

**Strafford**

*presents*

# **Foreign Corrupt Practices Act in Africa**

## **Compliance Strategies Given the Sub-Saharan Region's Unique Cultural and Governmental Intricacies**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Thomas R. L. Best, Attorney, **Steptoe & Johnson**, Washington, D.C.  
Herbert A. Igbunugo, Shareholder, **Igbunugo Partners Int'l Law Firm**, Minneapolis  
Obiamaka P. Madubuko, Partner, **McDermott Will & Emery**, New York

**Thursday, October 7, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

You can access the audio portion of the conference on the telephone or by using your computer's speakers.  
Please refer to the dial in/ log in instructions emailed to registrants.

For CLE purposes, please let us know how many people are listening at your location by

- closing the notification box
- and typing in the chat box your company name and the number of attendees.
- Then click the blue icon beside the box to send.

For live event only.

- If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.
- If the sound quality is not satisfactory and you are listening via your computer speakers, please dial **1-866-871-8924** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.
- If you dialed in and have any difficulties during the call, press **\*0** for assistance.



# FCPA and Anti-Corruption Law Risks in Sub-Saharan Africa

Tom Best  
202.429.8079  
tbest@step toe.com  
Step toe & Johnson LLP  
Washington, DC

Strafford Publishing Webinar  
October 7, 2010



STEP TOE & JOHNSON LLP

# Presentation Overview

- FCPA overview
  - Basics
  - Recent trends
- Doing business in Sub-Saharan Africa (“SSA”)
  - SSA’s economic importance to the US
  - FCPA/anti-corruption law risks pervasive
  - Heightened enforcement environment (US, UK, other countries)
- Does SSA pose unique challenges for FCPA/anti-corruption compliance?

# FCPA Overview

- Two sets of provisions:
  - Anti-bribery provisions
  - Accounting requirements
    - Recordkeeping
    - Internal controls
- Application
  - Anti-bribery provisions apply to covered persons
  - Accounting requirements apply to all issuers of U.S. publicly-traded securities, wherever based

# FCPA Overview: Key Features

- Criminal statute
- Focus on public sector (official) corruption, broadly defined
  - Public bodies and international organizations
  - Other laws addressing private sector corruption
- Corporate vicarious liability for acts of employees and, in some circumstances, acts of third parties
- Individual as well as corporate liability
  - Non-reimbursability of individual fines
- Other countries increasing enforcement of their own transnational corruption statutes

# FCPA Overview: Anti-Bribery Provisions

- What does the law prohibit?
  - Offer, promise, authorization, or other act in furtherance of
  - Payment of anything of value
  - Directly or indirectly
  - To “foreign official” or other covered person
  - To secure action, inaction, influence, or advantage
  - To obtain or retain “business”

# FCPA Overview: Anti-Bribery Provisions (continued)

- Prohibits *quid pro quo* arrangements
  - Anything of value
  - Intended to induce official action, including
    - a decision or action
    - influence over decision (“trafficking”)
    - an advantage
- More than just payments of money
  - Offers, promises, authorizations, other acts in furtherance
  - In-kind benefits (gifts, entertainment, sponsorship, etc.)
- More than just successful bribes
  - Failure to receive benefit or advantage not a defense
  - “Everyone does it” not a defense
- “Business” includes any tangible benefit (not just contract)

# FCPA Overview: Anti-Bribery Provisions (continued)

- “Foreign Officials” very broadly defined:
  - Anyone acting in official capacity for a public body
    - State-owned or controlled enterprises (e.g., NOCs, JVs with SOEs)
    - Customs and immigration services
    - Regulatory authorities
    - Security officials (police and military)
    - Judges and legislators
    - Public international organization officials
- Also prohibits bribes to foreign political parties, party officials, or candidates for public office

# FCPA Overview: Accounting Requirements

- **Two Requirements:**
  - Keep accurate books and records
    - Amount
    - Character/purpose
  - Maintaining systems of internal accounting controls
    - Procedures
    - Proper authorizations
    - Audit trails
- **Requirements apply to**
  - All financial transactions (including legitimate payments)
  - All subsidiaries and controlled affiliates
    - Parent responsible for subsidiaries' accounting practices and controls, including foreign subsidiaries
- **Effective strict liability of parent**

