



PUBLIC  
CONTRACTING  
INSTITUTE

**KUTAKROCK**

ATTORNEYS AT LAW

# Identifying Risks in Your Foreign Supply Chain: Anti-Corruption/Foreign Corrupt Practices Act (FCPA)

David S. Gallacher, Kutak Rock LLP, Washington, DC

**November 8, 2023**

# Introductions



**David Gallacher**

+1 202.828.2437 | Washington, D.C.

[David.Gallacher@KutakRock.com](mailto:David.Gallacher@KutakRock.com)

# Overview of the Series

- Sep. 20, 2023: New Rules and Restrictions in Foreign Supply Chains
- Oct. 4, 2023: Buy American Act Requirements
- Oct. 18, 2023: Trade Agreements Act
- Nov. 1, 2023: U.S. Export Control Laws and Tariffs
- Nov. 8, 2023: **Corruption/Foreign Corrupt Practices Act (FCPA)**
- Nov. 15, 2023: **Supply Chain Cybersecurity**

# Today's Agenda

- 1. FCPA Enforcement**
- 2. FCPA Basics**
- 3. Other Anti-Bribery Laws**
- 4. FCPA and Government Contractors**
- 5. Best Practices**

# 1. FCPA Enforcement

# Why It Matters to You



- Compliance is risk mitigation

# Aggressive Enforcement



# Aggressive Enforcement (cont'd)





# Aggressive Enforcement (cont'd)

**The New York Times**

**Glencore will pay \$1.1 billion to settle bribery and price-fixing charges**

**THE WALL STREET JOURNAL.**

**Stericycle to Pay About \$90 Million to Resolve Bribery Probes in U.S., Brazil**

**The Washington Post**

Business  
**Power giant Alstom to pay record \$772 million to settle bribery charges**

**THE WALL STREET JOURNAL.**

**Record \$279 Million Whistleblower Award Went to a Tipster on Ericsson**  
The largest-ever award in the SEC's cash-for-tips program was related to Ericsson's bribery case

# Aggressive Enforcement (cont'd)

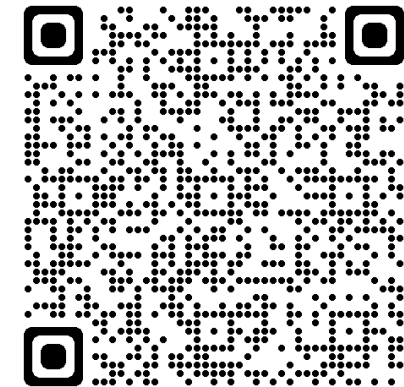
	Company (country)	Year	Penalty
1	Goldman Sachs Group Inc. (USA)	2020	\$3.30 B
2	Airbus SE (EU/NL)	2020	\$2.09 B
3	Petrobras (BRA)	2018	\$1.78 B
4	Telefonaktiebolaget LM Ericsson (SWE)	2019	\$1.06 B
5	Telia Company AB (SWE)	2017	\$1.01 B
6	MTS (RUS)	2019	\$850 M
7	Siemens (GER)	2008	\$800 M
8	VimpelCom (NL)	2016	\$795 M
9	Alstom (FRA)	2014	\$772 M
10	Glencore PLC (CHE)	2022	\$700 M

# Aggressive Enforcement (cont'd)

- Most recent settlement (October 2023)...
  - Albemarle Corporation
  - Specialty chemicals manufacturing company in NC
  - Admitted to paying bribes to petrochemical/oil refineries in Vietnam, Indonesia, and India for “catalyst” chemical contracts
    - Paid inflated commissions to sales agents in Vietnam
    - Paid “necessary” bribes in Indonesia through sales agent
    - Bribed officials in India to avoid getting blacklisted
  - Voluntary disclosure (but it was not “reasonably prompt”)
  - Cooperation
  - Three-year non-prosecution agreement
  - ~\$300M in fines/disgorgement to SEC and DOJ



ALBEMARLE®



# Industry Sweeps

- Enforcement actions have come from a diverse set of industries in recent years
- However, we still do see some patterns...

