

# The FCPA, The Dodd-Frank Act, UK Bribery Act and Building an Effective Compliance Program

Presented on June 8, 2011 to the Greater Houston Business Ethics Roundtable  
June 2011 Meeting by

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# Topics of Discussion

- Overview of the FCPA
- The Rise of SEC and DOJ Enforcement of the FCPA
- The Dodd-Frank Act Whistleblower Bounty Provisions
- The Dodd-Frank Disclosure Requirements for Oil and Gas Companies
- UK Bribery Act
- Components of Effective Compliance Program

# Overview of the FCPA

# FCPA's Two Prongs

- Antibribery Provisions
  - Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage
- Books & Records
  - Provisions Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls

# Antibribery Provisions

- It is unlawful for:
  - an issuer, domestic concern, or anyone acting within the jurisdiction of the United States
  - with “corrupt intent”
  - directly or indirectly
  - to offer, pay, promise to pay, or authorize payment
  - of “anything of value”
  - to a “foreign official”
  - for the purpose of obtaining or retaining business or securing any improper advantage

# To Whom do the Antibribery Provisions Apply?

- Any **issuer** that files reports to the SEC or trade equity or debt on a U.S. exchange
- Any **domestic concern**
- Any **person** including an organization, wherever located, that, while in the territory of the United States, does any act in furtherance of the prohibited conduct

# Books & Records Provision

- Books and Records
  - Must be in reasonable detail that accurately and fully reflect transactions
  - Payments, gifts, and entertainment
- Effective internal accounting controls
  - company policies and procedures
  - documentation (*e.g.*, expense forms)
  - reporting
  - certifications
  - corrective actions
- Apply to issuers

# Books & Records Provisions

- Improper payments to a foreign official to obtain or retain business may result in charges under both prongs
  - Improper payments falsely characterized on a company's books and records as "miscellaneous" expenses, "commissions," etc.
  - Improper payments viewed as a consequence of ineffective internal controls
- Violations of the Books & Records Provisions are not contingent on Antibribery Provisions Violations

# FCPA Jurisdictional Reach

- Antibribery Provisions
  - Issuers
  - Domestic concerns
  - Persons, including organizations, wherever located, that, while in U.S. territory, perform any act in furtherance of the prohibited conduct
- Books & Records Provisions
  - Issuers
  - Companies required to file reports with the SEC

# FCPA Facilitating Payments Exception

- “Grease” payments – small bribes to facilitate **routine** government action
- Exception to the antibribery provisions
- Limited application
  - Payment to a foreign official to expedite or secure the performance of routine governmental actions
  - Applies only to nondiscretionary actions by a foreign official, such as processing government paperwork or providing routine government services

# FCPA Bona Fide Promotional Expenditures Exception

- Affirmative defense to the antibribery provisions
- Payments related to product demonstration or promotion
  - A reasonable and bona fide expenditure
  - Directly related to the promotion, demonstration, or explanation of products or services
  - Or the execution or performance of a contract

# FCPA Travel & Entertainment Expenditures

- Must be:
  - Permitted under local law
  - Reasonable under circumstances
  - Made directly to vendors, hotels, airlines, etc.
  - Not more than the costs actually incurred
  - Properly recorded in books and records
- Cannot:
  - Pay to visit tourist attractions
  - Pay for spouses or other family members
  - Be lavish
  - Provide a per diem if also paying for meals and other expenses

# FCPA Written Local Law Exception

- Affirmative defense to the antibribery provisions
- Payments lawful under the written laws of the foreign country
  - Written laws of the foreign country must affirmatively state that the payment is legal
  - Local law has never been recognized as a defense to a payment prohibited by the FCPA

# The Rise of SEC and DOJ Enforcement of the FCPA

# The Rise of SEC Enforcement

- Fundamental reorganization of the SEC Enforcement Division and expansion of investigative tools
  - National specialized enforcement units
    - Asset management, market abuse, structured and new products, FCPA, municipal securities, and public pensions
  - Increased focus on individual liability
  - New cooperation tools
  - Office of Market Intelligence
    - Responsible for the collection, analysis, risk-weighting, triage, referral, and monitoring of tips, complaints, and referrals
    - Responsible for harvesting that intelligence to better inform the SEC's investigative focus and priorities
  - Dodd-Frank Act Whistleblower Provisions

# Specialized SEC FCPA Enforcement Unit

- Better capability to detect emerging fraud and misconduct
- Greater capability to file cases with “strike-force speed”
- Increase in enforcement division expertise
- Broader array of cooperation and intelligence tools

# An Increased Focus on Individual Liability

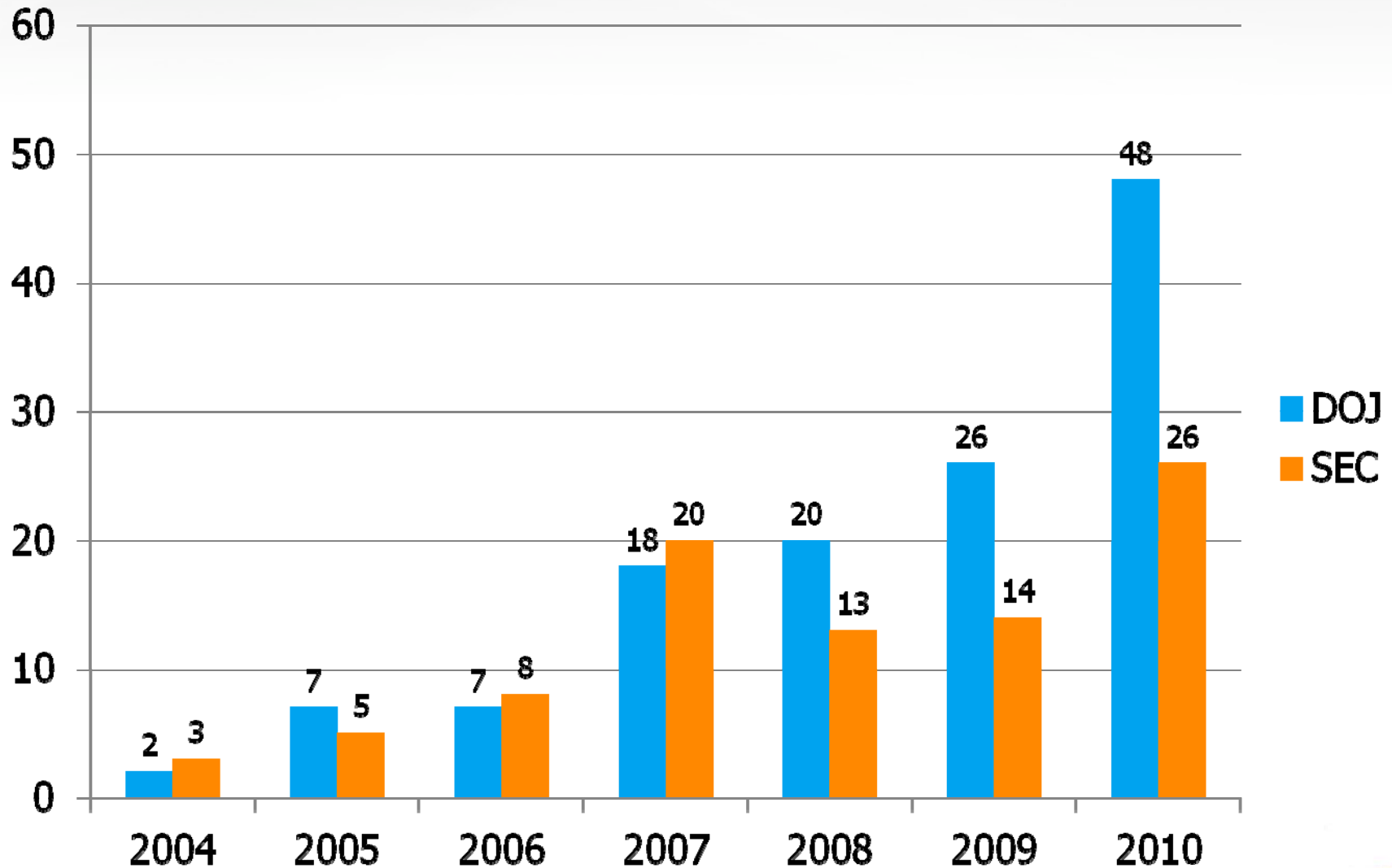
- Direct liability
- Aiding and abetting liability
- Control person liability