# FCPA Overview: Who is Covered?

- **Companies**
  - “Issuers” of publicly traded securities and their foreign subsidiaries
  - Any U.S.-incorporated company
  - Foreign companies (non-issuers) whose acts linked to the U.S.
- **Officers, directors, employees, agents and shareholders of covered companies, U.S. or foreign**
- **U.S. citizens and residents**
  - Whether or not working for a covered company
  - Even when acting abroad, without any links to the U.S.
- **Foreign citizens and residents**
  - Acting while physically present in the U.S. territory or
  - Acting for a U.S. company or individual, with a link to the United States
    - Minimal connections to U.S. territory can provide jurisdiction
    - Transactions in dollars between foreign accounts that clear through the United States may be sufficient

# Penalties for FCPA Violations

- Companies
  - Criminal penalties
    - Multi-million dollar fines, which can be increased based on profits earned or losses incurred by another party
    - Compliance monitors
  - Civil fines
    - Can include disgorgement of profits, also leading to multi-million dollar fines
    - Cease-and-desist orders and injunctions
- Individuals
  - Criminal penalties (non-reimbursable)
    - Anti-bribery – up to \$250,000, imprisonment, or both
    - Accounting – up to \$5 million, imprisonment, or both
  - Civil fines of up to \$100,000 and disgorgement

# Recent Enforcement Trends: Broadening Enforcement Focus *Post-Kay*

- Over 130 pending investigations:
  - More activity in last 5 years than in prior 25
- FCPA enforcement now a priority for U.S. regulators
  - DOJ: dedicated FBI agents, increased attorney resources
  - SEC: FCPA enforcement unit formed January 2010
- FCPA risk no longer confined to “grand” corruption (large-scale sales and marketing)
  - *U.S. v. Siemens AG; Halliburton/KBR; United States v. ABB Vetco Gray*
- Increased focus on petty corruption (operations):
  - *U.S. v. Vetco Gray Controls Inc. et al.*; Panalpina World Transport, Ltd. and related investigations (DOJ and SEC; pending)
  - Tax officials: Halliburton/TKSJ; Bristow Group, Inc.

# Recent Enforcement Trends: Dramatically Increasing Penalties

- ABB/Vetco Gray (2004): \$16.4 million
- Titan (2005): \$28.5 million
- Vetco Gray (2007): \$26 million
- Baker Hughes (2007): \$44.1 million
- Willbros (2008): \$32.3 million
- Siemens (2008): **~\$1.7 billion total (and counting)**
- Halliburton/KBR Inc. (2009): **\$579 million total (and counting)**
- Daimler (2010): \$185 million
- Snamprogetti/ENI (2010): \$365 million
- Technip (2010): \$338 million

# Recent Enforcement Trends: Individuals (U.S. and Non-U.S.)

- ***U.S. v. Albert “Jack” Stanley (2008)***
  - Former CEO of KBR Inc.
  - Guilty plea agreement: **7 years prison; \$10.8 million restitution**
- ***U.S. v. Samson, Munro, Campbell, Whelan (2006)***
  - Three U.K. citizens and U.S. citizen agreed to civil injunction in connection with bribes paid to Nigerian state-owned oil concerns
- ***U.S. v. Brown; SEC v. Brown; United States v. Steph (2006 and 2007)***
  - Guilty plea by former Managing Director of Willbros’ Nigerian subsidiary and 2007 indictment of another former Willbros employee; case arises from bribes to officials of state-owned oil concerns in Nigeria and Ecuador

# Recent Enforcement Trends: Individuals (U.S. and Non-U.S.) (continued)

- ***U.S. v. Frederic Bourke (2009)***
  - Investor in scheme to gain control of SOCAR (Azeri NOC)
  - **Level of knowledge = “willful blindness”**: Bourke did not pay any bribe himself; he did not know that Kozeny paid bribes;
  - Knowledge that Kozeny was likely to pay bribes deemed sufficient as a matter of law to support conviction
- ***SEC v. Nature’s Sunshine (2009)***
  - SEC settlement for FCPA violations in Brazil: \$600,000 civil penalty
  - CFO and former CEO held personally liable (\$25,000) civil penalty as “control persons”
- ***Numerous others in 2010***
  - Control Components Inc. former management

