

FCPA Risks Faced by Institutions of Higher Education

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The University of Texas - Systemwide Compliance Academy

Presented by:

Lindi Jarvis, Senior Managing Director – Seattle

Brian Ong, Senior Managing Director – New York

Michael Archibald, Managing Director – New York



Webinar Essentials

- Session is currently being recorded, and will be available on our Academy website at <https://www.utsystem.edu/offices/systemwide-compliance/systemwide-compliance-academy>
- If you wish to ask questions:
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Hypothetical – Satellite Campus

A high profile American university seeks to expand it's global reach and establish a stand-alone satellite campus in Asia. Leaders from the school enter into discussions with officials from this country. As a sign of hospitality and in an effort to continue talks, the University offers to host the foreign officials visiting the United States at certain events on or near the campus.

Is there cause for concern?



Presentation Goals

- **Perspective** on the current state of global bribery and corruption
- **Overview** of significant laws, specifically the Foreign Corrupt Practices Act
- **Instruction** on the elements of a bribe and how to detect
- **Examples** applicable to Colleges and Universities
- **Effective** compliance measures

Corruption Landscape



Reality

Nearly every organization that operates outside its own borders or accepts foreign investment and trade, through its respective businesses and public officials, runs the risk of participating in bribery and corrupt practices.

The proof is in the headlines...



Recent Settlements



Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges
Dec 2014



SEC Charges Goodyear With FCPA Violations *Feb 2015*



Avon Pleads Guilty to Violating FCPA - \$135 million in penalties *Dec 2014*



BNY MELLON

SEC Charges BNY Mellon With FCPA Violations
Aug 2015



Hewlett-Packard to Pay Over \$100 Million in Penalties to the DOJ and SEC *April 2014*

Overview of Significant Laws

The U.S. Foreign Corrupt Practices Act (FCPA)

Passed in 1977, the FCPA contains two main provisions relating to bribery of foreign officials and accounting transparency requirements



■ It resulted from a combination of factors, including:

- Need to protect foreign policy
- Concerns over cash handling by corporations
- Rise in use of corporate funds for improper political contributions in the U.S. and abroad

The law was rarely enforced for over twenty years

Since the collapse of Enron in 2001, the U.S. government has taken a much closer look at the obligations of corporate entities to be transparent and obey the law

UK Bribery Act

UK Bribery Act, *implemented on 1 July 2011* Replaced laws dating back to the 1880s, seen as an attempt to restore UK's international reputation after mishandling a major corruption case

- Provides strict laws targeting bribery in both the public and private sectors
- Will force firms to be more pro-active in combating corruption and encourages effective anti-bribery systems
- Has become a benchmark for future national anti-corruption legislation



A Comparison of Global Anti-Corruption Laws

| Provision | Covered Under UK Bribery Act? | Covered Under FCPA? |
|-------------------------------------|-------------------------------|--|
| Bribery of foreign public officials | Yes | Yes |
| Private-to-private bribery | Yes | No |
| Receipt of a bribe | Yes | No |
| Third party liability | Yes | Yes |
| Failure to keep books and records | Covered by other legislation | Yes |
| Promotional expenses | No specific provisions | Must be reasonable and directly related to the promotion |
| Facilitation payments | Yes | Allowed under certain circumstances |
| Extra-territorial application | Yes | Yes |
| Penalties | Unlimited Fines, Prison | Limited Fines, Prison |



Hypothetical – Study Abroad Programs

A university's English department is seeking to set up a study abroad program at an institution in Europe. Although the country where you are likely to establish the program has a relatively low risk of corruption, officials from the foreign school have asked that you provide special consideration for their relatives.

This consideration is specific to forgoing certain academic requirements for their relatives as they would like to attend your university in the United States. Additionally, the officials have inquired into certain scholarships and/or financial assistance be made available to their relatives regardless of need.

Red flags?

What About the Rest of the World?



Enforcement in the United States





U.S. Department of Justice



- The U.S. Department of Justice (DOJ) is responsible for **criminal prosecutions** and **civil enforcement** against organizations and individuals
- The main prosecutorial arm is the United States Attorney's Office (USAO)
- The main investigative arm is the Federal Bureau of Investigation (FBI)
- DOJ frequently works together with law enforcement from other countries

What Constitutes a Bribe?



Hypothetical – Research Agreement

You would like to enter into a collaborative research agreement with a foreign state-controlled institution. This institution is renowned for the specialists in this particular field and the location is ideal for research.

