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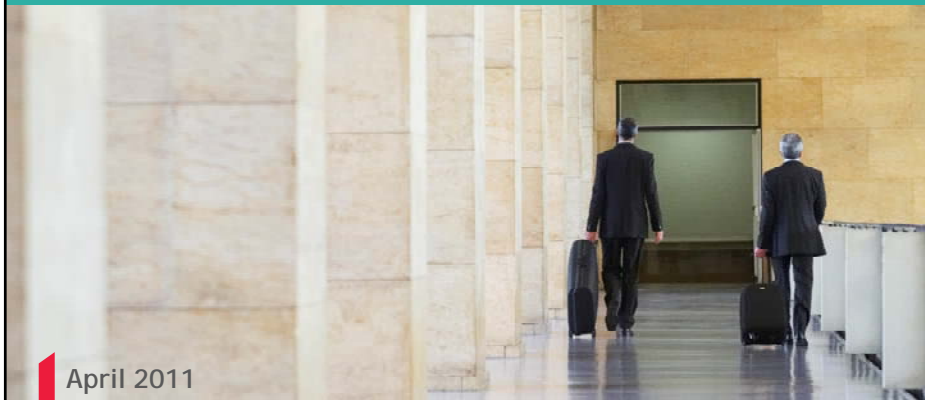
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FCPA SERIES: DOING BUSINESS ABROAD - SPOTLIGHT ON CHINA



April 2011

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MODERATOR



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Select Experience

- 25 years of forensic accounting, auditing and consulting experience. Co-chairs the firm's U.S. Anti-Corruption Compliance and Investigations practice. Certified Public Accountant and Certified Fraud Examiner.
- Conducts multi-national fraud investigations pertaining to allegations of corruption, embezzlement, theft and financial reporting fraud.
- Designs, implements and monitors anti-corruption compliance programs.
- Conducts FCPA and other regulatory transaction advisory due diligence.

Education

M.B.A., Finance, Baruch College - City University of New York
B.S., Accounting, State University of New York at Buffalo

PRESENTERS



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Select Experience

- Concentrates in the area of white collar criminal defense and related civil litigation. He has more than 20 years of experience defending corporations, other entities and individuals in all phases of white collar criminal litigation, including investigations, trials, appeals, regulatory enforcement matters and related civil litigation.
- Advises on a wide range of matters including criminal antitrust, securities, mail, wire, accounting, bank, health care and customs fraud, tax evasion, FCPA, money laundering and RICO. He has extensive experience conducting internal investigations and interacting with prosecutors, regulators and other law enforcement officials on federal, state and international levels. He has handled numerous cross-border criminal and regulatory investigations.
- Has published a number of articles on criminal defense issues in legal and trade journals. He also has served as a panelist on a number of CLE panels and guest lectured at several law schools. He was the partner in charge of pro bono at his previous law firm for many years.
- Was selected for inclusion in The Best Lawyers in America 2011.

Education

J.D., Fordham University School of Law
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PRESENTERS

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Select Experience

- Is an associate in Skadden's New York White Collar Crime Group and focuses on white collar criminal defense, internal investigations and regulatory enforcement matters.
- Has experience defending U.S. and international corporations, entities and individuals in matters involving criminal antitrust, the Foreign Corrupt Practices Act and securities fraud. She has worked on matters involving cross-border criminal and regulatory investigations.
- Prior to joining Skadden, Ms. Marino was a key member of a team that successfully defended Michael Stern on securities fraud charges in a federal criminal trial and on appeal in 2006.

Education

J.D., Georgetown University Law Center
 M.S., Tufts University
 B.S., Bucknell University

PRESENTERS



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Select Experience

- A Partner of Internal Control Service Department at BDO China, with over 10 years of experience servicing clients in the areas of internal audit, internal control, policy compliance, enterprise-wide risk management and anti-fraud implementation.
- As a Ph.D. in Accounting, Certified Information Systems Auditor, Gary has led several international engagements pertaining to fraud and corruption audits, internal control designs and implements, IPO consulting, internal audits and C-SOX compliances.
- Specializes in the manufacturing, real estate, high-tech enterprises, international trade services sector and has handled several large fraud services including investigations and audits on behalf of the Regulators.

