



# **The Foreign Corrupt Practices Act: A Primer**

March 29, 2017

# Presenters



**Mark Srere**  
Partner, DC  
(202) 508-6050  
[mark.srere@bryancave.com](mailto:mark.srere@bryancave.com)



**Kristin Robinson**  
Associate, DC  
(202) 508-6334  
[kristin.robinson@bryancave.com](mailto:kristin.robinson@bryancave.com)

Connect with us on LinkedIn

Mark (<https://www.linkedin.com/in/mark-srere-2585689>)

Kristin (<https://www.linkedin.com/in/kristin-robinson-2b097a4>)

# Topics of Discussion

- Introduction and Relevance
- Overview of the FCPA
- SEC Enforcement Considerations
- FCPA Compliance Programs

# INTRODUCTION AND RELEVANCE

# History of the FCPA

- SEC investigations in mid-1970s
  - 400+ US companies made questionable or illegal payments of more than \$300 million
  - Abuses ranged from bribery of high-level foreign officials to payments facilitating certain clerical duties (“facilitating payments”)
- 1977 – Congress enacted the FCPA

# FCPA Top Ten Settlements

1. Siemens (Germany): \$800 million (2008)
2. Alstom (France): \$772 million (2014)
3. KBR / Halliburton (U.S.): \$579 million (2009)
4. Teva Pharmaceutical (Israel): \$519 million (2016)
5. Odebrecht/Braskem (Brazil): \$420 million (2016)
6. Och-Ziff (U.S.): \$412 million (2016)
7. BAE (UK): \$400 million (2010)
8. Total SA (France): \$398 million (2013)
9. VimpelCom (Holland): \$398 million (2016)
10. Alcoa (U.S.): \$384 million (2014)

# OVERVIEW OF THE FCPA

# Structure of FCPA

## Antibribery Provisions

- Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage
- Mainly enforced as criminal violations by the Department of Justice

## Books and Records Provisions

- Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls
- Mainly enforced as civil violations by the Securities and Exchange Commission



# Antibribery Prohibited Acts

- It is unlawful for
  - an “issuer,” “domestic concern,” or “any person acting within the territory 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 business advantage

# Jurisdiction

- Any “issuer” that files reports to the SEC or trades equity or debt on a U.S. exchange
  - Includes any foreign company that trades, for example, American Depository Receipts (ADRs) on a U.S. exchange
- Any “domestic concern”
  - Includes U.S. citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the U.S. or a U.S. territory or that has its principal place of business in the United States
- Any “person,” including an organization, wherever located, that, while in a U.S. territory, does any act in furtherance of the prohibited conduct
  - Government argues minimum contacts include emails, telephone calls, transfers through correspondent bank accounts in U.S. intermediary banks

# Corrupt Intent

- “Corruptly” means an intent or desire to wrongfully influence the recipient
- In addition to Quid Pro Quo, the FCPA also prohibits corrupt payments to:
  - **any person**, while **knowing** that all or a portion of such money or thing of value will be offered to foreign official directly or indirectly
- “Knowing” includes having a **firm belief** that something will happen
  - Knowledge is established if a person is aware of a **high probability** of the existence of such circumstance, unless the person actually believes that such circumstance does not exist
- Willful blindness instructions are appropriate in FCPA cases
  - Bourke Case

# Direct or Indirect Payments Covered by Law

- Statute prohibits unlawful payments directly or indirectly through a third party
- Many enforcement cases involve indirect payments
- Examples of third parties through whom illegal payments have been made:
  - Agents or consultants
  - Distributors
  - Joint venture partners
  - Lawyers/accountants
  - Service providers

# Does a Payment Need to Be Made?

- No
- Offers, promises, or authorizations to make prohibited payments are just as illegal as actually making a prohibited payment
- The simple offer of a payment is enough to create liability