# DOJ's FCPA Global Enforcement Trends

- Corporate mega fines fueled by voluntary disclosure process.
- DOJ has dedicated additional prosecutors to FCPA cases.
- FBI has dedicated FCPA squad.
- Obama administration is continuing focus on FCPA prosecutions.
- FBI is using aggressive investigative tactics for FCPA violations.
- DOJ is increasing use of industry-wide investigations.
- There are a growing number of prosecutions of individuals by DOJ.
- There are a growing number of cross-border investigations by DOJ.
- DOJ is closely coordinating with other U.S. enforcement agencies.

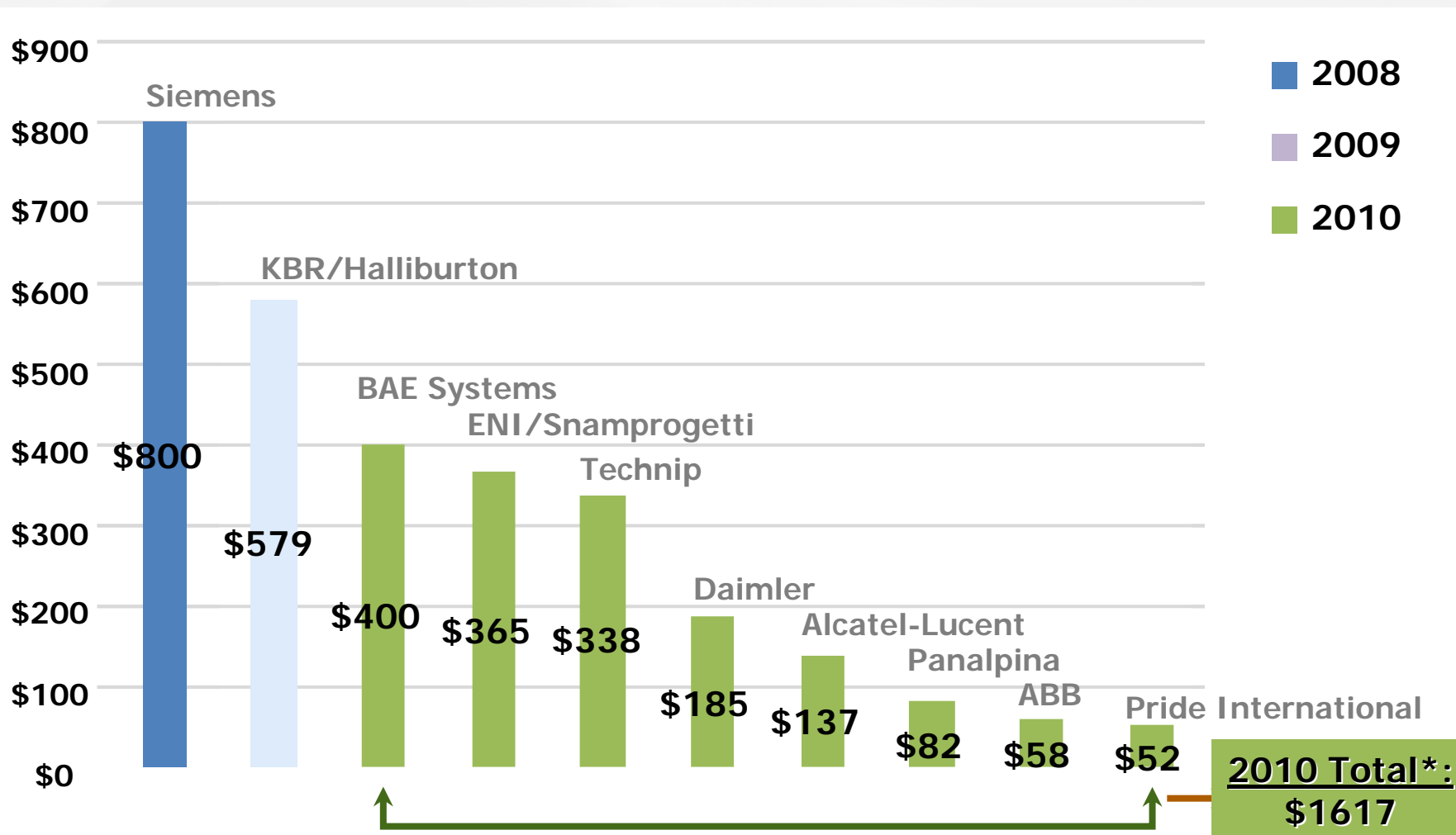
# Increase in FCPA Enforcement Actions

2010 witnessed an 85% increase in FCPA enforcement actions over 2009, which itself was a record year.



# Blockbuster FCPA Settlements

\* Eight of the top ten monetary settlements in FCPA history were reached in 2010.



# Most Severe Jail Sentences for FCPA Violations

David Kay,  
American Rice, Inc.

**37 months**

John Warwick,  
Ports Engineering  
Consultants Corporation

**37 months**

Robert Antoine,  
Haiti Telco

**48 months**

Juan Diaz,  
Third party consultant  
to Haiti Telco

**57 months**

Douglas Murphy,  
American Rice, Inc.

