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Today's Webinar

**FOREIGN CORRUPT PRACTICES ACT (FCPA):**

***A Hot Topic on Compliance Risk Heat Maps***

*Presented by: James H. Wistman, MBA,  
Director, ICS Compliance*

**\*\* Will begin Shortly \*\***

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## BAFT-IFSA EDUCATIONAL SERIES TODAY'S TOPIC

### FOREIGN CORRUPT PRACTICES ACT (FCPA): *A Hot Topic on Compliance Risk Heat Maps*

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## Heat Maps

Wikipedia says....

- *“A **heat map** is a graphical representation of data where the values taken by a variable in a two-dimensional map are represented as colors.”*
- Heat maps to represent the results of Compliance Risk Assessments have moved from the drawing board and into production because:
  - Increasing layers of complexity in compliance risk management.
  - Integration of bank and non-bank compliance programs (“Enterprisewide”).
  - Increasing expectations for proactive and “risk-based” compliance programs (“Find and Fix”).
  - Demands by Audit Committees for simplification and reduce clutter.
  - Supports the budget process for necessary resources to maintain the compliance program.
- Sophistication of heat maps varies from simple (Excel or Powerpoint slides) to “scoring” models with algorithms, and “dashboards” of supporting information.
- It’s time to add FCPA.

## THE HISTORY

- As a result of Securities and Exchange Commission (SEC) investigations in the mid-1970s, over 400 U.S. companies admitted making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties.
- In the course of these investigations, it became apparent that, in many instances, these activities were concealed from the outside auditors and others by maintaining off-the-book bank accounts or otherwise circumventing the system of internal accounting controls.
- After the investigations, Congress passed the Foreign Corrupt Practices Act of 1977 (FCPA) to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.
- Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage -- compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes.

## MORE HISTORY

- Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA.
- In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
- The United States ratified this Convention and enacted implementing legislation in 1998. Since 1998, the provisions also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

## THE PROVISIONS

The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.

There are two separate sets of provisions

- those that *prohibit the offering or payment of bribes* to certain foreign officials, and
- those requiring the *maintenance of complete accounting books and records* and an effective system of accounting controls.

## RECENT PAST AND THE PRESENT

- The first billion-dollar settlement (over \$1.6 billion in penalties) occurred in 2008.
- A recent surge of FCPA enforcement activity: 120 FCPA cases were investigated in 2009. This is more than in any previous year.
- A significant level of ongoing investigations: suggests that the trend will continue.

## FCPA TRENDS IN 2009 AND BEYOND

- The current political climate creates an increased opportunity and momentum for the enforcement of FCPA cases:
  - Heightened international awareness of the human cost of corruption as evidenced by international agreements and cooperation addressing corruption;
  - The economic urgency created by the worldwide economic downturn
  - A climate of distrust of the financial services and business community and the associated appetite for uncovering and punishing corporate wrongdoing
- Tom Friedman wrote “The World is Flat” and companies feel compelled to expand globally via mergers and acquisitions, offshoring (etc) and they face potential local market corruption.

## FCPA TRENDS IN 2009 AND BEYOND

- This new anticorruption era is forcing companies to change their behaviors to adapt to financial and reputational risks.
- So called “gray areas” add complexity to anticorruption compliance: facilitation payments, travel and entertainment expenses and the retention of third-party agents.
- FCPA compliance is becoming a top corporate governance issue leading to more rigorous FCPA compliance and self-monitoring programs.
- Audit Committees -- “Find it and Fix it... soon.”

## ANTI-BRIBERY PROVISIONS

Prohibitions consist of five elements:

1. The use of an instrumentality of interstate commerce in furtherance of...
2. a payment or an offer to pay “anything of value” directly or indirectly...
3. ...to any officer or employee of a foreign government, or any department, agency, or instrumentality thereof, or of a public international organization, or to a foreign political party, or foreign political candidate (“foreign officials”)
4. ...for the “corrupt” intent of getting the recipient to act, or to refrain from acting..
5. ...to assist in obtaining or retaining business or to directing business to any particular person or to secure an improper advantage.