# Recent Enforcement Trends: Narrowing Scope of Exceptions and Defenses

- DOJ/SEC trying to narrow safe harbors
  - “Facilitating payments” exception:
    - Allows modest payment to an official to secure/expedite “routine governmental action”
    - Action sought must be common and lawful for official to do
    - Payments cannot influence official to misapply the law
    - Payments must be properly booked
  - FCPA does not refer to amounts; DOJ/SEC routinely assert only small amounts qualify for the exception
- Local law and third country legal issues

## Recent Enforcement Trends: Narrowing Scope of Exceptions and Defenses (continued)

- Payments legal under the *written laws* of the host country
  - Custom and practice are not sufficient
- Narrowly construed by courts - *United States v. Kozeny, et. al.*, No. 05-518 (S.D.N.Y. filed Oct. 21, 2008)
- Certain sponsorship and hosting payments
  - For product demonstration or contract execution/performance
  - Payments must be bona fide, reasonable in amount, and directly related to a permitted purpose

# Recent Enforcement Trends: Increased International Cooperation and Enforcement

- European countries (especially Germany, UK) increasingly active
- Less than a decade ago:
  - No foreign corruption offences
  - Bribes were tax deductible in France and Germany
  - UK corruption legislation over 100 years old; no prosecutions
  - European multinationals regarded lax regulation of their foreign activities as an important competitive advantage
  - Bank secrecy often an impediment to evidence gathering
- Now: German and UK enforcement clearly on the rise
- UK Bribery Act 2010 to be implemented in April 2011

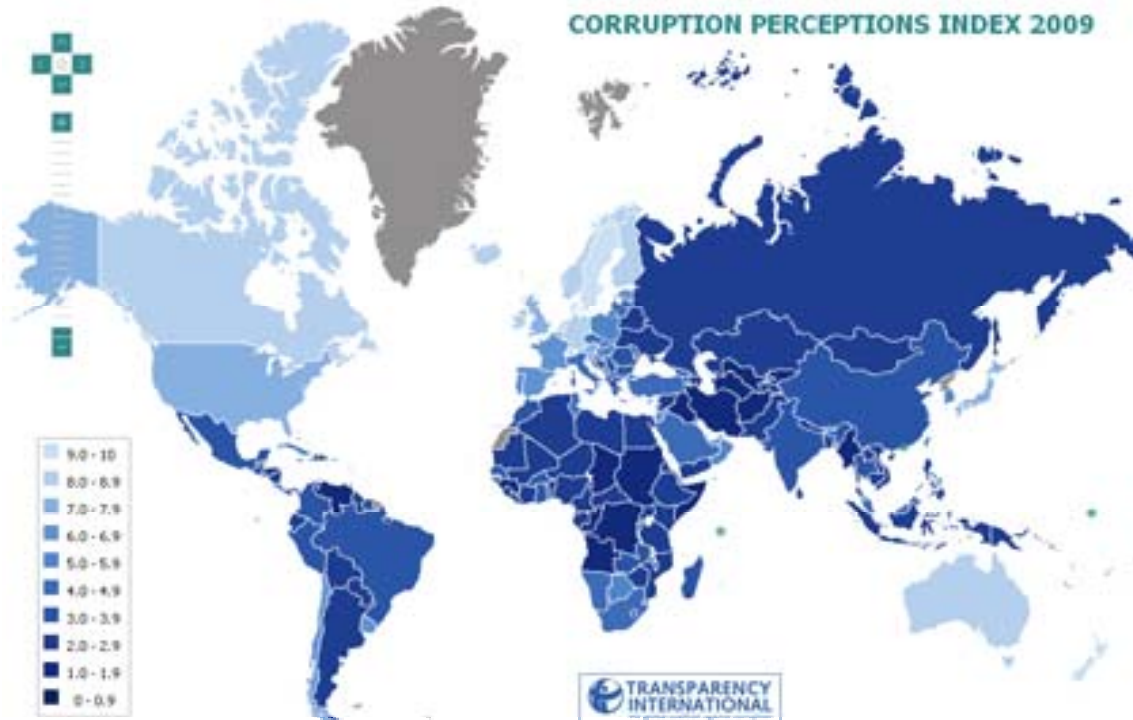
# **FCPA/Anti-Corruption Law Risks of Doing Business in SSA**

