

# The Foreign Corrupt Practices Act (FCPA)

Dale A. Lisonbee



# Who is Covered?<sup>2</sup>

- Issuers
- Other entities
- Officers, directors, employees, agents, stockholders of the above
- US citizens, nationals or residents
- Anyone else inside the United States

# Is Anyone Not Covered?

- Yes, but for your own sake, assume you are covered until you know otherwise.

# What does the FCPA require?<sup>2</sup>

- Do NOT do this:
  - Offer, pay, promise to pay or authorize the payment of any money, OR
  - Offer, gift, promise to give or authorize the giving of anything of value

# What does the FCPA require? <sup>2</sup>

- To whom?
  - Any foreign official, foreign political party or official thereof or any candidate for political office for a prohibited purpose.
  - Any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, for a prohibited purpose.

# Prohibited Purposes<sup>2</sup>

- **Doing any of the following in order to assist such covered person in obtaining or retaining business for or with, or directing business to, any person:**
  - **Influencing such recipient in his/its official capacity**
  - **Inducing him/it to do or omit to do any act in violation of his/its lawful duty**
  - **Securing any improper advantage, OR**
  - **Use his/its influence with a foreign government or instrumentality to affect or influence any act or decision of such government or instrumentality**

# What is a foreign official?<sup>2</sup>

- ANY officer or employee of, or person acting in an official capacity for or on behalf of, a foreign government or ANY department, agency or instrumentality thereof, or of a public international organization.

# What is a foreign official?<sup>2</sup>

- See “Litigation: Who is a foreign official under the FCPA?” by Matthew Ingber in Inside Counsel dated June 2, 2011. In this article, there is a “non-exhaustive list of these defining characteristics that can help an entity determine when it is dealing with an ‘instrumentality’:
  - The entity provides a service to the citizens of the jurisdiction;
  - Government officials act as or appoint the key officers and directors of the entity;
  - The entity is being financed, at least in large measure, through governmental appropriations, or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties;
  - The entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
  - The entity is widely perceived to be performing official functions.”

# Exception for Routine Governmental Actions:<sup>2</sup>

- The FCPA does not prohibit:
  - Facilitating or expediting payments
  - To a foreign official, political party, or party official
  - The purpose of which is to expedite or secure the performance of a routine governmental action by a foreign official, political party or party official

# What is a routine governmental action?<sup>2</sup>

- **ONLY** an action which is ordinarily and commonly performed by a foreign official in
  - Obtaining permits, licenses or other official documents to qualify a person to do business in a foreign country;
  - Processing governmental papers, such as visas and work orders;
  - Providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
  - Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
  - Actions of a similar nature.

# **Routine Governmental Action does NOT include:<sup>2</sup>**

- **Any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.**

# Why are facilitating payments permitted?<sup>3</sup>

- The thinking is that they do not involve any discretionary action.

# Affirmative Defenses<sup>2</sup>

- The payment, gift, offer or promise of anything of value was lawful under the written laws and regulations of the recipient's country; OR
- The payment, gift, offer or promise of anything of value was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of the recipient AND was directly related to:
  - The promotion, demonstration or explanation of products or services, OR
  - The execution or performance of a contract with a foreign government or agency thereof

# Additional Requirement for Issuers<sup>2</sup>

- **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; and**
- **Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that –**
  - **Transactions are executed in accordance with management’s general or specific authorization**
  - **Transactions are recorded as necessary (i) to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements, and (ii) to maintain accountability for assets**
  - **Access to assets is permitted only in accordance with management’s general or specific authorization; and**
  - **The recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.**

# What do “reasonable detail” and “reasonable assurances” mean?<sup>2</sup>

- Such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs

# What if you violate the FCPA?

- You may get a new wardrobe – prison stripes
- You may get to share the wealth – Uncle Sam will gladly accept your money

# What is the Legislative History?<sup>3</sup>

- **Purpose of the FCPA**
  - **Prohibit bribing foreign officials, political parties and candidates**

# What is the Legislative History?<sup>3</sup>

- **Need for FCPA**
  - **More than 400 corporations acknowledged making payments of concern**
  - **Types of payments acknowledged: Everything from grease payments to bribes**

# What is the Legislative History?<sup>3</sup>

- **What is the big deal?**
  - **Counter to the moral expectations and values of the American public**
  - **Bad business**
  - **Erodes public confidence in the integrity of the free market system**
  - **Short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products.**

