



## **DOING IT RIGHT:**

# **How to comply with anti-corruption legislation**

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# Agenda

The presentation will focus on the following topics:

- Overview of CFPOA, FCPA, and UK Bribery Act legislation and its reach (Canada, US, and UK)
- Recent Cases, Enforcement Actions, Fines and Sanctions
- Developing, implementing and monitoring effective anti-corruption compliance programs and policies
- Conducting internal investigations and third party due diligence
- Implementing effective anti-corruption training programs
- Fostering and sustaining a culture of compliance
- Mitigating foreign corruption risk
- Leveraging technology in monitoring, tracking and reporting

# Overview

CFPOA, FCPA, UK Bribery Act

# *Corruption of Foreign Public Officials Act*

## **“CFPOA”**

- Enacted by Canada in 1998
- Direct response to the OECD Convention
  - Canada subsequently also signed the UN Convention and the Inter-American Convention
- Corruption issues have not be particularly prominent in Canada
  - In Transparency International’s Corruption Perception Index, Canada is ranked 10<sup>th</sup> out of 182 countries (2011)
- CFPOA is enforced through Canada’s Criminal Code by federal police and prosecutors

## The CFPOA Offence

- Offence of Bribing a Foreign Public Official  
Section 3(1) of the *CFPOA* provides that:

Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

- (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
- (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions

## The CFPOA Offence (cont.)

(1) Offending Action (*Actus Reus*) – Bribery  
- Many elements to the bribery action

(a) **A person undertakes the offending action**

- Not limited to individuals
- Section 2 of the *Criminal Code* defines “person” – includes natural persons, corporations, associations, joint ventures, Canadian nationals, foreign nationals in Canada. Query whether foreign subsidiaries of Canadian corporations and Canadian and foreign nationals living abroad are persons under the *Criminal Code* and *CFPOA*
- Includes national companies and their foreign subsidiaries, Directors, Officers, High-level Managers and Executives, Employees, Stockholders, Agents, Accounting, Compliance, Legal, Sales, etc.

## The CFPOA Offence (cont.)

(b) *In order to obtain or retain an advantage in the course of business*

- Business purpose test
- Broad language
- Covers bribes to secure business or advantages in the course of business
- Covers domestic and international bribes

## The CFPOA Offence (cont.)

### (c) *Directly or Indirectly*

- Covers bribes given directly or through related companies, intermediaries, agents and third parties
- Query whether it covers bribes given by independent sales representatives
- Due diligence issue



## The CFPOA Offence (cont.)

(d) ***Gives, offers or agrees to give or offer***

- Not necessary to actually have given the bribe

## The CFPOA Offence (cont.)

### (e) ***A loan, reward, advantage or benefit of any kind***

- Broad interpretation
- Includes money or anything of value:
  - Cash/cash equivalents
  - Tangible or intangible property
  - Useful information/inside information
  - Cancelling an open tender
  - Gifts, donations, loans
  - Travel expenses
  - Jewelry
  - Shopping sprees/expensive gifts/lavish dinners
  - Share of future profits
  - Promise of future employment
  - Example - Signed Wayne Gretzky hockey card
- See Section 121(1) (a) (i) of the *Criminal Code*

## The CFPOA Offence (cont.)

### (f) *To a foreign public official*

- Defined in *CFPOA* - Includes:
  - Elected officials of federal, provincial, state, municipal, district and other sub-governments (may include government as a whole)
  - A person who holds an administrative or judicial position, including courts, boards, tribunals, commissions, etc.
  - Government employees including persons who perform public duties or functions of a government corporation or other body
  - Ambassadors and other persons who perform public duties or functions
  - An official or agent of a public international organization (e.g., WTO, NATO, UN, World Bank, etc.)
  - Likely also an individual at a state-owned enterprise

## The CFPOA Offence (cont.)

(g) ***Or to any person for the benefit of the foreign public official***

- See Section 121(1)(a)(1) of the *Criminal Code*
- For example, to family member, political party, corporation owned by foreign public official, etc.
- Persons who were foreign public officials (e.g., Clinton)
- Person running for public office (e.g., Obama)

## The CFPOA Offence (cont.)

(h) ***As consideration for an act or omission by the official in connection with the performance of the official's duties or functions***

- Awarding a contract
- Jumping a cue
- Giving a loan
- Reduce tax liability
- Hold off conducting an inspection
- Give approvals to be added to a short list of qualified suppliers
- Includes acts outside the official's competence

## The CFPOA Offence (cont.)

(i) ***Or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions***

- Awarding of a contract
- Listing on a short list of qualified suppliers
- Providing information on upcoming RFPs