# Economic Importance of SSA

- Increasingly important oil and gas exporters to U.S.
  - Nigeria, Angola = ~15% of 2009 U.S. crude imports
  - All-Africa = ~20% of U.S. crude imports
  - Trend continuing: Ghana to come “on-stream” in near future
- Acute FCPA and other risks:
  - Numerous DOJ and SEC enforcement actions; ~15 investigations pending in Nigeria alone
  - Serious security issues, esp. in Niger Delta region

# Transparency International CPI

## Transparency International 2009 Corruption Perceptions Index



- Nigeria = T-130<sup>th</sup>  
(Mozambique, Uganda)
- Cameroon = T-146<sup>th</sup>
- Ivory Coast = T-154<sup>th</sup>
- Angola, Congo-Brazzaville, DRC, Guinea-Bissau = T-162<sup>nd</sup>
- Equatorial Guinea, Guinea = T-168<sup>th</sup>

# “Petty” vs. “Grand” Corruption

- “Grand”
  - Traditional “bribery”; typically focused on executive behavior
  - Most understand actions not lawful
- “Petty”
  - Smaller amounts, typically associated with operations (freight forwarding/customs)
- Each poses different management/compliance challenge

# FCPA Risks Are Pervasive

Settled and pending FCPA cases demonstrate corruption risks not confined to sales and marketing function:

- Sales and marketing (esp. to NNPC/NAPIMS):
  - *In re Paradigm B.V., Siemens AG, United States v. ABB Vetco Gray, Halliburton/TKSJ*
- Nigerian Customs Service officials:
  - *U.S. v. Vetco Gray Controls Inc. et al.*; Panalpina and ~15 pending investigations
- Tax officials:
  - Bristow Group, Inc.

# Anti-Corruption Risks Pervasive (cont.)

- Nigeria enforcement actions resulting from pre-merger due diligence:
  - *United States v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK, Ltd.*
  - Opinion Procedure Release 04-02 (July 12, 2004)
- DOJ Opinion Procedure Release 98-01 (February 23, 1998) is the only FCPA Opinion Procedure Release to threaten prosecution if the proposed transaction takes place

# Key Anti-Corruption Risks in SSA

- “Grand” and “Petty” corruption risks:
  - Opaque business practices, bureaucracy
  - Culture of gifts and “gratifications”
  - Heavy state involvement in the economy
  - Security can be a serious issue
  - Third party relationships, joint venture partners widespread:
    - Can be required by local content, other rules
- FCPA/anti-corruption law due diligence strategies essential

# Key Anti-Corruption Risks in SSA (cont'd)

- In many industries, a very difficult operating environment:
  - Information technology systems can be primitive, may limit the availability of relevant electronic documents that can be captured
  - Paper records kept in-country are often incomplete, poorly kept
  - Local cultural sensitivities and politics, especially with JV partners, can create difficulties for management and counsel

## Key Anti-Corruption Risks in SSA (cont'd)

- Low-level permissible FCPA “facilitating” payments can give rise to demands for larger payments over time, or extortion
- Extortion and duress defenses very narrow – although a payment made in genuine fear of immediate safety could be excused (*see Chiquita Brands International, Inc.* plea agreement, March 6, 2007)

## Additional Challenges (cont.)

- Nigeria: Civil servants (esp. NNPC/NAPIMS officials) consider themselves entitled to “estacode” payments, in addition to reasonable expenses, when traveling abroad

# Intersection of the FCPA and Local Anti-Bribery Laws in Sub-Saharan Africa

Herbert A. Igbanugo  
Igbanugo Partners Int'l Law Firm, PLLC  
612.746.0361  
higbanugo@igbanugolaw.com

# Congruency of the Laws and Enforcement of Local Anti- Corruption Laws

# Country: Kenya

- ❑ **Statutes:** Anti-Corruption and Economic Crimes Act 2003, Public Officers Ethics Act 2003, Proceeds of Crime and Money Laundering Bill, Finance Act 2006, Service Commissions Act, Public Procurement and Disposal Act 2005
- ❑ **Agencies:** Kenya Anti-Corruption Commission (KACC), Controller and Auditor General of the Kenya National Audit Office, Public Complaints Standing Committee, Public Procurement Oversight Authority