## Important Exceptions – What is Not Prohibited?

- “Grease” or “facilitating” payment to foreign officials to perform duties that are essentially ministerial or clerical (*i.e.*, for non-discretionary duties such as installing a telephone line or activating electricity in an office)
- Payments to those who are not foreign officials, *i.e.* foreign private parties (other than political party officials and politicians); provided that such payments are *not* indirect payments to foreign officials
- Payments to foreign officials to get them to use their influence with private parties (other than political parties)
- Payments unrelated to “obtaining,” “retaining” or “directing” business or securing an “improper advantage” (e.g. a birthday gift of de minimus value to a legislator who has no power to award or otherwise influence potential business)
- Payments specifically allowed in the written laws of the foreign country or of the U.S.
- Reasonable, bona fide expenditures, such as travel and lodging expenses, associated with the promotion of a product or performance of a contract in the foreign country

## ACCOUNTING PROVISIONS

- The obligation to maintain accurate books and records and to have an adequate system of internal accounting controls has been long been a requirement applicable to banks.
- Passage of the Foreign Corrupt Practices Act extends similar provisions to essentially all companies in the United States, and requires them to:
  - Make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and
- Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurance that:
  - Transactions are executed in accordance with management's general or specific authorizations;
  - Transactions are recorded as necessary
    - i. to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and
    - ii. to maintain accountability for assets;

## ACCOUNTING PROVISIONS *(cont'd)*

- ...system of internal accounting controls sufficient to provide reasonable assurance that (continued):
  - Access to assets is permitted only in accordance with management's general or specific authorization; and,
  - The recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any difference.

## PENALTIES

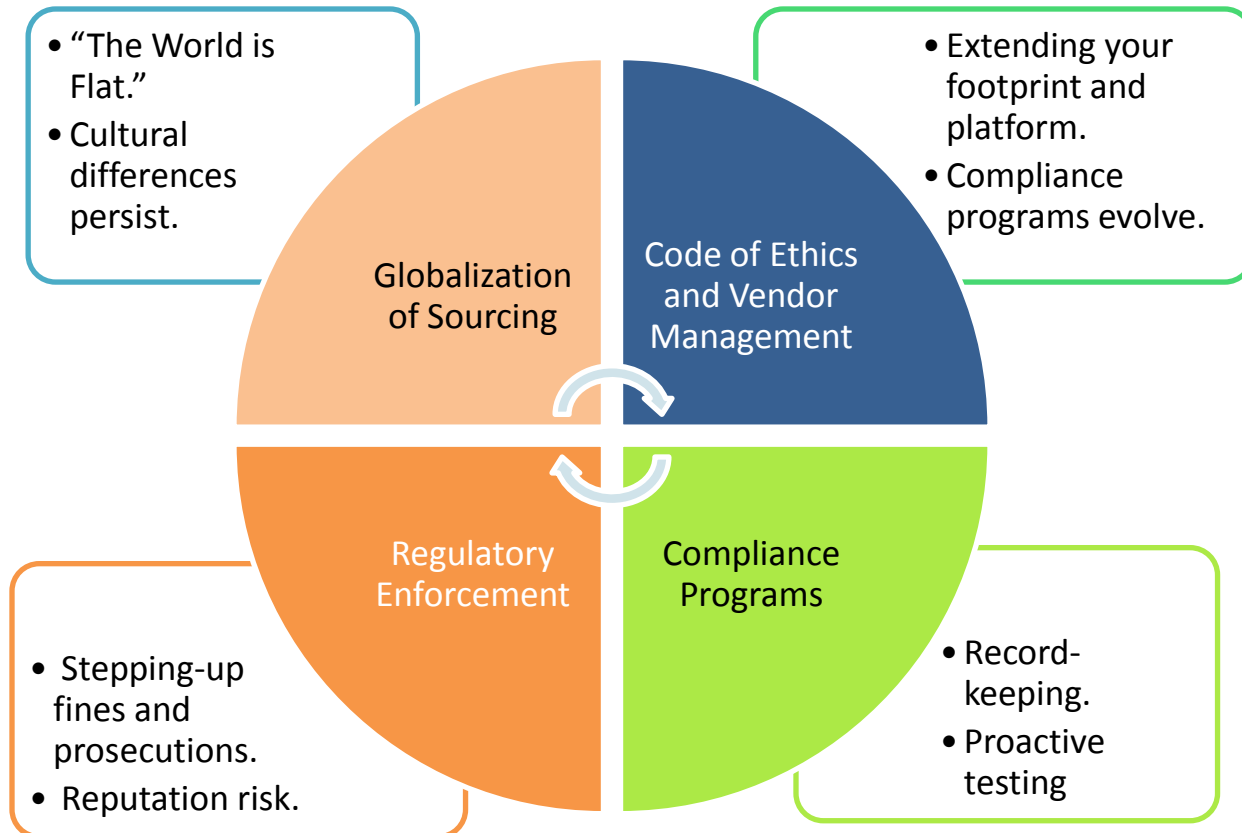
- Both the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) have jurisdiction over the FCPA. Generally the SEC prosecutes, through civil and administrative proceedings, and DOJ prosecutes, through criminal proceedings of both companies and individuals.
- Corporate fines can be as high as \$2,000,000 per violation
- Individuals can be fined up to \$250,000 and 5 years in prison
- Alternative fines for corporate entities where there is gain to the defendant or loss to the victim equal to twice the amount of the total gain or loss.