# The CFPOA Offence (cont.)

## (2) Mental Element - *Mens Rea*

- The *CFPOA* does not expressly use the words “intentionally” or “knowingly”
- Common law principles of criminal culpability require a *mens rea*
- A payment may be prohibited, even if the payor is not certain that the payment will be made to a foreign public official
- Suspicious payments
- Conscious disregard, willful blindness, deliberate ignorance
- Need to demonstrate due diligence
- Done voluntarily and intentionally and with the bad purpose of the end result (*U.S. v. Liebo*, 8<sup>th</sup> Circuit, 1991)

## “Knowing” Conduct”

- Knowing that a violation will occur, or is substantially certain to occur
- Firmly believing that a circumstance exists or that a result is substantially likely to occur
- No “Willful blindness”, “deliberate ignorance” or “head-in-the-sand”
- Possible even if bribe did not succeed in its purpose



## Liability For Acts of Third Parties

- Company authorized payment or “knew” it would be made
- Company consciously disregarded a real possibility or probability that the payment would be made

## The CFPOA Exceptions – What is Allowed

- The CFPOA provides for three exceptions / defenses to the offence of bribery:
  1. Legal Payments
  2. Reasonable Expenses
  3. Facilitation Payments
- If you plan to rely on an exception, you must have adequate proof of its availability

# Legal Payments

## (1) Lawful in Foreign State

- Under paragraph 3(3)(a) of the *CFPOA*, a person is not guilty of an offence if the loan, reward, advantage or benefit “*is permitted under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions*”
- The chance of this defense being used is limited because few countries have such laws or explicitly “permit” bribery

# Reasonable Expenses

## (2) Reasonable Expenses

- Paragraph 3(3)(b) of the *CFPOA* provides that reasonable expenses incurred in good faith and directly related to the promotion, demonstration or explanation of products and services or to the execution or performance of a contract with the Foreign State do not qualify as a bribe
- Includes reasonable and *bona fide* expenditures, such as
  - Certain payments made directly to service provider and not government official
  - Travel to Canadian factory to witness demonstration of the good
  - Travel to Canada to determine compliance with RFP criteria
  - Reimbursement for telephone and faxes (if receipts / invoices)
  - Inexpensive promotional items related to the business
  - Reimbursement of cab fare between the hotel and the office

## What is Reasonable?

- Depends on the facts and circumstances
- Modest sums of money involved (not extravagant)
- Legitimate plant visits
- Foreign government (not company) selects which foreign officials will travel (subject to exceptions)

## What is NOT Reasonable?

- Depends on the facts and circumstances
- A large, unaccountable expense account
- Most expensive restaurant in town
- Host spouses or family members
- Leisure or side trips
- Unfortunately, what is unreasonable is in the eye of the beholder and may not coincide with what the guests expectations are

# Facilitation Payments

## (3) Facilitation Payments

- Subsections 3(4) and (5) of the *CFPOA* exempt facilitation payments
- This differs from U.S. law which does not allow such payments
- Facilitation payments are payments made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including:
  - Issuance of a permit, license or other document to qualify a person to do business
  - Processing of official documents (e.g., visas and work orders)
  - Providing services offered to the public (e.g., mail pick up and delivery, telecommunications, power, water, etc.)
  - Providing police protection
  - Loading and unloading cargo
  - Protection of perishable products or commodities
  - Scheduling inspections related to contract performance or transit of goods

## Facilitation Payments (cont.)

- The term “act of a routine nature” does not include a decision to award new business or continue business with particular party, including a decision on the terms of that business or encouraging another person to make any such decision
- Query what “act of a routine nature” includes



## Necessity is Not a Defence

It is not a defence to argue that business cannot be done in the foreign country without bribing officials, or that competitors from other countries are engaging in bribery

## The CFPOA Penalty

- Bribery Offence
  - Imprisonment: Prison term not exceeding five years
  - Fine: No limit

# Red Flags



Red Flags → Suspicion →  
Due Diligence → Ask Questions →  
Research → Record facts

## Red Flags (cont.)

- Foreign country with a history of / reputation for corruption

## Red Flags (cont.)

Transparency International Corruption Index	
179/179	Somalia
178/179	Iraq / Myanmar
172/179	Afghanistan
162/179	Venezuela / Cambodia / Central African Republic / Bangladesh / Papua New Guinea / Turkmenistan
150/179	Kazakhstan
147/179	Nigeria
143/179	Russia
131/179	Philippines / Iran / Libya / Yemen / Honduras
118/179	Ukraine / Sao Tome & Principe / Mali/Malawi/Benin
105/179	Argentina / Bolivia / Albania / Burkina Faso / Djibouti / Egypt
72/179	China / India / Mexico / Morocco / Peru / Surinam / Brazil

## Red Flags (cont.)

- Foreign official with a history of/ reputation for corruption
- Foreign official who asks for emails to be sent via hotmail account
- Allegations related to integrity (google search)