# Country: Nigeria

- ❑ **Statutes:** Corrupt Practices and Other Related Offenses Act 2000, Money Laundering (Prohibition) Act 2004, Advance Fee Fraud and other Fraud Related Offenses Act 2006, Fiscal Responsibility Act 2007, Public Procurement Act 2007, Nigerian Extractive Industries Transparency Initiative Bill 2007, Nigerian Code of Corporate Governance
- ❑ **Agencies:** Independent Corrupt Practices and Other Related Offenses Commission, Economic and Financial Crimes Commission, Code of Conduct Bureau, Public Complaints Commission, Supreme Audit Institution, Office of the Principal Secretary to the President, Bureau of Public Procurement, Budget Monitoring and Price Intelligence Unit, Corporate Affairs Commission, Securities and Exchange Commission

# Country: South Africa

- ❑ **Statutes:** Prevention and Combating of Corruption Act 2004, Public Finance Management Act of 1999, Promotion of Access to Information Act 2000, Code of Conduct for Assembly and Permanent Council Members, Framework for Supply Chain Management
- ❑ **Agencies:** Special Investigating Unit (SIU), the Auditor-General, the Public Protector (Ombudsman), the Public Service Commission, the South African Police Service (SAPS), and the National Prosecuting Authority (NPA), South African revenue Service, International Complaints Directorate, the Scorpions (dissolved)

# Country: Ghana

- ❑ **Statutes:** Criminal Code, Anti-Money Laundering Act 2008, Public Procurement Act 2003
- ❑ **Agencies:** Commission on Human Rights and Administrative Justice (CHRAJ), Serious Fraud Office, Economic and Organized Crime Office, The Office of Accountability, Ghana Audit Service, Public Procurement Authority

# FCPA Affirmative Defense

- Affirmative defense exists under anti-bribery provisions for payments or offers that are lawful under the written laws and regulations of the country of the foreign official, political party, party official, or candidate. 15 U.S.C. 78dd-1(c)(1), -2(c)(1), -3 (c) (1).
- It is a rare situation where government would, as an official matter, permit payments or offers to violate a lawful duty.

# FCPA Affirmative Defense

- Recognized customs and patters within a particular country cannot form the basis of an affirmative defense.
- Sole basis is whether the practice is permitted under the written laws of the jurisdiction.
- “Everyone does it” is not a defense.
- Need to exercise special care to ensure that the payments are clearly permitted by written laws of the particular country.

# Gift Giving

## KENYA

### Public Officers Ethics Act: Section 11(3)

- Public officer may accept a gift given to him in his official capacity but, unless the gift is a non-monetary gift that does not exceed value prescribed by regulation, such gift shall be deemed to be a gift to the public officer's organization.

# Gift Giving

## KENYA

### Public Officers Ethics Act: Section 11(2)

- Public officer shall not accept or request gifts or favors from a person who:
  - ✓ Has an interest that may be affected by the performance or non-performance of the public officer's duties.
  - ✓ Performs regulated activities with respect to which the public officer's organization has a role.
  - ✓ Has a contractual or similar relationship with the public officer's organization.
- NOTE: Public officer may accept a gift from a relative/friend given on a special occasion recognized by custom.

# Gift Giving

## NIGERIA

### Code of Conduct Bureau and Tribunal Act

- Public officer shall not ask for or accept property or benefits for himself or any other other person on account of anything done or not done by him in discharge of his duties.
- Public officer shall only accept personal gifts or benefits from relatives or personal friends to such extent and on occasions recognized by custom.

# Gift Giving

## NIGERIA

### Criminal Code Act

- A person is guilty of the felony of official corruption and is liable to 7-year imprisonment if he corruptly:
  - asks for, receives or obtains property for himself or for any other person, or
  - agrees or attempts to receive or obtain any property or benefit for himself or any other person, on account of:
    - Anything already done or omitted, or any favor or disfavor already shown to any person, by a public official in the discharge of his official duties; or
    - Anything to be afterwards done or omitted, or any favor or disfavor to be afterwards shown to any person, by a public official in the discharge of his official duties.

