

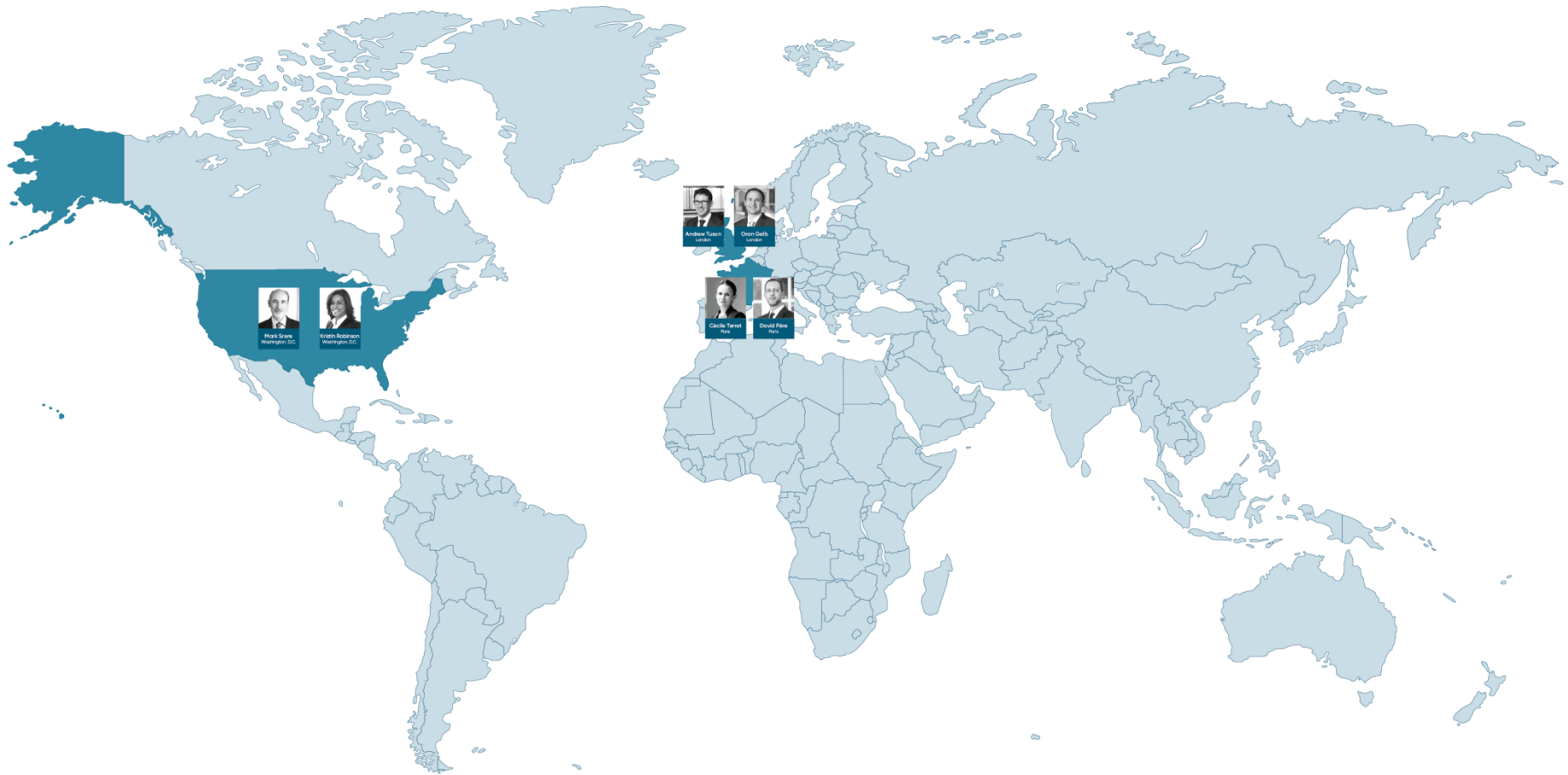


# Anti-Corruption Enforcement: Analyzing the Enforcement Approaches of the U.S., the U.K. and France

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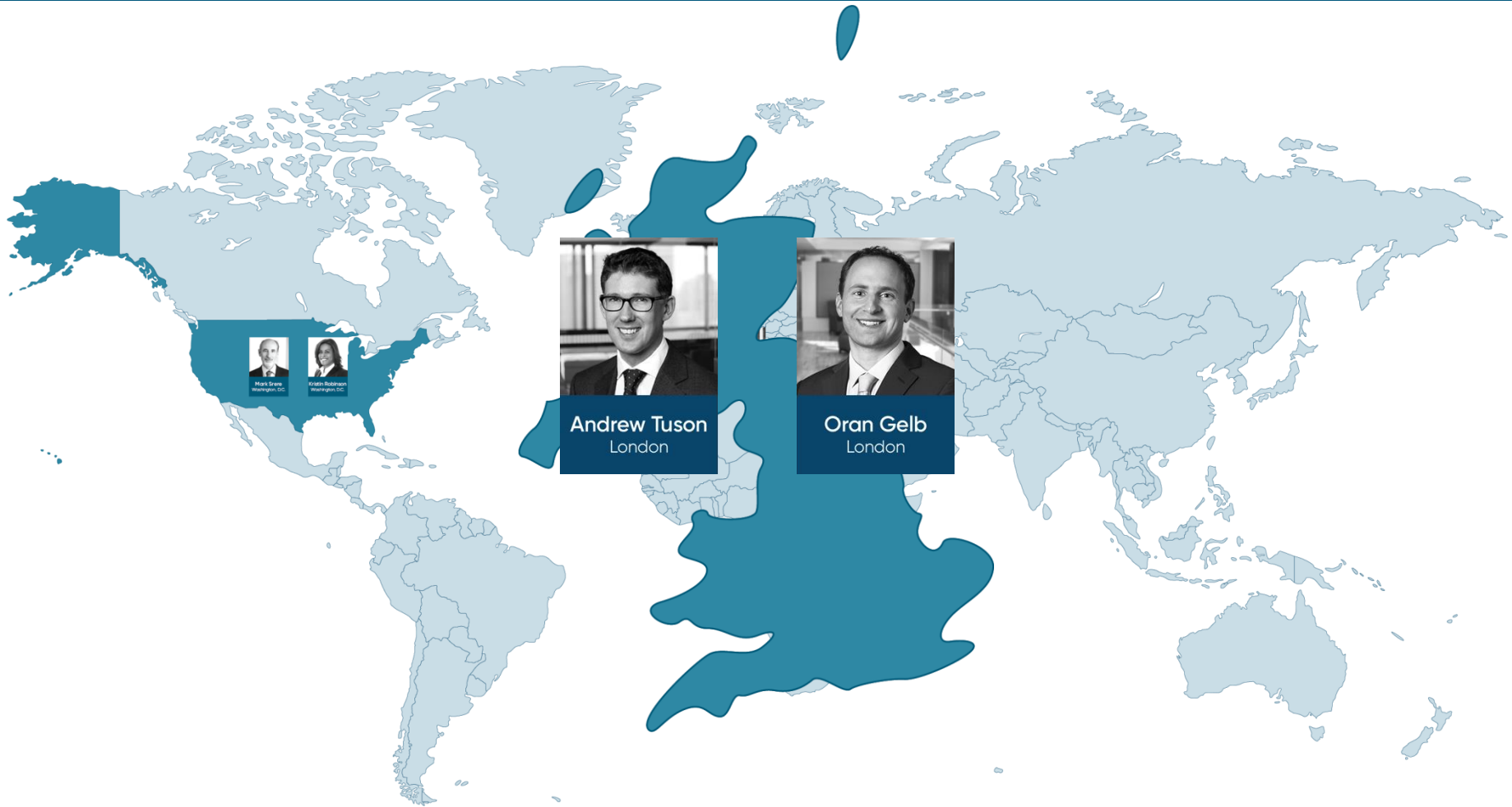
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# Topics

- Statutes and Jurisdiction
- Specific Differences:
  - Commercial Bribery
  - Corporate Liability
  - Exceptions/Defenses
- Enforcement Tools and Penalties
- Enforcement Results
- Compliance Tips