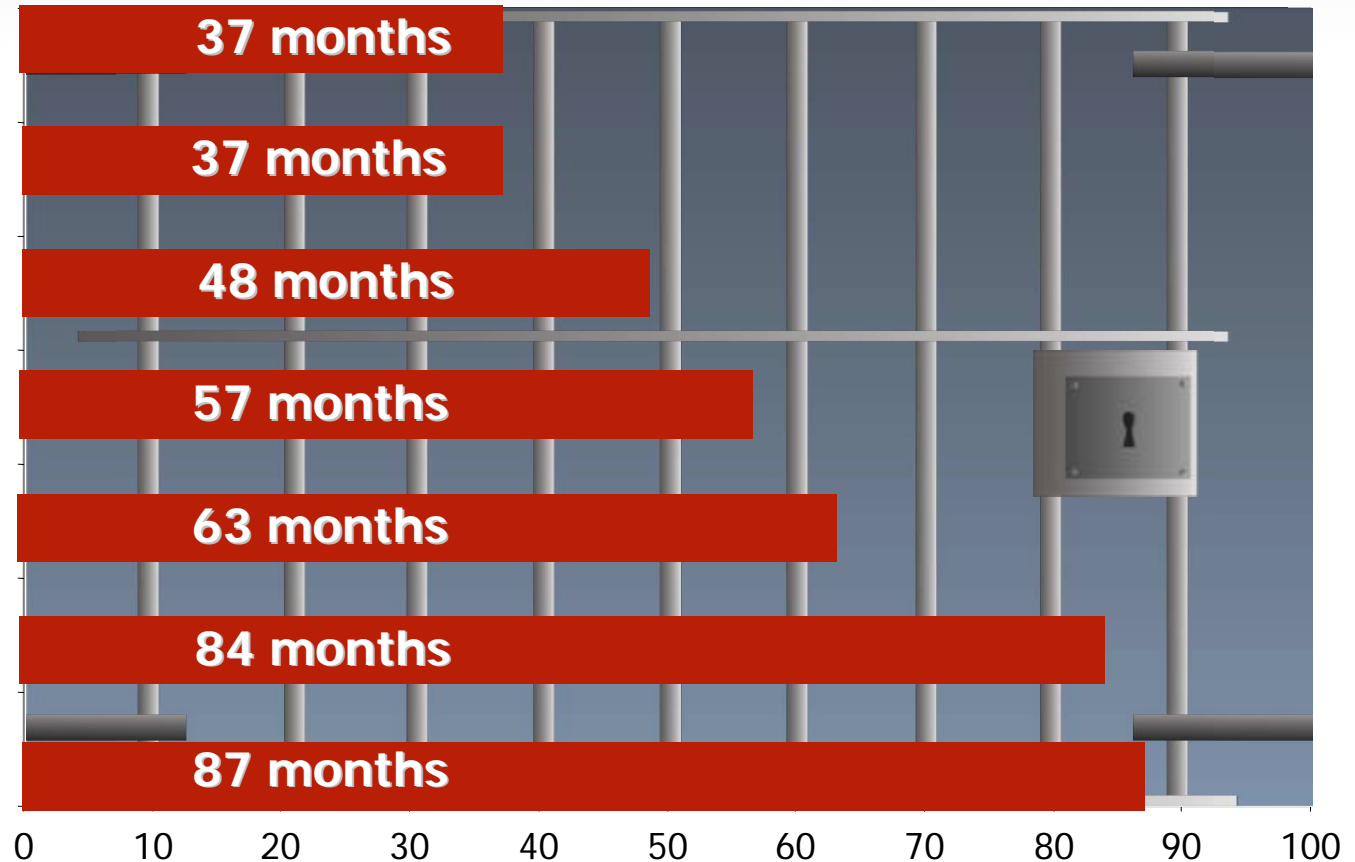
**63 months**

Albert Jack Stanley,  
KBR

**84 months**

Charles Paul Edward Jumet,  
Ports Engineering  
Consultants Corporation

**87 months**



# Industry-Wide Investigations

**Oil and Oil-Services Industry – Panalpina Investigation – Vetco settled FCPA case in 2007 based on illegal bribes made through Panalpina. Following settlement, DOJ issued at least 11 letters to oil and oil services companies, requesting information about their dealings with Panalpina. On Nov. 4, 2010, DOJ and the SEC announced settled FCPA enforcement actions against Panalpina plus six of these oil and oil services firms (most of which were Panalpina customers) totaling \$236.5 million in disgorgement, fines, and penalties. Panalpina paid a \$70 million fine.**



# Industry-Wide Investigations

- **Medical Device and Pharmaceutical Industry**

1. E.g., Biomet, DePuy, Diagnostic Products, Medtronic, Micrus, Smith & Nephew, Stryker, Syncor, Wright Medical, Zimmer Holdings
2. E.g., Eli Lilly, Merck, Astra Zeneca, Bristol-Myers Squibb, GlaxoSmithKline, SciClone

- **Military and Law Enforcement Products Industry**

1. E.g., SHOT Show Sting targets, Armor Holdings, DynCorp, Smith & Wesson, Allied Defense, Blackwater/Xe

- **Telecommunications Industry**

- E.g., Alcatel-Lucent, Haiti Teleco, ITXC, Latin Node, Magyar Telekom, Siemens entities, UTStarcom, Veraz

**SEC recently launched an industry-wide investigation against global financial companies focusing on dealings with sovereign wealth funds**

# The Dodd-Frank Act Whistleblower's Bounty Provisions

# The Whistleblower's Bounty: Eligibility Requirements

- The SEC will pay an award to one or more whistleblowers who:
  - Voluntarily provide the SEC
  - With original information
  - That leads to the successful enforcement by the SEC in a federal court or administrative action
  - In which the SEC obtains monetary sanctions totaling more than \$1,000,000

# What is a Whistleblower?

- A **whistleblower** is an individual who provides the SEC with “information relating to a potential violation of the securities laws”

# Original Information

- **Original information** is information based upon the whistleblower's independent knowledge or independent analysis that is not already known to the SEC and not exclusively derived from an allegation in a judicial or administrative hearing, government report, hearing, audit, investigation or news media
  - **Independent knowledge:** can come from “experiences, communications and observations in your business or social interactions”
  - **Independent analysis:** is the “examination and evaluation of information that may be generally available, but which reveals information that is not generally known to the public”

# Leading to a Successful Enforcement Action

- Information will be considered as having led to a **successful enforcement action** if:
  - it caused the SEC to commence a new examination or investigation and significantly contributes to the success of a resulting enforcement action; or
  - the conduct was already under investigation when the information was submitted, but the information is essential to the success of the action and would not have otherwise been obtained.

# Amount of Award

- At least 10% but not more than 30% to be collected by the SEC or other specified authorities in a “Related Action”

