FCPA and Anti-Corruption in Russia and the Commonwealth of Independent States
Compliance Strategies for the Region’s Unique Cultural and Governmental Intricacies

THURSDAY, MAY 12, 2011
1pm Eastern    |    12pm Central    |    11am Mountain    |    10am Pacific

Today’s faculty features:
William D. Semins, Partner, K&L Gates, Pittsburgh
Svetlana A. Vorobyeva, Attorney, K&L Gates, Moscow, Russia
Ihor V. Mehednyuk, Partner, Salans, Kyiv, Ukraine

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Introduction

The Commonwealth of Independent States ("CIS") is comprised of:

- Armenia
- Azerbaijan
- Belarus
- Kazakhstan
- Kyrgyzstan
- Moldova
- Russia
- Tajikistan
- Turkmenistan
- Ukraine
- Uzbekistan
THE 2010 CORRUPTION PERCEPTIONS INDEX MEASURES THE PERCEIVED LEVELS OF PUBLIC-SECTOR CORRUPTION IN 178 COUNTRIES AROUND THE WORLD

www.transparency.org
## Transparency International CPI:

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Deloitte’s 2010 “Look Before You Leap” Survey

- Respondents were “extremely concerned” about compliance and integrity issues, ranking CIS countries third behind Pakistan and the Middle East.

- “Bribery is endemic in Russia and Ukraine, where you cannot complete a plant or import a new product without paying someone off.”
  - Multinational executive
Current Russian Anti-Corruption Law
Anticorruption Law

- There is no unified anticorruption law in Russia.
- Anticorruption rules are dispersed among:
  - Federal Law on Counteracting Corruption
  - Criminal Code
  - Code of Administrative Offences
  - Civil Code
  - Federal Law on State Civil Service
  - And others.
Gifts to Public Officials

- General rule - **gifts to public officials are prohibited**
  - In connection with their official capacity or in connection with their official duties
- Exceptions:
  - Customary gifts of no more than ≈ $107
  - Gifts donated in connection with:
    - protocol events, business trips and other official events
Gifts to Public Officials

- A gift over $107 is recognized as state/municipal property and is passed over to the respective authority.

- Consequences of the violation: VOID transaction and a risk of administrative/criminal liability.

- (!) A gift with a value of $107 or less does not necessarily decriminalize the gift.
Criminal Code and Code of Administrative Offences

Prohibited:

- Bribe-giving (Article 291 of the Criminal Code)

- Commercial bribery (Article 204 of the Criminal Code)

- Unlawful remuneration on behalf of a legal entity (Article 19.28 of the Code of Administrative Offences)
Criminal Code and Code of Administrative Offences

- What is prohibited?
  - Illegal transfer of money, securities, other property
  - Illegal provision of services, granting pecuniary benefits

- Purpose?
  - For commission of an action (inaction) in connection with the public official’s position

- Intent
Bribe-giving

- Criminal liability for individuals

- Regardless if given personally or through an intermediary

- Regardless of whether it is given directly to a public official or to his/her relatives

- Committed at the moment of receipt of the bribe

- Failed transfer = an attempted bribe-giving
Commercial Bribe

- Applies to bribes given to individuals in organizations (commercial and non-commercial) other than state or municipal authorities or institutions

- Criminal liability for individuals
Unlawful Remuneration on Behalf of a Legal Entity

- On behalf of, and in the interests of, a legal entity
- Under the Code of Administrative Offences
- Administrative liability for legal entities (no criminal liability for entities in Russia)
- The offence is committed at the moment of the transfer
- Penalty:
  - Administrative fine of up to a 3-fold amount of the transferred money, 3-fold amount of the securities, other property, or services provided
  - But! The fine must be not less than $36,000
  - With forfeiture of the transferred money, securities, or other property
Recent Amendments to Russian Anti-Corruption Law
Recent Amendments

- Recently proposed amendments to anti-corruption regulation were signed into law on May 4, 2011

- Amendments will become effective after 10 days of their official publication
Recent Amendments

- Penalties are tightened
  - New method for calculating fines
  - Much higher fines
  - Longer terms of imprisonment
- Extended statute of limitations
- Includes foreign public officials and officers of public international organizations
- New crime – bribery intermediation
Bribe-giving

- Includes foreign public officials and officers of public international organizations
- Four types of bribes:
  - Ordinary bribe – up to $890
  - Significant bribe – up to $5,400
  - Big bribe – up to $36,000
  - Especially big bribe – over $36,000
- Penalty depends on the type (amount) of the bribe
Bribe-giving