## FCPA CASES

- The fine against Siemens, issued in December, 2008, for the violation of the books and records provision of the FCPA included the following components: a \$450 million fine to DOJ, \$350 million disgorged profits to SEC, \$856 million to German officials, for a whopping total amount of \$1.6 billion.
- In February of 2009, Halliburton was charged with an internal controls failure to detect or prevent bribery and that its records were falsified to cover up illegal payments made in Nigeria by its then subsidiary KBR.
- Halliburton agreed to a fine of \$402 million plus profit disgorgement of \$177 million for a total amount of \$579 million.

## FCPA Compliance Environment – KEY COMPONENTS



## Existing Regulatory Requirement - *Commercial Bank Examination Manual*

- Section 4125.4– “Payment System Risk and Electronic Funds Transfer Activities: Internal Control Questionnaire”
  - Question #27. Has the institution devised and maintained an adequate system of internal accounting controls, as required by the Foreign Corrupt Practices Act?
- Section 5020.3– “Overall Conclusions Regarding Condition of the Bank: Examination Procedures”
  - 9. Determine compliance with the Foreign Corrupt Practices Act (15 USC 78dd-1 and -2) by—
    - a. reviewing the bank’s policy prohibiting improper or illegal payments, bribes, kickbacks, etc., to any foreign government official or other person or organization covered by the law;
    - b. determining how that policy has been communicated to officers, employees, or agents of the bank;
    - c. reviewing any investigation or study done by, or on behalf of, the board of directors on the bank’s policies and operations concerning the advance of funds in possible violation of the act;
    - d. reviewing the work done by the examiner assigned to internal control to determine whether internal or external auditors have established routines to discover improper or illegal payments;
    - e. analyzing the general level of internal control to determine whether there is sufficient protection against the inaccurate recording of improper or illegal payments on the bank’s books;
    - f. requesting that examiners working in other areas of the bank be alert for any transactions that might violate the provisions of the act;
    - g. compiling any information discovered throughout the examination on possible violations; and
    - h. performing procedures on suspected criminal violations as outlined in section

## Existing Regulatory Requirement - *Commercial Bank Examination Manual*

### Section 1010.4 - “Internal Control and Audit Function, Oversight, and Outsourcing: Audit Function Questionnaire”

1. Is the audit program formalized and therefore on record as a commitment that can be analyzed and reviewed?
2. Are all important bank functions and services identified as subjects of the audits?
3. **Does the audit program include procedures necessary to ensure compliance with the Federal Election Campaign Act and the Foreign Corrupt Practices Act?**
4. Does the internal audit department have access to all reports, records, and minutes?
5. Are internal audit activities adjusted for significant changes in the bank’s environment, structure, activities, risk exposures, or Systems?

## Sample Policy Language

- **Commitment:** It is the policy of {our firm} to maintain ongoing compliance with the provisions of the Foreign Corrupt Practices Act.
- **Requirement:** This policy prohibits anyone working for or on behalf of {our firm} from illegally influencing an act or decision (including a decision not to act) of a foreign official or political candidate, or inducing a foreign official or candidate to use his or her influence to affect or influence an act or decision of the foreign government or instrumentality, in order to assist {our firm} in obtaining, retaining, or directing business for itself or another person.
- **Scope:** This policy covers all employee, officer, director, or significant shareholder or third party acting on our behalf; prohibited activities include corruptly offering anything of value or making an improper or illegal payment, such as a bribe, kickback, or loan. Prohibited recipients expressly include:
  - Foreign government officials
  - Officials of a foreign government instrumentally
  - Foreign political party or officials of such party
  - Candidate for foreign political office or
  - To a person that the bank believes will give such money to those foreign officials.