# A “Related Action”

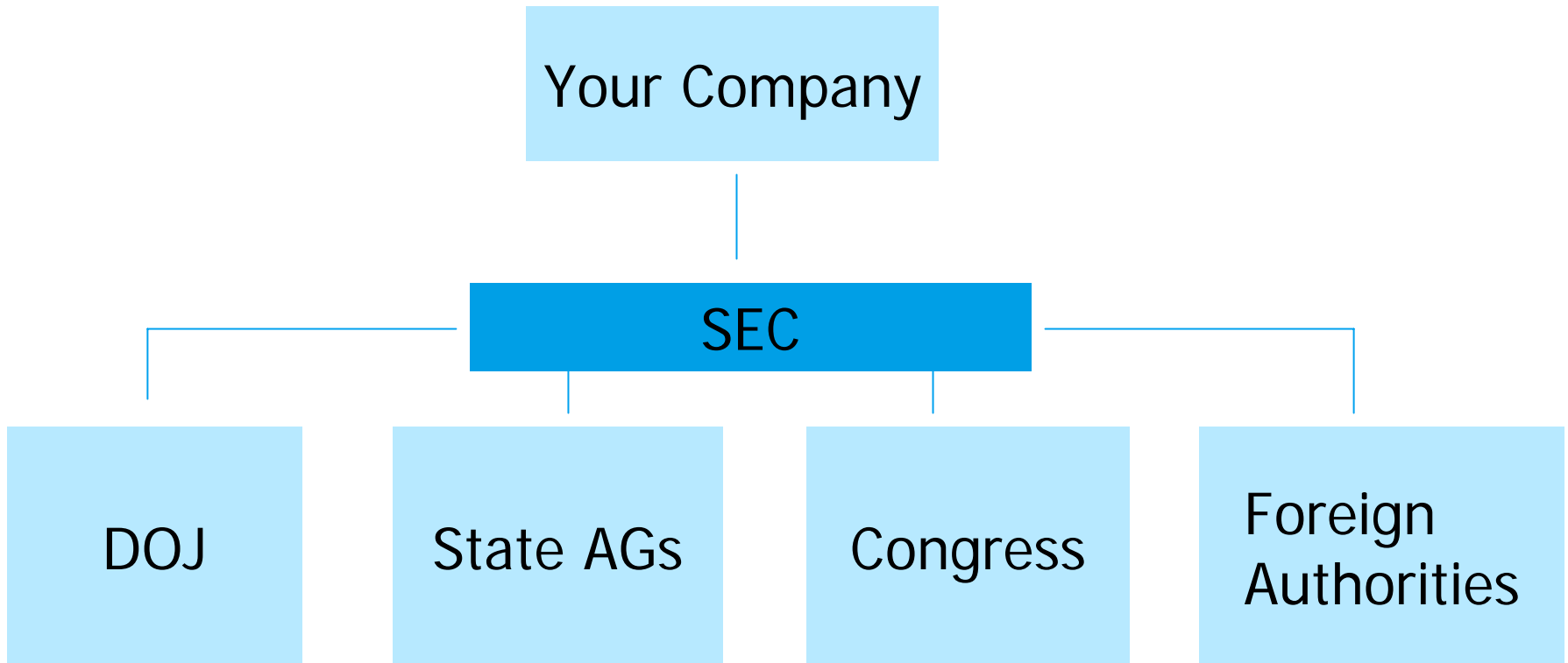
- A judicial or administrative action:
  - brought by the Attorney General of the United States, an appropriate regulatory authority, a self-regulatory organization, or a state Attorney General in connection with any criminal investigation
    - “appropriate regulatory authority” includes **foreign securities and law enforcement authorities**
  - that is based on the same original information that the whistleblower voluntarily provided to the SEC, and that led the SEC to obtain monetary sanctions totaling more than \$1,000,000

# Award Amount Criteria

- If all award eligibility criteria are met, the SEC will decide the amount of the award based on the:
  - significance of the whistleblower's information to the success of the SEC's action;
  - degree of assistance provided by the whistleblower;
  - programmatic interest of the SEC in deterring violations; and
  - whether the award enhances the SEC's ability to enforce securities laws, protect investors, and encourage submission of high-quality information by whistleblowers.

# Cooperation with Other Enforcement Authorities

- SEC is authorized to share whistleblower-provided information with enumerated federal, state, and foreign enforcement authorities



# Impact of Dodd-Frank on Internal Reporting

- Proposed rules seek to discourage the bypassing of internal compliance programs by:
  - Preserving whistleblower’s “place in line” by designating date of report as day reported internally (provided a report is made to the SEC within 90 days)
  - Considering higher percentage awards for those who first report information through an internal compliance program

# Impact of Dodd-Frank on Internal Reporting

- Barring certain individuals from award eligibility, including:
  - Individuals who obtain the information because s/he is a person with legal, compliance, etc. (*e.g.*, a CCO) responsibility and the information was conveyed with reasonable expectation that the individual would cause the entity to respond appropriately to the violation, unless the entity did not disclose the information to the SEC within a reasonable time or proceeded in bad faith
  - Individuals who obtain the information through audits required under federal securities laws
  - Individuals with a legal or contractual duty to report the information

# Managing New Dodd-Frank Act Whistleblower Provisions Strengthen Internal Reporting Mechanisms

- Maintain an effective system for:
  - Providing advice on an urgent basis
  - Encouraging internal and, where possible, confidential reporting
  - Protecting those who report internally
  - Responding to requests and reports
- Consider anonymous hotlines and intranet portals
- Consider incentives for internal reporting
  - performance and compensation reviews
  - BUT do not penalize for failure to internally report – antiretaliation provisions

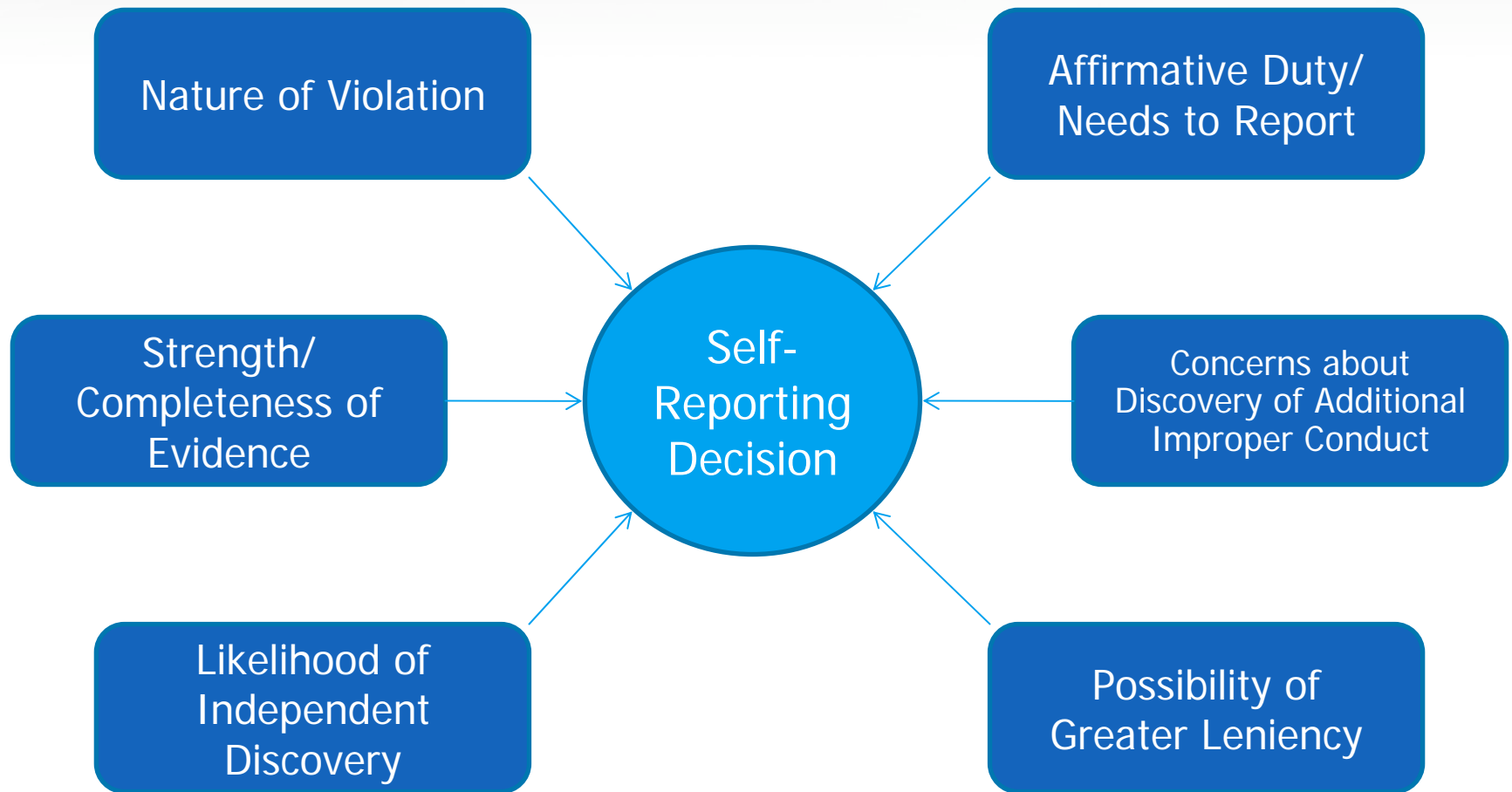
# How Dodd-Frank Could Undermine Internal Reporting