Penalty for giving bribes

- **Ordinary bribe** – fine of up to **30-fold** amount of the bribe OR imprisonment for up to **2 years** with an up to **10-fold** fine
- **Significant bribe** – fine of up to **40-fold** amount of the bribe OR imprisonment for up to **3 years** with a **15-fold** fine
- **Big bribe** – fine of up to **80-fold** amount of the bribe with a deprivation of the right to hold certain positions/engage in certain activities for up to **3 years** OR imprisonment for up to **10 years** with a **60-fold** fine
- **Especially big bribe** – fine of up to **90-fold** amount of the bribe OR imprisonment for up to **12 years** with a **70-fold** fine
Bribery Intermediation

- Direct transfer of the bribe (upon request of the bribe-taker or bribe-giver) or other facilitation
  - Significant bribe
    - Fine of up to 40-fold amount of the bribe with a deprivation of right to hold certain positions/engage in certain activities for up to 3 years OR imprisonment for up to 5 years with a 20-fold fine
  - Promise or offer of bribery intermediation
    - Fine of up to 70-fold amount of the bribe (or up to $18,000,000) with a deprivation of right to hold certain positions/engage in certain activities for up to 3 years OR imprisonment for up to 7 years with a 60-fold fine
Commercial Bribe

**Penalty for the giver:**

- Fine of **up to 50-fold (70-fold*)** amount of the commercial bribe with deprivation of right to hold certain positions/engage in certain activities for **up to 2 years (3 years*)** or
- Restriction of freedom for **up to 2 years** or
- Imprisonment for **up to 5 years (6 years*)**.

*with an advance conspiracy OR by an organized group OR for deliberately illegal actions
Commercial Bribe

Penalty for the taker:

- Fine of up to 70-fold (90-fold*) amount of the commercial bribe with deprivation of right to hold certain positions/engage in certain activities for up to 3 years or
- Imprisonment for up to 7 years (12 years*) with a fine of up to 40-fold (50-fold*) amount of the commercial bribe.

*with an advance conspiracy OR by an organized group OR for deliberately illegal actions OR with extortion
Unlawful Remuneration

- Covers not only transfer, but also *promise* and *offer* of remuneration
- Includes foreign public officials and officers of public international organizations
- Statute of limitations is extended *from 1 to 6 years* (from the day of the offence)
Unlawful Remuneration

Penalty for big scale and especially big scale unlawful remuneration

- Big scale remuneration (over $36,000)
  - Fine of up to **30-fold** amount of the remuneration but not less than **$714,000**
- Especially big scale remuneration (over $714,000)
  - Fine of up to **100-fold** amount of the remuneration but not less than **$3.6 million**
Russian Enforcement Activity
Enforcement

- National Strategy on Counteraction to Corruption
- National Plan on Counteraction to Corruption for 2010-2011
Enforcement

- There is NO unified anti-corruption authority in Russia
  - Authorities in charge:
    - General Prosecutor’s Office
    - Federal Security Service
    - Ministry of Internal Affairs
    - Federal Customs Service
    - Investigative Committee
Enforcement

- In 2010 – 40,596 corruption-related crimes registered (including fraud, embezzlement, abuse of authorities, bribery, etc.)

- General Prosecutor is not satisfied with the quality of investigative work on corruption cases

- Anti-corruption hotlines
Bribery Statistics 2010 (Public Officials)

Giving bribes:
- 3,360 people convicted
  - 328 – imprisonment (most – less than 5 years, 4 – from 5 to 8 years)
  - 7 – corrective work
  - 1,297 – fine
  - 1,710 – probation sentence

Taking bribes:
- 1,368 cases investigated and sent to court
- 2,035 people convicted
Commercial Bribery Statistics 2010

- **Giving:**
  - 90 convicted
    - 6 – imprisoned (less than 2 years)
    - 51 – fine
    - 32 – probation sentence

- **Taking:**
  - 275 convicted
    - 16 – imprisonment (most – less than 5 years, 3 – from 5 to 8 years)
    - 98 – fine
    - 160 – probation sentence
Anti-Corruption Statistics

- Deputy Chief of the Economic Security Department of the Ministry of Internal Affairs:
  - Average amount of a bribe in 2010 exceeded $2,100 (in 2009 it was $821)
  - One of the biggest bribes in 2010 amounted to $2,536,000

- Investigative Committee:
  - In Moscow average amount of a bribe is more than $18,000

- Most bribery convictions are for amounts ranging from $18 to $360
Enforcement

Transparency International Russia, October 2010:

- “Nothing has changed, situation with corruption in Russia remains as bad as it was”.
The United States
Foreign Corrupt Practices Act
U.S. Foreign Corrupt Practices Act

Two Distinct But Complementary Sets of Provisions:

- **Anti-Bribery:** Prohibiting bribery of foreign public officials
- **Books & Records:** Requiring internal controls and imposing accounting standards for publicly-traded companies
FCPA Anti-Bribery Provisions

Applicability

- **Issuers/Filers**—Includes foreign company sponsoring level II and III ADRs; Form 20-F filers
  - Directors, officers, employees, and agents
- **Domestic Concerns/U.S. Persons**—Includes foreign company’s U.S. operations and its U.S. personnel around the world
  - Directors, officers, employees, and agents
- **Territorial**—Includes foreigners who commit an act within the territory of the U.S. and (perhaps) only minimal acts touching the U.S.