# Need for FCPA<sup>3</sup>

- **Rewards corruption instead of efficiency**
- **Puts pressure on ethical enterprises to lower their standards or risk losing business**
- **Can damage a company's business**
- **Can lead to costly lawsuits**
- **Can cause the cancellation of contracts**
- **Can result in the appropriation of valuable assets overseas**
- **Embarrass friendly governments**
- **Lower the esteem for the US among citizens of foreign nations**
- **Bolsters arguments by foreign opponents of the US that US businesses exert a corrupting influence on the political processes of their nations**

# Does Anyone Really Ever Violate the FCPA?<sup>1</sup>

Name of Party Charged	Date of Action	Amount of Fine
<a href="#">U.S. v. David H. Mead, et al.</a>	4/17/98	
<a href="#">U.S. v. Herbert Tannenbaum</a>	7/23/98	\$ 15,000.00
<a href="#">United States v. Saybolt North America Inc., et al.</a>	8/18/98	\$ 1,500,000.00
<a href="#">United States v. Control Systems Specialist, et al.</a>	8/19/98	
<a href="#">U.S. v. International Materials Solutions Corp., et al.</a>	2/8/99	
<a href="#">U.S. v. Litton Applied Technology Division, et al.</a>	6/29/99	
<a href="#">U.S. v. Daniel Ray Rothrock</a>	6/13/01	\$ 100.00
<a href="#">United States v. Robert Richard King, et al.</a>	6/27/01	\$ 60,000.00
<a href="#">United States v. Joshua C. Cantor</a>	7/17/01	
<a href="#">United States v. Richard K. Halford</a>	8/3/01	\$ 175.00
<a href="#">United States v. Albert Franklin Reitz</a>	8/3/01	
<a href="#">United States v. David Kay, et al.</a>	12/12/01	\$ 1,300.00
<a href="#">U.S. v. Gautam Sengupta</a>	1/30/02	\$ 6,000.00
<a href="#">U.S. v. Richard G. Pitchford</a>	9/3/02	\$ 300,000.00
<a href="#">United States v. Ramendra Basu</a>	11/26/02	\$ 200.00
<a href="#">U.S. v. Syncor Taiwan, Inc</a>	12/5/02	\$ 500,000.00
<b>United States v. Thomas Farrell</b>	3/10/03	
<a href="#">U.S. v. James H. Giffen, et al.</a>	4/2/03	\$ 32,000.00
<a href="#">U.S. v. J. Bryan Williams</a>	4/2/03	\$ 3,512,000.00

# Does Anyone Really Ever Violate the FCPA?<sup>1</sup>

Name of Party Charged	Date of Action	Amount of Fine
<a href="#">United States v. Clayton Lewis</a>	7/31/03	
<a href="#">U.S. v . Hans Bodmer</a>	8/5/03	
<a href="#">United States v. Thomas Carman</a>	3/2/04	\$ 250,000.00
<a href="#">United States v. Vincent Nico</a>	3/2/04	\$ 250,000.00
<a href="#">United States v. ABB Vetco Gray, Inc., et al.</a>	6/22/04	\$ 5.25 M (each)
<a href="#">United States v. Robert E. Thomson, et al.</a>	7/1/04	Not guilty
<a href="#">In Re InVision Technologies, Inc.</a>	12/3/04	\$ 800,000.00
<a href="#">United States v. Monsanto Company</a>	1/6/05	\$ 500,000.00
<a href="#">In Re Micrus Corporation</a>	2/28/05	\$ 450,000.00
<a href="#">United States v. Titan Corporation</a>	3/1/05	\$ 13,000,000.00
<a href="#">United States v. Viktor Kozeny, et al.</a>	5/12/05	\$ 1,000,000.00
<a href="#">United States v. DPC (Tianjin) Co. Ltd.</a>	5/20/05	\$ 2,000,000.00
<a href="#">United States v. Richard John Novak</a>	10/5/05	\$ 200.00
<a href="#">United States v. Faheem Mousa Salam</a>	6/7/06	\$ 100.00
<a href="#">United States v. Steven Lynwood Head</a>	6/23/06	\$ 5,000.00
<a href="#">United States v. Yaw Osei Amoako</a>	9/6/06	\$ 7,500.00
<a href="#">United States v. Jim Bob Brown</a>	9/11/06	\$ 17,500.00
<a href="#">United States v. SSI International Far East, Ltd.</a>	10/10/06	\$ 7,500,000.00
<a href="#">United States v. Statoil, ASA</a>	10/13/06	\$ 10,500,000.00