# What qualifies as “anything of value”?

- Comes in all shapes and sizes - any unfair benefit
- Payor must still have corrupt intent
- Cash or the equivalent of cash such as a gift card, voucher, coupon
  - Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items are unlikely to improperly influence an official
- Gifts
  - The FCPA does not prohibit gift-giving – the FCPA prohibits the payments of bribes, including those disguised as gifts
  - Large and extravagant gifts (sports cars, fur coats, other luxury items)
  - Gifts that are a mere token or modest in value that are tokens of esteem or gratitude if given openly and properly recorded in the books and records do not violate FCPA, unless widespread and part of a pattern of bribes

# Entertainment or Travel

- Both DOJ and SEC have brought cases where travel and entertainment expenditures occurred in conjunction with other conduct reflecting systematic bribery or other clear indicia or corrupt intent
- Examples:
  - \$12K birthday trip that included visits to wineries and dinners
  - \$10K spent on dinner, drinks and entertainment
  - Trip to Italy – primarily sightseeing and \$1K “pocket money” for each official
- Payments to third parties (like official’s family) also violate the FCPA
- If in the context of a promotional payment, may be an affirmative defense

# How is “Foreign Official” defined?

- Guidance emphasizes language is broad and “any” prohibits bribes to low-ranking employees and high-level officials alike
- Statutory definition includes:
  - Foreign government employees or officials
  - Political officials or members of their staffs
  - Employees of public international organizations
  - Candidates for political office
- Has also been interpreted by DOJ to include:
  - Employees of government-owned or controlled businesses
  - Examples include:
    - Employees of state-owned or state-controlled hospitals
    - Employees of state-owned or state-controlled media outlets, e.g. Chinese journalists
    - Employees of sovereign wealth funds



# Instrumentalities

- “Foreign official” includes officers and employees of instrumentalities of foreign governments
- Many foreign government operate through state-owned and state-controlled entities
  - Particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation
- “Instrumentality” includes an entity where a foreign government owns or controls a majority of shares
  - Instrumentality is not likely to include entities where the government has a minority interest, unless it has substantial control

# Instrumentalities

- Fact-specific analysis of an entity's ownership, control, status, and function
- DOJ and SEC have done this since the beginning of time (at least the beginning of enforcement of the FCPA)
  - Mexican national oil company
  - Mexican-owned and controlled electricity commission
  - Haiti-owned and controlled telecommunications company
  - Malaysian telecommunications company (Gov't owned only 43% of shares, but Ministry had veto power over all major expenditures, controlled important operational decisions, appointed senior officers)

# What is an unfair business advantage?

- Guidance: The FCPA “does apply broadly to bribes paid to help obtain or retain business, which can include payments made to secure a wide variety of unfair business advantages”
- Focus is on gaining a competitive advantage rather than directly securing a particular contract
  - Examples include:
    - Circumventing the procurement process
    - Gaining access to non-public bid tender information
    - Evading taxes or penalties
    - Influencing the adjudication of lawsuits or enforcement actions
    - Obtaining exceptions to regulations
    - Avoiding contract termination
- The bribe does not need to achieve its intended effect

# Facilitation Payments

- Applies ONLY to expedite or secure performance of “routine governmental action” by a government official
  - Must be non-discretionary, and not a misuse of discretion
  - Size is not determinative, but can suggest discretion or corruption – look to purpose rather than its value
- Examples
  - Obtaining permits, licenses, or other official documents
  - Processing governmental papers, such as visas and work orders
  - Providing police protection
  - Mail pick-up and delivery
  - Providing phone service, power and water supply
  - Loading and unloading cargo
  - Protecting perishable products
  - Scheduling inspections associated with contract performance or transit of goods across country
- **BUT** some companies no longer allow these types of payments
- **AND** facilitating payments are not always permitted under local foreign law