# Gift Giving

## SOUTH AFRICA

### Prevention and Combating of Corrupt Activities Act 12 (“Corruption Act”)

- Prohibits the giving or acceptance of any “gratification” that is given or accepted in order to act or to influence a person to act in a manner that:
  - Amounts to illegal, dishonest, unauthorized, or biased performance of duty
  - Amounts to misuse or selling of information obtained in the course of performance of duty
  - Amounts to abuse of position, breach of trust, or violation of duty or rules
  - Is designed to achieve unjustified result
  - Amounts to unauthorized or improper inducement to do anything or not to do anything

# Gift Giving

## SOUTH AFRICA

### Corruption Act

- Applies equally to persons in public and private sectors.
- Does not distinguish between different types of gratification.
- Defines “gratification” broadly to include any money, donation, gift, reward, property or valuable consideration of any kind.
- Makes it a criminal offence to offer, give or accept, or agree to offer, give or accept, gratification.

# Gift Giving

## GHANA

### Public Procurement Act

- Makes it an offense to directly or indirectly attempt to influence a procurement process to obtain unfair advantage in a procurement award.
- Procurement entity must reject a tender, proposal or quotation if the supplier, contractor or consultant gives or agrees to give directly or indirectly to any current or former public official, gratuity, employment, a thing of service or value as an inducement

# Gift Giving

## GHANA

### Commission of Human Rights Administrative Justice (CHRAJA): Guidelines

- Public official shall not:

Solicit gifts directly or indirectly from persons with whom he comes into contact in relation to official duties.

Accept gifts that may or appear to have the potential to influence the exercise of his official functions and proper discharge of duties or judgment, indirectly from a person with whom he comes into contact in relation to official duties.

Accept cash of any amount.

# Lessons Learned from Recent Enforcement Action

# General Tips

- Pay foreign national employees by U.S. wage standards to help diminish the incentive to engage in corrupt practices.
- Do not tie U.S. expatriates' financial incentives and bonuses to striking business deals.
- Be alert to “usual suspects” of fraudulent schemes that prevail in SSA.

# Avoid “Usual Suspects”

- No “greasing the wheels” payments.
- No payment to shell companies.
- No charitable contributions that may benefit a government official.
- No payments to relatives, friends and acquaintances of foreign officials.
- No payments that exceed the stated or normal rate for similar goods or services.

# Company Policies

- Set clear guidelines on what persons should do if they suspect an FCPA violation has occurred. E.g. hotlines and other anonymous reporting systems.
- Give policy real “teeth” by taking consistent, disciplinary action against violators.
- Communicate company’s anti-corruptions policies clearly and in local language.

# Cultural Competence

- Liaise with culturally competent personnel to combat corruption.
- Learn the culture of the country from a competent source in order to navigate gray areas.
- Train local agents and partners in native languages on FCPA compliance.

# Due Diligence

- Recent enforcement actions show that DOJ will pursue criminal charges and long prison sentences for executives and employees who violate the FCPA.
- Investigations often focus on use of third-party agents through which companies pay bribes to foreign officials.
- FCPA checklist should be part of overall due diligence before starting any business dealings in an emerging market.

McDermott  
Will & Emery

# Best Practices To Minimize FCPA Risks In Africa

Focusing on Sub-Saharan Africa (SSA) Region

Obiamaka P. Madubuko

(212) 547-5308

Email: [omadubuko@mwe.com](mailto:omadubuko@mwe.com)

[www.mwe.com](http://www.mwe.com)

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan Munich New York Orange County Rome San Diego Silicon Valley Washington, D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

© 2010 McDermott Will & Emery LLP. McDermott operates its practice through separate legal entities in each of the countries where it has offices. This communication may be considered attorney advertising. Previous results are not a guarantee of future outcome. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery/Stanbrook LLP, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, MWE Steuerberatungsgesellschaft mbH, McDermott Will & Emery Studio Legale Associato and McDermott Will & Emery UK LLP. These entities coordinate their activities through service agreements. This communication may be considered advertising under the rules regulating the legal profession.