Jurisdiction

- Use of mails or any instrumentality of interstate commerce
  - Email, telephone
  - USD denominated wires between foreign banks clearing through correspondent accounts in the U.S.
- Alternative Jurisdiction (i.e., extraterritorial jurisdiction)
FCPA Anti-Bribery Provisions

Elements

The FCPA’s anti-bribery provisions prohibit –

- any knowing act in support of
- a payment, an offer to pay or an authorization to pay
- money or anything of value
- directly or indirectly
- to any foreign government official, foreign political party or party official, foreign political candidate, or officers of a public international organization (“foreign officials”); or
- to a third person knowing it will be passed on to a foreign official
FCPA Anti-Bribery Provisions

Elements (cont.)

- **Corruptly**
  - With the intent to: (i) influence an official’s act or decision; (ii) induce action (or inaction) in violation of a lawful official duty; (iii) secure any improper advantage; or (iv) induce an official to use influence to sway an act or decision
    - It does **not** require that the act be fully consummated or succeed in producing the desired outcome

- In order to **obtain or retain business**, or to direct business to any person, or to achieve any business-related objective
  - Anything with a **business nexus**
FCPA Anti-Bribery Provisions

Definitions

- **Knowing**
  - Actual knowledge
  - Firm belief
  - Awareness of high probability

- **Directly or Indirectly**
  - Includes not only direct payments but also any payments made indirectly through any third party intermediary, broker, consultant, representative, or agent

- You must make efforts to know your foreign business partners
U.S. FCPA Enforcement Activity
FCPA Enforcement Actions Involving Conduct in CIS

Daimler AG: Russia, Turkmenistan, Uzbekistan
Panalpina World Transport: Azerbaijan, Kazakhstan, Russia, Turkmenistan
Baker Hughes, Inc.: Kazakhstan, Russia, Uzbekistan
Siemens A.G.: Russia
Alliance One International: Kyrgyzstan
ABB Ltd.: Kazakhstan
Mercator Corp.: Kazakhstan
Omega Advisors: Azerbaijan
Paradigm B.V.: Kazakhstan
Daimler A.G. - 2010

- Improper payments allegedly made in at least 22 countries, including Russia, Turkmenistan and Uzbekistan from 1998-2008 by Daimler A.G. and numerous subsidiaries

- Payments in Russia were made via kickbacks facilitated through inflated sales contracts

- Charged with anti-bribery, books and records, and internal controls violations

- Collective fine of $93.6 million issued by DOJ, $23.26 million specifically allotted to Daimler’s Russian subsidiary.

- Daimler disgorged $91,432,867 in profits, collectively to settle SEC charges.

- Compliance monitor for three years
Freight Forwarders: Panalpina World Transport - 2010

- Enforcement actions brought against freight forwarder Panalpina and its customers

- Panalpina allegedly made approximately $27 million in small bribes directly to customs officials in at least 7 countries, including Azerbaijan, Kazakhstan, Russia and Turkmenistan, from 2002-2007 to obtain preferential customs treatment. Panalpina’s customers admitted approval of or acquiescence to the payment of bribes on their behalf and falsely recorded these payments

- Panalpina was fined $70.56 million by DOJ and disgorged $11,329,369 million in profits to settle SEC’s civil charges, no compliance monitor was required

- Panalpina’s customers paid a total of $51 million in fines to DOJ and disgorged $33,518,539 million in profits to settle SEC civil charges
Baker Hughes - 2007

- Improper payments allegedly made in at least 8 countries, including Kazakhstan, Russia, and Uzbekistan from 1998-2005 by Baker Hughes and its subsidiaries

- Employees of Baker Hughes’s subsidiary were found to have known that its agent in Kazakhstan was passing along all or a portion of its commissions to Kazakhoil officials

- A fine of $11 million was issued by DOJ for Baker Hughes’ subsidiary’s FCPA violations in Kazakhstan. Baker Hughes disgorged $23,078,015 in profits (including interest) and paid a $10 million fine to the SEC (fine for violation of cease and desist order for past FCPA violations)

- Implementation of a compliance monitor for an unspecified period
Siemens AG - 2008

- Improper payments allegedly made in at least 13 countries, including Russia, from 2001-2007 by Siemens subsidiaries.

- In Russia, Siemens paid bribes to officials of a traffic control project and officials of Russian state-owned hospitals.

- The payments were made through complex off the books slush funds and sham “consulting agreements” with third parties that did not provide any services and commissions were paid to offshore tax haven jurisdictions.