- No requirement to report through an internal compliance program
- No financial incentive for reporting internally
- Plaintiffs' counsel are actively recruiting whistleblowers

# More and Better Internal Investigations

- Conduct prompt and effective internal investigations
  - Ensure adequate resources (legal, compliance, internal audit, outside counsel)
  - Take steps to maintain the attorney-client privilege
  - Determine the scope of the wrongdoing across employees, agents, business units
  - Determine whether conduct is ongoing

# The Impact of Dodd-Frank on Whether & When to Self-Report



# The UK Bribery Act

# UK Bribery Act: Delay in Implementation

- UK Bribery Act had an original effective date of April 2011 but its effective date was delayed until guidance was issued in late March 2011 (3-month lag between guidance and effective date which is now July 1, 2011).
- UK government conducted “review” of law because of UK business complaints.
- UK prosecutors have stated they intend to aggressively enforce the Act against global companies “doing business” in UK.
- Guidance on “adequate procedures” defense and prosecution policies issued three months before new effective date.

# Overview of the UK Bribery Act 2010

- Sweeps away old law on bribery
- New offences
  - 2 “general” offences: bribery and taking a bribe
  - Bribery of foreign public official
  - Corporate offence: failure to prevent bribery
- Broad-brush, almost “principles-based” approach

# General Offenses: Bribery and Taking a Bribe

- Bribery – § 1: offering, etc. an **advantage** to another person
  - intending to induce or reward **improper performance of a relevant function**, or
  - knowing acceptance constitutes **improper performance**
- Taking a bribe – § 2:
  - requesting, accepting, etc. an **advantage**
  - **Performing improperly** (including procuring improper performance) in anticipation of an **advantage**

# Relevant Function

- Any function or activity:
  - of a public nature
  - connected with a business
  - performed in the course of employment
  - performed by or on behalf of a body of persons
- Only captured if the person performing the function is:
  - expected to do so either (a) in good faith or (b) impartially
  - in a position of trust by virtue of performing it

# Improper Performance

- Performance (or failure to perform) in breach of a “relevant expectation”
  - Not in the manner expected by the relevant expectation condition (e.g., impartially)
  - Past performance may be relevant
  - Expectation based on what a reasonable person in the UK would expect
  - Local custom or practice to be ignored
    - unless permitted or required by local written law
    - Constitution; legislation; written case law

# Advantage

- Advantage may be “financial or other”
- In most cases, the recipient need not be the same as the person performing the function
- Bribery/taking bribes through a third party is covered
- The advantage need not benefit the recipient

## § 6 Offense: Bribery of Foreign Public Officials

- Bribing a foreign public official if intending to influence the official in his or her official capacity, intending to obtain/retain business or business advantage
- Broadly overlaps with § 1 offense
- But unlike § 1, does not require proof of improper performance or an intention to induce it

# Facilitating Payments

- No exception under the Act
- Ministry of Justice guidance: Eradication is a “long term objective that will require economic and social progress and sustained commitment to the rule of law”
- Businesses “have a role to play” through ABC procedures
- Prosecutorial discretion: joint prosecution guidance
  - Duress: danger to “life, limb or liberty”
  - Large or frequent payments
  - Compliance with organization’s own policy
  - Self-reporting, cooperation, and remedial action

# Hospitality Payments

- Bona fide hospitality and promotional expenses are permitted where they:
  - Seek to improve the image of a commercial organization
  - Better present products or services
  - Establish cordial relations
  - *Are reasonable and proportionate*
  - *Do not seek a financial or other advantage to influence the official in his/her official role*

## § 7 Offense: Failure to Prevent Bribery

- *Relevant commercial organization* commits an offense if person *associated* with that organization bribes another person intending to obtain/retain business or a business advantage for the organization
- Strict liability offense
- Full defense if organization can prove it had in place *adequate procedure* designed to prevent persons associated with it from undertaking such conduct

# Relevant Commercial Organization

- UK body corporate or partnership that carries on business anywhere
- Non-UK body corporate or partnership that carries on a business, or part of a business, in the UK
  - Common sense approach, ultimately determined by courts
  - UK subsidiaries
  - UK listing

# Associated Person

- If a person “performs services” for or on behalf of an organization, in whatever capacity
  - Non-exclusive examples: employee (presumed), agent, or subsidiary
  - May extend much further
    - Supply chain
    - Joint ventures
    - Indirect benefit not enough in itself
  - Determined by all relevant circumstances, not just the nature of the relationship (*e.g.*, actual level of control)

# Adequate Procedures

1. Proportionate Procedures
2. Top-Level Commitment
3. Risk Assessment
4. Due Diligence
5. Communication (including training)
6. Monitoring and Review

# Proportionate Procedures

- Policies and effective implementation
- Proportionate to risks faced by organization (*e.g.*, size and nature of business)
- Guidance lists areas which policies and procedures might cover, *e.g.*,
  - Overall strategy and antibribery statement
  - Hospitality guidelines
  - Financial controls and decision-making process
  - Enforcement

# Top-Level Commitment

- Top-level involvement in formulating strategy
- Involvement of senior management in development/implementation
- Public statements (internal and external)
- Leadership in developing ethos
- Enforcement

# Risk Assessment

- Assessment support at top level and appropriate resources supplied
- Ongoing assessment process
- Key risk analysis: country, sector, transaction, business opportunity, business partner
- Internal risks: proper training, remuneration structure, clarity of policies and procedures, control systems, clear ethos

# Due Diligence

- Put in place procedures to do due diligence on potential risks
  - Particularly on proposed associates
  - Proportionate to risk and type of relationship
- Ongoing monitoring may be necessary
- Recruits for key positions

# Communication

- Internal
  - Ensure that policies and procedures are understood throughout the organization
  - Clear reporting procedures (including whistleblowing and speak-up)
  - Proportionate training
- External
  - Clear public statements/code of conduct
  - Possible training for key associated persons

# Monitoring and Review

- Monitor and evaluate policies and procedures
- Adapt to changing risks
- Adopt systems for internal/external review and feedback
- Reports for top-level management

# Jurisdictional Reach

## General Offenses and § 6

- Any act forming part of offense occurs in UK
- Any act occurring outside of the UK if acts would constitute an offense in UK and are committed by person with “close connection” with UK (citizens, residents, and UK corporations)

## § 7 Corporate Offense

- UK corporation or partnership
- Non-UK companies carrying on business in UK
- Acts of associated person constituting bribery may take place anywhere

# Penalties

## General Offenses and § 6

- Individuals: 10 years imprisonment or unlimited fine
- Other persons: unlimited fine

## § 7 Corporate Offense

- Unlimited fine

## Offenses May Trigger

- Automatic ban on tendering for public procurement contracts
- Recovery/confiscation order: all proceeds of crime

# UK Bribery Act Comparison to FCPA

- Extends to private person-to-private person bribery
- No carve-out for facilitation payments
- No formal advisory services
- Broader jurisdictional reach
- No discretion on imposition of public procurement ban
- Current uncertainties in UK regarding plea bargaining
- No books and records provisions
- No explicit exception for bona fide business expenses

# The Dodd-Frank Disclosure Requirements for Oil and Gas Companies

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 - Background

- Congressional description of Dodd-Frank bill “A bill to promote the financial stability of the United States by improving accountability and transparency in the financial system ... and for other purposes.”
- § 1504 “Disclosure of Payments by Resource Extraction Issuers.”
- “Transparency and accountability” at what cost?
- Substance of this provision was originally considered and rejected during legislative debate prior to enactment of the FCPA in 1977.