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Name of Party Charged	Date of Action	Amount of Fine
<a href="#">United States v. Christian Sapsizian, et al.</a>	12/19/06	\$ 200.00
<a href="#">United States v. Aibel Group Limited</a>	1/5/07	\$ 4,200,000.00
<a href="#">United States v. Vetco Gray Controls Inc., et al.</a>	1/5/07	\$ 26,000,000.00
<a href="#">United States v. Baker Hughes Services International, Inc.</a>	4/11/07	\$ 11,000,000.00
<a href="#">United States v. Baker Hughes Incorporated</a>	4/11/07	\$ 34,000,000.00
<a href="#">United States v. Leo Winston Smith</a>	4/25/07	
<a href="#">United States v. William J. Jefferson</a>	6/4/07	\$ 1,100.00
<a href="#">United States v. Si Chan Wooh</a>	6/26/07	\$ 7,541,000.00
<a href="#">In Re Omega Advisors, Inc.</a>	7/6/07	\$ 500,000.00
<a href="#">United States v. Jason Edward Steph</a>	7/19/07	\$ 2,000.00
<a href="#">United States v. Roger Young</a>	7/25/07	\$ 7,000.00
<a href="#">United States v. Steven J. Ott</a>	7/25/07	\$ 10,000.00
<a href="#">In Re Textron Inc.</a>	8/23/07	\$ 3,500,000.00
<a href="#">In Re Paradigm B.V.</a>	9/24/07	\$ 1,000,000.00
<a href="#">United States v. York International Corporation</a>	10/1/07	\$ 12,000,000.00
<a href="#">United States v. Thermo King Ireland Limited</a>	10/31/07	\$ 2,000,000.00
<a href="#">United States v. Ingersoll-Rand Italiana SpA</a>	10/31/07	\$ 4,220,000.00
<a href="#">United States v. Ali Hozhabri</a>	11/1/07	\$ 1,950,000.00
<a href="#">In Re Akzo Nobel N.V.</a>	12/20/07	\$ 2,950,000.00
<a href="#">In Re Lucent Technologies Inc.</a>	12/21/07	\$ 1,500,000.00

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Name of Party Charged	Date of Action	Amount of Fine
<a href="#">United States v. Gerald Green, et al.</a>	1/16/08	\$ 500,000.00
<a href="#">United States v. James K. Tillery, et al.</a>	1/17/08	\$ 6,000,000.00
<a href="#">In Re Westinghouse Air Brake Technologies Corporation ("Wabtec")</a>	2/14/08	\$ 300,000.00
<a href="#">United States v. Flowserve Pompes SAS</a>	2/21/08	\$ 4,000,000.00
<a href="#">United States v. Volvo Construction Equipment, AB</a>	3/20/08	\$ 7,000,000.00
<a href="#">United States v. Renault Trucks SAS</a>	3/20/08	\$ 7,000,000.00
<a href="#">United States v. Martin Eric Self</a>	5/2/08	\$ 20,200.00
<a href="#">United States v. Willbros Group, Inc., et al.</a>	5/14/08	\$ 22,000,000.00
<a href="#">United States v. AGA Medical Corporation</a>	6/3/08	\$ 2,000,000.00
<a href="#">In Re Faro Technologies, Inc.</a>	6/5/08	\$ 1,850,000.00
<a href="#">United States v. Ousama M. Naaman</a>	8/7/08	
<a href="#">United States v. Albert Jackson Stanley</a>	8/29/08	\$ 11,300,000.00
<a href="#">United States v. Shu Quan-Sheng</a>	11/12/08	\$ 300.00
<a href="#">United States v. Nam Quoc Nguyen, et al.</a>	12/4/08	\$ 32,000.00
<a href="#">United States v. Misao Hioki</a>	12/8/08	\$ 80,000.00
<a href="#">United States v. Siemens S.A. (Venezuela)</a>	12/12/08	\$ 500,000.00
<a href="#">United States v. Siemens Bangladesh Limited</a>	12/12/08	\$ 500,000.00
<a href="#">United States v. Siemens S.A. (Argentina)</a>	12/12/08	\$ 500,000.00
<a href="#">United States v. Siemens Aktiengesellschaft</a>	12/12/08	\$ 448,500,000.00