- Siemens agreed to pay combined U.S. penalties of $800 million, the largest U.S. penalty issued to date, as well as $800 million in penalties to German authorities and to retain a compliance monitor for up to four years.
Alliance One - 2010

- Over $3 million in improper payments were made between 1996 and 2004 to officials of the Kyrgyz tobacco authority and to various tax and local officials.

- DOJ charged Alliance One’s Kyrgyz and Swiss subsidiaries with substantive violations of the FCPA and a conspiracy charge.

- Alliance One’s two subsidiaries were collectively fined $9.45 million by DOJ and disgorged $10 million in profits to the SEC.

- Alliance One agreed to retain a compliance monitor for three years.

- Four executives were charged (4 SEC, 1 DOJ), with the DOJ seeking a $250,000 fine and a 38 month prison sentence for the former country manager of the Kyrgyz subsidiary.
The U.K. Bribery Act
UK Bribery Act

Quick Facts

- Passed in April 2010, effective on July 1, 2011
- Ten year statute of limitations
- Contains four offenses:
  - Bribing a private individual
  - Bribing a foreign public official
  - Being bribed
  - Failing, as a company, to prevent bribery
- Applies to corrupt acts committed anywhere by:
  - UK nationals
  - UK companies
  - Companies “doing business” in the UK
- Applies to corrupt acts occurring in the U.K. committed by anyone
Similarities to the FCPA

Like the FCPA, the UK Bribery Act prohibits bribing foreign public officials, specifically:

- offering, promising, or giving
- any financial thing or other advantage
- to a foreign public official
- with the intent that the financial thing or other advantage cause the foreign public official to improperly perform his/her official duty.
Similarities to the FCPA

- Like the FCPA, the UK Bribery Act will punish a company for the acts of its third party agents, specifically third parties “associated with” or “performing services for” the company.

- Like the FCPA, there is no limit on the fines or other penalties that may be imposed for violations.
UK Bribery Act is Broader than the FCPA

- Facilitation payments:
  - The UK Bribery Act has no exception for facilitation/grease payments and the guidance issued on the Act has not indicated that prosecutors will be lenient on this aspect

- Hospitality payments:
  - Under the wording of the Act, “corporate hospitality” could be viewed to be prohibited
  - Guidance on the Act, however, indicates hospitality that is sensible, proportionate and in good faith will not be prosecuted.
    - It is unknown how this will actually be interpreted by prosecutors
UK Bribery Act is Broader than the FCPA

- **Commercial Bribery**
  - Unlike the FCPA, the UK Bribery Act prohibits bribes made to individuals of private companies, also known as commercial bribery.

- **Accepting Bribes**
  - The FCPA only criminalizes the payment of a bribe, whereas the UK Bribery Act makes it illegal to accept bribes.

- **Jurisdiction**
  - Potentially broader than the FCPA’s “domestic concern” provision.
UK Bribery Act is Broader than the FCPA

Corporate Strict Liability

- The UK Bribery Act makes companies strictly liable for failing to prevent bribery by employees
- There is an affirmative defense to this charge, which is to implement “adequate procedures” to prevent bribery
- Guidance sets out six principles for establishing “adequate procedures”:
  - Proportionate Procedures
  - Top-level Commitment
  - Risk Assessment
  - Due Diligence
  - Communication and Training
  - Monitoring and Review
AREAS OF PRACTICE

Mr. Semins advises companies with business in foreign countries on matters involving the Foreign Corrupt Practices Act (FCPA) and has conducted internal corporate investigations as well as investigations into prospective and existing foreign agents and business partners in the United States, Europe, the Middle East, North Africa, Asia, and South America. In addition to helping clients develop effective FCPA compliance programs to deter and detect potential FCPA problems, he has represented clients in FCPA matters before the Department of Justice and the Securities and Exchange Commission. His practice also involves handling complex commercial litigation, including experience with class action, products liability, antitrust, environmental, and other contract disputes, and he has appeared before the Pennsylvania Superior and Supreme Courts.

COURT ADMISSIONS

U.S. District Court for the Western District of Pennsylvania

BAR MEMBERSHIP

Pennsylvania

EDUCATION

J.D., University of Virginia School of Law, 2002
A.B., Princeton University, 1993 (cum laude)

ACHIEVEMENTS

2011 Pennsylvania Rising Star
2010 Pennsylvania Rising Star
AREAS OF PRACTICE
Svetlana Vorobyeva is an associate in the firm’s Moscow office. Ms. Vorobyeva focuses her practice on mergers and acquisitions, joint ventures, real estate matters, and labor and immigration law issues. She has also worked on a wide variety of commercial matters, advising Russian and foreign clients on various aspects of financial transactions, service agreements, and issues of application of anti-corruption rules.

Ms. Vorobyeva is a certified translator for both English and Russian.