## 5 Steps To Minimize FCPA Risk In Africa

**Step 1:** Know how business is done.

**Step 2:** Know with whom you are doing business.

**Step 3:** Do your homework before going in.

**Step 4:** Maintain an effective compliance program.

**Step 5:** Monitor and make changes when needed.

## Step 1: Know How Business Is Done

- Understand the cultural and business environment you are operating in
  - SSA is not a monolithic region
  - Business culture differs by country
    - even by sub-regions within a country (e.g., Northern v Southern Nigeria)
- Learn who are the main players
- Understand how business is conducted
  - Observe how relationships are established
  - Learn the rules of engagement
    - Understand that business norms can differ

## Know Your FCPA Risk Profile

- Determine the FCPA risk level for your transaction
  - Amount of government interaction required or expected
  - Geography (e.g., country's perceived level of corruption)
  - Prior history of prior corruption related investigations
  - Use of intermediaries
- DOJ and SEC are focused on certain **high-risk industries** including:
  - pharmaceuticals (DOJ has publicly announced focus on this industry);
  - medical device and healthcare;
  - energy;
  - telecommunications;
  - construction;
  - Defense and law enforcement supply
- **The higher the FCPA risk, the more due diligence is needed**

## Step 2: Know With Whom You Are Doing Business

- Direct dealings with foreign government officials
  - Need clear rules
  - Remove decision-making authority in “gray areas” (e.g., travel/entertainment/gifts)
- Third parties and business partners
  - Nigeria Halliburton case is instructive regarding dangers of not conducting proper FCPA due diligence:
    - KBR/Halliburton (2009): \$579 million
    - Snamprogetti Netherlands B.V./ENI S.p.A. (2010): \$365 million
    - Technip (2010): \$338 million
  - Be cautious of third parties recommended by foreign government officials or use of former foreign officials as agents
  - Be sure to do independent research and adequate due diligence on third parties
- **NOTE: FCPA risk factors should be considered *before* entering into any international business deal, particularly in SSA**

## FCPA Best Practices For Engaging Third Parties

- Research the business reputation of third party
- Conduct *reasonable* due diligence
- Require formal application process
- Obtain a list of references and interview them
- Require approval of third party contracts by centralized authority at the corporate level
- Include FCPA provisions in third party contracts
- Monitor third parties and require additional certifications and audits as needed

- **Research the reputation of your foreign business partners**
  - Use official sources (e.g., Embassies or Consulates, US Dept of State Commercial Services Division)
  - Review all publicly available information
  - Review incorporation documents to assess true ownership and ensure no governmental interest
  - Find out whether the company has been subject of past corruption-related investigations
  - Interview proposed partner's clients and customers
  - Determine whether further investigation is warranted

- Lack of publicly available information
- No formal databases of reputable/ acceptable contractors
- Referrals/references are difficult to obtain in timely manner
- Takes too long and/or is too expensive

## Help For Sub-Saharan Africa Due Diligence Woes

- Have standard process in place
  - No need to re-invent the wheel
- Require third parties to do the leg work
  - Empower them to provide the requested information and supporting documentation
  - Enlist their help to get their references to respond in a timely manner
  - Provide incentives to help expedite the process
- **NOTE:** Spending the necessary time and resources on due diligence on the front end will minimize FCPA exposure going forward.

## Step 3: Do Your Homework Before Going In

- Do proper due diligence
  - Failure to conduct adequate due diligence can be a costly lesson
    - Halliburton - \$579M (2009)
- Be on the lookout for **red flags**
  - compensation to third parties without sufficient supporting detail;
  - lack of written agreements
  - use of consultants who do not appear to be qualified
  - use of consultants whose office locations do not make sense in light of service offerings;
  - recommendation or request by foreign official to use specific consultants

## Red Flags (cont'd)

- use of a specific consultant not typically used or known;
- use of side letters or stand alone consultant agreements;
- payments to entities run by former governmental officials;
- payments to shell or nominee companies;
- cash transactions or “off-books” payments;
- payments made outside country where goods or services were provided
- request for commission or payment be made to another name or company from one earning commission or payment;
- unusually high commission payments, distributor sale price/discount, or use of success fees
- large dollar travel, gifts, entertainment or gratuities

## FCPA Due Diligence Guidelines For Business Transactions In Sub-Saharan Africa

- Allow adequate time and resources for FCPA due diligence efforts
- Agree on FCPA specific due diligence plan
- Investigate and address all red flags uncovered
- Document your investigation efforts
- Retain diligence records