# STATUTES AND JURISDICTIONAL REACH

# Foreign Corrupt Practices Act of 1977

- SEC investigations in mid-1970s
  - 400+ US companies made questionable or illegal payments of more than \$300 million
  - Abuses ranged from bribery of high-level foreign officials to payments facilitating certain clerical duties (“facilitating payments”)
- 1977 – Congress enacted the FCPA
- Encouraged the OECD to pass Convention on Combating Bribery in 1997 (43 current signatories)
- Started being vigorously enforced in mid-2000s



# FCPA Antibribery Provisions

- 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 or securing any improper business advantage

# FCPA Jurisdiction

- 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

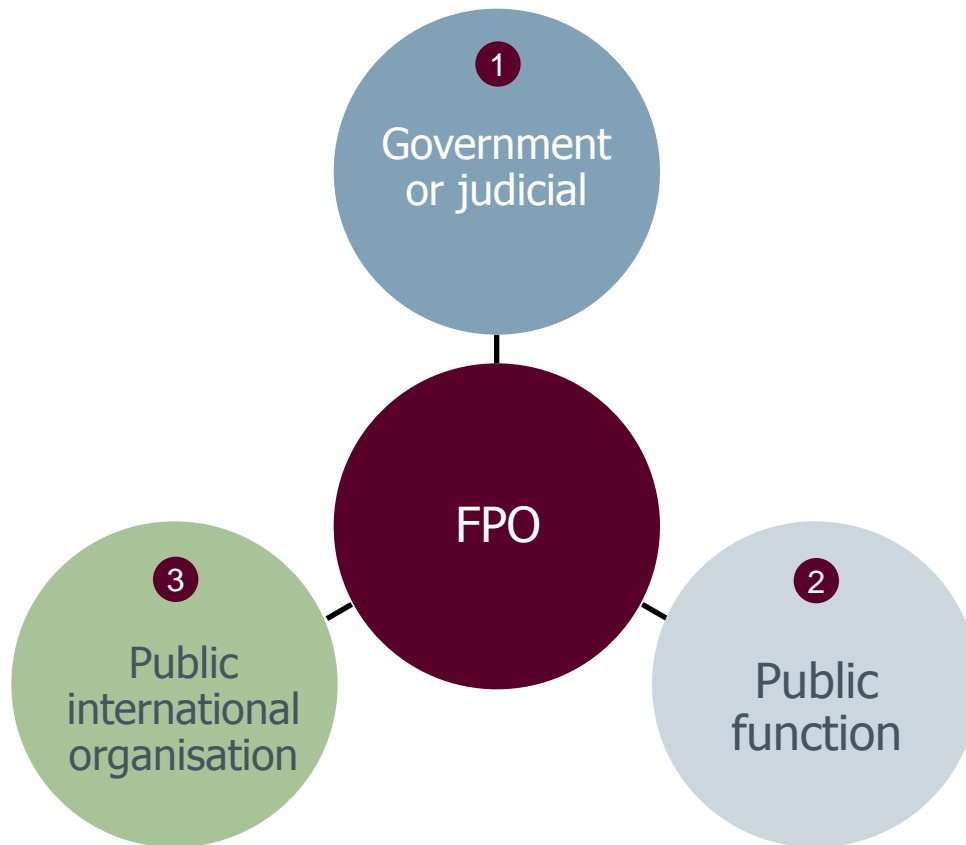
# UK Bribery Act 2010

- Statute passed in 2010 and came into force in July 2011
- Outlaws bribery of foreign (non-UK) public officials as well as UK public officials
- Also outlaws private sector/ “commercial” bribery
- Applies to both bribe-givers and bribe-takers
- Four offences:
  - Section 1: bribing another person
  - Section 2: being bribed
  - Section 6: bribing a foreign public official
  - Section 7: failure of commercial organisation to prevent bribery
- Section 7 lowered the threshold for corporate criminal liability in the UK

# Bribery Act Jurisdiction

- Sections 1, 2 and 6: broadly UK citizens and corporates
- Section 7: applies to any commercial organisation carrying out business in the UK
- A commercial organisation can commit the section 7 offence even if the wrongdoing took place outside the UK and was perpetrated by an associated person with no ties to the UK

# UK Bribery Act - Foreign Public Officials



- 1 Anyone holding any **legislative, administrative or judicial** position, whether appointed or elected, of a country outside the UK
- 2 Anyone exercising a **public function** either:
  - For or on behalf of a country/territory outside the UK; or
  - For any public agency or public enterprise of that country or territory
- 3 Any official or agent of a **public international organisation** (e.g. UN, World Bank, etc.)