PROFESSIONAL/CIVIC ACTIVITIES
Judge, Russian National Championship of the Philip C. Jessup International Moot Court Competition

BAR MEMBERSHIPS
Russian Federation

EDUCATION
LL.M., University of the Pacific McGeorge School of Law, 2006
LL.B., Law School of St. Petersburg State University, 2005

LANGUAGES SPOKEN
English
Russian

REPRESENTATIVE EXPERIENCE
Advised both sellers and purchasers on all aspects of domestic and cross-border acquisitions, including due diligence, drafting and negotiating share purchase agreements, and anti-monopoly clearance.

Advised clients on application of FCPA and Russian anti-corruption rules and regulations.

Advised clients on real estate transactions, including drafting and negotiating lease and sub-lease agreements, and advising clients on landlord-tenant disputes.

Established branch and representative offices for American and European companies, providing full support in the launch of their operations in Russia, including negotiations with counter-parties and governmental authorities.

Advised Russian and foreign companies on employment and immigration law issues for both foreign and Russian employees.

Assisted a leading international hotel group with regard to a franchise for a five-star hotel in Moscow. Represented a major airline company on various matters regarding customs clearance in Russia, advising on various issues before the Russian Federal Air Transportation Authority (Rosaviatsia).
FCPA and Anti-Corruption in Russia and the Commonwealth of Independent States

Ihor Mehednyuk
Salans
Tel: + 380 44 494 47 74
Mobile: +380 67 300 35 79
Fax: + 380 44 494 19 91
Email: imehednyuk@salans.com

49-A, Volodymyrska Street, 2nd floor
01034 Kiev
Ukraine
www.salans.com
Ukrainian Anti-Corruption Legislative Framework

- Criminal Code of Ukraine (the “Criminal Code”)
- Law of Ukraine “On the Civil Service”
- Anticorruption Laws
- Implementing rules
- ETS 174 – Civil Law Convention on Corruption of 04 November 1999, ratified by Ukraine on 16 March 2005 and effective as of 01 January 2006
- UN Convention Against Corruption
- Criminal Law Convention on Corruption, dated 27 January 1999, signed by Ukraine on the same date, and ratified by Ukraine on 18 October 2006
- Additional Protocol to the Criminal Law Convention on Corruption, dated 15 May 2003, signed by Ukraine on the same date, and ratified by Ukraine on 18 October 2006
Criminal Code – Cont’d

- **commercial bribery** (as stipulated by Article 235⁴ of the Criminal Code) – offering, giving or transferring an unlawful benefit to an officer of a private legal entity for performance or non-performance of actions with the use of his/her official powers in the interests of the giver or a third party.

- **bribing a person who renders public services** (Article 235⁵) – offering, giving, transferring an unlawful benefit to an auditor, notary, expert, valuator, arbitrator or other person rendering public services, as well as an independent agent or member of a labor arbitration panel, for performance or non-performance of actions with the use of their official powers in the interests of the giver or a third party.

- **illicit enrichment** (Article 368¹) – accepting by public officials of illegal benefits or transferring same to close relatives.

- **offering or giving a bribe** (Article 369) – bribing public officials for the purpose of satisfying personal interests or interests of third parties.
Corruption Offences Cont’d.

- **acceptance of a bribe** (article 368) – receipt by an official in any form of a bribe for performance or non-performance in the interests of the bribe-giver or a third party of any type of action with the use of his/her official powers or service position.

- **abuse of power or service position** (article 364) - deliberate and corrupt use by an official of his/her official powers or service position contrary to official interests, if it caused considerable damage to legitimate rights, freedoms and interests of particular citizens or state/public interests or interests of legal entities, or inflicted severe consequences.

- **excess of power or office** (article 365) - deliberate performance by an official of actions, which are obviously beyond the scope of his/her official powers, if it caused considerable damages or inflicted severe consequences.
Corruption Offences Cont’d.

- **interference with activities of judicial authorities** (article 376) – interference in any form with activities of a judge with a view to obstructing to performance of his/her official duties or pursuing delivery of an unjust judgment.

- **legalization (laundering) of proceeds from crime** (article 209) – performance of financial transactions and other deals involving money or other property obtained from crime, as well as concealing or disguising the illegitimate origin of such money/other property, rights to them, sources of their origin, location, and, correspondingly, use of such money/other property.

A bribe is construed as illegal remuneration of material value, i.e., the bribe can be solely of a material nature. The bribe may include property (money, articles of value and other things), a right to property, any actions of a proprietary nature (assignment of proprietary benefits or waiver of same, supply of services or works free of charge etc.)

Services, benefits and preferences that have no material value (giving a prestigious job, intimacy etc.) may not be regarded as a bribe for Criminal Code purposes.
Penalties under the Criminal Code

- Although the corruption offences, for which legal entities are to be liable are stipulated by the articles of the Criminal Code, this does not mean they will be subject to criminal liability *per se*.