## Step 4: Maintain An Effective Compliance Program

- What are the hallmarks of an effective anti-corruption compliance program?
  - Setting the tone from the top
  - Having a clear written policy that is well known
  - Regular training of staff and related parties
  - Strong internal controls
  - Consistent and fair enforcement
  - Monitoring and making changes when needed

*US Sentencing Guidelines Manual, §8B2.1*

## Setting The Tone From The Top

- “High-level personnel” should have responsibility for overall compliance program and direct reporting relationship to the Board (*USSG Manual, §8B2.1(2)(B)*)
- Senior management should adopt strong code of conduct and clear policies designed to prevent bribery and corruption
- Creating a culture of compliance requires senior level support and employee buy-in

- Make sure policies are reasonable
  - Having a zero tolerance goal is laudable but be careful not to overburden compliance staff
    - Establishing travel/entertainment/gift threshold amounts
    - Requiring pre-approval for routine and legitimate government payments
    - May be harmful to have stringent anti-corruption policies “on paper” that are not actually followed by the company
  - The policies should be designed to prevent key risk areas of the business
    - Ex: If your industry utilizes a lot of consultants who interact directly with government officials, then the FCPA policy and trainings should focus more on this area.

## FCPA Training Best Practices

- An FCPA policy is only effective if it is understood and adhered to by the employees. So be sure to:
  - Have regular trainings
    - Preferably in person
    - In local language or involving local persons
    - Be conscious of cultural differences
  - Use real life examples that are relevant to job function
  - Take attendance and track results
- Update trainings to adjust for changes in the law and in the business

## Who Should Be Trained On The FCPA?

- All employees doing business in SSA and any one who will be interacting with foreign government officials on your organization's behalf. This includes:
  - Board members, directors, senior management, and other employees
  - Business partners and third party intermediaries working in the region (e.g., consultants, contractors, distributors, suppliers who deal with foreign government actors)

- Challenges
  - It goes against perceived notions of how “business is done” in SSA
  - Some may feel anti-corruption compliance will affect the bottom line (profits) or otherwise limit business opportunities in the region
- Creative solutions
  - Empower your employees to be compliance driven (use of bonuses and other incentives)

- Have a strong financial accounting system in place that helps ensure illegal payments are not made and detects questionable payments when made
  - Establish appropriate controls for contract approvals, payments, and other disbursements paid
  - Focus on maintaining sufficient documentation
  - Identify all government related payments and track this information
  - Involve internal audit and other business managers in ensuring FCPA compliance
  - Conduct periodic reviews and assessments of internal controls

- Make sure policies are consistently enforced
  - No special treatment for certain clients or senior level executives, officers or directors
- Make sure discipline is appropriate and remedial action taken is designed to prevent future wrongdoing
- Make sure to promptly investigate concerns raised, particularly anonymous hotline complaints
  - Will serve to prevent whistleblower claims
  - Will help to establish a culture of compliance and encourage more internal reporting

- Conduct periodic audits and risk assessments of compliance program
- Periodically engage outside professionals to test soundness of compliance program and recommend areas for improvement
- Engage various parts of the business in FCPA compliance efforts (e.g., Legal, compliance departments, finance, HR, business heads, Board of Directors)
- Make changes where necessary

## Steps to Take If Misconduct Is Suspected

- Determine whether and what to investigate
  - Separate, categorize and triage allegations
  - Look at who is making the complaint, who is alleged to be involved and whether the allegations are material, i.e., significant wrong-doing
  - Promptly investigate actionable claims
  - Document all investigation efforts
- Determine who will investigate
  - In-house counsel or outside counsel
    - If outside counsel is used, does regular FCPA counsel handle the investigation or is new outside counsel needed?

- Agree on investigation plan
  - Order and priority of witness interviews
  - Process for gathering and preserving relevant documents
  - Determination of scope of investigation
  
- Determine whether to self-report to the government
  - Decide whether the problem is immaterial and can be remedied (in which case, disclosure may not be needed) OR whether the problem is significant and it will benefit a company to self-report in order to receive valuable cooperation credit
  - Make sure to understand the scope and size of the issue(s) presented before going to the government
  - Think through some of the strategy questions that will be asked (e.g., what is the investigation plan? Scope of investigation?)