## Red Flags (cont.)

- Industry with a history of violations
  - Defense (Lockheed Martin)
  - Aircraft (Lockheed Martin, Boeing)
  - Oil (El Paso Corp., Textron, Akzo Nobel, Exxon/Mobil/Giffen)
  - Natural gas
  - Telecommunications (Siemens)
  - Medical devices (Biomet, Medtronic, Stryker, Smith & Nephew, Zimmer Holdings)
  - Hydro
  - Charities / Emergency Relief
  - Freight forwarding
  - Entertainment companies

## Red Flags (cont.)

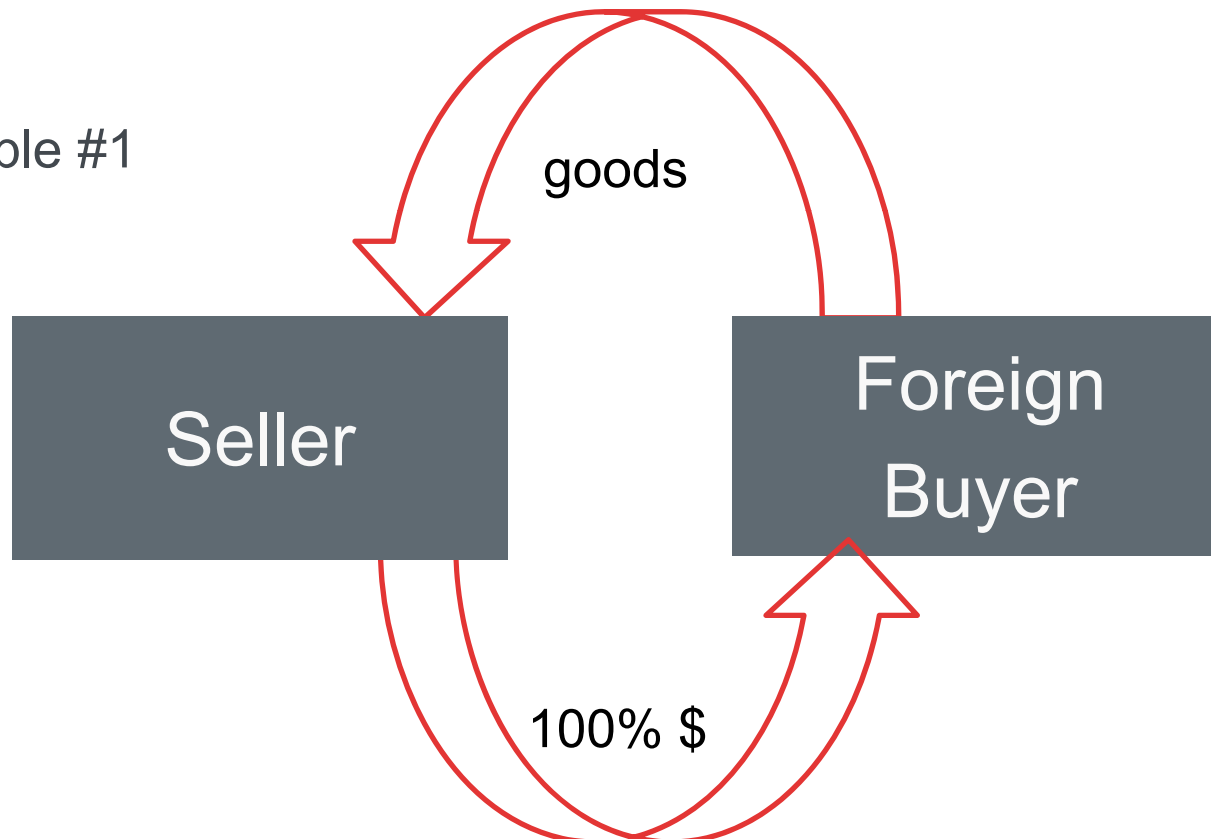
- Unusual payment patterns or financial arrangements