PRESENTERS



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Select Experience

- 25 years of experience as a consultant and prosecutor, investigating complex financial and white-collar crimes including FCPA violations, fraud, embezzlement, money laundering and tax violations. He co-chairs the firm's U.S. Anti-Corruption Compliance & Investigations Practice.
- Develops and implements anti-corruption compliance programs including the development of training programs. Assists counsel with internal investigations, including those in response to inquiries by the DOJ and SEC. Conducts FCPA Transaction Advisory Due Diligence.
- Prior to BDO, served as Senior Counsel to the Independent Inquiry Committee into the United Nations Oil-For-Food Programme in Iraq, where he conducted investigations of alleged corruption and mismanagement, interviewed witnesses, conducted financial analysis and documented recovery and review.
- Assistant District Attorney for the Queens County District Attorney's Office in the Economic and Environmental Crimes Bureau, Organized Crime and Rackets Bureau and Narcotics Investigations Bureau.

Education

J.D., Villanova University School of Law
 B.A., Colgate University

PRESENTERS



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Select Experience

- 15 years of experience providing domestic and international investigative due diligence, fraud investigations and litigation support services.
- Conducts and supervises international due diligence assignments for mergers and acquisitions (M&A), Foreign Corrupt Practice Act (FCPA) compliance and business transactions with respect to potential acquisition targets, business partners, vendors, agents and distributors.
- Has led large scale criminal and white collar financial investigations involving allegations of employee misconduct, securities fraud, money laundering, kickback schemes and counterfeit goods for Fortune 500 corporations, financial institutions and law firms.
- International experience conducting due diligence and FCPA investigations includes such countries as China, Saudi Arabia, Pakistan, Turkey, South and Central America, Israel, Philippines, Russia, India, Tunisia, South Africa, Canada, Europe, Netherlands, Australia, Mexico and the Caribbean.
- Has developed internal compliance programs to conform with a wide range of federal regulations including FCPA, Sarbanes-Oxley, Bank Secrecy Act, Know Your Customer Requirements and USA Patriot Act.

Education

J.D., Environmental Law, Pace University School of Law
 B.A., Pace University (With Distinction)

PROGRAM OBJECTIVES

Participants will:

- Gain a better understanding of the Foreign Corrupt Practices Act (FCPA)
- Recognize corruption risks associated with doing business in China
- Understand the anti-corruption & enforcement efforts - legal framework in China
- Obtain an update on the legal challenges to whether employees of state-owned enterprises should be treated as "foreign officials" under the FCPA
- Become familiar with the elements of effective anti-corruption due diligence and challenges presented in China

TODAY'S AGENDA

- I. Foreign Corrupt Practices Act
- II. Risk Factors with Doing Business in China
- III. Anti-Corruption & Enforcement Efforts
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FOREIGN CORRUPT PRACTICES ACT

Overview

- FCPA is a U.S. federal law enforced by the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ)
- Enacted in 1977 by U.S. Congress in response to SEC investigations in the 1970s
- FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or retaining business
 - Anti-bribery
 - Books and records

FOREIGN CORRUPT PRACTICES ACT

Anti-Bribery Provision

- Prohibits corrupt offers or payments to foreign government officials, political parties, political party officials or candidates, or to any person in order to gain an improper advantage
- The elements of this provision are:
 - Issuers, domestic concerns, and any person;
 - Making use of interstate commerce;
 - Corruptly;
 - In furtherance of an offer or payment of anything of value;
 - To a foreign official, political party, or candidate for political office;
 - For the purpose of influencing an official act of that foreign official in violation of the duty of that official or to secure any improper advantage in order to *obtain or retain business*.

FOREIGN CORRUPT PRACTICES ACT

Book & Records

- Books and Records provision has two parts requiring that:
 - Books and records are kept in reasonable detail to accurately reflect transactions and dispositions of assets
 - A system of internal accounting controls is devised

“Issuer must make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets.”