# “Affirmative Defenses” Under the FCPA

- “Lawful” under local law
  - The fact that bribes may not be prosecuted under local law does not suffice for this defense
  - In *US v. Kozeny*, court ruled that an exception under Azeri law that relieved bribe payors who voluntarily disclosed bribe payments to the authorities of criminal liability did not make the bribes legal under this affirmative defense
- Promotional Payments
  - “Reasonable and bona fide” expenses
    - promotion, demonstration, explanation of products
    - execution or performance of contract
  - Proper documentation of expenditures

# Extortion or Duress

- Payments made under extortion or duress will not give rise to FCPA liability
  - true extortionate demands under imminent threat of physical harm
  - “a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt intent”
- Mere *economic* coercion does not amount to extortion
- If true extortion happens, company should contact appropriate U.S. embassy

# Successor Liability

- “Applies to all kinds of civil and criminal liabilities, including FCPA”
- Does not create liability where there was none before
- Manual suggests that the DOJ and SEC only take action against successor companies in “limited circumstances:”
  - Egregious or sustained violations
  - The acquiring company participated in the violation or failed to stop the misconduct
- The Manual advises voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program to decrease the likelihood of an enforcement action

# Aiding and Abetting and Conspiracy

- Even if the foreign entity or individual is not covered under FCPA jurisdiction, DOJ and SEC take the position that they can be convicted of conspiring to violate the FCPA
- DOJ and SEC take the position that even if the foreign entity or individual did not take an act within the U.S. in furtherance of the violation, it can be convicted of aiding and abetting an FCPA violation
- Asserts civil liability for aiding and abetting if they knowingly or recklessly provided substantial assistance to the violator



# United States v. Hoskins

- Hoskins worked for Alstom UK and was assigned to Alstom Resources Management S.A. in France. Indictment alleges:
  - He performed functions and services for other Alstom subsidiaries, including Alstom Power, Inc., located in the U.S.
  - He authorized payments to consultants that were used as bribes to obtain a contract in Indonesia to build power stations for Indonesia's state-owned and controlled electricity company
- Court held: non-resident foreign national, who is not an agent of a domestic concern or issuer and who does not commit acts while physically present in the U.S., cannot be subject to criminal liability under the Foreign Corrupt Practices Act (FCPA) under a theory of conspiracy or aiding and abetting a violation of the FCPA by a person who is within the statute's jurisdictional reach

# Request for DOJ Advisory Opinion

- Where a company is unsure whether an act would constitute an FCPA violation, the Act allows a company to submit an inquiry to DOJ concerning the propriety of the conduct
- DOJ must, within 30 days after receiving the inquiry, provide an advisory opinion to the requesting person or entity indicating whether the conduct complies with the FCPA
- Such requests provide helpful guidance, particularly because there is a dearth of decided cases interpreting FCPA provisions

# Potential FCPA Consequences

- Jail and massive fines
- Termination of government licenses
- Debarment from government contracting programs
- Disgorgement of a company's profits on contracts secured with improper payments
- Tax implications
- Shareholder litigation
- Foreign enforcement actions
- Appointment of independent compliance monitors

# **SEC ENFORCEMENT CONSIDERATIONS**

# Who is covered by these provisions?

- Applies to issuers with securities registered pursuant to the Exchange Act
- Parent companies may be liable for false or fraudulent entries on any book or record of a subsidiary whose results are consolidated into its financial statements
- If issuer holds 50% or less of the voting power of subsidiary, then issuer must proceed in **good faith** to use its influence to cause subsidiary to meet internal accounting controls requirement

# Books and Records

- Books, records, and accounts must be kept “in reasonable detail”
  - Level of detail that would satisfy prudent officials in the conduct of their own affairs
  - No materiality threshold
  - Bribes are often concealed as legitimate payments, such as consulting fees, marketing expenses, travel and entertainment, or discounts
- System of internal accounting controls
  - The processes in place to ensure accurate financial reporting
  - Includes the organization’s “tone,” risk assessments, and control activities such as approvals, authorizations, segregation of duties, etc.
  - An effective compliance program is a critical component of internal controls
- SEC will look to see if there are potential reporting and anti-fraud violations that accompany the FCPA violation
- There can be criminal liability for accounting violations