# Does Anyone Really Ever Violate the FCPA?<sup>1</sup>

Name of Party Charged	Date of Action	Amount of Fine
<a href="#">United States v. Mario Covino</a>	12/17/08	
<a href="#">United States v. CNH France S.A.</a>	12/22/08	\$ 10,809,142.00
<a href="#">United States v. CNH Italia S.p.A.</a>	12/22/08	\$ 10,809,142.00
<a href="#">United States v. Iveco S.p.A.</a>	12/22/08	\$ 10,809,142.00
<a href="#">United States v. Richard Morlok</a>	1/7/09	
<a href="#">United States v. Juthamas Siriwan, et al.</a>	1/28/09	
<a href="#">United States v. Kellogg Brown &amp; Root LLC</a>	2/6/09	\$ 402,000,000.00
<a href="#">United States v. Jeffrey Tesler, et al.</a>	2/17/09	\$ 240,000,000.00
<a href="#">United States v. Latin Node, Inc.</a>	3/23/09	\$ 2,000,000.00
<a href="#">United States v. Stuart Carson, et al.</a>	4/8/09	\$ 18,200,000.00
<a href="#">United States v. Juan Diaz</a>	4/22/09	\$ 73,824.20
<a href="#">United States v. Antonio Perez</a>	4/22/09	\$ 250,000.00
<a href="#">United States v. Novo Nordisk A/S</a>	5/11/09	\$ 1,400,000.00
<a href="#">United States v. Fernando Maya Basurto</a>	6/10/09	
<a href="#">United States v. Control Components, Inc.</a>	7/22/09	\$ 18,201,200.00
<a href="#">In Re Helmerich &amp; Payne, Inc.</a>	7/30/09	\$ 1,000,000.00
<a href="#">United States v. AGCO Limited</a>	9/30/09	\$ 1,600,000.00
<a href="#">United States v. Charles Paul Edward Jumet</a>	11/10/09	\$ 15,000.00
<a href="#">United States v. John Joseph O'Shea</a>	11/16/09	
<a href="#">United States v. Joel Esquenazi, et al.</a>	12/4/09	\$ 1,852,209.39

# Does Anyone Really Ever Violate the FCPA?<sup>1</sup>

Name of Party Charged	Date of Action	Amount of Fine
<a href="#">United States v. Jonathan M. Spiller</a>	12/11/09	
<a href="#">United States v. John Gregory Godsey, et al.</a>	12/11/09	
<a href="#">United States v. Daniel Alvarez, et al.</a>	12/11/09	
<a href="#">United States v. Helmie Ashible</a>	12/11/09	
<a href="#">United States v. Andrew Bigelow</a>	12/11/09	
<a href="#">United States v. R. Patrick Caldwell, et al.</a>	12/11/09	
<a href="#">United States v. Saul Mishkin</a>	12/11/09	
<a href="#">United States v. Yochanan R. Cohen</a>	12/11/09	
<a href="#">United States v. Haim Geri</a>	12/11/09	
<a href="#">United States v. John Benson Wier III</a>	12/11/09	
<a href="#">United States v. Israel Weisler, et al.</a>	12/11/09	
<a href="#">United States v. Ofer Paz</a>	12/11/09	
<a href="#">United States v. Pankesh Patel</a>	12/11/09	
<a href="#">United States v. David R. Painter, et al.</a>	12/11/09	
<a href="#">United States v. John M. Mushriqui, et al.</a>	12/11/09	
<a href="#">United States v. Amaro Goncalves, et al.</a>	12/11/09	