FOREIGN CORRUPT PRACTICES ACT

Liability

- Prosecution does not have to prove actual knowledge
- Company will be liable if it had reason to know that a corrupt payment has been made
- Companies are responsible for actions of their employees and intermediaries when engaged in company business
 - Comply with applicable laws
 - Adhere to standards of business conduct consistent with company's conduct guidelines
- Intermediaries include:
 - Agents
 - Consultants (including marketing/business development)
 - Distributors
 - Joint venture partners
 - Other parties doing business on a company's behalf

FOREIGN CORRUPT PRACTICES ACT Significant Penalties for Individuals & Companies

Individuals

- Up to \$5 million per record-keeping violation + up to 20 years in prison (applies to accounting/finance professionals)
- Up to \$250,000 per anti-bribery violation + up to 5 years in prison per violation (applies to business developers /marketing professionals)
- Company is prohibited from paying employee fines

Companies

- Up to \$25 million per record-keeping violation
- Up to \$2 million per anti-bribery violation
- Twice the pecuniary gain (or losses) from illegal activities
- Disgorgement of gross profits obtained from tainted business
- Post-enforcement monitoring
- Loss of State Department export licenses
- Disbarment from government contracts
- Disbarment from World bank, OPIC and the CFTC

FOREIGN CORRUPT PRACTICES ACT Significant Penalties for Individuals & Companies

- FCPA has been in effect for more than 30 years, but only the last 5-10 years have brought significant enforcement activities



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RISK FACTORS WITH DOING BUSINESS IN CHINA

Anti-Corruption in China - Legal Situation

- As a crucial issue in China, the law enforcement against commercial bribery has been strengthened
- In 2006, around 6,000 criminal prosecutions against commercial corruption are reported in Mainland China
- On September 13, 2007, the National Bureau of corruption prevention in China was founded, which focused on commercial corruption cases involving government officials

RISK FACTORS WITH DOING BUSINESS IN CHINA

Anti-Corruption in China: Unique Situation

China in Brief

- **Population Environment:** Nearly 1.4 billion
- **Culture Environment:** Chinese is the official language; most people in big cities can speak English; Confucianism and Buddhism are popular in China;
- **Marketing Environment:** Transformation from planned economy to market economy; SOEs have great power in economy; the average growth of GDP is nearly 10% in the last 10 years

RISK FACTORS WITH DOING BUSINESS IN CHINA

Anti-Corruption in China: Cases

- More than 35 FCPA cases in China from 2005
- China is the priority area for FCPA Monitoring
- Cases:
 - Lucent - \$1.5 million fine
 - DPC - \$4.8 million fine
 - Daimler Chrysler -\$18.5 million fine
 - Avery - \$0.5 million monetary penalties
 - InVision - \$1.9 million monetary penalties

RISK FACTORS WITH DOING BUSINESS IN CHINA

Major Laws & Regulations

- Anti-Unfair Competition Law of the People's Republic of China
- Interim Provisions on Prohibiting Commercial Bribery
- The Criminal Law & the Supreme People's Court and the Supreme People's Procuratorate on Issues concerning the Application of Law in the Handling of Criminal Cases of Commercial Briberies

RISK FACTORS WITH DOING BUSINESS IN CHINA

Key Concepts & Definitions

- Commercial bribery refers to an operator's behavior of bribing another entity or individual with property or by other means in order to sell or purchase commodities
- **Key Component:** *Purpose* - Whether the behavior of giving or accepting the property is legal or not depends on the purpose -- whether it aims to sell or purchase commodities

RISK FACTORS WITH DOING BUSINESS IN CHINA

Forbidden Activities

- Any of the following activities in order to sell or purchase commodities:
 - Payment of properties: this refers to, for the sale or purchase of commodities the operator paid to other entity or individual in cash or in kind under the guise of promotion fees, publicity fees, sponsorship fees, research fees, service charges, consulting fees, commission, or reimbursement of various fees
 - Payment of other interests: this refers to the operator providing interests other than property such as various domestic and international travel, study, survey, food, drink, play, etc.

RISK FACTORS WITH DOING BUSINESS IN CHINA

Forbidden Activities

- Any of the following activities in order to sell or purchase commodities:
 - **Important Note:** The activities which even just appear to be improper conduct should be avoided. Because such behavior may lead to the questions from law enforcement agencies about the purpose of the act, which will also lead to the survey about the commercial bribery or unfair competition

RISK FACTORS WITH DOING BUSINESS IN CHINA

Forbidden Activities

- Off-the-book Kickback

- "Kickback" refers to the operator giving a certain proportion of commodity price back to the other entity or individual secretly in cash or in other forms off-the-book
- "Off-the-book" means the company adhere to proper accounting treatment, which should reflect its production and business activities or administrative expenses. It includes not recording in the financial accounts, transferring into other financial accounts or falsifying accounting

RISK FACTORS WITH DOING BUSINESS IN CHINA

Forbidden Activities

- Off-the-book Kickback

- Cash or goods gifts: Small advertising gifts within the commercial customaries shall be excluded
- Giving or receiving any secret rebates off-the-book will be punished as commercial bribery