Officials at the foreign institution are undecided about the collaboration. You want to suggest a visit to the United States to discuss it in person. You plan on making hotel reservations and arranging for airfare, as well as transportation in the city upon arrival. In addition, you think they might as well see something while in town and are going to arrange tickets to a play. One of the professors wants to bring his wife.

What risks should you be aware of?



Bribery: A Good Definition

“Corruptly offering or paying a thing of value to a foreign government official directly, or indirectly, with knowledge and for the purpose of influencing an official act or omission, or securing an improper advantage to obtain or retain business.”

-1977 U.S. Foreign Corrupt Practices Act

Bribery: A Good Definition

FIVE elements to be considered

**1. Party
Subject to
Law**

**2. Paying a
thing of
value**

**3.
Government
Official**

**4.
Directly or
indirectly**

**5. To obtain
or retain
business**



Basic Test

1. Party
Subject to
Law

2. Paying a
thing of
value

3.
Government
Official

4.
Directly or
indirectly

5. To obtain or
retain
business

- Any person or entity authorized by the organization to conduct business or enter into an agreement on behalf of the organization is potentially covered
- **UK Bribery Act:** “associated person” is anyone who performs services for or on behalf of the organization
- **Note:** The organization need not necessarily be aware of the representative’s illegal activity to be held liable

Offering or Paying

1. Party
Subject to
Law

2. Paying a
thing of
value

3.
Government
Official

4.
Directly or
indirectly

5. To obtain or
retain
business

- Paying, offering, or promising to pay
- Or authorizing anyone else to pay or offer to pay
- Money or **anything of value**

Who is a government official?

1. Party
Subject to
Law

2. Paying a
thing of
value

3.
Government
Official

4.
Directly or
indirectly

5. To obtain or
retain
business

- Government employees
- Political parties and party officials
- Candidates for political office
- Employees of government-owned or government-controlled businesses
- Employees of public international organizations
- Private persons who are advisors



Hypothetical – Permits

You are going in the field to conduct research next month in a country known to have a higher bribery risk. You learn that each member of the research team must obtain a research permit from the government of the foreign country where the research is to be performed. Your team is up to date on the paperwork but you are concerned about getting your permits in a timely fashion. You hear that you can make a one-time small cash payment to a clerk in the permitting office to ensure that the clerk files and stamps the research permit applications for expeditious review.

A week later, that agent calls you and says the permits are now being held up because the government is concerned about the environmental impact. He says that another small payment can ‘make it go away’ as he has a contact in the environmental ministry.

Red flags?

Directly or Indirectly

1. Party Subject to Law

2. Paying a thing of value

3. Government Official

4. Directly or indirectly

5. To obtain or retain business

DIRECT

Payments to the official or payments by an agent directly to the official

- Gifts
- Discounts
- Entertainment

INDIRECT

Payments made *to or through* a third party for the benefit of an official

- Donation to charity
- Donation to political party
- Payment by agent

To obtain or retain business

1. Party
Subject to
Law

2. Paying a
thing of
value

3.
Government
Official

4.
Directly or
indirectly

5. To obtain or
retain
business

- Most jurisdictions prohibit payments made in order to assist the firm in obtaining or retaining business for or with, or directing business to any person
- “Obtaining or retaining business” is **interpreted broadly**, encompasses more than the mere award or renewal of a contract
- The business to be obtained or retained does not need to be with a government entity
- In the U.S. it is a question of **improper advantage**



Hypothetical – Partnership for Healthcare Services

An American university-affiliated hospital seeks to establish a joint venture partnership to promote and provide specific healthcare services in a foreign country. The distribution of the healthcare services will include life saving drugs. Due to the civil war in the country, the distribution will actually take place through third parties that operate locally in country.

What risks should you address at the outset?

