



Foreign Corrupt Practices Act Enforcement: 2016 Year-in-Review

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Agenda

- FCPA Statute
- 2016 Enforcement Overview
- 2016 DOJ Update
 - DOJ Compliance Counsel
 - DOJ Pilot Program
- 2016 Enforcement Action News
 - Cooperation with Foreign Enforcers
 - Friends and Family
 - Hedge Funds under the Microscope
 - Successor Liability
 - Whistleblowers
 - State-Owned & Controlled Entities
 - Indirect Payments
 - Individuals and Jail
- 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

2016 ENFORCEMENT OVERVIEW

FCPA Statistics: Types of Settlements

- Corporate Settlements (DOJ / SEC)
 - 2016: 27 companies
 - 2015: 11 companies
 - 2014: 10 companies
 - 2013: 12 companies
 - 2012: 12 companies
 - 2011: 15 companies
- Individual Pleas/Indictments (DOJ)
 - 2016: 12 individuals
 - 2015: 8 individuals
 - 2014: 10 individuals
 - 2013: 12 individuals
 - 2012: 2 individuals
 - 2011: 10 individuals

FCPA Statistics: Monetary Settlements

- Monetary Settlements (DOJ / SEC)
 - 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 2016 Settlement
 - Teva Pharmaceutical's \$519 million settlement to the SEC & DOJ
- Four new additions to the Top Ten List in 2016
 - No changes to List in 2015

FCPA Top Ten Settlements

1. Siemens (Germany): \$800 million (2008)
2. Alstom (France): \$772 million (2014)
3. KBR / Halliburton (U.S.): \$579 million (2009)
4. Teva Pharmaceutical (Israel): \$519 million (2016)
5. Odebrecht/Braskem (Brazil): \$420 million (2016)
6. Och-Ziff (U.S.): \$412 million (2016)
7. BAE (UK): \$400 million (2010)
8. Total SA (France): \$398 million (2013)
9. VimpelCom (Holland): \$398 million (2016)
10. Alcoa (U.S.): \$384 million (2014)

2016 DOJ UPDATE

DOJ's Compliance Counsel

- Greater focus on creating and recognizing effective corporate compliance programs than ferreting out wrongdoing
- Independent compliance monitors instituted in eight 2016 corporate enforcement actions
 - Only five instituted in the five years prior
- Ten companies required to periodically self-report remediation and/or implementation of anti-corruption and compliance measures in 2016

DOJ's New Pilot Program

- One-year DOJ pilot program announced April 2016
- Purpose
 - Encourage companies to self-report FCPA violations
 - Formalize criteria for prosecutors to assess voluntary disclosures
- Mitigation credit where company meets program's "stringent requirements"
 - Fine reduction – up to 50% reduction
 - Reduced chance of compliance monitor
 - Possible declination of prosecution

Pilot Program: DOJ's Criteria

- Self-Disclosure
 - Voluntary, independent, timely, complete
- Cooperation
 - Full factual disclosure, proactive cooperation, facilitate interviews and third-party disclosure
- Timely & Appropriate Remediation
 - Effective compliance and ethics program
 - Corrective action & discipline
 - Additional steps

DOJ's New Pilot Program

- \$75.8 million SEC and DOJ settlement with General Cable (December 2016)
 - \$55.3 million in disgorgement & prejudgment interest
 - \$20.5 million criminal fine
- Received maximum 50% reduction
 - \$20.5 million represents 50% of the applicable U.S. Sentencing Guideline range
- DOJ has not granted more than 25% reduction for any company that didn't voluntarily disclose

Recent DOJ Declinations with Disgorgement

- In June 2016, the DOJ closed two investigations without prosecution
- DOJ emphasized the declinations were “consistent with the FCPA Pilot Program”
- Both cases involved foreign subsidiary payments to Chinese government officials
- DOJ’s rationale:
 - Prompt voluntary self-disclosure of misconduct
 - Thorough investigation
 - Fulsome cooperation, including to identify responsible individuals
 - Agreement to cooperate in ongoing investigations
 - Compliance program enhancements
 - Full remediation
 - Disgorgement to SEC

2016 ENFORCEMENT ACTION NEWS

Cooperation with Foreign Enforcers

- 1Malaysia Development Berhad scandal largest in financial history
 - Sovereign wealth fund founded by Malaysian Prime Minister
 - Billions allegedly siphoned from 1MDB into personal bank accounts around the world
 - Some funds used to purchase over \$8 million in property on Australia's Gold Coast, and to finance the film, "The Wolf of Wall Street"
- Cooperative investigation among corruption authorities in the U.S., Singapore, Australia, Switzerland, Hong Kong, Luxembourg, Seychelles