# Industry Sweeps (cont'd)

- Mining



GLENCORE



KINROSS



# Industry Sweeps (cont'd)

- Financial Services



Goldman Sachs

Deutsche Bank 

CREDIT SUISSE 

 JLT

U.S. Investment Fund Companies

# Government Contractors



## 2020: J&F Investimentos SA

- Brazilian meatpacking company with U.S. government contracts
- \$155M FCPA enforcement action
- U.S. members of congress seeking debarment

## 2016: Embraer

- \$187M settlement
- Third party payments Dominican Republic, Saudi Arabia, and Mozambique



## 2016: Louis Berger Aircraft Services

- \$17.1M FCPA settlement
- U.S. federal court ordered termination of U.S. Navy contract of subsidiary



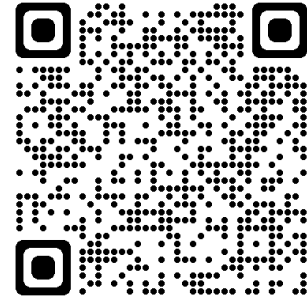
# World Bank Debarments



- 2023: Henan Geological & Mining Construction Engineering (Group) Co., Ltd. (China)
- 2022: Voith Hydro GmbH & Co. KG (Germany)
- 2022: Voith Hydro Shanghai Ltd. (China)
- 2021: GMV (Spain)
- 2021: Ferrostaal Oil & Gas GmbH (Germany)
- 2019: Odebrecht (Brazil)
- 2019: Merck (U.S.) business unit
- 2018: GL Systems LLC (U.S.)



# Corruption Perception Index (CPI)



- Transparency International

- **Least** Corrupt:

- Denmark
- Finland
- New Zealand

- **Most** Corrupt:

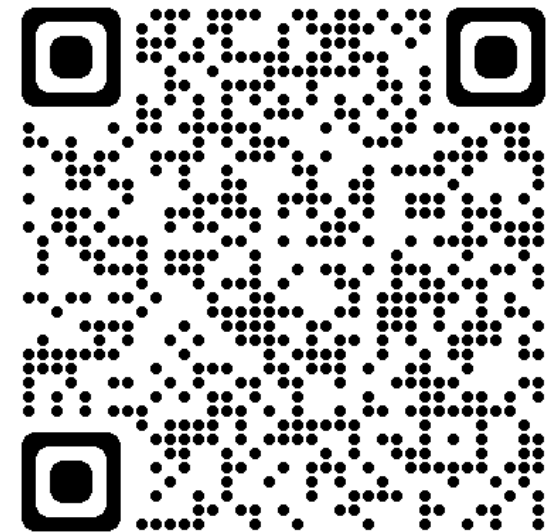
- |                |                |                      |
|----------------|----------------|----------------------|
| 1. Somalia     | 5. Yemen       | 9. Equatorial Guinea |
| 2. Syria       | 6. Libya       | 10. Burundi          |
| 3. South Sudan | 7. North Korea | 11. Turkmenistan     |
| 4. Venezuela   | 8. Haiti       | 12. Nicaragua        |



# Key Updates: 2022 Monaco (DOJ) Memo

- Potential increase in corporate criminal prosecutions
- Priority of prosecutions of **individuals**
- Cooperation credit will depend on timeliness of disclosure
- High priority on compliance self-assessment