# Sapin II

- Sapin II law only entered into force on June 1<sup>st</sup> 2017
- Controls over the implementation of compliance program through the new established French Anti-Corruption Agency (“*Agence française anticorruption*” or “AFA”) started back in October 2017
  - The AFA will not have to prove any act of bribery to assess whether or not a compliance program has been lawfully implemented
- However, active and passive anti-bribery provisions already provided for in the French Criminal Code
  - Articles 432-11, 432-17, 433-1, 433-22, 433-23, 433-25, 434-9, 434-44 and 434-47 with respect to the corruption in the public sector (national public agent and magistrate, jury member, expert, arbitrator...)
  - Articles 445-1 through 445-4 with respect to corruption in the national private sector
  - Articles 435-1, 435- 3, 435-7 435-9 435-14 and 435-15 with respect to public foreign officials or international and international judicial staff

# Sapin II Jurisdiction

- Sapin II introduced a new criminal offense related to bribery: influence peddling of foreign officials (i.e., offering a donation, a gift or reward to induce a foreign public official to abuse his real or alleged influence in view of obtaining, employment, contract or any other favourable decision from a public authority or a government: Article 435-2 and 435-4 of the French Criminal Code
- Sapin II extended extra-territorial scope provided (Articles 435-6-2 and 435-11-2)
  - French Courts will be able to prosecute French citizens committing acts of bribery or influence peddling abroad regardless whether or not a complaint has been filed and any denunciation by the State where the offense has been perpetrated
  - French Courts will be able to prosecute foreigners residing in France for acts of bribery or influence peddling committed abroad

# SPECIFIC DIFFERENCES



# COMMERCIAL BRIBERY

# What conduct is prohibited?

- As stated above, the main prohibition is against the bribery of foreign officials
- Do the statutes also proscribe commercial bribery?
- Do the statutes also proscribe accepting a bribe?

# Does UK Bribery Act Prohibit Commercial Bribery?

- Yes!
- Sections 1, 2 and 7 can be committed in relation to commercial bribery
- Drafting of section 1 and 6 suggest that the threshold to commit the offence of bribing a Foreign Public Official is lower than the threshold of commercial bribery
  - Inducing/ rewarding improper performance (section 1)
  - Intending to influence an FPO in their capacity as an FPO (section 6)
- Section 2 offence: requesting, agreeing or accepting a bribe (or acting improperly in anticipation of one).

# Does Sapin II Prohibit Commercial Bribery?

- Yes!
- But it was not introduced by Sapin II
- Already existing set of criminal law provisions in the French Criminal Code with respect to active and passive corruption:
  - of public foreign officials and international judicial staff;
  - in the national private sector (*i.e.*, applicable over individuals which do not held public function);
  - in the public sector (*i.e.*, national public agent and magistrate, jury member, expert, arbitrator...)

# Does FCPA Prohibit Commercial Bribery?

- Easy answer: NO

**BUT . . .**

- Federal prosecutors have used The Travel Act to charge commercial bribery incident to an FCPA case

**ALSO . . .**

- For public companies, commercial bribes are likely to violate the FCPA's books and records and internal accounting controls provisions
- The FCPA does not prohibit the acceptance of bribes, and foreign officials who receive bribes have not violated the FCPA

# CORPORATE LIABILITY

# Do the statutes assign liability to corporations?

- Bribes are offered, authorized and paid by people – individuals
- All three statutes provide for criminal penalties and individuals can go and have gone to jail for violations
- Can corporations violate the statutes and how do the statutes assign liability to corporations?