Cooperation with Foreign Enforcers

- \$3.5 billion global settlement between Odebrecht/Braskem and corruption authorities (December 2016)
- Company allegedly engaged in bribery and bid-rigging schemes
- Settlement result of cooperative investigation among U.S., Swiss and Brazilian authorities
- DOJ and SEC expected to receive \$420 million

Cooperation with Foreign Enforcers

Out of 27 DOJ/SEC corporate enforcement resolutions, at least 7 resulted from cooperation with authorities from one or more of the following countries:

Austria	Finland	Portugal
Bermuda	France	South Africa
Brazil	Gibraltar	Spain
British Virgin Islands	Latvia	Sweden
Canada	Liechtenstein	Switzerland
Cayman Islands	Malta	UAE
Cyprus	Marshall Islands	United Kingdom
Denmark	Netherlands	Uruguay
Estonia	Norway	

Friends and Family

- \$264 million SEC and DOJ settlement with a major US financial institution (November 2016)
- Created referral program specifically to place well-connected individuals
 - Required “directly attributable linkage to business opportunity”
 - Tracked revenue derived from each hire
 - Program ran from 2006-2013
- Company received NPA for:
 - Taking employment action against those involved
 - Conducting a thorough internal investigation
 - Making foreign documents and employees available to DOJ

Friends and Family

- \$7.5 million SEC settlement with Qualcomm (March 2016)
- Involved hiring of interns and full time employees related to government officials with the power to select mobile technology products, or that worked at government-owned telecom companies
 - Interns had weak qualifications
 - Referred to as “special hires” or “must place” candidates
- SEC cited evidence of explicit intent that hiring decisions were intended to obtain or retain business

Hedge Funds Under the Microscope

- \$412 million SEC and DOJ settlement with major hedge fund (September 2016)
- Allegation of obtaining investments from sovereign wealth funds by using third parties to pay bribes to government officials in Africa
- First time a hedge fund has been held liable under FCPA

Successor Liability

- \$14 million SEC settlement with Johnson Controls (July 2016)
- Involved conduct by Johnson Control's Chinese subsidiary
 - Alleged \$4.9 million in improper payments paid to state-owned shipyards and shipowners
 - Sham vendors created “slush funds” used to make the payments
- Subsidiary operated with very little oversight
 - Criticized for lax internal control environment

Successor Liability

- \$13 million SEC settlement with global Agribusiness (January 2017)
- Indian subsidiary paid bribes to foreign officials in exchange for factory approvals and permits
- SEC alleged failures:
 - To conduct appropriate due diligence on the agent
 - To monitor the activities of the agent

Whistleblowers

- \$6 million SEC settlement with US beverage corporation (September 2016)
- Minority-owned JV made improper payments to Indian officials
- Allegations that the company “chilled a whistleblower” through severance agreements
 - Agreements prohibited outgoing employees from reporting conduct that could garner a whistleblower award from the SEC

Whistleblowers

- BHP Billiton fined \$20 million for failing to properly monitor a program that gave all-expense-paid trips to the 2008 Beijing Olympics to foreign government officials (May 2015)
- \$3.75 million paid to Australian whistleblower (Aug 2016)
 - Whistleblower was fired after reporting the misconduct
 - First U.S. whistleblower bounty ever paid to an employee of an Australian company

Hospitality: Gifts & Travel

- \$12.8 million SEC settlement with SciClone Pharmaceuticals, Inc. (February 2016)
- Allegations of improper gifts and travel expenditures for professionals employed at state health institutions
 - Funding family vacations for VIP clients
 - Sponsoring attendance at a beer festival that included golf outings
 - Lavish gifts

State-Owned or Controlled Entities

- \$25 million SEC settlement with Novartis AG (March 2016)
- Gave money and gifts to doctors and health care professionals employed by the State
 - Sponsored the attendance of 20 Chinese health care providers (and some spouses) at a medical conference in Chicago
 - Provided \$150 in “pocket money”
 - Paid for recreational activities and sightseeing, including a trip to Niagara Falls

Indirect Payments

- \$3.9 million SEC settlement with SAP SE (February 2016)
- Former VP used a slush fund used to pay Panamanian officials bribes and kickbacks through a third party
 - Cache of money was created by deeply discounting products (up to 82%)
 - Discounts should have raised red flags
- VP plead guilty and was jailed for 22 months

Individuals and Jail

- Two former senior executives of Louis Berger International sentenced (July 2016)
 - Helped orchestrate a bribery scheme that paid \$3.9 million to foreign officials in exchange for contracts
 - Scheme ran from 1998 to 2010
- Executive 1 sentenced to a year and a day in jail
- Executive 2 sentenced to two years' probation + \$10,000 fine

THE NEW ADMINISTRATION

Trump on FCPA

- May 15, 2012 CNBC Squawk box interview:
 - “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.”