# Dodd-Frank Whistleblower Provisions

- Whistleblowers who
  - “Voluntarily” provide the SEC with
  - “Original information”
  - That leads to a “successful enforcement” action in a federal or administrative court
  - That results in monetary sanctions greater than \$1,000,000
- Are entitled to a mandatory award from the SEC between 10 and 30 % of the monetary sanctions

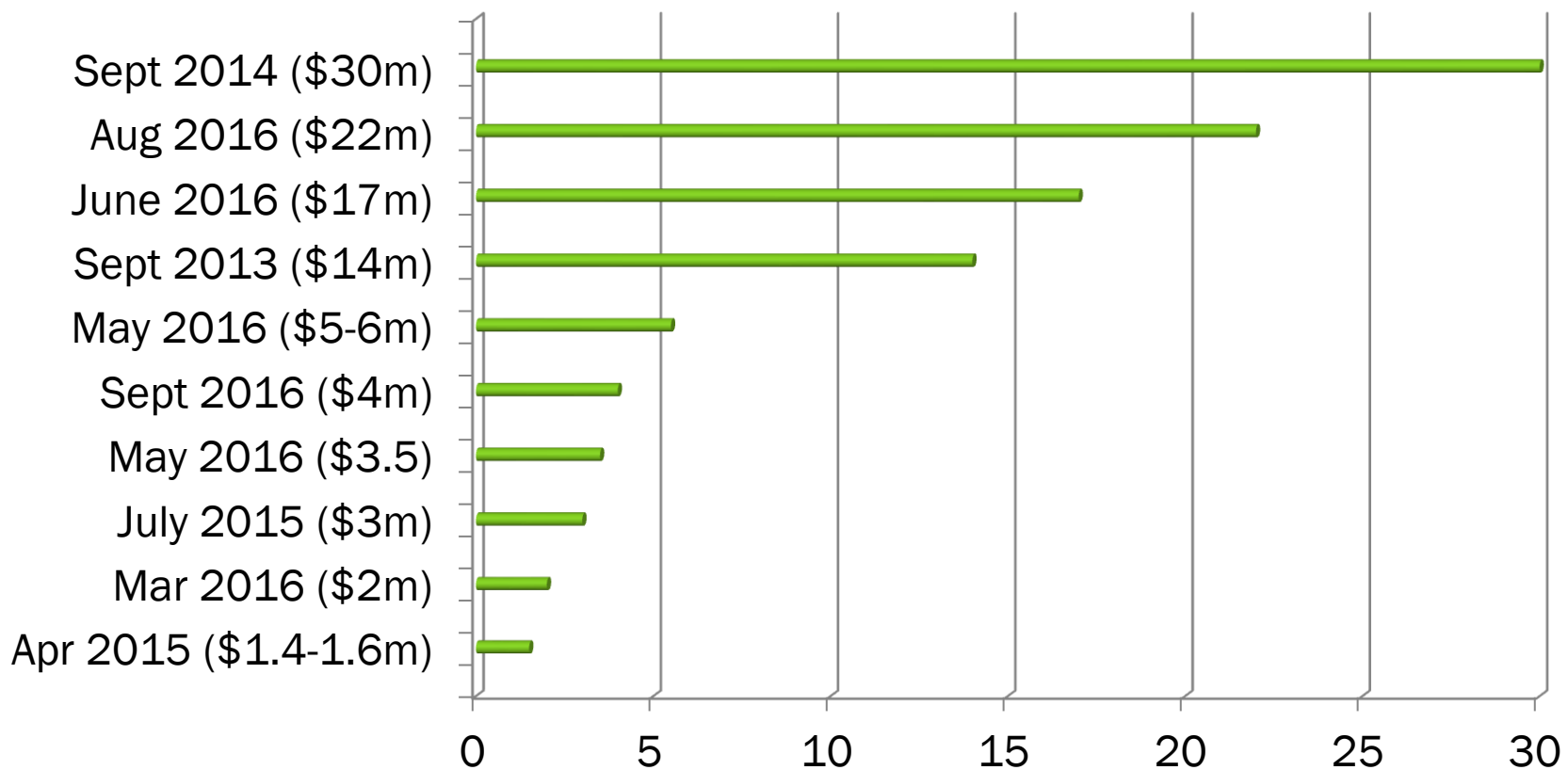
# Dodd-Frank Whistleblower Statistics

- In its 2016 fiscal year, the SEC received 4,218 whistleblower tips
  - Possible corporate disclosure/financial statements and offering fraud most common complaint category at 22% of the tips
  - 238 tips with respect to FCPA violations; up each year and from 186 in 2015
  - Tips received from all 50 states and 67 foreign countries
- Sept. 22, 2014, awarded more than \$30 million to a whistleblower, the largest amount ever
- Awarded more than \$53.5 million to whistleblowers in 2016—the most in any year to date



# Dodd-Frank Whistleblower Statistics

## Top Ten Settlements in Millions



# **FCPA COMPLIANCE PROGRAMS**

# DOJ Compliance Guidance

- Analysis & Remediation of Underlying Misconduct
- Senior and Middle Management
- Autonomy and Resources
- Policies and Procedures
- Risk Assessment
- Training and Communications
- Confidential Reporting and Investigation
- Incentives and Disciplinary Measures
- Continuous Improvement, Periodic Testing & Review
- Third Party Management
- Mergers and Acquisitions

# DOJ Compliance Guidance

Evaluation focus is on:

- Compliance program structure
- Effectiveness of program implementation
- Genuine culture of compliance within the organization

# DOJ Compliance Guidance

## Analysis & Remediation of Underlying Misconduct

- Root cause analysis
- Prior indications
- Remediation

## Senior and Middle Management

- Conduct at the top
- Shared Commitment
- Oversight

# DOJ Compliance Guidance

## Autonomy & Resources

- Compliance role
- Stature
- Experience and qualifications
- Autonomy
- Empowerment
- Funding and resources
- Outsourced compliance functions

# DOJ Compliance Guidance

## Policies and Procedures

- Design and accessibility
  - Designing compliance policies & procedures
  - Applicable policies & procedures
  - Gatekeepers
  - Accessibility
- Operational Integration
  - Responsibility for integration
  - Controls
  - Payment systems
  - Approval/Certification process
  - Vendor management

# DOJ Compliance Guidance

## Risk Assessment

- Risk management process
- Information gathering and analysis
- Manifested risks

## Training and Communications

- Risk-based training
- Form/Content/Effectiveness of training
- Communications about misconduct
- Availability of guidance



# DOJ Compliance Guidance

## Confidential Reporting and Investigation

- Effectiveness of the reporting mechanism
- Properly scoped investigation by qualified personnel
- Response to investigations

## Incentives and Disciplinary Measures

- Accountability
- Human resources process
- Consistent application
- Incentive system

