keppel Offshore & Marine Ltd. (Dec. 2017)
  - Related to Operation Car Wash investigation
  - Bribes paid to officers at Petrobras and other officials
- Cooperative investigation among corruption authorities in the U.S., Brazil, and Singapore
- U.S. fine will be offset by fines paid to foreign enforcement authorities
- DPA for Keppel, plea for U.S. subsidiary
  - Received some mitigation credit

# Cooperation with Foreign Enforcers

- \$238 million settlement with SBM Offshore (Nov. 2017)
  - Related to Operation Car Wash investigation
  - Bribes paid to officials in Angola, Brazil, Equatorial Guinea, Iraq & Kazakhstan
- DOJ investigation reopened in 2016
- U.S. fine will be offset by fines paid to foreign enforcement authorities
- DPA for SBM, plea for U.S. subsidiary
  - Received some mitigation credit

# Successor Liability

- \$13 million SEC settlement with two global Agribusinesses (January 2017)
- Company 1 failed to conduct appropriate due diligence on and monitor activities of an agent of its Indian subsidiary
- Company 2 bought Company 1 in February 2010
- Indian sub made \$90,000 in payments from Feb. to Oct. 2010
- In Oct. 2010, Company 2 received information questioning payments
- Company 1's failure created the risk that funds paid to the agent could be used for improper purposes
- Company 2 conducted serious due-diligence in 24 countries, but tabbed with successor liability

# Recurring Enforcement

- Halliburton—\$29.2 million settlement
  - Original enforcement action in 2009
  - Used Angolan company to obtain business from state-owned oil company
- Biomet—\$30.5 million settlement
  - Original enforcement action in 2012
  - Continued to use third-party known to have paid bribes
  - Inadequate internal accounting controls at subsidiary
- Orthofix—\$14 million settlement
  - Original enforcement action in 2012
  - Concealed use of third-party known to have paid bribes

# State-Owned or Controlled Entities

- \$13 million settlement with Alere (Sept. 2017)
- Gave money to manager of a health insurance company
  - Originally a private company
  - Colombian Ministry of Health took control
  - Company transformed
- Books and records violations

# Improper Payments

- \$30.5 million SEC settlement with SQM (Jan. 2017)
- Nearly \$15 million in payments
  - Politicians and candidates
  - Connected businesses, individuals and charities
- Criminal charges based on
  - Books and records violations
  - Lack of sufficient internal controls
- DPA & compliance monitor imposed



# Individuals and Willful Blindness

- KOM senior attorney
  - Plead guilty to one count of conspiracy to violate the FCPA
  - Drafted and prepared contracts between KOM and its agents
  - Will be sentenced in May
- SBM executive
  - Plead guilty to one count of conspiracy to violate the FCPA
  - Authorized payments to third parties
  - No actual knowledge—deliberately avoided learning the truth
  - Also awaiting sentencing

# Eberhard Reichert

- Siemens executive, German citizen, 78 years old
- Arrested in Croatia in September 2017
- Indicted in S.D.N.Y. in December 2017
- Charged with FCPA violations stemming from a 1998 contract with Argentinian government

# THE NEW ADMINISTRATION

# Trump on FCPA (Pre-POTUS)

“It’s a horrible law and it should be changed.”

U.S. shouldn’t prosecute companies that are “getting business and creating jobs in this country.”

“ . . . for this country to prosecute because something happened in India is outrageous.”

*May 15, 2012 CNBC Squawk box interview*

# Trump on FCPA (Post-POTUS)

National Security Strategy paper:

“Using our economic and diplomatic tools, the United States will continue to target corrupt foreign officials and work with countries to improve their ability to fight corruption so U.S. companies can compete fairly in transparent business climates.”

# Sessions Post-Confirmation

“Corruption harms free competition, distorts prices [and] often leads to substandard products and services coming into this country[,]. . . increases the cost of doing business, and hurts honest companies that don’t pay these bribes.”

Because the DOJ “wants to create an even playing field for law-abiding companies,” DOJ will “continue to strongly enforce the FCPA and other anti-corruption laws.”

“Congress enacted this law 40 years ago, when companies considered it a routine expense to bribe foreign officials in order to gain business advantages abroad”

*Attorney General Jeff Sessions*

# Sessions: Global Forum on Asset Recovery

- Changes at DOJ:
  - Increased staffing at Office of International affairs
  - More resources devoted to reviewing/executing MLATs
- Emphasized the importance of global cooperation
  - Sharing of intelligence
  - Proper consideration of extradition requests

# Department of Justice

The strategy of the Trump administration's anti-fraud effort "is to motivate companies and individuals to comply with the law" and "not to prosecute every company we can, or break our own records for the largest fines or longest prison sentences."

*Trevor McFadden*  
*Acting Deputy Attorney General*  
*DOJ Criminal Division*



# Investigation Timeline

“[Future FCPA investigations will] be measured in months, not years” as the DOJ makes “a concerted effort to move corporate investigations expeditiously.”