## Sample Policy Language (*cont'd*)

- **Statement of Risk:** Even the appearance of a violation of the FCPA can have substantial and adverse legal, regulatory, financial and reputational impacts on the firm. Noncompliance of this policy may expose the firm and the individual to legal proceedings, including civil and criminal fines and sanctions.
- **Escalation:** This policy requires employees, officers, directors, or significant shareholders or third party acting on our behalf to come forward and seek guidance from Legal and Compliance at any time they feel exposed to a possible FCPA situation.

## Examples of Procedural Changes

- **AML Monitoring:** Enhance your existing AML program to explicitly consider FCPA monitoring or “red flags.” Revise Compliance and Audit testing programs.
- **Travel & Expense:** Modify your existing T&E approval process (standardized forms, either paper or online) to include a check-box that no Politically Exposed Persons (PEPs) were involved in the travel or events.
- **Gift-giving and Gift-getting:** Modify your existing T&E approval process (standardized forms, either paper or online) to include a check-box that no Politically Exposed Persons (PEPs) were involved in the travel or events.
- **Foundations and Charitable Giving:** Consider an additional due diligence step to evaluate risk of the appearance of a conflict of interest.
- **Lending Policies/Approval Forms:** Consider an additional due diligence step to evaluate risk of the appearance of a conflict of interest.
- **Vendor Management/Facilities Management:** Modify your existing vendor management program, including outside legal representation, to include prohibitions on bribery-corruption.
- **Escalation Pathways:** Revise training programs (Code of Ethics, New Hire Orientation, Board Training) to include FCPA sensitivity and escalation know-how. Commit to “No Surprises” for board members (Audit Committee)

## Points to Consider

- “What can we do proactively to stay out of trouble?”
- “Could one of our own (employee, officer, et al) violate the provisions?”
- “Could one of our vendors or agents violate the provisions?”
- “Would one of our good customers, using our services as their conduit, violate the FCPA provisions and damage our reputation?”
- “What should we do if/when a red flag is identified?”
- “What fact-finding or remedial action would we take?”

## The Bar Keeps Rising

- The Dodd-Frank Act and Wall Street Reform Act include sections that address the ethics of extraction industries and “Conflict Minerals.”
- Therefore, we recommend the audience become familiar with Transparency International (“TI”) and an offshoot, EITI.

**[www. TI.org](http://www.TI.org)**  
**[www. EITI.org](http://www.EITI.org)**

- The CISAD Act (signed 1-July-2010) specifically mentions FATF’s views on Iran.
- We therefore recommend that you stay on top of FATF developments.

**[www.fatf-gafi.org](http://www.fatf-gafi.org)**

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Questions?





## About James H. Wistman, MBA

Jim Wistman is a Director in ICS Compliance's NY region and has more than 24 years of hands-on experience in implementing and enhancing compliance programs at all forms of financial institutions. Prior to joining ICS Compliance, Jim developed a truly balanced approach to managing regulatory requirements through his 10 years of experience at the Federal Reserve Bank of New York and 10 years of compliance risk management experience as a top-tier Compliance Officer.

Jim has unparalleled experience in coping with enforcement orders, and at the Federal Reserve he served as a Supervising Examiner in the Bank Supervision Division and was often a leader on full scope examinations at high-profile institutions. He also served as a Staff Director at the Discount Window during a nationwide liquidity crisis. Thereafter, Jim directed the implementation or upgrade of the U.S. compliance programs for four of the largest globally active banks, often serving as the U.S. Chief Compliance Officer.

Graduating with a B.A. in Economics with honors from the University of Rochester, Jim later obtained an MBA from Columbia University's Graduate School of Business where he was the first-ever candidate sponsored by the Federal Reserve. He holds certificates in International Relations and Management of Financial Institutions and is a frequent speaker on the current best practices in compliance risk management at industry conferences.

## About ICS Compliance

As compliance specialists, ICS Compliance focuses only on regulatory issues for financial institutions. Our seasoned professionals, with previous experience as Compliance Officers and/or Federal Regulatory Examiners, provide financial institutions with invaluable expertise and insight. This competency, along with our tailored approach and strong regulatory awareness, provides clients with the confidence that comes from hiring experts in compliance. Serving institutions nationally from 17 offices, we provide customized compliance programs, remediation projects, and consultation.



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## About BAFT-IFSA

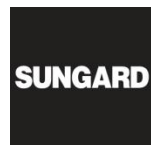
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