# DOJ Compliance Guidance

## Continuous Improvement, Periodic Testing & Review

- Internal audit
- Control testing
- Evolving updates

## Third Party Management

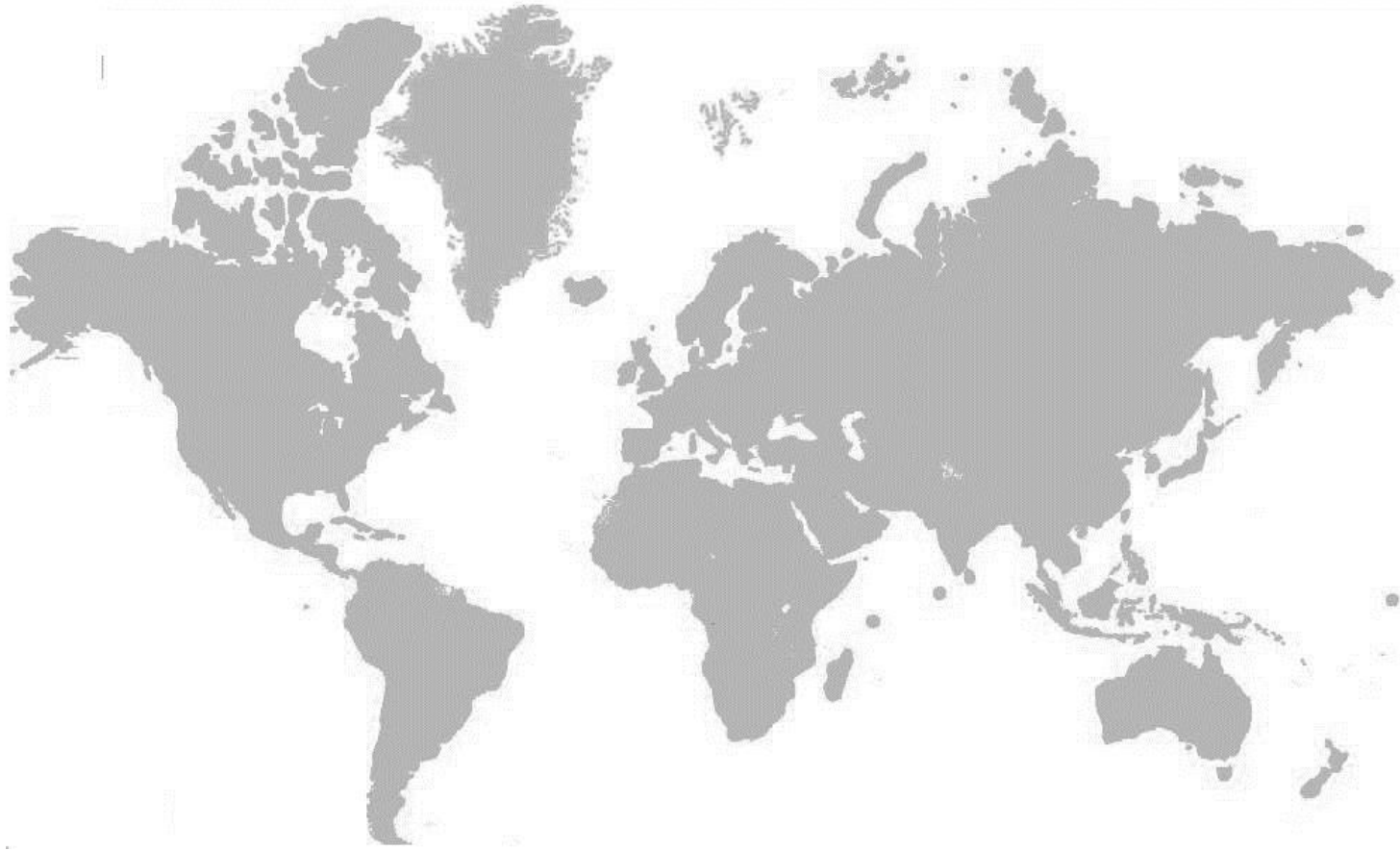
- Risk-based and integrated processes
- Appropriate controls
- Management of relationships
- Real actions and consequences