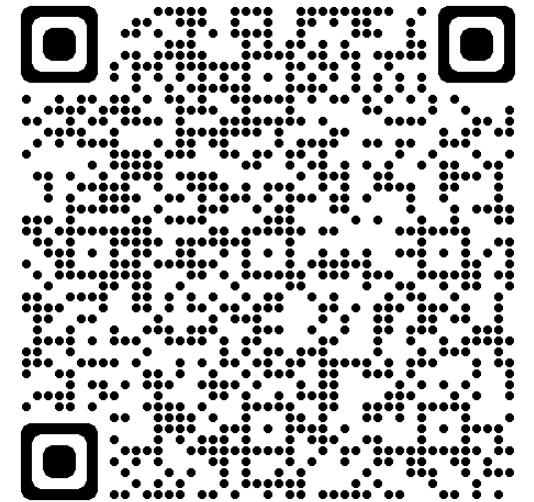
**“We cannot ignore the data showing overall decline in corporate criminal prosecutions over the last decade. We need to do more and move faster.”**



# Key Updates: 2023 DOJ Safe Harbor Policy

- Encouraging voluntary self-disclosures
- 6-month safe harbor for issues identified in M&A activity
  - Imminent harm may require more rapid disclosure
- Presumption of declined prosecution
- Penalties will still apply

**“We are placing an enhanced premium on timely compliance-related due diligence and integration. Compliance must have a prominent seat at the deal table if an acquiring company wishes to effectively de-risk a transaction.”**



# Potential Trend: Cryptocurrency Payments

- Sam Bankman-Fried
  - Convicted of fraud
  - First ever FCPA enforcement action based on illegal payments using cryptocurrency
  - Allegedly directed \$40M to Chinese authorities to unfreeze \$1B in cryptocurrency



## 2. FCPA Basics

# FCPA – Bribery



- 15 U.S.C. §§ 78dd-1, *et seq.*
- Payment, offer, or promise
- Money or thing of value
- To a foreign official
- To obtain or maintain a business advantage

# FCPA – Intent



- Intentional
- Conscious disregard
- Willful blindness

# FCPA – “Foreign Official”



- Government Owned Entities (including jointly-owned entities)
- Political party, official, or candidate
- Public international organization
- **Anyone acting on their behalf**



# FCPA – “Thing Of Value”



- Anything with value to the recipient
  - Gift
  - Hospitality
  - Job or contract (including for family members)
  - Loan or favorable financing
  - Donation

# Third-Party Payments



- Almost 100% of recent cases
- Highest compliance risk
- Most difficult diligence

# FCPA Exceptions & Defenses



- Bona fide payments
  - *Reasonable*
  - *Reasonably connected to permitted purpose:*
    - Demonstrate product or service
    - Execute or perform contract
- **Facilitation Payments** (aka “Grease Payments”)
  - Expedite *non-discretionary* payments
  - Common example: permits
  - But note that these payments could still be illegal under local laws