# Red Flags – Unusual Payment Arrangements

- Least likely arrangement for problems

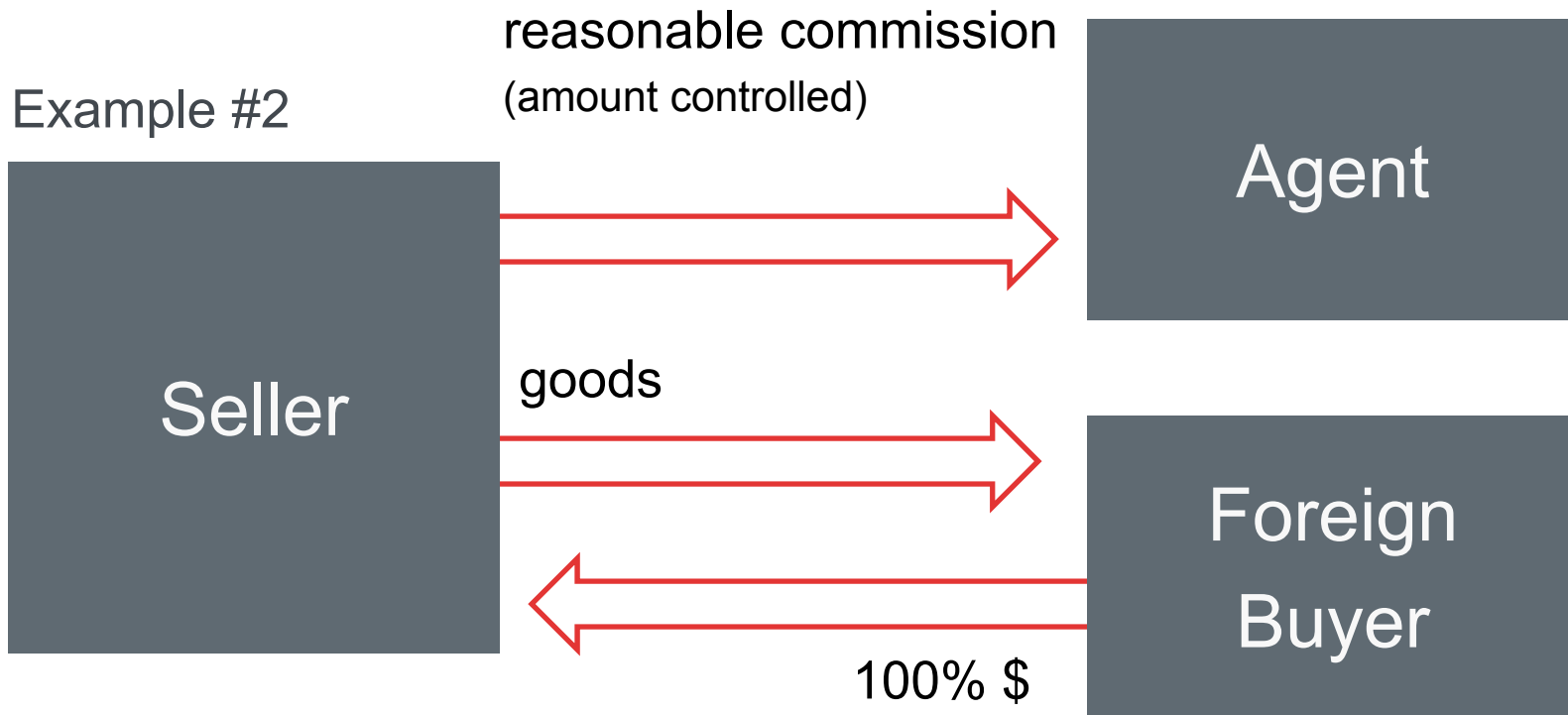
Example #1



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# Red Flags – Unusual Payment Arrangements (cont.)