# DOJ Compliance Guidance

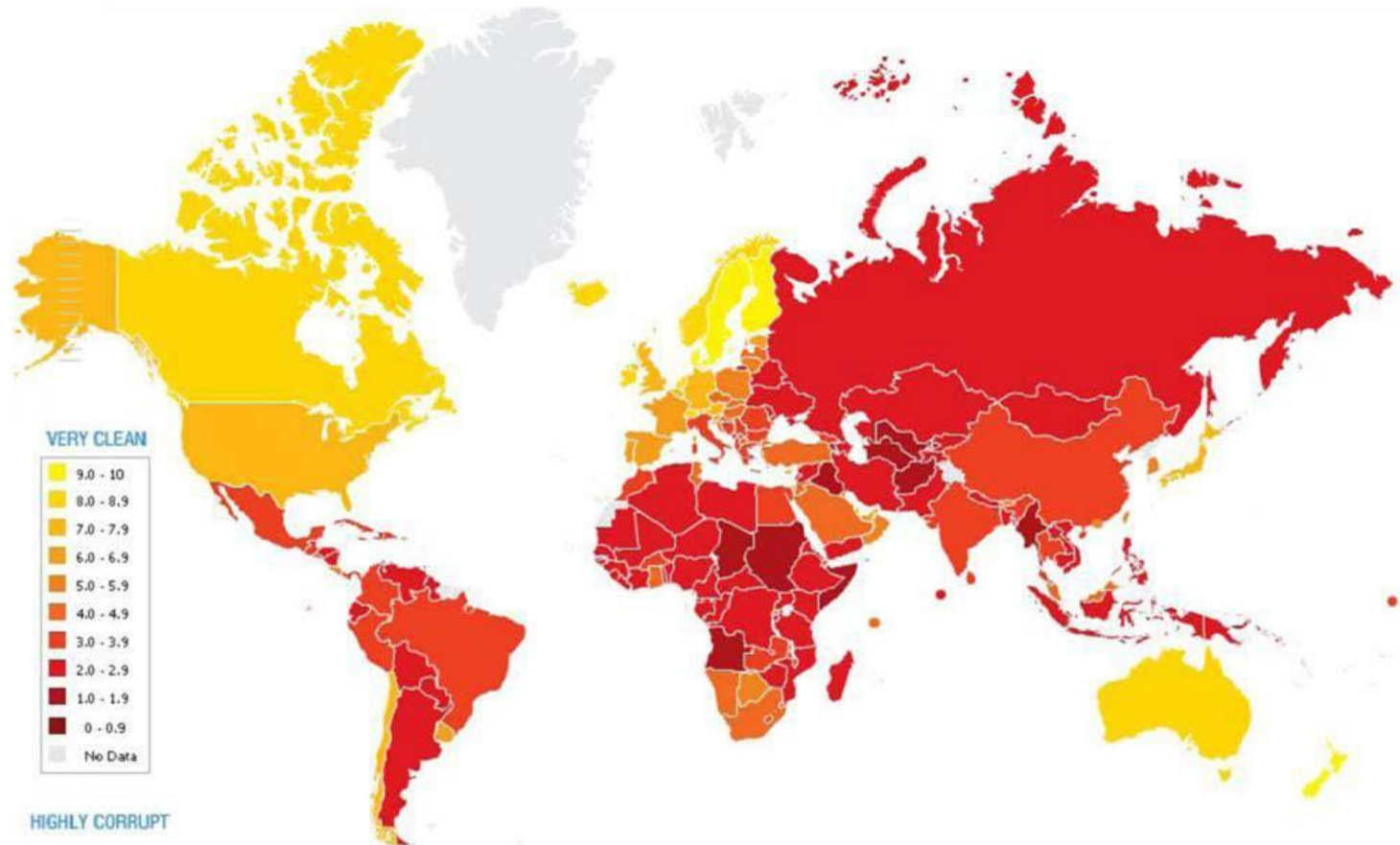
## Mergers and Acquisitions

- Due diligence process
- Integration in the M&A process
- Process connecting due diligence to implementation

# The Sales Personnel See...



# Prosecutors see...



# QUESTIONS

# Contact Information

Kristin Robinson, Washington, DC  
202-508-6334  
kristin.robinson@bryancave.com

Mark Srere, Washington, DC  
202-508-6050  
mark.srere@bryancave.com