Sessions on FCPA

- Question from Senator Whitehouse:
 - “Will you commit to continued vigorous enforcement of the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998?”
- Response from Senator Sessions:
 - “Yes, if confirmed as Attorney General, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case.”

Sessions on Whistleblowers

The Attorney General nominee suggested he supported whistleblowers:

“I think [whistleblower provisions] are a valid and effective method of rooting out fraud and abuse. ...So these are important issues... It has saved this country a lot of money and probably caused companies to be more cautious because they could have a whistleblower that would blow the whistle on them if they try to do something that’s improper.”

Sessions on Corporate Prosecutions

- Sessions' statement at Cole confirmation hearing June 15, 2010:
 - “You’re saying BP is too big to fail. They’ve got employees, too. This is a dangerous philosophy. Normally, I was taught if they violated a law, you charge them. If they didn’t violate the law, you don’t charge them.”

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:
 - Criminal accusations against 239 individuals
 - \$10 billion in fines
 - Criminal sentences of 1,148 years combined

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.: Strengthened Enforcement by SFO

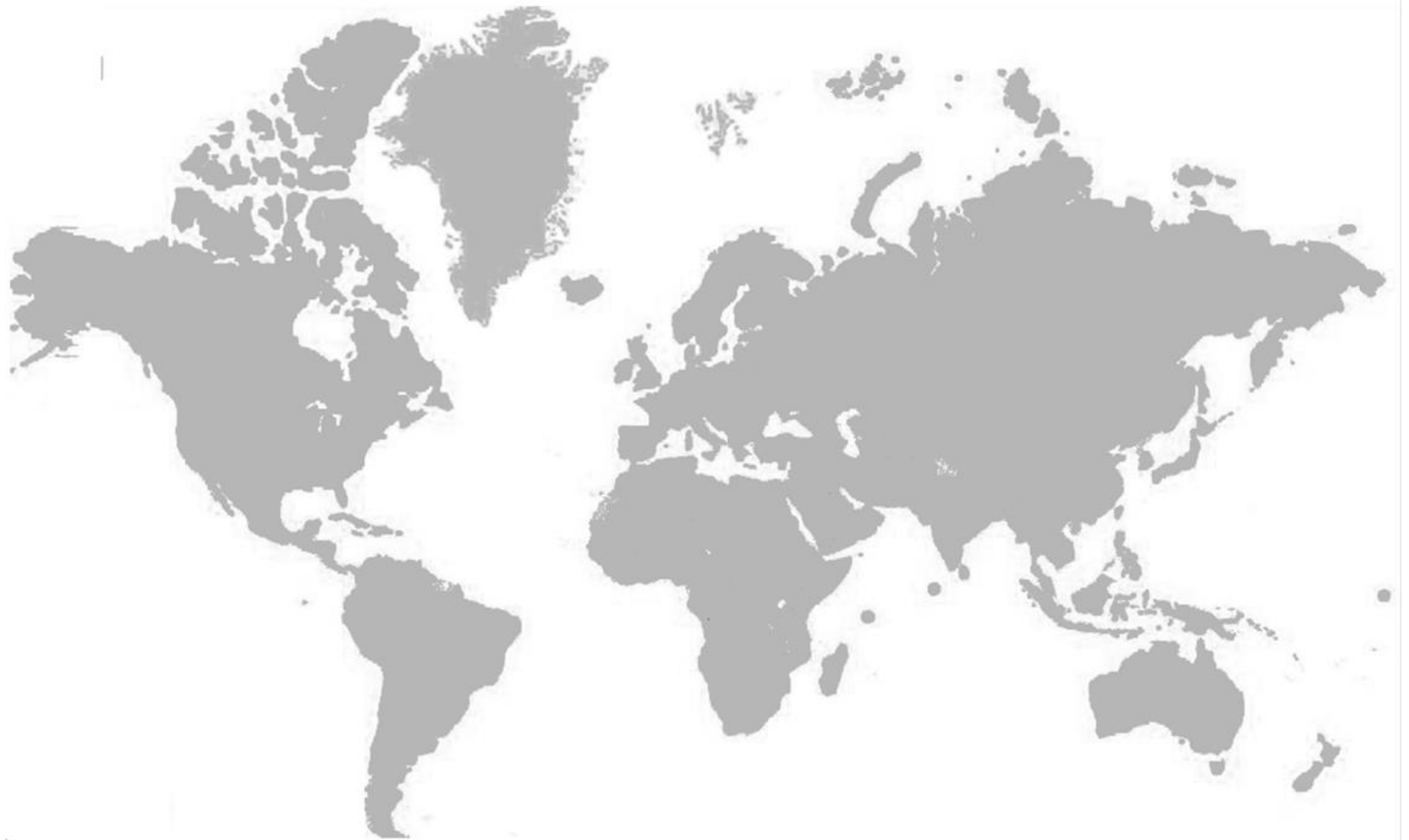
- \$600 million SFO settlement with Rolls-Royce (January 2017)
- Involved the payment of bribes in at least twelve countries
 - Payments made in exchange for confidential information or contract awards
 - Potential for future prosecution of 30+ individuals
- Another \$200+ million to be paid to U.S. and Brazilian anticorruption authorities
- Potential for future prosecution of 30+ individuals