# FCPA Accounting Provisions

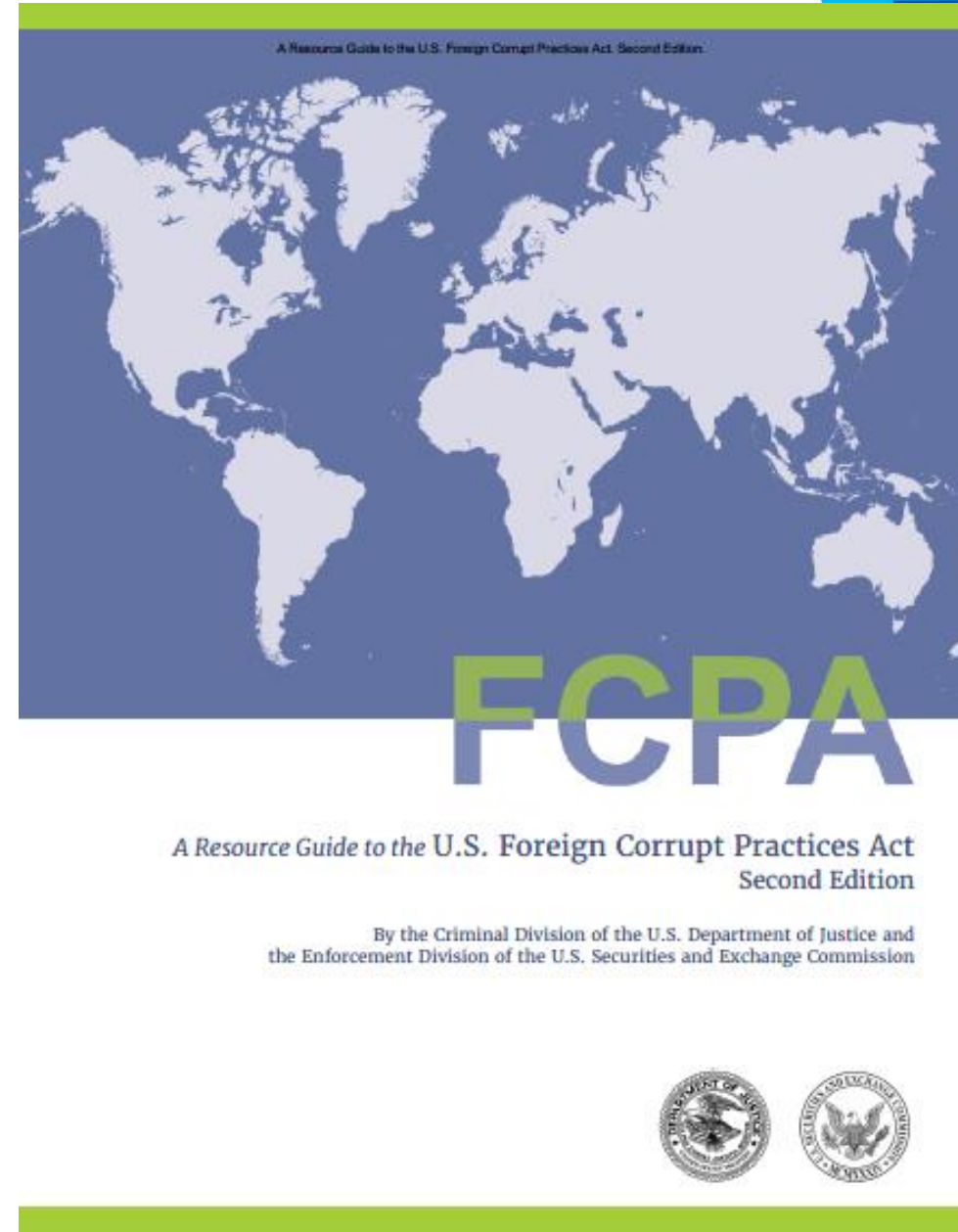
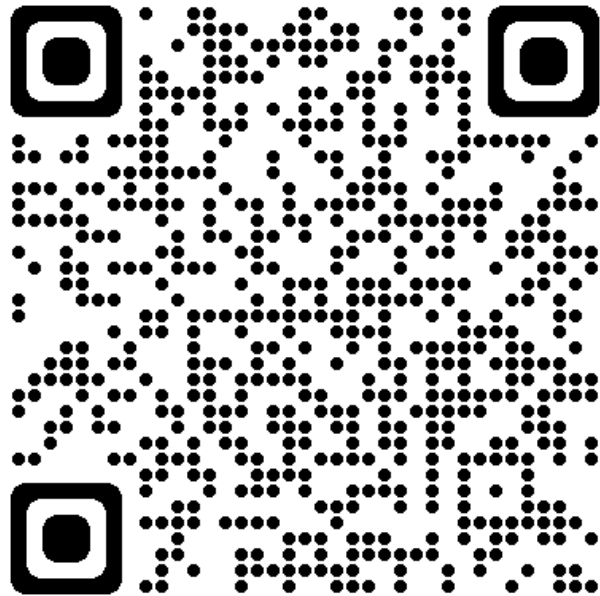