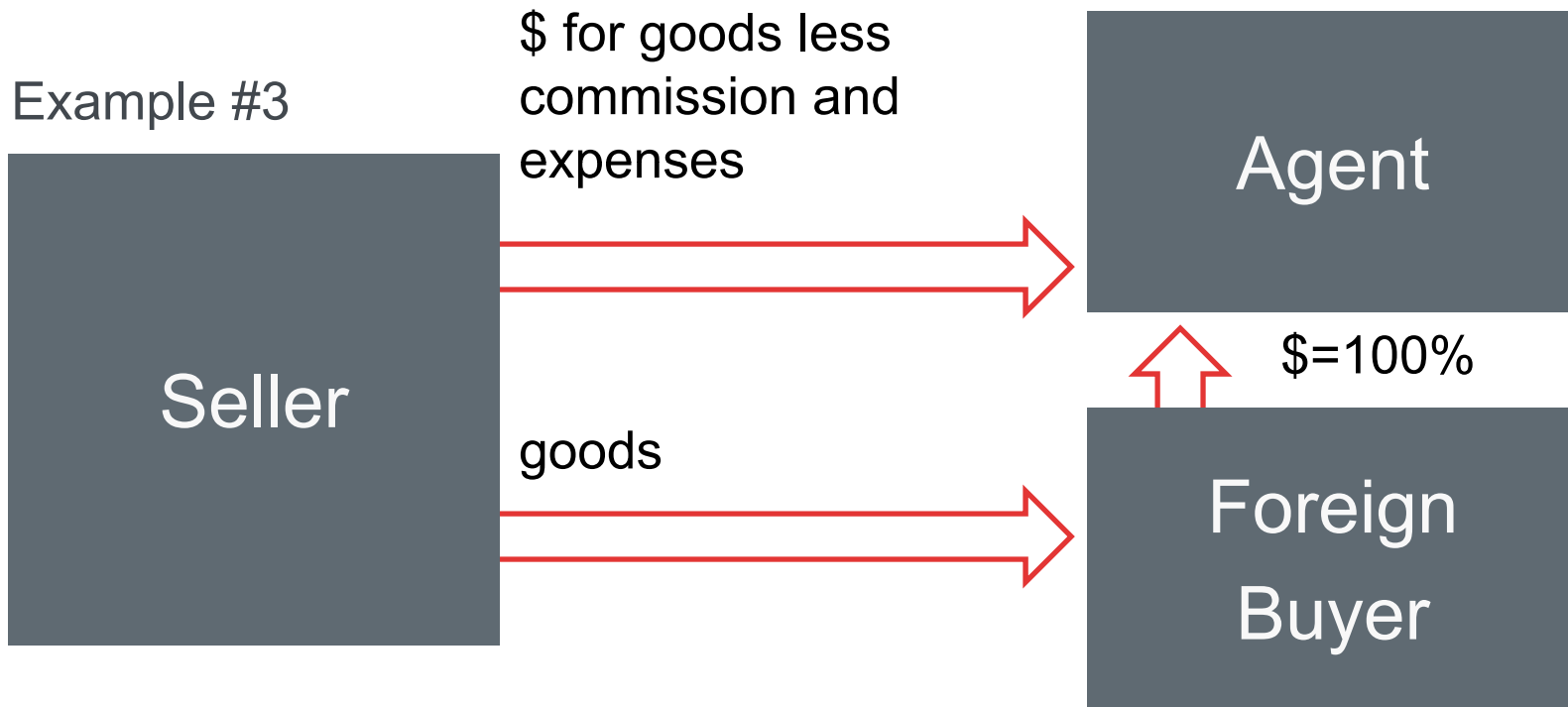
- Less likely arrangement for problems



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# Red Flags – Unusual Payment Arrangements (cont.)

- Increase potential for problems

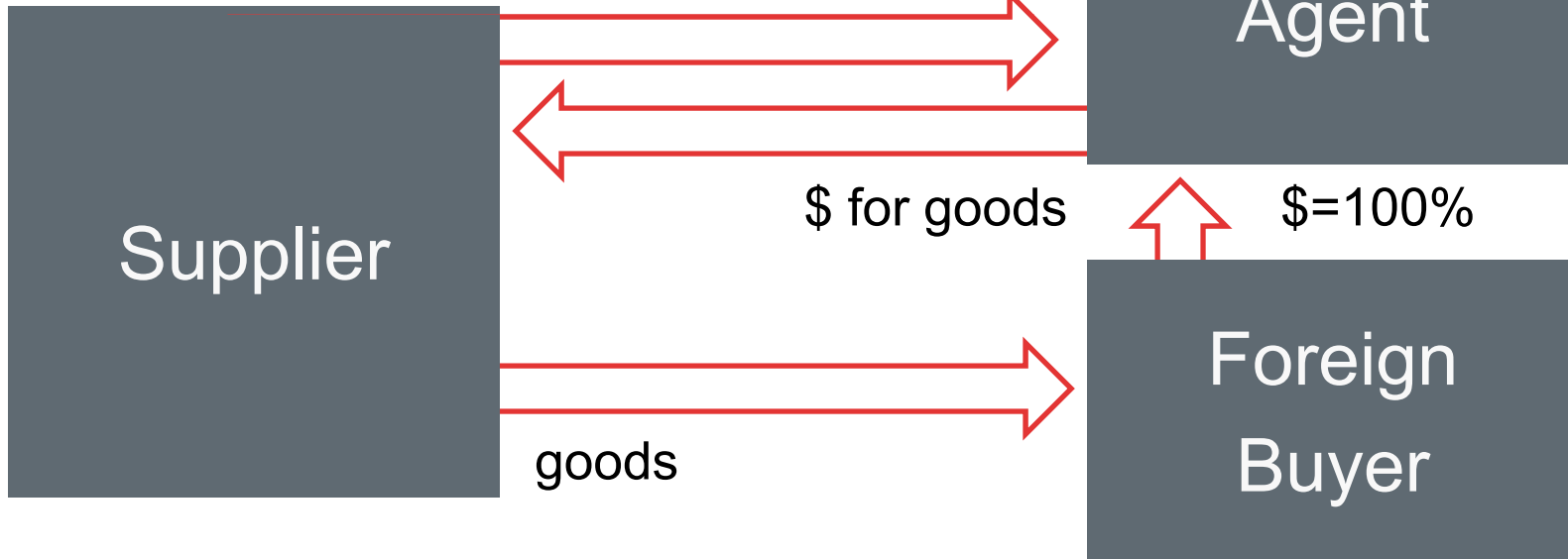


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# Red Flags – Unusual Payment Arrangements (cont.)



