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**TRENDS IN BRIBERY/CORRUPTION LAW  
ENFORCEMENT AROUND THE GLOBE**

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# INTRODUCTION

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- The re-invigoration of the SFO
- Increasing local/national enforcement initiatives around the world
- Examples - China, India, Brazil, Canada, Spain (Poland, Namibia and Egypt)
- The importance of good compliance – both systems and implementation
- Independent investigative process required
- High level of fines and costs, and potential for disbarment

# THE RE-INVIGORATION OF THE SFO

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- Current cases include Rolls Royce, GSK, Barclays, G4S, Serco, Alstom, Olympus, GPT, Sweett Group, and Tesco
- Broad scope of geographies across Asia, CIS, EU, Middle East and Latin America
- Determined to take on large corporates
- Higher quality and better motivated management team
- Focus on prosecution over settlement
- DPA's available since February 2014 – is there enough “carrot?”
- Full and early co-operation expected, including waiver of LPP – but see recent SFO speeches

# THE RE-INVIGORATION OF THE SFO (2)

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- New Sentencing Guidelines – starting point can be 20% of worldwide revenue from relevant business unit
- “Blockbuster” funding
- City of London Police Overseas Anti-Corruption Unit: 150+ on-going cases involving 50+ countries
- Section 7 – failure to prevent bribery (subject to adequate procedures defence)
- Proposed extension of Section 7 to cover all financial crime by organisations and associated persons is “*gaining traction*” – very important development
- Current test for corporate criminal liability

# CORPORATE LIABILITY FOR FINANCIAL CRIME

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- *“when it comes to prosecution of corporates, the SFO’s performance is often compared unfavourably to that of US prosecutors. The key reason for this is the much higher bar that we in the SFO face in proving corporate criminal liability”*
- *“In practice, the email trail has a strange habit of drying up at middle management level. Why not extend the principle encapsulated in Section 7 of the Bribery Act?...such an offence would sharpen corporate vigilance around compliance... such a change is high on my wish list”*

**Extracts from David Green QC’s recent speeches**

# SECTION 7 BRIBERY ACT 2010

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- Corporate offence of failing to prevent bribery
- Broad extra-territorial scope: not only UK companies, but also non-UK companies which carry on part of a business in the UK
- Liability for acts of “*associates*” who pay bribes on behalf of the company
  - Employees, agents, representatives, service providers...
- No requirement that the bribe be connected to the UK, or that the organisation approve or even be aware of the conduct
- “*adequate procedures*” defence
- Ministry of Justice Adequate Procedures Guidance 6 Principles

# CHINA

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- 2012: President Xi Jinping launches anti-corruption campaign
- Historically, local ABC laws rarely enforced against non-Chinese companies
- That has changed:
  - 2013: GSK investigated
  - 2014: Covers entire sector: AstraZeneca, Eli Lilly, Novartis, UCB and Sanofi
  - Two investigators imprisoned
  - Executives prosecuted and given suspended sentences
  - GSK fined £300M September 2014
  - SFO and DoJ/SEC now also investigating GSK in Iraq, Jordan, Lebanon, Poland and Syria

# CHINA: SUBSTANTIAL INCREASE IN ENFORCEMENT ACTIVITY (2)

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- Also in 2013:
  - Mutual legal assistance treaty UK/PRC– awaiting ratification
  - 182,000 party members investigated
  - Three-dozen senior government officials detained on ABC allegations
- Government officials/top executives at SOEs targeted, including former Politburo member and former security and law enforcement head
- Recent legislation boosts investigatory and asset recovery powers

# INDIA: TOUGHER ENFORCEMENT CLIMATE

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- Telecoms industry scandal
- Corruption in the process for awarding mobile phone licences in 2008: estimated loss \$39 billion – licences revoked by the Supreme Court in 2012 and telecoms Minister imprisoned for 15 months
- 2013: Bill grants independent ombudsman authority to investigate and prosecute politicians/civil servants for corruption, including PM
- 2014 – launch of anti-corruption hotline (4,000 calls in the first day)
  - Central Bureau of Investigation investigating \$1.2 billion jet engine contract involving Rolls Royce/Hindustan Aeronautics
- Legislation currently pending to strengthen whistle-blower protection

## INDIA: TOUGHER ENFORCEMENT CLIMATE (2)

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- Three senior officials from Commonwealth Games facing corruption charges
- March 2014 CBI charges in respect of “Coalgate” – alleged corruption in the allocation of licences to operate coal fields
- US proceedings against six individuals, including an Indian MP, re corruption to secure mining licences for group DF