Effective Compliance Measures



Hallmarks of Effective Compliance Programs (FCPA)

- Commitment from senior leaders and a clearly articulated policy against corruption
- Code of conduct and compliance policies and procedures
- Oversight, autonomy, and resources
- Risk assessments
- Training and continuing advice



Hallmarks of Effective Compliance Programs (FCPA)

- Incentives and disciplinary measures
- Third-Party due diligence and payments
- Confidential reporting and internal investigation
- Continuous improvement via periodic testing and review

Tracking the Problem



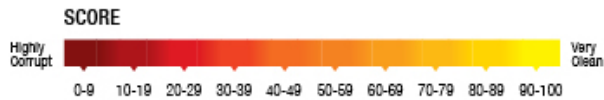
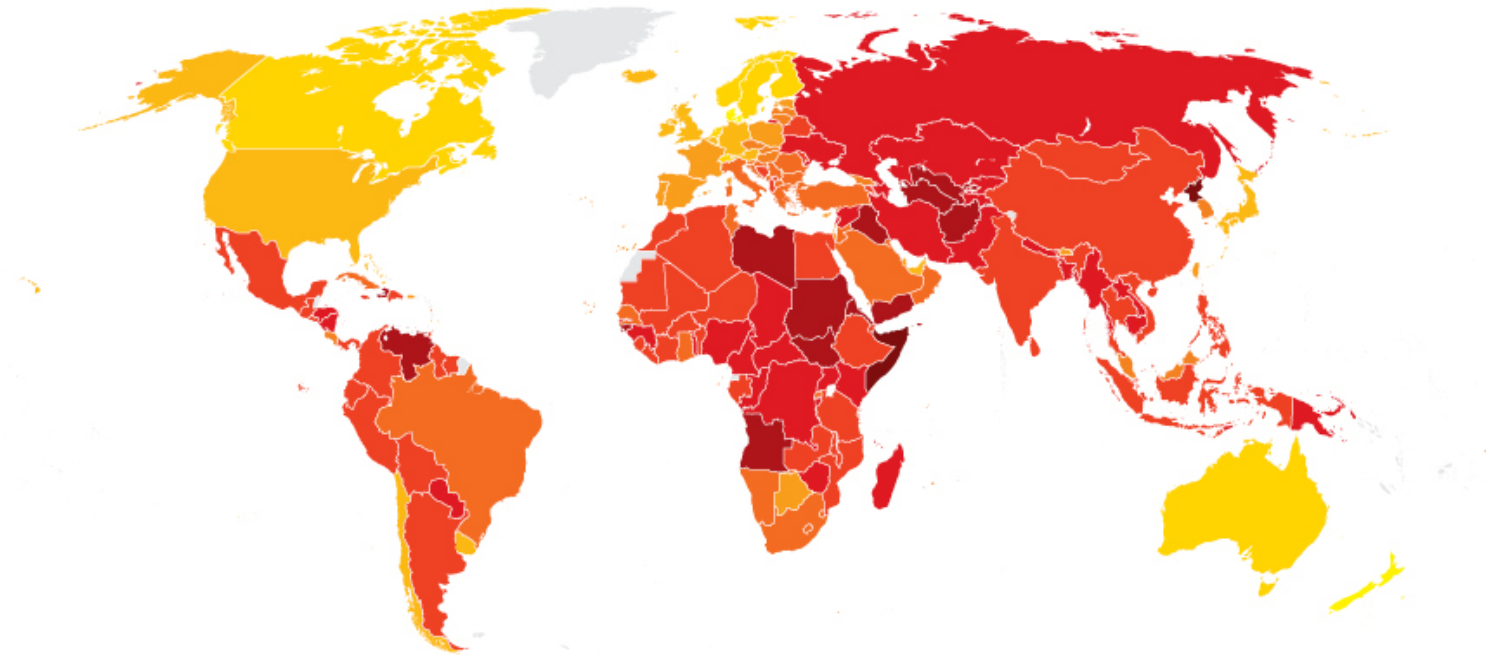
- Non-political, Non-Government Organization founded in 1993
- Headquartered in Berlin, Germany with approximately 90 local chapters around the world
- A research and development resource for tracking and identifying corruption and its impact on the world economy
- Most noted for publication of its research-based annual Corruption Perception Index (CPI)
- More information and numerous resources can be found at www.transparency.org

Transparency International Corruption Perception Index (CPI)



CORRUPTION PERCEPTIONS INDEX 2014

The perceived levels of public sector corruption in 175 countries/territories around the world.