- Criminal liability and punishment in Ukraine generally applies only to individuals, not to legal entities.

- Criminal liability for violations of anti-corruption legislation will involve:
  1. fine, or
  2. imprisonment for up to 12 years; and
  3. a ban on engaging in the specific activity; and/or
  4. confiscation of property (i.e., the property that is the subject matter of the crime, i.e., the actual bribe)
Corruption Laws


- As a result of repealing the ‘anti-corruption package’, Ukrainian law “On Combating Corruption” of 1995 (the “Corruption Law”), which was to lose its effect on 1 January 2011, is believed to be still effective.

- Draft Law on Fundamental Principles for Preventing and Counteracting Corruption as a contemplated replacement for the invalidated ‘‘anti-corruption package’ of laws was passed by the Ukrainian Parliament 7 April 2011, but has not yet been signed by the Ukrainian President into law.
Corruption Laws

- Definition of “corruption” in the Corruption Law:

  1. Illegal receipt by a person, who is authorized to perform State functions, in connection with performing such State functions, of benefits of value, services, privileges or other preferences, including the receipt or acceptance of things (services) at the price (rate) that is significantly lower than their actual cost; and

  2. Illegal receipt by a person, who is authorized to perform State functions, of credits or loans, acquisition of securities, real estate or other property, using for this privileges or preferences not contemplated by applicable law currently in force.

- Gifts received under circumstances specified in point (1) above are prohibited and confiscated.
Corruption Laws

- **Reach of the Corruption Law**
  
  The following categories of Ukrainian civil servants and government officers are subject to the Corruption Law:
  
  - Civil servants
  - Prime Minister, First Prime Minister and Vice Prime Minister of Ukraine
  - Parliament members, members of local legislatures (Radas)
  - Officers of local self-government
  - Military officers

- **Penalties under the Corruption Law**
  
  Violations of the Corruption Law entail administrative sanctions in the form of fines
Enforcement

There is NO single anti-corruption combat agency in Ukraine

Enforcement agencies in charge of combating against corruption and bribery are:

- General Prosecutor’s Office
- Ministry of Internal Affairs
- Security Service
- Military enforcement units
- Other agencies specified by Ukrainian law
Enforcement

- In 2010 more than 2,914 bribery-related offenses were committed in Ukraine versus 2,764 in 2009, which is 5.4% higher than in 2009, including 2,501 offenses involving receipt of bribes and 412 offenses involving giving of bribes.

According to the information disclosed by the Ukrainian Ministry of Internal Affairs:

The amount of bribes received in 2010 amounts to UAH 12.62 million (appr. USD 1,575,000 at current USD/UAH exchange rates).

The amount of an average bribe in 2010 is equal to UAH 177,000 (appr. USD 22,125 at current USD/UAH exchange rates).

The largest bribe in 2011 amounted to UAH 8 million (appr. USD 100,000 current USD/UAH exchange rates).
Mr. Mehedynyuk advises Ukrainian and foreign clients on various matters of Ukrainian securities law, M&A and cross-border transaction structuring, anti-corruption law and compliance, land and real estate law, corporate law, secured transactions, tax law and tax structuring, employment law etc., as well as on matters of Ukrainian law governing specific Ukrainian industries and sectors, including, *inter alia*, oil & gas, mining of mineral resources, telecommunications, TV and radio broadcasting, agriculture, and industrial construction. He has worked with various Ukrainian Government Agencies, including, *inter alia*, the Ministry of Finance, Ministry of Transport, State Property Fund, Securities Commission and Antimonopoly Committee.

Mr. Mehedynyuk holds a degree in law from the University of Georgia School of Law (LLM, 1999), USA, and a law degree from the law department of the Precarpathian University, Ukraine.
FCPA and Anti-Corruption in Russia and the Commonwealth of Independent States: Identifying & Managing Corruption Risk
Identifying Corruption Risk
Identifying Corruption Risk

- A “red flag” is a fact or circumstance that the U.S. enforcement agencies might consider sufficient to put a company on notice of a likelihood that bribery or corruption may occur in connection with a potential transaction.

- The presence of a “red flag” does not necessarily mean that a transaction is unlawful, but it effectively imposes a duty to conduct additional diligence and/or implement more stringent controls.
Identifying Corruption “Red Flags”

“Red Flags” are risk factors that should not be ignored when choosing to proceed with a business relationship, including for example:

- A history of corruption in the country
- A pattern of corruption in an industry
- Requests by the business partner for unusual financial arrangements (e.g., offshore payments, advance payments, third-party payments, cash payments)
- Unusually high or commercially unreasonable commissions in relation to services to be performed
- Lack of transparency in expenses and accounting records
- Any family or business relationships between a business partner and government officials
- Recommendation by a government official or government-owned or controlled entity to enter into the business relationship
- Apparent lack of qualifications on the part of the business partner
- Any misrepresentations by the business partner in connection with a proposed transaction
- Any pattern of or reputation for corrupt, illegal, improper, or unethical conduct
- Refusal (or even reluctance) by a prospective business partner to cooperate with requests for information
- Refusal by a prospective business partner to provide compliance certification
Corruption Red Flags in CIS Countries

- Because knowledge of corruption climate in CIS is so well-known and tales of endemic corruption are widespread, you may be deemed to be on notice of “red flag” before you even enter the market.