- Listed company is required to:
  - Establish and maintain **accurate books and records** that describe in **reasonable detail** all financial transactions
  - Design and implement sufficient **internal controls** to **detect and prevent** FCPA violations
- Strict liability – no corrupt intent required
- No materiality requirement

# FCPA Accounting Provisions (cont'd)

- Bribes and corrupt payments are often unlawfully mischaracterized in corporate books and records:
  - ✓ Commissions or royalties
  - ✓ Consulting fees
  - ✓ Sales and marketing
  - ✓ Scientific studies
  - ✓ Rebates or discounts
  - ✓ Travel and entertainment
  - ✓ Miscellaneous
  - ✓ Petty cash
  - ✓ Free goods
  - ✓ Intercompany accounts
  - ✓ Write-offs
  - ✓ Supplier/Vendor payments
  - ✓ Customs intervention payments

# FCPA Resource Guide



# 3. Other Anti-Bribery Laws

# Domestic Bribery



- 18 U.S.C. § 201(b)(1): applies to federal public officials and private contractors working for the U.S. government
- Each state has laws prohibiting bribes to state officials
- Other federal statutes
  - US Travel Act
  - Mail and Wire Fraud
  - Fraud and False Statements
  - Conspiracy to Commit \_\_\_\_\_



# UK Bribery Act (UKBA): Differences from FCPA



- No payment exceptions
- Applies to domestic **and** foreign officials
- Applies to commercial **and** governmental bribery
- **Affirmative defense for compliance program**

# 4. FCPA & Government Contracts

# FCPA & Government Contracts



- Mandatory Disclosure Rule
  - FAR 52.203-13(b)(3)(i) – disclosure to Agency OIG and Contracting Officer
  - Applies to all covered contracts (>\$6M and at least 120 days duration) as well as subcontractors
- **Suspension or debarment** for failure to disclose violations

# “Credible Evidence” Rule



## FAR 52.203-13(b)(3)(i)

- Contractors must disclose **credible evidence** of violation involving **fraud**, conflict of interest, or bribery, a violation of the **False Claims Act**, or a **significant overpayment** in connection with a contract
- Opportunity to conduct **preliminary examination** of the evidence to determine its credibility before deciding whether the disclose to the government
- Contractors should take reasonable steps to determine evidence is “credible,” **not launch complex investigation**
- **“Timely Disclosure”**: no set timeframe
- Consequence of failing to disclose = suspension or debarment

# Other Requirements Under FAR 52.203-13



- **Code of Ethics:** FAR 52.203-13(b)
  - All covered contracts must have written Code of Ethics
  - Should be tailored to government contracting compliance obligations
  - Must develop internal procedures to detect and investigate potential violations to determine whether there is “credible evidence”
- **Compliance Program:** FAR 52.203-13(c)
  - Does not apply to:
    - Small businesses
    - Commercial contracts
  - Must have Business Ethics Awareness and Compliance Program and Internal Control System
  - Requires training
  - Must be in place within 90 days of contract award

# 5. Best Practices

# Best Practices



- Tone at the top
  - Management buy-in
  - Proper resources
  - Policies
- Risk Based Compliance Program
  - Assess risk profile
  - Tailor compliance program
  - Use the Corruption Perception Index as a guide
  - Continued strong enforcement in Africa, Russia and China

# Best Practices (cont'd)



- Tailored due diligence on:
  - Customers
  - Third parties
  - Sales agents (esp. overseas sales agents)
  - M&A
- Training
  - Efficiency: train the trainers
  - Simple, actionable messages
  - Consider attorney-client privilege
- Transparency



# Best Practices (cont'd)



- Compliance self-assessment
  - Especially if you are a high-risk market
- Voluntary disclosure to SEC (if needed)
  - Coupled with Mandatory disclosure to OIG (if required)

“Self-assessment is the best best practice”

# Questions?



# Last Session on November 15, 2023...

- **Supply Chain Cybersecurity**