Example #4



Slide 36

## Red Flags – Unusual Payment Arrangements (cont.)

- Excessive or unusually high compensation
- Requests for increase in compensation during sales campaign or at a critical time in contract negotiations or RFP process
- Unusual discount policies or poorly stated discount policies
- Sharing profits with or making payments to undisclosed or unnecessary third party
- Use of shell companies
- Agent's name is same as or similar to foreign public official
- Agent is closely related to a foreign public official
- Agent recommended by government official or customers
- Agent is involved in a political party of foreign public official
- Agent lacks necessary qualifications (e.g., does not have engineering degree) or “track-record”

## Red Flags – Unusual Payment Arrangements (cont.)

- Agent has poor or no book/records
- Agent lacks facilities or qualified staff
- Consulting contract for which the services are poorly defined
- Requests for cash/untraceable payments
- Payments through third countries
- Payments to tax havens
- Payments to countries with banking secrecy
- Payments to numbered bank accounts with no details
- State-owned enterprises (also pose risk)
- No official receipts
- Refusal to sign anti-bribery certifications
- Refusal to meet Sellers officers
- No or sparse paper trail
- Poorly documented entertainment or junkets where government officials participate

## Additional *Criminal Code* Offences

- Offence of Possession of Property or Proceeds of Crime
  - anyone who possesses property or proceeds obtained or derived from the bribery of foreign public officials or from laundering that property or proceeds is guilty of a criminal offence
- Offence of Laundering of Property or Proceeds of Crime
  - prohibits the laundering of profits obtained from committing the offence of bribing a foreign public official
- Various forms of bribery, corruption, frauds on the Crown, breach of trust, etc.
- Secret commissions received by a public official or agent

# ***US Foreign Corrupt Practices Act*** **(“FCPA”)**

- prohibits any U.S. person, real or corporate, from bribing a foreign official
- mandates record-keeping standards for publicly-held corporations registered under the Securities Exchange Act of 1934



## The FCPA offence

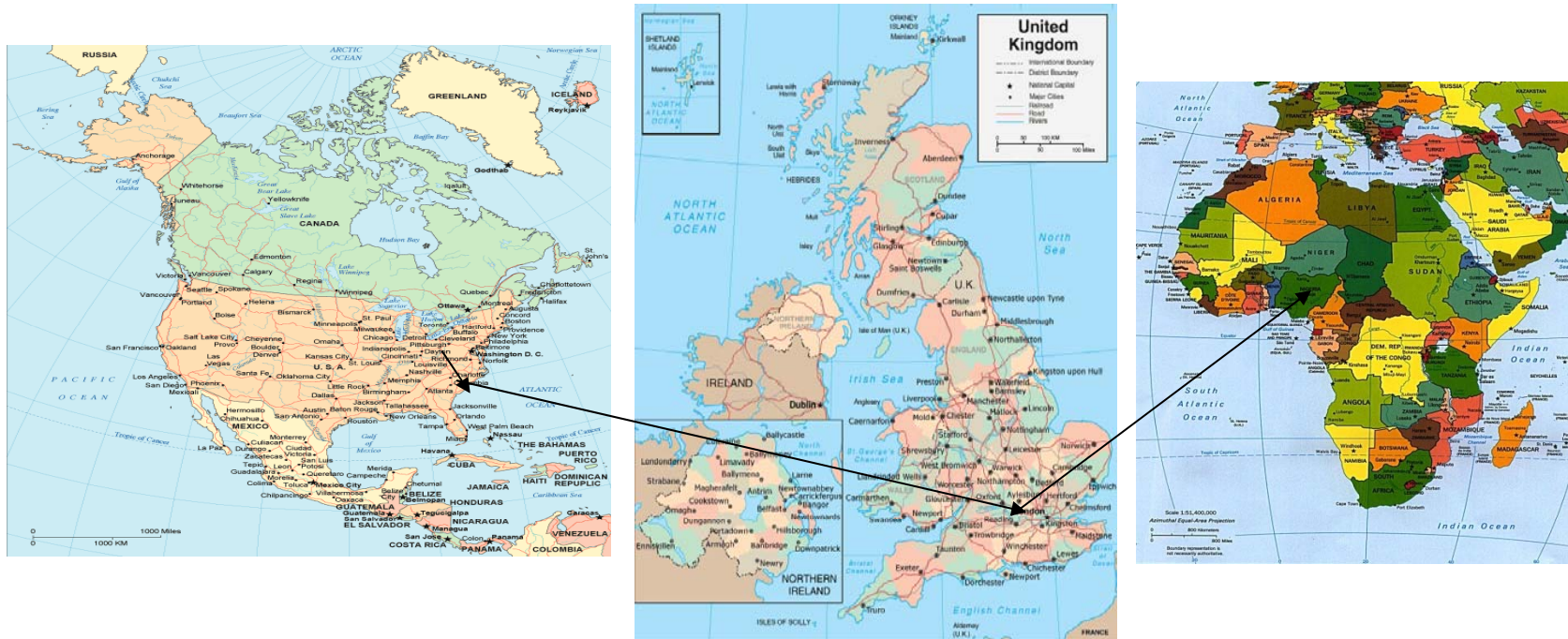
- FCPA explicitly prohibits **all** firms (whether subject to SEC regulations or not) from:
  - directly, indirectly or through a third-party bribing a foreign official, foreign political party, party official or candidate in order to obtain or retain business;
  - using the mail or interstate commerce “corruptly in furtherance of an offer or payment of money or anything of value to a ‘foreign official’”
  - giving or promising to give anything of value to foreign officials or foreign political parties to influence any act within their “official capacity” or to induce foreign officials to violate their “lawful duty.”.