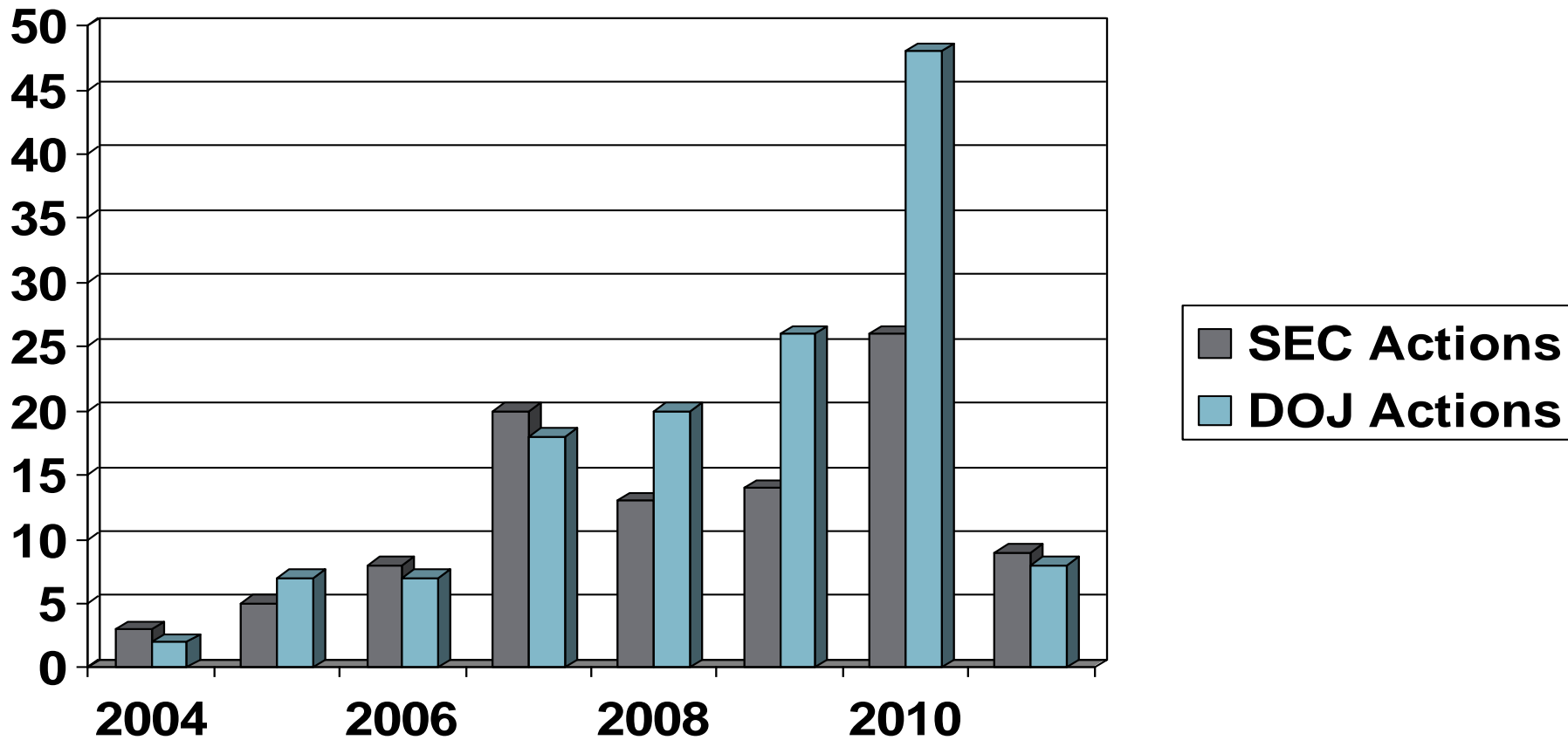
# Does Anyone Really Ever Violate the FCPA?<sup>1</sup>

Name of Party Charged	Date of Action	Amount of Fine
<a href="#">United States v. John W. Warwick</a>	12/15/09	\$ 200.00
<a href="#">In Re UTStarcom Inc.</a>	12/31/09	\$ 15,000,000.00
<a href="#">United States v. Richard T. Bistrong</a>	1/21/10	
<a href="#">United States v. Jean Fourcand</a>	2/1/10	
<a href="#">United States v. BAE Systems plc</a>	2/4/10	\$ 400,000,000.00
<a href="#">United States v. Innospec Inc.</a>	3/17/10	\$ 14,100,000.00
<a href="#">United States v. DaimlerChrysler China Ltd.</a>	3/22/10	\$ 93,600,000.00
<a href="#">United States v. Daimler Export and Trade Finance GmbH</a>	3/22/10	\$ 93,600,000.00
<a href="#">United States v. DaimlerChrysler Automotive Russia SAO</a>	3/22/10	\$ 93,600,000.00
<a href="#">United States v. Daimler AG</a>	3/22/10	\$ 93,600,000.00
<a href="#">United States v. Latin Node Inc.</a>	3/23/10	\$ 2,000,000.00
<a href="#">United States v. Technip S.A.</a>	6/28/10	\$ 240,000,000.00
<a href="#">United States v. Snamprogetti Netherlands B.V.</a>	7/7/10	\$ 240,000,000.00
<a href="#">United States v. Bobby Jay Elkin, Jr.</a>	8/3/10	\$ 5,000.00
<a href="#">United States v. Alliance One Tobacco Osh, LLC</a>	8/6/10	\$ 4,200,000.00
<a href="#">United States v. Universal Leaf Tabacos Ltda.</a>	8/6/10	\$ 4,400,000.00
<a href="#">In Re Universal Corporation</a>	8/6/10	\$ 4,400,000.00
<a href="#">United States v. Alliance One International AG</a>	8/6/10	\$ 5,250,000.00
<a href="#">In Re Alliance One International, Inc.</a>	8/6/10	\$ 5,250,000.00
<a href="#">United States v. Enrique Aguilar, et al.</a>	9/15/10	