*Trevor McFadden*  
*Acting Deputy Attorney General*  
*DOJ Criminal Division*

# Securities & Exchange Commission

“Combatting corruption is an important governmental mission.”

[I plan to work] “with my fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws.”

*SEC Chair Jay Clayton*

# What Effect—If Any?

## DOJ

- Rosenstein announcement that new FCPA Enforcement Policy will free prosecutors to work on “other financial crimes”
- Suggests new Policy in practice may simply manage voluntary disclosures

## SEC

- Significant drop in enforcement since Trump administration began
- No longer pursuing “broken windows” enforcement strategy
- Could see fewer small corporate cases, more individual cases

# **GLOBAL ANTI-CORRUPTION UPDATE**

# Brazil: Operation Car Wash

- Massive corruption probe began with a gas station network accused of money laundering in early 2014
- Informant revealed comprehensive political corruption scheme
  - State-run oil company Petrobras overcharged on contracts
  - Surplus funds were used for campaign finance and to buy support for Worker's Party
- Results of corruption probe:
  - Spread to other industries
  - Criminal accusations against 200 individuals
  - \$10 billion in fines
  - Criminal sentences of 1,300 years combined jail time

# France: *Sapin II*, passed November 8

- New law aimed at preventing and fighting foreign bribery
  - Applies to companies with 500+ employees and \$100+ million in revenue
  - Requires implementation of measures to prevent and detect corruption
- Sapin II creates:
  - The Agence Française Anticorruption (AFA), to provide oversight
  - French Deferred Prosecution Agreements
  - Certain whistleblower protections

# U.K.: Anticorruption Strategy

- Long-term strategy released Dec. 2017
- Priorities
  - Reducing insider threat in high-risk domestic sectors
  - Strengthening the integrity of the UK
  - Promoting integrity across public & private sectors
  - Reducing corruption in public procurement & grants
  - Improving the business environment globally
  - Working with other countries to combat corruption