- The primary risk in CIS countries involves reliance on and use of third parties, including agents, intermediaries, resellers, distributors, and joint venture partners.
  - This underscores the need for heightened scrutiny of business partners in the region.

- Don’t be surprised by a lack of transparency
  - This can make the due diligence harder than in other places, but not impossible.
Corruption Red Flags in CIS Countries

- Lack of transparency is a “red flag”
- Examples of non-transparent practices include:
  - Complicated ownership arrangements
    - know who your business partner really is
  - Use of or affiliations with shell companies
  - Use of offshore holding companies
  - Use of offshore bank accounts
  - Use of fake invoices and stamps
  - Use of sham counterparties to create unrecorded cash (obnalichka/obnalichvanie)
    - Illegal under Russian law
    - Not often (or selectively) enforced
    - Difficult (but not impossible) to detect in audit
    - Often used for tax avoidance and money laundering…
    - …but may also be used to pay bribes.
Corruption Red Flags in CIS Countries

- These non-transparent practices make it difficult to “follow the money.”

- None of these practices is an FCPA/UK Bribery Act violation (though they may violate other laws), but they are “red flags” that should be investigated further and managed to reduce risk.
Identifying Corruption Risk

Starts with a Robust Compliance Program

- A clearly defined corporate policy, backed by commitment from senior management
- Dissemination of policy to all employees
- Periodic training and emphasis on the requirements of the policy, identifying red flags, and associated controls and procedures, including internal reporting
- Periodic compliance certifications from relevant personnel
- Periodic audit testing, particularly in high-risk areas and new acquisitions
Identifying Corruption Risk

Why is this necessary?

- No statutory requirement for compliance program

- **BUT**, corporate liability often turns on extent to which company had procedures in place to prevent violations or simply ignored “red flags.”

- Under the U.K. Bribery Act, companies are strictly liable for “failing to prevent bribery” unless they can show “adequate procedures” to detect and prevent bribery.
Identifying Corruption Risks

- Policy should require **commercially reasonable due diligence** regarding prospective foreign business partners.
  - Investigate business reputation and integrity
  - Failure to conduct adequate due diligence will likely cause the government to take the position that the “knowledge” element has been satisfied if a problem later arises—
    - Conscious disregard, willful blindness and deliberate ignorance
  - By contrast, commercially reasonable diligence can mitigate the “knowledge” element.
Commercially Reasonable Due Diligence

What Should Due Diligence Include?
Due diligence should include the following general assessment—

- What is the competence, expertise, and reputation of the foreign business partner?
- Are there any relationships between foreign business partner and government officials?
- Is the compensation reasonable – e.g., is it commercially justified, consistent with market for similar services?
  - Carefully scrutinize “success fees” or other payments
- Is the proposed relationship legal and enforceable under local law?
- Apply a common sense “smell test”
Commercially Reasonable Due Diligence

What Should Due Diligence Include?

One size does NOT fit all!!

- No statutory requirement
  - But see Baker Hughes
- Case-by-case
- Phased-approach

  Preliminary risk assessment based on such factors as jurisdiction, high-value transactions, and involvement of government entities as customers or regulators.
Commercially Reasonable Due Diligence

What Should Due Diligence Include?

- Due diligence CAN include any combination of the following activities, escalating as necessary to address specific red flags:
  - Initial “desktop” due diligence (in English and Russian)
  - Written questionnaire
  - Third-party investigative agency report
  - International Company Profile from U.S. Commercial Service
Commercially Reasonable Due Diligence

What Should Due Diligence Include? (Cont’d)

- Bank account information, including declarations and signatories
- Corporate registration and related permits, licenses, etc.
- Proof of ownership – share certificates, share registration
- In-person interviews (the greater the risk, the greater the benefit of independent review)
- Request recent annual reports, audit reports
- Request audit
- Conduct discrete preliminary audit of bank statements, expenses, and sample transactions
- Perform full audit of books and records
- Seek local counsel opinion where necessary regarding legality of proposed relationship
Commercially Reasonable Due Diligence

What Should Due Diligence Include?