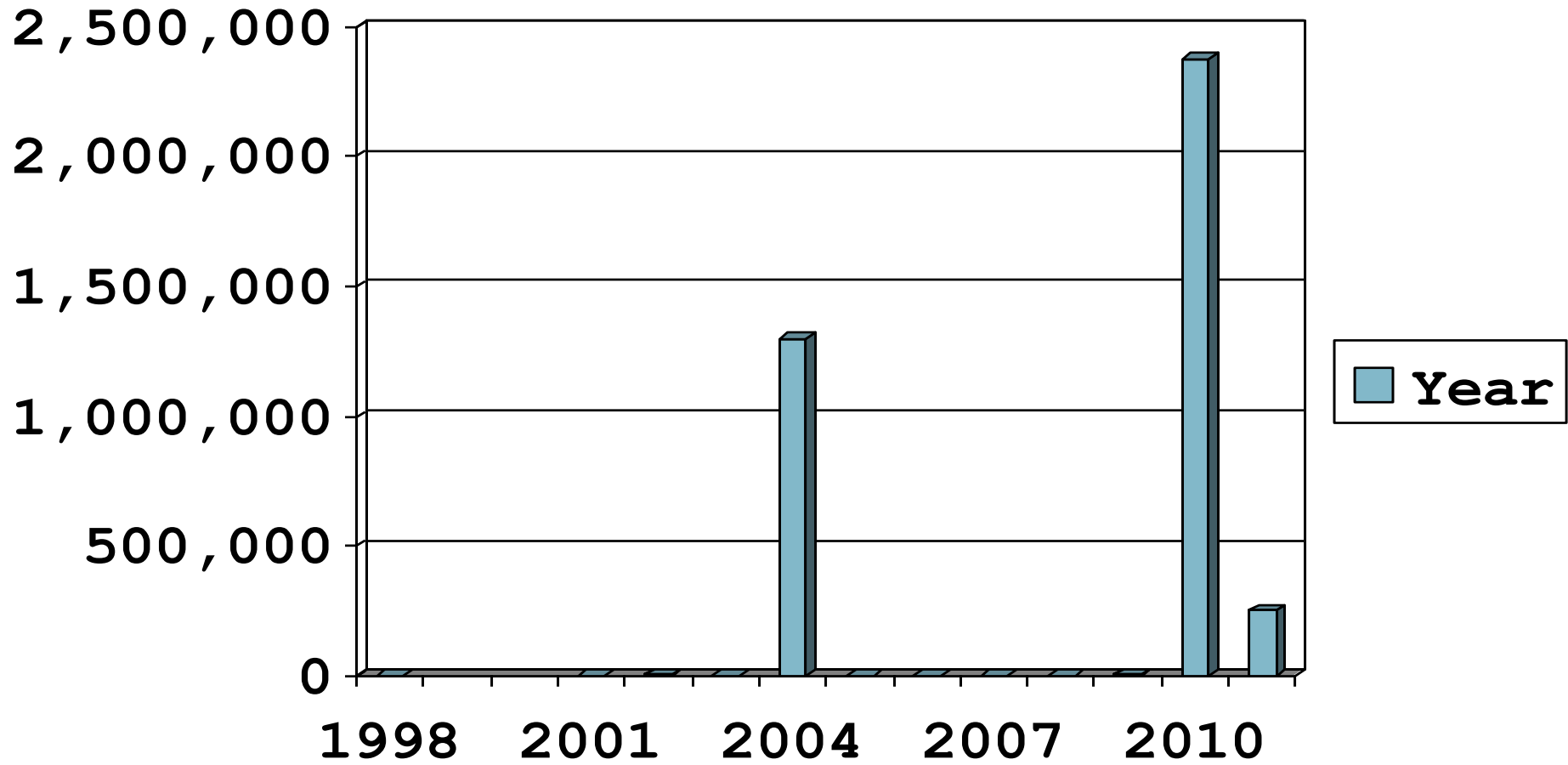
# Does Anyone Really Ever Violate the FCPA?<sup>1</sup>