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 - Background

- Specifically, disclosure requirements were given much consideration during Congressional hearings prior to final enactment of the FCPA.
- Final FCPA House Report:

*“Most disclosure proposals would require U.S. corporations doing business abroad to report all foreign payments including perfectly legal payments such as for promotional purposes and for sales commissions. A disclosure scheme, unlike outright prohibition, would require U.S. corporations to contend not only with an additional bureaucratic overlay but also with massive paperwork requirements.” (emphasis added)*

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 - Background

- The FCPA prohibits payments to foreign government individual recipients, *i.e.*, “foreign officials” made in order to obtain or retain business or obtain an unfair advantage AND requires issuers to implement effective internal controls and keep accurate books and records to ensure transparency and accountability.
- With § 1504 requirements, corporations already subject to the FCPA may be required to augment their compliance programs to ensure disclosure of legal and legitimate payments to foreign governments.

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 – Substance/Challenges

- Amends Section 13 of the Exchange Act.
- Requires the SEC to issue final rules “no later than 270 days after enactment” of Dodd-Frank (July 21, 2010) that would require:
  - A “Resource Extraction Issuer” – Defined as an issuer that:
    - Files an annual report with the SEC and;
    - Engages in the commercial development of oil, natural gas, or minerals.
  - To report annually:
    - Information related to any “payment”;
    - Made by the issuer, a subsidiary of the issuer, or any entity under the control of the issuer;
    - to a foreign government; a department, agency, or instrumentality of a foreign government; or a company owned by a foreign government.
    - For “commercial development of oil, natural gas, or minerals.”

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 – Substance/Challenges

- It can be difficult to determine whether you are a “resource extractions issuer”.
- Why?
- Because determining whether you engage in the “commercial development of oil, natural gas, or minerals” is unclear.
- Definition under § 1504:
  - “the term ‘ commercial development of oil, natural gas, or minerals’ includes exploration, extraction, processing export **and other significant actions relating to** oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the Commission.”

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 – Substance/Challenges

- Is your company a “resource extraction issuer”?
  - Do you provide equipment used in the extraction of oil, natural gas, or minerals?
  - Is conducting seismic operations for an extraction company a “significant action” related to oil, natural gas, or minerals?
- It is not currently clear whether either of these types of operations, or whether any number of other business activities, would subject a company to the § 1504 disclosure requirements.

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 – Substance/Challenges

- Lack of clarity as to what constitutes a “payment”.
  - Made to further commercial development of oil, natural gas, or minerals.
  - Not “de minimis.”
  - **Includes** taxes, royalties, fees, production entitlements, bonuses, and other material benefits that the “commission determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 – What Should Companies Be Doing?

- Initially consider whether your company is a resource extraction issuer.
- If so, begin to determine costs, budget, and procedures for implementing effective disclosure protocol, including identification of all affected payments and adequate recordkeeping.
- Consider the potential collateral effect of disclosure.
  - Public relations issues related to amount and types of payments made.
  - Commercial implications, including possible competitive disadvantage.
  - Inquiry from FCPA or international enforcement agencies related to payments.

# Dodd-Frank Wall Street Reform and Consumer Protection Act § 1504 – What Should Companies Be Doing

- Do Not Panic – Undue concern is premature for most companies whose operations are related to the oil and gas or minerals industries.
- The SEC has until April 17, 2011 to promulgate regulations implementing § 1504.
- The regulations will hopefully provide clarity on who is subject to the disclosure requirements and what payments are included.

# Disclaimer

The opinions contained in this presentation are those of the author and are not intended to be an expression of the opinions of Anadarko Petroleum Corporation.

# Effective Compliance and Ethics Programs

# Agenda

- DOJ Guidance & Sources
- Program Components
- Examples from Existing Compliance Programs
  - Baker Hughes
  - Weatherford
  - Anadarko Petroleum
- Tips and Hints for “Tailoring” a Compliance Program for your organization
- Too Big to Fail, Inc. Compliance Case Studies

# DOJ Guidance

*“Ultimately, from our perspective, an effective compliance and ethics program is one that prevents fraud and corruption in the first place and, when it can’t, has in place clear policies to quickly detect, fix, and report the violations. Likewise, an effective compliance program is dynamic and ever-evolving; it cannot exist only on paper.*

*There are, of course, no “check the box” answers. But there are benchmarks.”*

Lanny A. Breuer  
Assistant Attorney General, Criminal Division  
U.S. Department of Justice\*

Prepared Remarks to Compliance Week 2010 – 5th Annual Conference for  
Corporate Financial, Legal, Risk, Audit & Compliance Officers, May 26, 2010

# Sources

- Principles of Federal Prosecution of Business Organizations
- OECD's *Good Practice Guidance on Internal Controls, Ethics, and Compliance*

# Program Components

## Part I: Written Program & Leadership

- Tone at the Top
- Oversight structure
- Code of Conduct, Guidelines, Policies & Procedures

## Part II: Program Deployment

- Risk Assessment
- Internal communication & training
- External communication & due diligence

## Part III: Audit, Reporting, Response & Enforcement

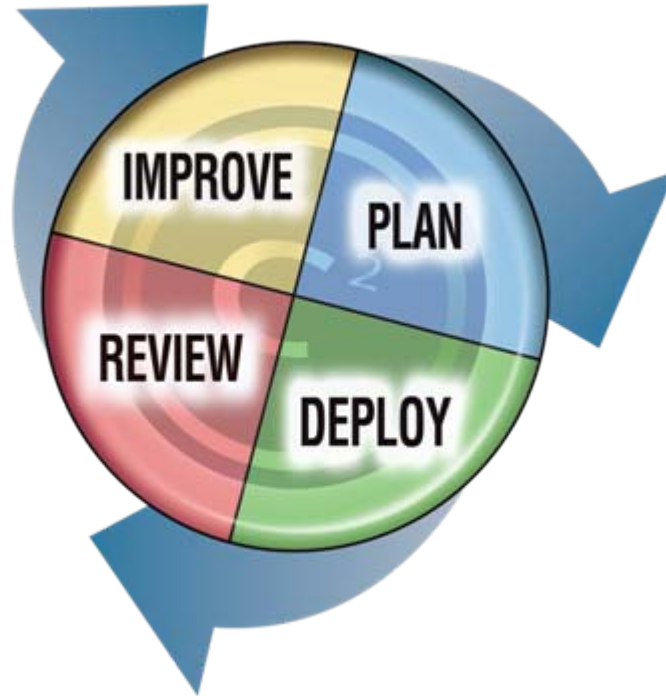
- Regular reports to Board
- Regular audits
- Mechanisms for anonymous reporting, investigation, response, enforcement & discipline
- Positive incentives

## Part IV: Periodic Review & Process Improvement

- Performance Metrics & Benchmarking

# Baker Hughes: Compliance Program Components

- XIII. Compliance Program Metrics
- XIV. Performance Measurement and Monitoring
- XV. Benchmarking to Maintain Best Practices
- IX. Reporting
- X. Auditing
- XI. Investigating
- XII. Discipline



- I. Tone-at-the-Top
- II. Leadership and Structure
- III. Key Goals and Objectives
- IV. Consistent Policies, Procedures and Guidelines
- V. Risk Assessment
- VI. Compliance Training and Education
- VII. Communications
- VIII. Due Diligence on Third Party Representatives

# Part I: Written Program & Leadership

# Tone at the Top

- The Company should develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA and a strong commitment from senior management.
- Strong policy statement should be adopted by the Board.
- Board and senior management should be required to make commitment to anti-corruption compliance.
- Compliance commitment must be demonstrated by actions.