ISO 37001

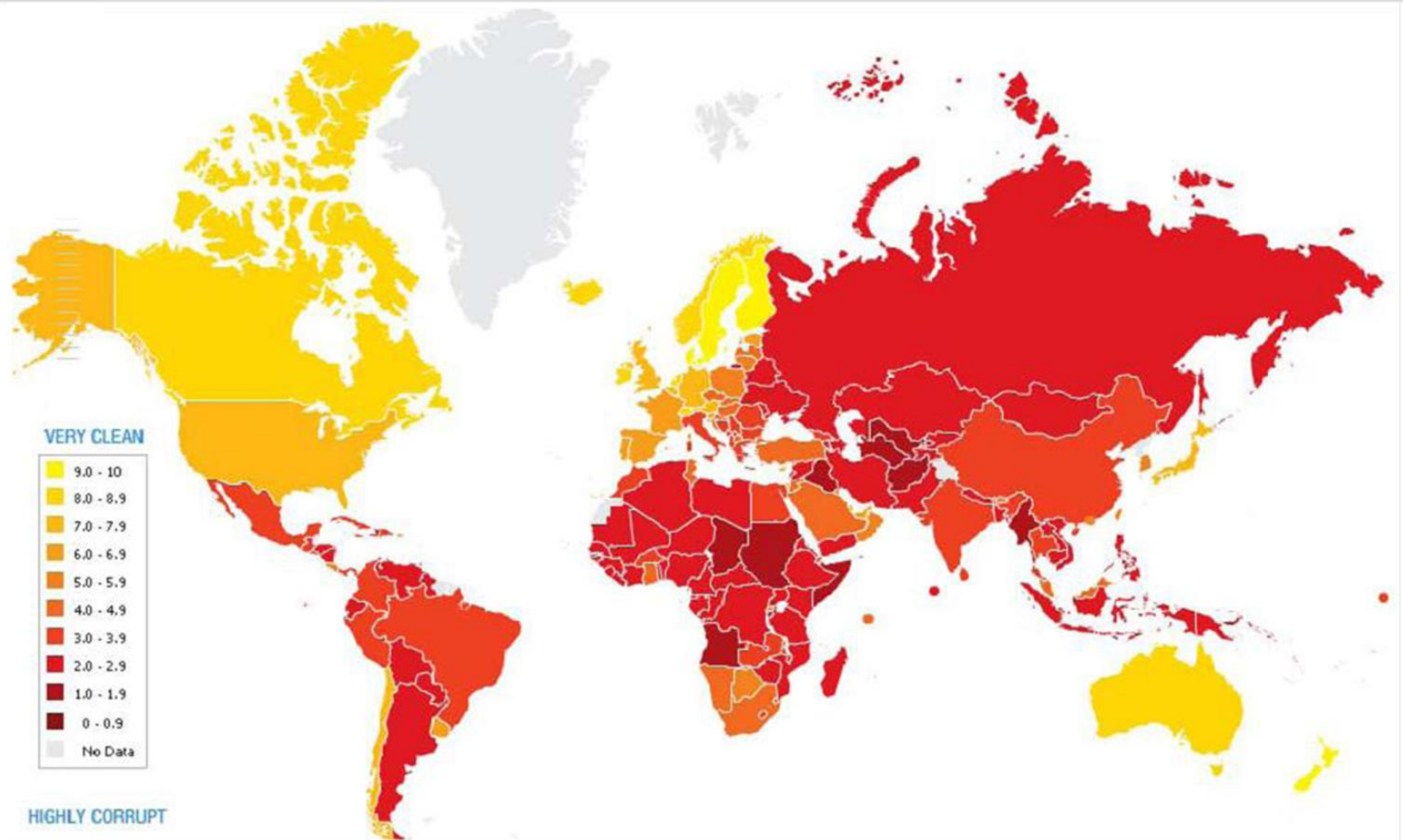
- Provides a new, globally accepted management system standard for anti-bribery compliance programs
 - Describes proactive and reactive measures to ensure an ethical corporate culture and discourage bribery
- An adequate compliance program includes:
 - Adoption of an anti-bribery policy
 - Appointment of a person to oversee anti-bribery compliance, training, risk assessment and due diligence
 - Performance of due diligence on projects and business associates
 - Implementation of financial and commercial controls
 - Institution of reporting and investigation procedures

CONCLUSION

You See...



Prosecutors See...



QUESTIONS & ANSWERS



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