RISK FACTORS WITH DOING BUSINESS IN CHINA

Allowed Activities

- Discount

- Operators are allowed to offer discounts to the others when selling commodities. However, the operators providing discounts shall do so in an explicit way and make true and fair accounting treatment

RISK FACTORS WITH DOING BUSINESS IN CHINA

Allowed Activities

- "Discount," that is, to offer discount in business, the selling party expresses the offer explicitly and truthfully records the price concession to the purchasing party
- Usually, it includes two refunding forms:
 1. A certain percentage of the total amount to be deducted immediately, and
 2. Refund of a certain percentage after the payment of the total amount is made

RISK FACTORS WITH DOING BUSINESS IN CHINA

Allowed Activities

- Discount

- "Explicitly and recorded" refers to a true and fair record into the accounting system (which reflects production and business activities or administrative expenses) according to the accounting standards, in the amount and payment methods agreed upon in the contract

From here, we can see that an explicit offer and proper accounting treatments are key to distinguishing a legal discount from an illegal kickback)

RISK FACTORS WITH DOING BUSINESS IN CHINA

Criminal Laws

- Bribery of public officials is forbidden according to Criminal Law
- Bribery of non-public-officials is forbidden according to Criminal Law
- Notice of the Supreme People's Court and the Supreme People's Procuratorate on Issuing the Opinions on Issues concerning the Application of Law in the Handling of Criminal Cases of Commercial Briberies (effective date: Nov. 20, 2008) (Hereinafter "Judicial Interpretation 2008")

RISK FACTORS WITH DOING BUSINESS IN CHINA

Judicial Interpretation 2008

- The property in commercial bribes shall include not only money and property in kind, but also property benefits, the value of which may be calculated in monetary, such as provision of housing decoration, membership cards containing money, token cards (coupon) and travel expenses, etc.
 - The specific amounts shall depend on the actually paid costs and expenses
- For a person taking a bribe in the form of bankcard, whether the bribe taker has actually drawn money from it or consumed the money, the total amount of deposit in the card shall normally be deemed as the amount of the bribery
 - For a person who overdraws a bankcard, if the party offering the bankcard assumes responsibility for repayment, the overdrawn amount shall be also deemed as an amount of bribery

RISK FACTORS WITH DOING BUSINESS IN CHINA

Judicial Interpretation 2008

- In such commercial activities as bidding and government procurement, giving property to a relevant person in violation of the principle of fairness so as to secure a competitive advantage shall be within the meaning of “for any illegal benefit”

RISK FACTORS WITH DOING BUSINESS IN CHINA

Legal Liabilities and Consequences

- **Civil liability:** Companies and individuals can report corruption behavior or take a legal action
- **Administrative responsibility:** State/Local Administration for Industry and Commerce takes charge in the investigation and enforcement of commercial bribery. It may impose a fine, forfeit all illegal earnings and/or even hand over to criminal investigation institution, if necessary

RISK FACTORS WITH DOING BUSINESS IN CHINA

Legal Liabilities and Consequences

- Administration for Industry and Commerce has wide discretion, and their investigation could be random or inconsistent, and easily influenced by local power and policies
- In 2008, a Tsingtao beer distributor was fined over one million RMB by local Industrial and Commerce administration for bribing several major customers
- **Criminal liability:**
 - For the bribe taker, the prosecution threshold is 5000 RMB
 - For bribers (companies), the threshold is 200,000 RMB
 - For bribers (individuals), the threshold is 10,000 RMB

RISK FACTORS WITH DOING BUSINESS IN CHINA

Solutions

- Policy compliance
- Culture merging
- Internal investigation
- Internal control and management
- Others

RISK FACTORS WITH DOING BUSINESS IN CHINA

Conclusion

- Corruption behavior may cause civil, administrative, even criminal liabilities
 - Negative influence on the company's reputation
- Anti-corruption is a long and tough process for a company
- Employees should seek advice from legal counsel where there is uncertainty

TODAY'S AGENDA

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ANTI-CORRUPTION & ENFORCEMENT EFFORTS