Name of Party Charged	Date of Action	Amount of Fine
<a href="#">United States v. ABB Inc.</a>	9/29/10	\$ 17,100,000.00
<a href="#">United States v. ABB Ltd - Jordan</a>	9/29/10	\$ 19,000,000.00
<a href="#">United States v. Pride Forasol S.A.S.</a>	11/4/10	\$ 32,625,000.00
<a href="#">United States v. Panalpina, Inc</a>	11/4/10	\$ 70,560,000.00
<a href="#">United States v. Transocean Inc.</a>	11/4/10	\$ 156,565,000.00
<a href="#">United States v. Tidewater Marine International, Inc.</a>	11/4/10	\$ 156,565,000.00
<a href="#">United States v. Pride International, Inc</a>	11/4/10	\$ 156,565,000.00
<a href="#">United States v. Shell Nigeria Exploration and Production Co. Ltd.</a>	11/4/10	\$ 156,565,000.00
<a href="#">In Re Noble Corporation</a>	11/4/10	\$ 156,565,000.00
<a href="#">United States v. Panalpina World Transport (Holding) Ltd.</a>	11/4/10	\$ 156,565,000.00
<a href="#">In Re RAE Systems Inc.</a>	12/10/10	\$ 1,700,000.00
<a href="#">United States v. Jorge Granados, et al.</a>	12/14/10	
<a href="#">United States v. Juan Pablo Vasquez</a>	12/17/10	
<a href="#">United States v. Manuel Salvoch</a>	12/17/10	
<a href="#">United States v. Maxwell Technologies, Inc.</a>	1/31/11	\$ 8,000,000.00
<a href="#">United States v. Tyson Foods, Inc.</a>	2/10/11	\$ 4,000,000.00
<a href="#">United States v. JGC Corporation</a>	4/6/11	\$ 218,800,000.00
<a href="#">In Re Comverse Technology, Inc.</a>	4/7/11	\$ 1,200,000.00
<a href="#">United States v. Johnson and Johnson (DePuy)</a>	4/8/11	\$ 21,400,000.00

# 2011 Enforcement Statistics<sup>6</sup>



# Total Fines Each Year<sup>1</sup>



Numbers in Millions

# Top 20 Fines<sup>1</sup>

<a href="#">United States v. Siemens Aktiengesellschaft</a>	12/12/08	\$	448,500,000.00
<a href="#">United States v. Kellogg Brown &amp; Root LLC</a>	2/6/09	\$	402,000,000.00
<a href="#">United States v. BAE Systems plc</a>	2/4/10	\$	400,000,000.00
<a href="#">United States v. Jeffrey Tesler, et al.</a>	2/17/09	\$	240,000,000.00
<a href="#">United States v. Technip S.A.</a>	6/28/10	\$	240,000,000.00
<a href="#">United States v. Snamprogetti Netherlands B.V.</a>	7/7/10	\$	240,000,000.00
<a href="#">United States v. JGC Corporation</a>	4/6/11	\$	218,800,000.00
<a href="#">United States v. Transocean Inc.</a>	11/4/10	\$	156,565,000.00
<a href="#">United States v. Tidewater Marine International, Inc.</a>	11/4/10	\$	156,565,000.00
<a href="#">United States v. Pride International, Inc</a>	11/4/10	\$	156,565,000.00
<a href="#">United States v. Shell Nigeria Exploration and Production Co. Ltd.</a>	11/4/10	\$	156,565,000.00
<a href="#">In Re Noble Corporation</a>	11/4/10	\$	156,565,000.00
<a href="#">United States v. Panalpina World Transport (Holding) Ltd.</a>	11/4/10	\$	156,565,000.00
<a href="#">United States v. DaimlerChrysler China Ltd.</a>	3/22/10	\$	93,600,000.00
<a href="#">United States v. Daimler Export and Trade Finance GmbH</a>	3/22/10	\$	93,600,000.00
<a href="#">United States v. DaimlerChrysler Automotive Russia SAO</a>	3/22/10	\$	93,600,000.00
<a href="#">United States v. Daimler AG</a>	3/22/10	\$	93,600,000.00
<a href="#">United States v. Panalpina, Inc</a>	11/4/10	\$	70,560,000.00
<a href="#">United States v. Baker Hughes Incorporated</a>	4/11/07	\$	34,000,000.00
<a href="#">United States v. Pride Forasol S.A.S.</a>	11/4/10	\$	32,625,000.00