## Extraterritorial Effect

- One bribe may be prosecuted by many jurisdictions
- This could result in multiple fines and multiple prison terms
- Multiple fines means there is the potential for multiple disgorgements of the same profits
- There are no Bribery Convention provisions on choice of law, division of prosecutorial responsibilities or to divide penalties

# Extraterritorial Effect (cont.)

## Example 1



## Extraterritorial Effect (cont.)

- Using an instrumentality of interstate commerce (telephone, etc.) by any person (US or foreign) or an act outside the US by a domestic concern or US person, or an act in the US by a foreign person in furtherance of the offer or promise to pay

# Special FCPA Record-keeping Requirements

- all issuers are required to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer”;
- mandates corporations to create a system of internal accounting controls which provide:
  - “reasonable assurance” that transactions are properly authorized.
  - “Reasonable assurances” and “reasonable detail” are defined under the “prudent man: standard to mean a “level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”

## UK Bribery Act

- Generally, the Bribery Act is similar to the FCPA and CFPOA with a few noteworthy exceptions:
  - private realm if it is connected to a business, trade or profession (not only bribery of public officials)
  - focuses on “improper performance” based on a reasonable person standard, while the FCPA requires “corrupt intent”
  - Senior managers can be prosecuted if it is found that their “consent or connivance” was part of the offense
  - “Facilitation payments” allowed under the FCPA are not permitted under the Bribery Act
  - introduces the concept of “adequate procedures” as a potential defense to the accusation of failure to prevent bribery. The term “adequate procedures” is not defined by the Act.

# Recent Cases, Enforcement Actions, Fines and Sanctions

## Top 10 “Most Wanted”

### Non-US Company Fines in 2010 Pursuant to FCPA:

1	Siemens (Germany): <b>\$800 million</b> in 2008
2	KBR/Halliburton (USA): <b>\$579 million</b> in 2009
3	BAE (UK): <b>\$400 million</b> in 2010
4	Snamprogetti Netherlands (Holland/Italy): <b>\$365 million</b> in 2010
5	Technip S.A. (France): <b>\$338 million</b> in 2010
6	Daimler AG (Germany): <b>\$185 million</b> in 2010
7	Alcatel-Lucent (France): <b>\$137 million</b> in 2010
8	Panalpina (Switzerland): <b>\$81.8 million</b> in 2010
9	ABB Ltd. (Switzerland): <b>\$58.3 million</b> in 2010
10	Pride (USA): <b>\$56.1 million</b> in 2010

• For update, see: <http://www.fcpablog.com/blog/tag/eni>



## Cases – Hydro Kleen

- HK paid C\$28,300 in bribes to a US immigration official stationed at the Calgary airport
- HK agreed to plead guilty and pay a fine of C\$25,000 (88% of the bribes)
- Sentencing judge accepted the plea and remarked on the public harm in / to Canada:

“Where someone is dealing in international trade, especially with the United States, who is our closest and most important trading partner, matters that involve corruption that might interfere with trade are of much importance to Alberta...[it is important] that trade with the United States be seen to be honest and of high ethical standards ...”
- First conviction under CFPOA (2005)
  - Considered by Canadian authorities to be a low fine and of little precedential value

## Cases – Niko Resources

- Niko was seeking to minimize the amount of compensation payable after an explosion at one of its gas fields in Bangladesh
- Niko provided a C\$190,000 Land Cruiser to the Minister of Energy, who was primarily responsible for the matter.
- Niko agreed to plead guilty and pay a fine of C\$9.5 million (5,000% of the value of the bribe)
- Sentencing judge accepted the plea, considered FCPA precedents and noted the seriousness of the conduct by a publicly-traded Canadian multinational:

“Bribery tarnishes the reputation of Alberta and of Canada [and] ... is an embarrassment to all Canadians. . . .”