China Anti-Corruption Legal Framework

- FCPA applies to:
 - U.S. companies, issuers and foreign subsidiaries of U.S. companies operating in China
 - Employees and agents working in China who are U.S. citizens, nationals, and even non-citizens under certain circumstances
- China is a hot spot for FCPA enforcement action
 - At least 10 pending investigations have been disclosed in SEC filings
 - 16 companies have entered into resolutions with DOJ and/or SEC in the last 5 years
 - 6 individuals are going to trial later this year on FCPA-related charges
 - 3 individuals have pled guilty to FCPA-related charges in the past 30 months
- Majority of cases involve allegations of bribing employees of Chinese state-owned entities

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

China Anti-Corruption Legal Framework

Example of a Recent Enforcement Action

Maxwell Technologies ("MT")

According to the charging documents:

- MT, a U.S. company and issuer, is a manufacturer of energy storage and power delivery products
- Between 2002-2009, MT and its subsidiaries paid \$2.7 million to a Chinese agent to bribe officials to secure and retain contracts to supply high voltage capacitors
- Money to pay bribes was generated by adding 20% to the price quoted to the SOE. After the SOE paid the inflated amount to MT, the agent would issue invoices to MT for an "extra amount" or "special arrangement" fees
- Bribes were intended for officials from SOEs including those from Pinggao Group, Shenyang HV, and Xi-an XD, all state-owned manufacturers of electro-utility infrastructures
- U.S. executives were aware of this conduct going back to 2002. The conduct was discussed over email between executives, including the COO. The COO instructed that an employee familiar with how to handle the situation would take over and also requested that there be "[n]o more emails please."

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

China Anti-Corruption Legal Framework

- On January 31, 2011, MT reached a resolution with the DOJ and SEC
 - DOJ filed a criminal information charging one count of violating the FCPA's anti-bribery provisions and 1 count of violating the books & records provisions. MT entered into a 3 year deferred prosecution agreement and agreed to pay an \$8 million fine
 - MT consented to the entry of a final judgment, without admitting or denying the SEC's allegations. It was ordered to pay \$6.35 million in disgorgement and prejudgment interest
- No one from MT has been indicted yet, but it seems likely based on the charging documents

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

China Anti-Corruption Legal Framework

Other Anti-Corruption laws applicable to conduct in China

- U.K. Bribery Act (effective July 1, 2011)
 - Potential to apply to any entity doing business in the U.K., but applies to conduct outside of the U.K.
 - Prohibits bribery of foreign officials
 - Prohibits commercial bribery
 - Prohibits facilitating or grease payments
- China's Anti-Bribery laws

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Overview of China's Anti-Bribery Laws

- China's criminal laws prohibit the offering of bribes to:
 - State employees (including employees of SOEs) (Article 389)
 - Employees of companies or enterprises (Article 164)
 - Foreign (non-Chinese) public officials or officials of an international public organization (Article 164)
- Recently passed a statute to establish an anti-corruption agency under the Ministry of Justice

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Anti-Corruption Trends by China Government

The Chinese government has stepped up enforcement of bribery laws in recent years and has begun to target multi-national companies

- In 2007, after the announcement that Areva, a French nuclear energy company, had won a nuclear power plant contract in Guangdong, China, its marketing director was held for nearly two months for questioning relating to allegations of bribery and corruption involving the Chinese nuclear industry.
- In September 2009, Shanghai police detained a former employee of a bottling plant partly owned by Coca-Cola. Chinese news media reported that the employee took \$1.5 million in bribes.

ANTI-CORRUPTION & ENFORCEMENT EFFORTS

Anti-Corruption Trends by China Government

- In March 2010, four employees of Rio Tinto, a British-Australian mining company operating in China, were found guilty of commercial bribery and infringement of trade secrets. One of the four was a Chinese-Australian citizen and the other three were Chinese nationals. They were sentenced to jail terms ranging from seven to fourteen years.
- In June 2010, Chinese authorities reportedly began investigating Johnson & Johnson's Shanghai office in connection with alleged bribes paid to the former deputy chief of the Chinese State Food and Drug Administration.
- In September 2010, Nike's marketing director in China, was questioned in connection with an investigation into gambling and bribe-taking linked to the Chinese Football Association. Reportedly, the questioning related to Nike's potential sponsorship of China's professional league and the marketing director's relationship with the former CFA head who was arrested earlier in 2010.

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LEGAL CHALLENGES TO AN EXPANSIVE DEFINITION OF "FOREIGN OFFICIALS"

Should Employees of SOEs Be Deemed Foreign Officials Under the FCPA?