# What are some steps I can take to comply with the FCPA?

- **Establish a compliance program**
  - **In “FCPA Enforcement Trends and Compliance Program Best Practices” by Julie DiMauro dated March 15, 2011, Ms. DiMauro outlines some “components of today’s best practices in the FCPA arena. These components include:**
    - **maintaining a clear, written policy against violations of the FCPA and applicable foreign law...;**
    - **ensuring that senior management strongly, explicitly and visibly support these policies;**
    - **having standards and procedures, applicable to company and third parties, that pertain to gifts, entertainment, travel, political contributions, charitable donations, facilitation payments, and solicitation and extortion;**
    - **developing standards after a risk-based assessment that accounts for location, interaction with foreign officials, industry sectors, involvement in joint ventures, licensing and permitting, degree of governmental oversight, significance of goods and personnel clearing through customs and immigration;**

# What are some steps I can take to comply with the FCPA?

- reviewing and updating such standards and procedures not less than annually;
- designating at least one senior executive who reports to the Board to oversee the program;
- ensuring that financial and accounting procedures are designed to produce accurate books and records and that they cannot be used for foreign bribery or its concealment;
- designing periodic training and require certification for all directors, officers, employees, and, where appropriate, business partners and agents to ensure communication of the policies and procedures;
- implementing a process for providing guidance to agents on anti-corruption policy violations;
- instituting disciplinary procedures that address anti-corruption policy violations;
- performing due diligence on agents and business partners;
- including standard anti-corruption compliance provisions in any agreements with third parties; and
- conducting periodic reviews and testing of anti-corruption policies and procedures.”

# Comply With Your Program

- Do your diligence before you engage in the transaction
  - Ask questions
  - Let them know you take the FCPA very seriously
  - Review the bad boy lists
  - Get some references
  - Have them sign an agreement
  - Have them sign an FCPA compliance certificate

# Identify any “red flags”<sup>7</sup>

- **Red Flags**

- **The person has a history or reputation for corruption or for bypassing normal business channels.**
- **The person requests unusual payment patterns or financial arrangements (such as requests that payments be made (i) without any supporting documentation such as a written invoice or activity report; (ii) in cash; (iii) to another party; or (iv) to an account in a country different from the one where the person is located or is doing business).**
- **The country or industry of the person has a history of corruption.**
- **The person lacks the qualifications or resources to perform the services offered.**
- **The person has been recommended by a government official.**
- **Statements or an inference from the person that a particular payment is needed to “get the business.”**
- **Statements from the person that a foreign official has requested a “gift” or something of value.**

# Identify any “red flags”<sup>7</sup>

- The person is related to a foreign official.
- The sole reason for doing business with the person is to use its influence over certain foreign officials.
- Requests from the person that the Company prepare false invoices or false documentation.
- Refusals by the person to certify that it will not engage in corrupt activity or otherwise cause the Company to be in violation of the FCPA.
- Recommendations from the person that the Company enter into a relationship with a specific person or company, and such person is a relative of a foreign official, or such company is owned in part by a foreign official or a relative of a foreign official.
- Reluctance to identify the principals or other persons holding an ownership interest in the person.
- Request by the person for an excessive operating budget or for approval of excessive expenditures or fees (the excess amount may be used to finance a bribe).

# Identify any “red flags”<sup>7</sup>

- The person insists upon sole control over the government approval process.
- Managers of the person are awarded unusual bonuses.
- The person refuses to disclose subagents or subcontractors that interact with foreign officials.

## Action Item

- Address all red flags before you proceed with the engagement/transaction.

# What if your company suspects or gets accused of an FCPA violation?

- Engage outside counsel
- Have outside counsel conduct an investigation
- Document findings\*
- Document any corrective action taken\*
  
- Work closely with outside counsel on the documentation.

# What role can you play in the FCPA compliance process?

- Pre-transaction/engagement diligence
- Monitor compliance on ongoing basis
- Document compliance efforts
- Monitor developments related to the FCPA

# Sources

1. <http://www.justice.gov/criminal/fraud/fcpa/> (and related links)
2. The Foreign Corrupt Practices Act of 1977
3. 1977 Legislative History – House Report (Report No. 95-640)
4. Ingber, Matthew. “Litigation: Who is a foreign official under the FCPA?” dated June 2, 2011 in Inside Counsel.
5. DiMauro, Julie. “FCPA Enforcement Trends and Compliance Program Best Practices” dated March 15, 2011.
6. Gibson, Dunn & Crutcher LLP “2011 Mid-year FCPA update” dated July 11, 2011
7. Danish Hamid at Winston & Strawn LLP

# Questions





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