# BRAZIL: UPDATE ON PROGRESS

- 2012 – the *Mensalao* scandal – payment to politicians to support legislative agenda – 12 politicians imprisoned
- Various further corruption scandals involving politicians and government officials
- 2013 – Siemens debarred for 5 years following bribes paid to win contracts
- Transparency International 2013 report - "little or no enforcement" of OECD Anti-Bribery Convention in Brazil
- The Clean Company Law (or Anti-Corruption law) took effect in January 2014
- Strict liability – no corrupt intent required
- September 2014 – Petrobras – Paolo Costa, whistleblower and former head of Petrobras refining and supply unit, has alleged that Petrobras paid 3% of the value of new contracts to politicians in return for favourable votes
- Those implicated include the Minister for Energy and Mines, the Senate President, and the President of the lower house of Congress

# SPAIN

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- March 2014 – jurisdiction of Spanish courts extended in respect of international corruption
- Ongoing pressure on Spain from the OECD working group on bribery
- Increased efforts by Spain to investigate foreign bribery cases
- October 2014 – 51 people arrested as part of an investigation into “a network of corruption” that involved building contracts worth approximately €250 million

# CANADA

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- The Corruption of Foreign Public Officials Act (CFPOA) 1999
- 2008 – RCNP set-up specialist unit to investigate foreign bribery by Canadian companies
- *Niko Resources* fined C\$9.5 million for bribing a Bangladeshi government minister
- The Fighting Foreign Corruption Act (FFCA) passed in June 2013
- 2013 the *Karigar* case – a technology company bribing several government officials in India
- 2011 *Griffiths Energy International*, oil exploration company, fined C\$10.35 million
- Recent investigations include *Blackfire Exploration Limited* (barite mine in Mexico) and *SNC–Lavalin* - bridge construction in Bangladesh – six former employees face criminal charges
- Now broader jurisdiction, new books and records offence, facilitation payments exception to be repealed
- International Foreign Bribery task force set-up – Canada, US, UK and Australia

# FCPA: DOJ/SEC INVESTIGATIONS

- Over 100 on-going investigations
- Huge fines and costs (Siemens fines \$1.6 billion with fees of over \$1 billion. Walmart approaching \$500 million in fees)
- Alcoa (2014) - \$175million to SEC, \$223 million to DoJ in respect of bribery of Bahraini officials
- SFO prosecuted two individuals in the UK
- Critical: independent investigative process (Walmart; PwC)
- Important: established and evidenced compliance programme affects how regulators resolve cases and determine penalties (Morgan Stanley and Ralph Lauren)

# FCPA: DOJ/SEC INVESTIGATIONS (2)

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- 3 basic questions
  - Is company's compliance programme well designed?
  - Is it being applied in good faith?
  - Does it work?
- NB! SFO considers good pro-active corporate compliance programme when deciding whether to offer a DPA. Also a defence under UKBA.

# INCREASED FOCUS ON USE OF THIRD PARTIES

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- 60-70% of DoJ/SEC investigations over last two years involved third party intermediaries
- E.g. JV Partners, distributors, brokers, agents, freight forwarding agents
- Key red flags
  - Lack of business purpose for the third party relationship;
  - Paying inflated rate to the third party;
  - Dealing with third party that does not have infrastructure or support to provide the contracted services
- Recent survey of global compliance executives found:
  - more than 50% anticipate bribery and corruption risks will increase;
  - 58% never train third parties;
  - only 43% monitor compliance after third party relationship begins

# HOW INVESTIGATIONS START

- Allegation from competitor
- Whistleblower/co-operating witness
- Due diligence enquiries on sale of the business
- Intelligence gained from sector investigations
- Media investigation (e.g. New York Times in *Walmart*)
- Disputes between parties
- Disclosure obligations – e.g. to a Regulator, or to the market
- Through the audit process
- Decision to self-report
- Proceeds of Crime Act 2002 – possession, use etc. of proceeds of crime – anyone with knowledge or suspicion at risk (defence if report knowledge/suspicion to authorities)
- Proceeds of Crime Act 2002 – obligation to report knowledge or reasonable suspicion (applies to regulated sector)

# ACTUAL/POTENTIAL CONSEQUENCES

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- Reputational damage
- Management time and focus, and internal resource
- Criminal prosecution/negotiated settlement, penalties and confiscation
- Civil/regulatory penalties
- Debarment (national enforcement, World Bank, Regional Development Banks)
- Civil proceedings against the company including shareholder actions (e.g. Walmart)
- Professional fees (e.g. Siemens and Walmart)
- Possible personal culpability? Conspiracy, encouragement, aiding and abetting
- Disciplinary action from professional body
- Trend towards senior management accountability (e.g. banking/financial services sector)

# CONCLUSIONS

- Increasing local/national enforcement initiatives
- Greater co-operation between agencies, including at international level
- Parameters of an investigation will not be fixed – the focus can change, and new agencies can involve themselves
- Inconsistencies between jurisdictions, making the MNC's position even more difficult, include:
  - the basis for establishing corporate criminal liability;
  - the treatment of whistleblowers (e.g. incentivisation in the US)
  - the grant of immunity;
  - double jeopardy provisions;
  - facilitation payments;
  - the application of anti-corruption law to the private sector
- The enforcement net is tightening and the penalties/consequences of ABC non-compliance are increasingly severe



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