- The FCPA defines the term "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof..."
- Historically, government prosecutors have taken the position that employees of SOEs are foreign officials because SOEs are instrumentalities of foreign governments
- This year, there have been three separate challenges to the government's position by individuals charged with FCPA violations
- The outcome to these cases will offer the first significant guidance by the courts into this issue, which will be very important to any company doing business in China considering the prevalence of SOEs

LEGAL CHALLENGES TO AN EXPANSIVE DEFINITION OF "FOREIGN OFFICIALS"

Overview of Pending Cases

- Defendants in three cases have moved to dismiss their indictments on the grounds that the alleged recipients of bribes were not foreign officials under the FCPA
 - U.S. v. Carson (8:09-CR-00077, C.D. Ca) - 6 defendants charged with bribing officials from SOEs in China from the nuclear, electric, and petroleum industries as well as those in Korea, Malaysia and UAE
 - U.S. v. O'Shea (4:09-CR-00629, S.D. Tx) - 1 defendant charged with bribing officials from CFE, an electric utility company in Mexico owned by the government
 - U.S. v. Noriega (2:10-CR-01031, C.D. Ca) - 5 defendants also charged with bribing officials from CFE in Mexico

LEGAL CHALLENGES TO AN EXPANSIVE DEFINITION OF "FOREIGN OFFICIALS"

Arguments

Defendants

- Text of the FCPA limits meaning of "instrumentality" to something akin to a government subunit like a department or agency
- Legislative history indicates a Congressional intent to prohibit bribery of "true" government officials, not employees of SOEs
- DOJ's interpretation leads to "absurd" results
- DOJ's interpretation is unconstitutionally vague

DOJ

- It is premature to decide at the motion to dismiss stage
- Plain meaning of instrumentality includes SOEs
- Interpretation of FCPA must be consistent with U.S. treaty obligations, including the OECD
- Prior cases
 - Courts denied similar motions
 - More than 35 guilty pleas by individuals admitting to bribing officials of SOEs
 - Jury instructions
- Legislative history supports interpretation to include SOEs

LEGAL CHALLENGES TO AN EXPANSIVE DEFINITION OF "FOREIGN OFFICIALS"

Status of Legal Challenges

- U.S. v. Noriega - Motion fully briefed. Judge Matz ruled from the bench that the CFE officials were government officials based on a matter of statutory construction (i.e., without regard to legislative history). He apparently was persuaded by the undisputed ownership and functionality of CFE and by the dictionary's definition of "instrumentality"
- U.S. v. O'Shea - Briefing will be completed on 4/18/11
- U.S. v. Carson - Briefing will be completed on 5/2/11 and a court hearing is scheduled on 5/9/11

LEGAL CHALLENGES TO AN EXPANSIVE DEFINITION OF "FOREIGN OFFICIALS"

Takeaways

- This is an issue that needs to be monitored closely by companies doing business in China as rulings may be fact specific
- Defendants face an uphill battle, but it may come down to a fact specific inquiry
 - Judge Matz's ruling suggests that employees of government-owned public utility companies, like CFE in Mexico, and similar entities are more likely to be deemed "foreign officials"
- It would be prudent to treat employees of SOEs as government officials, unless, and until definitive appellate authority holds that they are not

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ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

Challenges

- China is perceived by U.S. Authorities as a high risk country for bribery and corruption
- China received a 3.4 rating (tied with Columbia and Serbia) on Transparency International's Corruption Perception Index, which ranks country-by-country how endemic corruption is in a country's business culture
- China is rife with SOE and many Chinese business people serve in dual capacities as government officials
- Business in China historically involves entertaining and gift giving

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

Challenges

- The sheer size of the Chinese market may lead companies to engage agents to penetrate new markets
- Chinese companies do not view corporate nepotism or the use of connections to obtain business in the same way as a U.S. company
- In certain industry sectors, kickbacks are an accepted means of conducting business
- Employees of U.S. companies eager to enter the Chinese market, may turn a blind eye and allow improper payments through third party intermediaries under the misguided assumption that such payments will not violate U.S. laws

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

Investigative Due Diligence

- Investigative due diligence typically covers the business ethics and practices of a company, its principals, economic and political standing in the business community, its relationships with government and government agencies, any sign of financial or tax difficulties, past or current civil or criminal/legal problems and any evidence of bribery or corruption
- Conduct due diligence with respect to the company's agents and business partners and keep accurate records of the due diligence reviews conducted