# France

- With Sapin II there is an affirmative obligation for a company to have an anti-corruption compliance program (8 mandatory items provided for in Article 17 of Sapin II) subject to the following thresholds:
  - having at least 500 employees, or belonging to any group whose parent company's headquarters is located in France and which has at least 500 employees,
  - and whose annual turnover is more than €100 million; French subsidiary of foreign groups falling in these thresholds must also comply with this obligation, unless the headquarter already implements a similar program
- Failing to comply with this obligation leads to administrative sanctions imposed by the AFA following controls:
  - fine on any director of up to €200,000.
  - fine on any company of up to €1 million.



# France

- However, corporate can be held liable only for offences committed “*by their organs or representative*”; therefore, Courts need to specify the individual who acted on behalf of the company, as the French Court de cassation recently judged on 17 October 2017.
- The offences that can lead to prosecution of companies must have been committed “*on their account*”; an action is deemed to be on the account of the company if it is “*aimed at ensuring the organization, the functioning or the goals of the company*”.
- Individuals whose actions led to the prosecution of the companies can be prosecuted for the same offences.

# U.K.

- Section 7 corporate offence: “strict liability” if the company fails to prevent bribery by persons associated with it.
- Associated persons:
  - Employees
  - Agents/Consultants
  - JV partners
  - Subsidiaries
- Performing services for/ on behalf of the corporation:
  - promoting/marketing the business
  - acting in an agency or representative capacity
  - providing some service which is integral to the core business
- But it is a complete defence to show the organisation has adequate procedures: six guiding principles
- Corporates can also commit offences under section 1 and 6 through the identification principle: “directing mind and will”

# U.S.

- No affirmative obligation for a company to have an anti-corruption compliance program
- Public companies have affirmative obligations to:
  - Make and maintain accurate books and records and
  - Implement adequate internal accounting controls
- Under *respondeat superior*, companies are liable for the acts of their employees if
  - Done in the course and scope of their employment
  - Done at least in part for the benefit of the corporation
- This is true even if the company has a compliance program and even if the company specifically directed its employees not to engage in such acts

# EXCEPTIONS/DEFENSES

# How can we provide hospitality without violating the statutes?

- Businesses need to demonstrate their products and services and they need to get to know their customers
- Do the statutes permit customary hospitality between businesses and their customers – even if the customer happens to be a foreign official?

# U.K.

- No explicit exemptions or safe harbours for “facilitation payments” or “reasonable and bona fide expenditure”
- However guidance indicates that reasonable and proportionate expenditure will not violate the Act
- Adequate procedures defence:
  - Tone from the top
  - Risk assessment
  - Training
  - Proportionate procedures
  - Due diligence
  - Monitoring

# France

- Like in the UK there is in France no exemption for facilitation payment or good faith behaviors
- However, Sapin II and its related mandatory compliance program is relatively new
- AFA released in December 2017 recommendations on how to implement the compliance program
- AFA recommends that provisions on gift and facilitation payment be covered by the anti-corruption code of conduct but without providing any prohibition at this stage
- In any case, the best assumed defense will be the lawful implementation of the compliance program

# U.S. Defenses/Exceptions

- Facilitation payments
  - Applies ONLY to expedite or secure performance of “routine governmental action” by a government official
- Promotional Payments
  - “Reasonable and bona fide” expenses
    - promotion, demonstration, explanation of products
    - execution or performance of contract
  - Proper documentation of expenditures



# Differences between UK Bribery Act, US FCPA and Sapin II law

## Bribery Act

- Public and private sector bribery
- Offences for giving, and receiving, bribes
- No statutory exemptions for “facilitation payments” and “reasonable and bona fide expenditures”
- Compliance programme defence

## FCPA

- Only targets public sector bribery
- Only targets bribe givers, not the recipients
- Statutory exemption for “facilitation payments” and “reasonable and bona fide expenditures”
- No compliance programme defence

## Sapin II Law

- Public and private sector bribery
- Offences for giving, and receiving, bribes
- No statutory exemptions for “fac. payments” and “reasonable expenditures”, but AFA recommendation to be covered in the anti-corruption code
- Potential compliance programme defence (depending on upcoming case law/DPA)