# Senior Management Oversight and Reporting

- The Company should assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of its Company's anti-corruption policies.
- Company should designate a Compliance Officer in senior management and provide adequate resources to compliance office.
- Compliance officer should be separate from General Counsel and internal auditing functions.
- Compliance officer to have responsibility for day-to-day operational responsibility and for independently investigating and acting on matters related to compliance.
- Individuals responsible for compliance program should report regularly to senior corporate executives responsible for compliance and have direct access to the CEO and BOD.

# A Manager's Role

- Establish proper Tone-at-the-Top (e.g., consistently and enthusiastically promote ethics and compliance).
  - Demonstrate compliance with all of their company's Core Values and the Business Code of Conduct.
  - Understand and effectively manage compliance risks faced by your business unit(s).
- Program Deployment
  - Help establish effective legal and compliance standards for your business unit(s) and disseminate these standards to all persons in your organization.
  - Ensure that effective risk based ethics and compliance training is in place for all of your employees based upon their job categories and geographical locations.
- Audit, Reporting, Response & Enforcement
  - Ensure that there is never retaliation against anyone who reports a potential violation.
  - See that all credible reports of potential violations of the company's Core Values and Business Code of Conduct are investigated in a timely manner.
  - Make your people and business unit(s) accountable for compliance lapses – apply consistent, prompt and fair disciplinary action in response to compliance violations.
  - Leverage your company's Ethics and Compliance culture into a competitive advantage.

# Anti-Corruption Policies and Procedures

The Company should establish an effective Code of Conduct and develop and promulgate compliance standards and procedures which shall include policies governing:

- a. gifts;
- b. hospitality, entertainment, and expenses;
- c. customer travel;
- d. political contributions;
- e. charitable donations and sponsorships and community payments;
- f. facilitation payments;
- g. solicitation and extortion;
- h. vetting and management of third parties; and
- i. Real estate transactions directly or indirectly involving government officials.

## Part II: Program Deployment

# Use of Risk Assessment

- The Company should establish an effective risk assessment program and develop its compliance standards and procedures using a risk assessment.
- The risk assessment should be a formal and documented review which examines:
  - the nature and extent of corruption in each country in which the company does business relying on public and internal sources of information (Transparency International, OECD, etc);
  - the extent of government interactions and the persons in the company responsible for such interactions; and
  - the use of third-party agents, consultants in each country.

# Communication and Training

- Inform employees of the existence and details of the company's compliance program.
- Establish appropriate policies and procedures and related training.
- FCPA training which shall include: (a) training for all directors and officers, and, where necessary and appropriate, employees, agents, and business partners; and (b) annual certifications, certifying compliance with the training requirements.
- Training programs should be tailored to different audiences and risks. Offices that have interactions (sales and regulatory) with foreign officials should have different programs from senior management.
- Legal and compliance staff throughout organization should have separate training programs.

# Foreign Business Representatives

## **Foreign Business Representatives.**

- 1) Perform appropriate due diligence on foreign business representatives;
- 2) Inform foreign business partners of its FCPA compliance program;
- 3) Seek reciprocal written anti-corruption and anti-bribery commitments from its foreign business partners.

## **Compliance Terms and Conditions.**

Include FCPA [anti-corruption] terms and conditions in its contracts with foreign business partners. \*\*NOTE impact of UK anti-bribery act may require review of “standard” clauses.

# Due Diligence Screening of Third Party Agents

- Screen the Initial Terms of Relationship with Third Party:
  1. Review the creation of relationship, or any subsequent changes to responsibilities or countries where agent operates.
  2. Establish procedure for centralized review of contracts to ensure consistent standards.
  3. Depending on size of company, should establish review at highest level within the company.
- Develop a Different Screening Procedure for Review of Individual Transactions.

# Guidelines for Due Diligence Process

- Do not over-standardize procedure.
  1. Need to tailor to individual circumstances in each country based on risk.
- Need to conduct background check to determine (5-10 year history).
  1. Existence of ties to foreign government officials and employees.
  2. Existence of any pending or prior investigations of bribery or other criminal conduct or civil violations.
- Create written package and record of review and approval process to demonstrate compliance.

# Basic Issues to Cover

- Existence of Relationships with Foreign Government Officials
  1. Purchasing Authority
  2. Licensing or other regulatory authorities
- Prior History of Bribery and other Crimes
- Nature of Services, Compensation and Payment Method
- Written contract
  1. Representations and warranties on compliance
  2. Right to inspect and audit third-party books
  3. Right to terminate contract if believe violation has or will occur

# Red Flags

**Due diligence review of relationship or individual transactions must include red flags which require additional investigation before approval.**

- Red flags are facts and circumstances that raise serious questions of an FCPA violation.
- Companies which ignore red flags run the risk of FCPA enforcement actions, criminal fines and the need for costly remedial measures.
- A red flag only means that further scrutiny is warranted.

## **Part III: Audit, Reporting, Response & Enforcement**

# Internal Controls

- The Company should ensure that it has a system of internal controls for the purpose of foreign bribery or concealing bribery.
- Internal controls are key to identifying and preventing bribery.
- Internal audits must be supplemented with forensic audits since internal audits hinge on “materiality” and may not catch bribery schemes.
- Every expenditure of money where bribery may occur should have specific controls and management procedures to prevent bribery (*e.g.*, gifts and hospitality, review form for certain amounts and review by compliance and legal offices).

# FCPA Testing

- Identify certain transactions related to key risk factors for testing purposes. The risk factors focus on:
  - Compliance Sensitive Accounts and the recording of transactions to the general ledger/subledgers:
    - Charitable Contributions/Political Donations
    - Commissions/Discounts/Rebates/Credit Notes
    - Customs expense, including freight forwarders
    - Expediting/Extortion/Facilitation payments
    - Fines and Penalties (tax, customs, visa)
    - Gifts
    - Licenses, Permit Fees and regulatory expenses
    - Lobbying
    - Marketing
    - Promotion expenses
    - Petty Cash
    - Security expenses
    - Sponsorships
    - Third Parties, including Tier 1 and Tier 2 Agents
    - Trade Association/Memberships/Training/Seminars/Conferences
    - Travel, meals and entertainment of key employees
    - Visa/Immigration Assistance
  - Review of contracts and invoices for Tier 1 and Tier 2 agents, including joint ventures

# Ongoing Advice and Internal Reporting

- The Company should establish or maintain an effective system for
  - a) Providing Guidance;
  - b) Monitoring;
  - c) Auditing;
  - d) Internal Reporting; and
  - e) Response to such internal reporting.
- Internet-based guidance and reporting systems
- Establish a Hot-line reporting system for employees to make anonymous reports
- Provide protection for whistleblowers
- Detailed procedure for review, response and/or investigate internet and/or hot-line reports
- Arrange for regular reports to the Board concerning internal investigations

# Discipline

- The Company should have appropriate disciplinary procedures to address violations of the anti-corruption laws and the Company's anti-corruption compliance code, policies, and procedures.
- Specific disciplinary procedures should be adopted for employees who commit a corruption offense.
- No tolerance policy should be adopted and enforced.
- Consistently enforce the company's policies and procedures through corrective action.