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

Investigative Due Diligence

- Be knowledgeable of **red flags** such as:
 - Unusual payment patterns or financial arrangements
 - Unusually high commissions
 - Lack of transparency in expenses and accounting records
 - Refusal by third party to provide certification (that it will not violate FCPA)
 - Refusal to agree to audit rights
 - Apparent lack of qualifications or resources to perform services offered
 - Typically pitches near contract award date
 - Insistence on payment in advance of contract award
 - Payments to off-shore accounts or holding company

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

What To Look For

- Undisclosed third-party transactions
- Material misrepresentations or omissions
- Unreported financial difficulties
- Illegal or unethical business practices
- Criminal conviction history

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

What To Look For

- Undisclosed legal or bankruptcy proceedings
- Criminal or regulatory sanctions or disbarments
- Reputational issues including suspicions or allegations
- Ownership by foreign official, political party or candidate
- Former government officials as officers or employees

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

What To Ask For

- Information relating to the target company's beneficial ownership and management
- Documents relating to accounting policies and procedures
- Any internal audit reports of possible corrupt activity
- Board minutes
- Regulatory actions, enforcement actions, internal investigations

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

What To Ask For

- How are background checks and reputation checks conducted
- Review government contracts, licenses and permits
- Are there written agreements for all international agents containing FCPA/Anti-Bribery representation
- Is there hotline reporting

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

Investigative Due Diligence

- The three classic elements of an investigative due diligence are:
 1. Commercial on-line and internet searches;
 2. Public records, media and other public source inquiries; and
 3. Direct contact with government, industry, personal and confidential sources.
- A frequent fourth element, a detailed disclosure questionnaire, can provide critical information.
 - Voluntary responses often yield cost effective investigative leads and benchmarks useful in assessing the credibility of the subject

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

Availability of Records in China

- **Corporate Registration Filings** (Hong Kong Companies Registry) - A director of a company can be a legal representative, third party or designee - presents challenges for instance if the entity is a wholly owned foreign enterprise, the registration filings only required to list legal representative, shareholders may be based elsewhere
- **Civil Litigation Records** (Hong Kong High Court, District Courts Magistrate Courts and Small Claims Court)
- **Bankruptcy Filings** (Receiver's Office in HK)
- **Regulatory Authorities** (HK Securities and Futures Commission, China Securities Regulatory Commission, Monetary Authority of Singapore)

ANTI-CORRUPTION DUE DILIGENCE & CHALLENGES IN CHINA

Availability of Records in China

- Criminal Records - not publicly available
- Credit Checks - looking for financial stability (records can be incomplete)
- Media (local language)
- Reputation Inquiries
- Embassy and Commerce Department Checks
- Watch Lists and Disbarment Lists

TODAY'S AGENDA

- I. Foreign Corrupt Practices Act
- II. Risk Factors with Doing Business in China
- III. Anti-Corruption & Enforcement Efforts
- IV. Legal Challenges to an Expansive Definition of "Foreign Officials"
- V. Anti-Corruption Due Diligence & Challenges in China
- VI. Conclusion
- VII. Questions & Answers

CONCLUSION

- China has been, and likely will continue to be a hot spot for FCPA enforcement.
- Prior to doing work in China, it is important to have access to resources, including experts, which will enable you to understand and assess the culture and industry in which you are operating.
- Pending the resolution of three current cases where the issue is being raised, companies need to be attentive to the fact that employees of state-owned enterprises, which are prevalent in China, are foreign officials under the FCPA.
- The overlap between government and commercial interests in China underscores the need for companies to perform robust due diligence to have an understanding of whom they are doing business with.

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Q & A

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AC'SENSE PROGRAMMING

Ac'senseSM Programs and Website:

<http://www.bdo.com/acsense/>

- NOTE: Link to a self-study course of today's program will be available shortly at:

<http://www.bdo.com/acsense/events/FCPACHina.aspx>

Currently scheduled webcasts:

- Mergers & Acquisitions Update - May 16, 2011
- 2011 Q2 Technical Update - July 7, 2011

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EVALUATION

- We continually try and improve upon our programming and appreciate constructive feedback
- Following the program, we will be sending out a thank you e-mail that contains a link to a brief evaluation
- Thank you in advance for you consideration!

THAT CONCLUDES TODAY'S PROGRAM.



Thank you for attending!