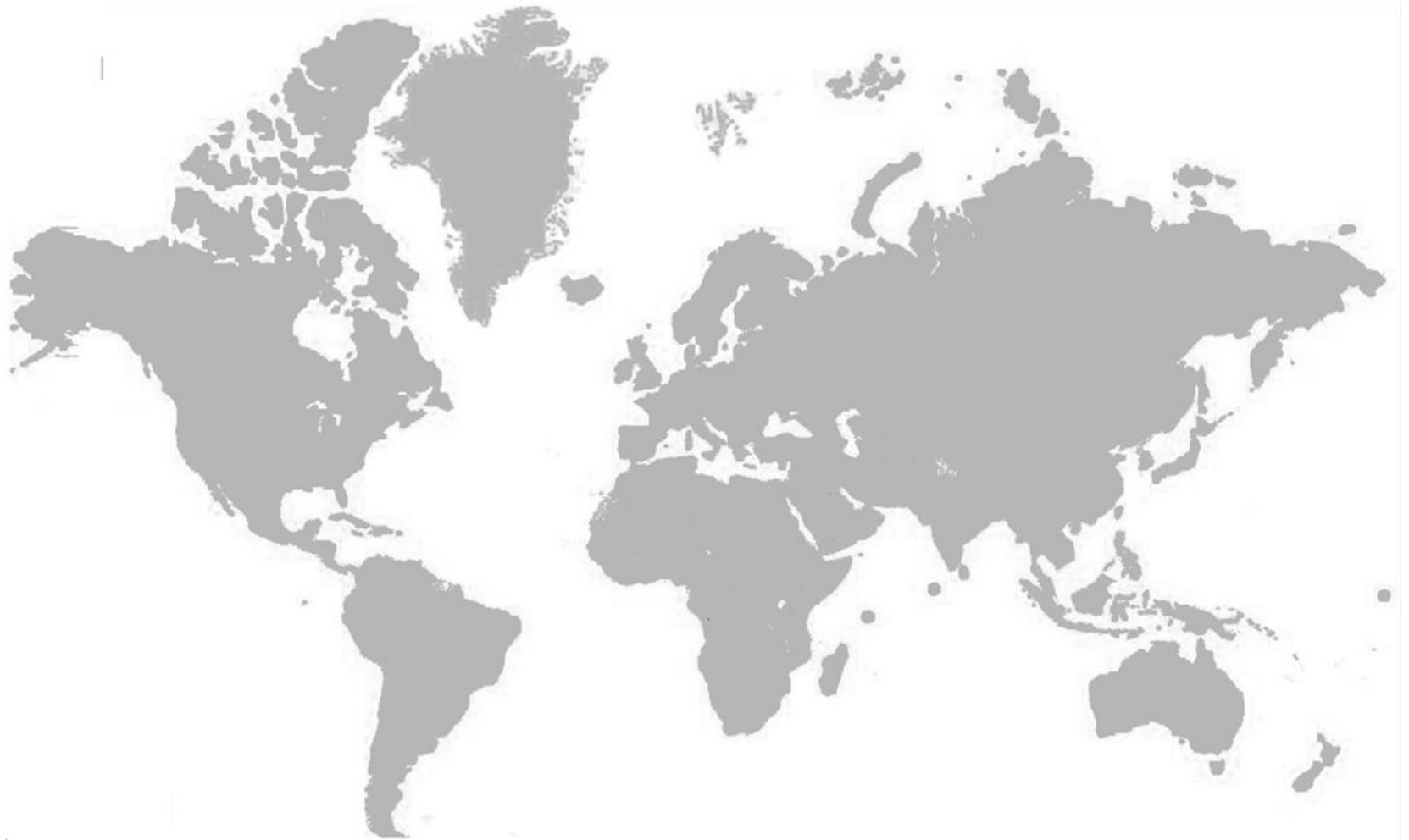
# U.K.: Strengthened Enforcement by SFO

- \$600 million SFO settlement with Rolls-Royce (January 2017)
- Involved the payment of bribes in at least twelve countries
  - Payments made in exchange for confidential information or contract awards
- Another \$200+ million to be paid to U.S. and Brazilian anticorruption authorities
- U.S. has charged five individuals

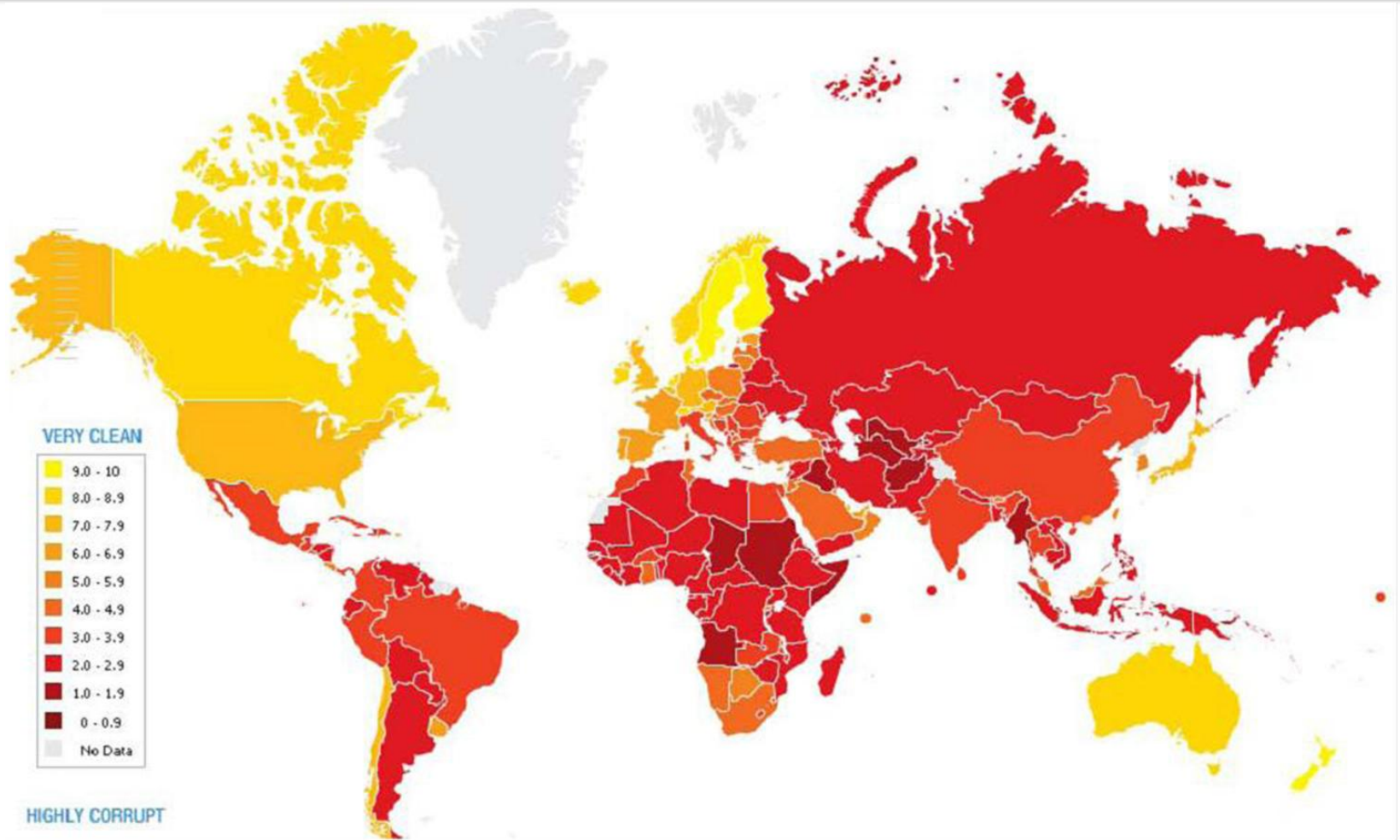


# CONCLUSION

# You See...



# Prosecutors See...



# QUESTIONS & ANSWERS



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