- Due Diligence Summary Report
  - Diaries and other records of your due diligence activities
- Who performs the work?
  - In house
  - Outside counsel
  - Other third parties
- Where risks are higher, an independent assessment has greater value
Managing Corruption Risk
Managing Corruption Risk: “Red Flags” are not violations

- Notice of a potential issue requiring follow-up
- Eliminate, or mitigate and manage to reduce risk
- Remediate or otherwise address
- Intelligent, risk-based assessment
- Business decision
- What is your risk tolerance?
Managing Corruption Risk

If no evidence of a violation, risk can usually be managed:

- Narrowly defined performance obligations
- Restrictions on assignment rights or ability to delegate duties to third parties
- Audit rights
- Cash controls
- Anti-corruption compliance representations and warranties – including termination rights for breach
- Anti-corruption compliance certifications
- Require itemized invoices
Managing Corruption Risk

- Monitor invoices
  - Review expenses and commission payments
  - Ask questions about service or handling charges
- Training programs for foreign business partners
  - Require certificate of completion as written record of training
- Require that business partners seek approval for any gifts, meals, or entertainment associated with business development activities and/or involving government officials
- Require that business partners seek approval before making campaign contributions or other donations to government officials, governments, or their charities
- Require business partners to open a dedicated account with trusted international bank with branch in CIS
Managing Corruption Risk

- Perform periodic and/or remedial risk assessments
  - Who? Internal compliance personnel, auditors, outside counsel, compliance experts
  - How? Scope and work plan will vary based on need
    - Target known problem areas – hit the likely suspects first
    - Review policies, procedures, and communications regarding same
    - Targeted interviews with key personnel internally and with business partner
    - Transaction sampling
Managing Corruption Risk: Joint Ventures

- Different risks from those presented by agents and other intermediaries
- Minority or majority partner?
- Scope of foreign partner’s obligations?
  - Who controls the joint venture?
  - Per se control and liability
  - Parent liability for JV even without control
  - Jurisdiction over JV independent from parent
  - Difficulty of minority partner status
Managing Corruption Risk: Cross-Border M&A

- Pre-acquisition due diligence a critical factor in DOJ charging decisions related to merger activity
- U.S. enforcement authorities expect maximum possible pre-acquisition diligence
  - Demonstrate intelligent, risk-based efforts to detect and resolve corruption
- See OPR 08-02 and Johnson & Johnson DPA for guidance on post-close diligence and integration
- SEC and DOJ will expect post-close organization to be in full compliance with FCPA regardless of prior state of compliance
- Regulators view FCPA transactional due diligence as good for business
  - Real, tangible benefit to compliance, self-disclosure and cooperation
Managing Corruption Risk: Cross-Border M&A

- Acquirer and target should consider the effect FCPA scrutiny will have on respective businesses
- Business risk of bringing target into compliance
- Develop a plan and tailor due diligence to transaction-specific risks
  - Who will lead—buyer or seller?
  - Standards for voluntary disclosure, if any?
  - Negotiation regarding existing anti-corruption investigations, if any
  - Issues uncovered by diligence and MAC clauses
  - Completion before signing?
  - Work plan outlining scope and liability for post-sign/pre-close diligence
  - Consider how to document and protect findings
- Employ certain baseline best practices to meet regulators’ expectations
Managing Corruption Risk: Cross-Border M&A

Due diligence is essentially the same as with other business partners

- Identify potential FCPA risk—
  - Line of business/Industry, countries of operation, government customers/contacts
  - Risk of improper payments, kickbacks, side agreements, etc.

- Assess controls environment—
  - Employee training
  - Audit environment
  - Practices, policies and procedures regarding entertainment of, gifts to, and travel for government officials
  - Facilitation payments
  - Process for retention and use of third-party intermediaries

- Vet third-party intermediaries—
  - Review contracts
  - Analyze payments

- Analyze books and records—
  - Fair and accurate representation of expenditures and transactions
  - No materiality lens
Questions?
AREAS OF PRACTICE

Mr. Semins advises companies with business in foreign countries on matters involving the Foreign Corrupt Practices Act (FCPA) and has conducted internal corporate investigations as well as investigations into prospective and existing foreign agents and business partners in the United States, Europe, the Middle East, North Africa, Asia, and South America. In addition to helping clients develop effective FCPA compliance programs to deter and detect potential FCPA problems, he has represented clients in FCPA matters before the Department of Justice and the Securities and Exchange Commission. His practice also involves handling complex commercial litigation, including experience with class action, products liability, antitrust, environmental, and other contract disputes, and he has appeared before the Pennsylvania Superior and Supreme Courts.

COURT ADMISSIONS

U.S. District Court for the Western District of Pennsylvania

BAR MEMBERSHIP

Pennsylvania

EDUCATION

J.D., University of Virginia School of Law, 2002
A.B., Princeton University, 1993 (cum laude)

ACHIEVEMENTS

2011 Pennsylvania Rising Star
2010 Pennsylvania Rising Star