#cpi2014

www.transparency.org/cpi

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QUESTIONS

About the Speakers

Lindi Jarvis

Senior Managing Director – Forensic & Litigation Consulting
lindi.jarvis@fticonsulting.com

3 Times Square
11th Floor
New York, NY 10036
Tel: +1 212 499 3688

925 Fourth Avenue
Suite 1700
Seattle, WA 98104
Tel: +1 206 689 4487

CERTIFICATIONS

Chartered Accountant,
Canada

Chartered Financial
Analyst Charterholder

Certified Public
Accountant

Certified in Financial
Forensics

PROFESSIONAL AFFILIATIONS

American Institute of
Certified Public
Accountants

Association of Chartered
Accountants in the United
States

Canadian Institute of
Chartered Accountants

CFA Institute

EDUCATION

Bachelor of Commerce,
University of Alberta

Lindi Jarvis is a senior managing director at FTI Consulting and is based in New York. Ms. Jarvis specializes in forensic accounting and litigation consulting. She has international experience in a wide range of large-scale financial investigative assignments and litigation assistance.

Ms. Jarvis' financial investigative assignments have included hedge fund investigations, forensic accounting investigations, financial reporting investigations, financial fraud investigations and white-collar crime investigations. Ms. Jarvis has performed numerous investigations in matters involving SEC financial reporting, violations of the US Foreign Corrupt Practices Act (FCPA), the UK Bribery Act and other fraudulent activities. Ms. Jarvis' anti-bribery and anti-corruption experience includes leading financial and forensic accounting investigations on a global basis, including investigating allegations of inappropriate behavior and suspected violations of the FCPA by U.S. Corporations, agents, distributors or foreign operating divisions. In addition, Ms. Jarvis has been involved in assisting a Fortune 50 company to implement an FCPA compliance program which incorporated the review of the operations in specific high risk countries. Ms. Jarvis has worked on behalf of management for companies under investigation by government agencies; for special committee counsel conducting investigations; and for counsel in a post-investigation monitoring or remediation capacity.

Ms. Jarvis' litigation and dispute advisory services experience includes assisting domestic and international clients in commercial disputes involving corporate transactions, working capital adjustments, post-closing balance sheet adjustments and earn out calculations. In addition, Ms. Jarvis has experience with accountant malpractice claims, securities litigation, and

damages analyses.

Prior to joining FTI Consulting, Ms. Jarvis spent three years in the financial advisory services practice of Deloitte in the Cayman Islands. While in Cayman, she managed the liquidation of several hedge funds which were liquidated due to fraudulent asset management, as well as assisted with court proceedings necessary to wind down the hedge funds. During this period, Ms. Jarvis spent a large portion of her time traveling to London, England, the US and the United Arab Emirates. Ms. Jarvis began her career as an auditor with Deloitte in the Calgary, Canada office.

Ms. Jarvis has taught classes and seminars on various fraud-related topics at New York University. These topics have included; accounting investigations, in-depth anti-bribery and anti-corruption case studies and fraud prevention. In addition, Ms. Jarvis has developed and presented courses at FTI Consulting's national training program. Ms. Jarvis holds a Bachelor of Commerce with Distinction from the University of Alberta, Edmonton, Canada. She is a Certified Public Accountant, a Chartered Accountant in Alberta, Canada, and a Chartered Financial Analyst charterholder. Ms. Jarvis is also an executive board member of the Association of Chartered Accountants in the United States.

Brian Ong

Senior Managing Director – Forensic & Litigation Consulting
brian.ong@fticonsulting.com

Brian Ong is a senior managing director at FTI Consulting and is based in New York. Mr. Ong is a senior business adviser with over 25 years of providing accounting, financial analysis, business valuation and corporate transactional advisory services to a variety of clients including numerous corporate clients, corporate boards of directors, “C-level” executives, in-house legal counsel and external legal counsel. Mr. Ong brings to his clients an array of services designed to help organizations and individuals address critical issues, mitigate risk, enhance corporate governance and improve performance.

Among his areas of professional expertise, Mr. Ong directs large-scale financial investigative assignments including forensic accounting investigations, financial reporting investigations, financial fraud investigations, investigations involving the Foreign Corrupt Practices Act and white-collar crime investigations. His background as an accountant includes performing financial statement audits of publicly and privately held companies, and providing merger, acquisition and divestiture due diligence services and bankruptcy/restructuring related services to numerous corporate clients.

Mr. Ong has considerable experience in transactional related analysis including corporate transactions involving working capital adjustments, post-closing balance sheet adjustments and “earn out” calculations. Mr. Ong has professional experience with merger and acquisition-related disputes arising from corporate transactions both in formal civil litigation proceedings and binding arbitration proceedings. He routinely serves as both an advisor to companies involved in transactional related disputes and as a neutral accounting arbiter adjudicating such disputes.