## Cases – Nazir Karigar

- Case is currently before the courts
- Karigar is alleged to have attempted to bribe a political associate of the Minister of Civil Aviation in respect of a \$100 million Air India security contract (which was not received)
- Defence counsel has indicated that Karigar will pursue jurisdictional challenges

# Compliance Toolkit

1. Developing, implementing and monitoring effective anti- corruption compliance programs and policies
2. Conducting internal investigations and third party due diligence
3. Implementing effective anti-corruption training programs
4. Fostering and sustaining a culture of compliance
5. Mitigating foreign corruption risk
6. Leveraging technology in monitoring, tracking and reporting

# Developing, Implementing and Monitoring Effective Anti-corruption Compliance Programs and Policies

- Anti-Corruption Policy and Procedures
- Facilitation Payments Guideline
  - Payment must be authorized
- Hospitality Guideline
  - no hospitality for foreign officials excepts as authorized by Guidelines
- Gift Registry
  - Gifts and leave-behinds recorded with approvals
- Using your Travel and Expense Policy
  - Prior approval for travel, meals, and entertainment
- Accounting Department is often gatekeeper

# Conducting Internal Investigations and Third Party Due Diligence

- Screening applications for jobs in foreign offices to exclude those who are public officials or are closely associated with foreign government
- Due diligence in mergers and acquisitions
- Country research (through Transparency International, World Bank, OECD, denied persons list, etc.)
- Google research better than you think!
- Ongoing monitoring of cases

# Flushing Out a Problem Before You Conduct Intensive Diligence

- Simple questions to ask your internal client before your conduct your diligence Why do we need this agent?
  - How is this agent going to add value to the business?
  - Who recommended this agent?
  - What is the level of this agent's expertise in the industry?
  - Are the commission rates reasonable?
  - Does this agent represent other US companies?
  - Does the agent have principals or relatives that work for the government or a government-owned entity?

## Internal Investigations (cont.)

- Assessing the potential scope of the investigation
- Assembling the right team and resources
- Establishing communication and reporting protocols
- Setting the investigative strategy
- Examining books and records
- Assessing investigative findings and actions required



# Implementing Effective Anti-corruption Training Programs

- Culture of Compliance begins with the CEO
- Mandatory twice annual training for sales, marketing, leadership, supply chain, finance
- New employee orientation
- Annual training of channel partners (agents, reps, dealers)
  - Annual certifications
- Principled approach to rules
  - Teaching red flags
  - Golden rule
  - Walking the talk
- Rewarding good behaviours and ‘outing’ bad ones

# Fostering and Sustaining a Culture of Compliance

- Top down mentality of zero tolerance for corruption
- Anti-Corruption compliance program / code of conduct
- Contracts stipulate employee will be fired if engages in bribery
- Contracts stipulate agent will be terminated if engages in bribery
- Zero tolerance and no exceptions (no grey area)
- Whistle-blower hotline with no retaliation
- Connect actions with ramifications – accountability of managers with P&L responsibility for regions

# Motherhood Statements on Ethics

- Promotes
  - Honest, ethical and legal conduct
  - Proper handling of conflicts of interest
  - Proper disclosure (transparent at all times)
  - Accountability
- Questions staff should ask self:
  - Is it honest?
  - Is it in the best interest of the company?
  - Does it make me feel good about myself?
  - Would I feel comfortable if this were in the news?

## An Excellent Example - Caterpillar

- <http://www.caterpillar.com/company/strategy/code-of-conduct>
  - We are Honest and Act with Integrity
  - We Avoid and Manage Conflict and Potential Conflicts of Interest
  - We Compete Fairly
  - We Ensure Accuracy and Completeness of our Financial Reports and Accounting Records
  - We are Fair, Honest and Open in Our Communication
  - We Handle "Inside Information" Appropriately and Lawfully
  - We Refuse to Make Improper Payments

# Mitigating Foreign Corruption Risk

- Rules applicable across company (all jurisdictions)
- Avoidance of grease payments
- Proper accounting and recordkeeping
- Reporting system for suspicious transactions
- Contracts requiring CFPOA/FCPA compliance, with periodic certification
- Detailed, accurate books, records, and accounts, which are periodically audited
- No fictitious invoices or other misleading documentation
- No sham transactions
- Payments by check or wire transfer, not cash or “bearer” instruments
- No use of unnumbered or offshore bank accounts
- No payments to anonymous person or third party bank account
- No payments to any consultant outside country where services performed or business conducted
- CLEAR exceptions:
  - Protection of life, safety or liberty

## Leveraging Technology in Monitoring, Tracking and Reporting

- Not much affordable technology available
- 3<sup>rd</sup> party due diligence systems
- Google alerts
- Internal portal to disseminate info
- Accounting controls with red flags/permissions

# Questions?



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