# ENFORCEMENT TOOLS AND PENALTIES

# Potential adverse consequences for violations

- Jail and massive fines
- 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

# U.S. enforcement tools

- Specialized units within DOJ, FBI and SEC
- Dodd-Frank Whistleblower Incentives
- DOJ Opinion Procedure
- Declinations (with and without disgorgement)
- Non-prosecution agreements
- Deferred prosecution agreements
- Monitors
- Civil and criminal fines and penalties
- Jail

# FCPA Corporate Enforcement Policy

- Presumption of a declination if:
  - Voluntary self-disclosure
  - Full cooperation
  - Timely and appropriate remediation
- Exceptions:
  - Aggravating circumstances
  - Offender is a criminal recidivist
- But:
  - Increased legal fees
  - Disgorgement, forfeiture and/or restitution
  - Potential for expanded investigation
  - Potential for fines/penalties
  - Potential for further monitoring

# France – Corporate Enforcement Policy

- AFA entered into cooperation agreements with some other public authorities, e.g., the Financial National Prosecutor (“*le Parquet National Financier*”) on March 28, 2018 in order to reinforce the efficiency of the Sapin II law provisions
- Circular issued under the authority of the French Ministry of Justice on January 31, 2018 with respect to the implementation of the Sapin II law

# France – penalties and consequences

- Individuals:
  - Imprisonment for directors
  - Criminal fine
  - Reputational damage
- Corporates:
  - Risk of foreign enforcement actions
  - Debarment from public tenders
  - Administrative, civil and criminal fines and penalties
  - Reputational damage
  - Since Sapin II deferred prosecution agreements (“*Convention judiciaire d’intérêt public*”)
  - Appointment of an independent appointed monitor at the costs of the company
  - Obligation to implement a compliance program even if the company does not fall within the thresholds of the Sapin II law.

# U.K. – penalties and consequences

- Individuals:
  - Imprisonment up to ten years
  - Unlimited fine
  - Reputational damage
- Corporates:
  - Compensation orders
  - Disgorgement of revenues
  - Debarment from public tenders
  - Unlimited fine
  - Reputational damage
- Since 2013, deferred prosecution agreements



# ENFORCEMENT RESULTS

# 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)

# U.K.

- Section 7 guilty plea: Sweett Group
  - GBP 2.25 million fine
- Bribery-related DPAs to date:
  - ICBC Standard Bank: USD 33 million in penalties
  - XYZ: GBP 6.5 million in penalties
  - Rolls Royce: GBP 497.25 million in penalties
- First consideration of the “adequate procedures” defence by a jury

# France

- On 30 October 2017, the first CJIP was entered into between the National Financial Prosecutor of the Paris Court of First Instance and a Swiss-based subsidiary of a major financial institution allegedly involved in illicit banking solicitation and laundering of tax-fraud proceeds. On 14 and 15 February 2018, the two first corruption-related CJIPs were entered into between the Public Prosecutor of the Nanterre Court of First Instance and two French companies.
- As of today, three CJIPs have been entered into. Their broad publicity clearly indicates that the Public Prosecutors want to advertise that they are ready to open discussions. However, there is still some way to go with implementation, as prosecutors' mindsets switch from pure prosecution authorities to negotiation partners.

# COMPLIANCE TIPS

# Essential Elements to Compliance Program

- Tone at the top – commitment from senior management and clearly articulated policy against corruption
- Code of conduct, compliance policies & procedures
- Oversight, autonomy, and resources
- Risk assessment
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence
- Confidential reporting and internal investigation

# Third Parties

- **Third parties remain one of the top risk areas for companies conducting business abroad**
- **Best practices include:**
  - Due diligence on potential third parties
  - FCPA compliance certification
  - Continuous monitoring of third party transactions
  - Auditing third party for compliance



# Mergers & Acquisitions

- **Important to conduct effective anti-corruption due diligence in deal context**
- **This includes the following:**
  - Pre-acquisition due diligence
  - Post-acquisition compliance integration
  - Anti-corruption training
  - FCPA audits
  - Disclosures to government

# QUESTIONS

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