Mr. Ong’s litigation and dispute advisory services experience includes assisting domestic and international clients in high-stakes commercial disputes. He assists in-house and external counsel in matters involving accounting analysis and the economic and financial analysis of lost profits/lost earnings resulting from a variety of civil claims including breach of contract, business interference/interruption, intellectual property infringement and trade dress/trade secret matters, lender liability, personal injury, wrongful termination and wrongful death, legal and accounting malpractice and mass tort litigation. He has extensive experience in damage quantification and analysis including serving as an expert witness and as a consultant. Mr. Ong has provided testimony as an expert witness in both litigation and arbitration/mediation proceedings.

Mr. Ong brings both public accounting and professional economic and financial advisory services experience to his clients. Prior to joining FTI Consulting, Mr. Ong was a partner at KPMG, an international public accounting firm. Before joining KPMG, he worked at PricewaterhouseCoopers, another international public accounting firm.

Mr. Ong has been an Adjunct Professor at New York University where he instructed post-graduate accounting related courses. He regularly instructs on the topics of fraud detection and prevention, financial statement analysis and the financial analysts’ role in dispute resolution and quantification of economic losses. Mr. Ong holds a B.B.A. in accounting from Abilene Christian University in Texas.

3 Times Square
11th Floor
New York, NY 10036
Tel: +1 212 499 3688

CERTIFICATIONS

Certified Public Accountant, New York and Texas

Certified Fraud Examiner

PROFESSIONAL AFFILIATIONS

American Institute of Certified Public Accountants

Association of Certified Fraud Examiners

EDUCATION

B.B.A., Accounting,
Abilene Christian University, Abilene, TX

Michael Archibald

Managing Director – Forensic & Litigation Consulting
michael.archibald@fticonsulting.com

Michael Archibald is a Managing Director in the FTI Consulting Forensic and Litigation Consulting practice based in New York. Mr. Archibald has over fifteen years of consulting experience and specializes in forensic accounting investigations and litigation consulting matters involving complex accounting and financial issues.

Mr. Archibald has worked with boards, bankruptcy committees and arbitration and mediation panels. He has considerable experience working on financial investigations involving both GAAP and GAAS and has assisted clients with a wide variety of public, private, and international financial statement engagements. He has also performed fraud investigations for client-identified company matters, numerous Foreign Corrupt Practices Act investigations, assessments of internal control environments and worked with state and local municipalities to develop and implement compliance monitoring programs.

During his career, Mr. Archibald has provided forensic, auditing and consulting services to companies spanning a broad range of industries including financial services, retail, commercial banking, pharmaceutical, health insurance providers and energy. His recent project experience includes:

- Conducted anti-corruption investigation for international Fortune 500 healthcare and pharmaceutical company to respond to bribery allegations set forth by a foreign government
- Worked with Counsel to review data, perform analysis of commodity pricing and conduct interviews with key witnesses in an FCPA investigation of a Fortune 100 petroleum manufacturer with operations in Europe and Africa

- Assisted Counsel to review data, analyze a multitude of commission and expense items, and conduct interviews in connection with an FCPA investigation of a Fortune 100 electronics manufacturer with a focus on operations in the Middle East and Asia
- Managed anti-money laundering investigation for a major financial institution via analysis of transaction monitoring systems and evaluation of internal compliance controls
- Assisted a special investigatory committee of a pharmaceutical company with the identification and quantification of an embezzlement scheme undertaken by the company's Director of Finance
- Assisted Counsel in an anti-money laundering investigation of a major financial institution by evaluating its internal control procedures and compliance with federal regulatory statutes
- Worked with a major metropolitan shipping terminal with the preparation of its \$50 million insurance claim related to damage sustained from Superstorm Sandy. Prepared business interruption loss estimates, determined property damage costs and worked with the company's insurer to provide to resolve various aspects of the claim

Prior to joining FTI Consulting, Mr. Archibald was a Manager with Alvarez and Marsal's Global Forensics and Dispute practice. He began his career with Deloitte & Touche's Assurance and Advisory practice in New York, providing audit services to financial services and retail clients.

3 Times Square
11th Floor
New York, NY 10036
Tel: +1 212 499 3676

PROFESSIONAL AFFILIATIONS

Association of Certified Fraud Examiners

EDUCATION

B.B.A., Accounting,
University of Georgia