## Part IV: Periodic Review & Process Improvement

# Ongoing Assessment

- **Annual Review.** The Company should review its anti-corruption compliance standards and procedures, on no less than an annual basis to ensure they are working.
- **Ongoing Assessment.** The Company should conduct ongoing assessments of its FCPA compliance program.
  - During the year, spot checks and quarterly audits of the compliance program should be conducted.
  - Dynamic process for modifying the compliance program should be made as new information is learned.

# Examples from Existing Compliance Programs

# Examples of Policy/Guidelines

Guideline/Policy	y/n
Guidelines for Travel and Entertainment	
Guidelines for Charitable Donations	
Guidelines for Compliant Gift Giving (Hospitalities)	
Non-U.S. Community Contributions	
Facilitating Payments	
Offshore Payments to Non-US Commercial Sales Representatives	
Non-US Representatives Due Diligence (Questionnaire, Report, Certification)	
Non-US Commercial Sales Representatives Commission Payment Approval and Expense Reimbursement Review Policy	
Petty Cash Funds	
Use of Non-U.S. Police or Military for Security Purposes	
Real Estate Transactions in Selected Countries	
Joint Venture Formation Due Diligence (& post formation Report)	
M&A / Asset Acquisitions Trade and Anti-Corruption Due Diligence	
Model/Standard Anti-Corruption Clause	

# Sources

- Baker Hughes Foreign Corrupt Practices Act (FCPA) Compliance Guide
- Weatherford International Anti-corruption Compliance Manual
- Anadarko Petroleum Corporation Foreign Corrupt Practices Act Compliance Manual

GHBER Members are invited to share their Compliance Guides/Forms/Codes of Conduct with fellow members

by sending those to the attention of:

Chris De La Garza

Ethics and Compliance Specialist, CenterPoint Energy

[chris.delagarza@centerpointenergy.com](mailto:chris.delagarza@centerpointenergy.com)

who will post on the GHBER website.

# Tips and Hints for “Tailoring” a Compliance Program for your organization

# Tailoring a Compliance Program

- Review OECD Guidelines, benchmarks
- Remember that no “one size fits all”
- Understand how your business operates
  - Use of intermediaries or not?
  - Acquisition/joint venture activity or not?
- Know your specific business partners and how they operate
  - Weakest link?
- Use risk assessment to identify key/greater risks and help allocate/customize resources (ex. training: who, when, how much and how often)
- Study other companies’ compliance programs – not just in one’s industry
  - Checklist of issues/trends (ex. facilitating payments)
  - Go-bys for developing your own forms/guidelines

# Positive Impacts of a Best-in-Class Compliance Program

- A good reputation for consistent ethical and compliant operating procedures opens up tremendous opportunities for business growth and profitability.
- Good reputation as a responsible corporate citizen allows a company to get faster government approvals.
- Companies with reputations for ethical business practices and good corporate governance tend to have higher stock prices and more satisfied employees.
- Compliance is not about what a Company cannot do, it's about what it can do. Acting legally and ethically can serve as a catalyst for success.
- Realistically, no company can eliminate all compliance violations, but by building a successful Compliance Program, it can minimize the frequency and severity of compliance violations.

# Too Big Too Fail, Inc. Case Studies

# Too Big to Fail, Inc. -- Intro

- Too Big To Fail, Inc. (“Too Big”) is a financial services company, domesticated in Delaware and listed in the U.S. that has operations in approximately 60 countries, including the U.S., U.K., and throughout Western Europe, the Middle East and Africa. Roger Chattyguy is the Chief Compliance Officer for Too Big reporting directly to General Counsel, Sharon Coleman.
- In late-2008, Too Big took an equity stake in a mining operation in the West African country of Low CPI. The investment gave Too Big 20% of the operation, called Caveat Emptor, Inc. The remaining 80% was owned by SWF, Inc., the sovereign wealth fund of a large Middle Eastern country. At the time of the investment, Too Big did no due diligence on Caveat Emptor.

# Too Big to Fail, Inc. -- Intro

- One year later, in late-2009, SWF presented Too Big with the opportunity to increase its equity stake in Caveat to 60%. Too Big leapt at the opportunity and is now seeking approval from Low CPI's Minister of Investment (MOI) for the transfer.
- Since its inception, Caveat has been run by a general director hired by SWF. The director, G. On Native, a U.K. citizen, has decades of experience mining in Low CPI and runs the operation without any real oversight by either SWF or Too Big who consider themselves simply equity investors.
- Notwithstanding the lack of oversight, from time to time, G. Native has submitted requests for approval of certain expenses/gifts/etc. back to the home office of Too Big.
- You work in the legal department of Too Big and have been asked to review/handle these requests.....

# Group Activity – Case Studies

- Working as a team, take about 5 – 10 minutes to complete your assigned “hypothetical” request from G. Native.
- Group discussion and debrief.



# CONCLUSION

- Further discussion
- Questions



# Components of Effective Compliance Program

- Establish an effective Code of Conduct
- Designate specific high-level personnel with direct responsibility for overseeing compliance who have direct access to the CEO and Board of Directors
- Appoint a compliance officer with responsibility for independently investigating and acting on matters related to compliance
- Establish an effective risk assessment program
- Establish appropriate policies and procedures and related training
- Inform employees of the existence and details of the company's compliance program
- Arrange for regular reports to the Board concerning internal investigations
- Establish effective methods of monitoring, auditing or reporting on compliance, including, without limitation, establishing an anonymous hotline and providing protection for whistleblowers
- Implement systems to ensure reasonable steps to respond to or investigate reported violations
- Consistently enforce the company's policies and procedures through corrective action

# Basic Elements of FCPA Compliance Program

- **FCPA Compliance Policy and Tone at the Top.** The Company should develop and promulgate a clearly articulated and visible corporate policy against violations of the FCPA and a strong commitment from senior management.
- Strong policy statement should be adopted by the Board.
- Board and senior management should be required to make commitment to anti-corruption compliance.
- Compliance commitment must be demonstrated by actions.

# Anti-Corruption Policies and Procedures

The Company should develop and promulgate compliance standards and procedures which shall include policies governing:

- a.gifts;
- b.hospitality, entertainment, and expenses;
- c.customer travel;
- d.political contributions;
- e.charitable donations and sponsorships and community payments;
- f.facilitation payments;
- g.solicitation and extortion;
- h.vetting and management of third parties; and
- i.Real estate transactions directly or indirectly involving government officials.

# Use of Risk Assessment

- The Company should develop its compliance standards and procedures using a risk assessment.
- The risk assessment should be a formal and documented review which examines:
  - the nature and extent of corruption in each country in which the company does business relying on public and internal sources of information (Transparency International, OECD, etc);
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# Senior Management Oversight and Reporting

- The Company should assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of its Company's anti-corruption policies.
- Company should designate a Compliance Officer in senior management and provide adequate resources to compliance office.
- Compliance officer should be separate from General Counsel and internal auditing functions.

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