



# **The DOJ/SEC Resource Guide on the FCPA: Considerations for Government Contractors**

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## Panelists



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## Today's Agenda

- ❖ **FCPA Basics and Trends**
- ❖ **The DOJ/SEC FCPA “Resource Guide”**
  - Background
  - Key Issues
    - ▶ Definition of foreign official
    - ▶ Facilitation payments
    - ▶ Gifts and entertainment expenses
    - ▶ Parent-subsidiary issues
    - ▶ Successor liability
    - ▶ Declination factors
    - ▶ Compliance programs



## The FCPA

### ❖ **Anti-Bribery Provisions**

- Prohibit corrupt payments, or offers of payment, directly or through intermediaries, to foreign officials for the purpose of obtaining or retaining business.

### ❖ **Books and Records & Internal Control Provisions**

- Requires companies registered with the SEC to keep accurate records of all business transactions and maintain an effective system of internal accounting controls

### ❖ **Department of Justice & Securities and Exchange Commission**



## Penalties & Costs

### ❖ Criminal Penalties

- **Corporate:** Up to \$2 million per violation or twice the value of benefit sought under anti-bribery provisions; \$25 million for willful books and records violations.
- **Individuals** – up to 5 years and/or \$250,000 fine

### ❖ Civil Penalties

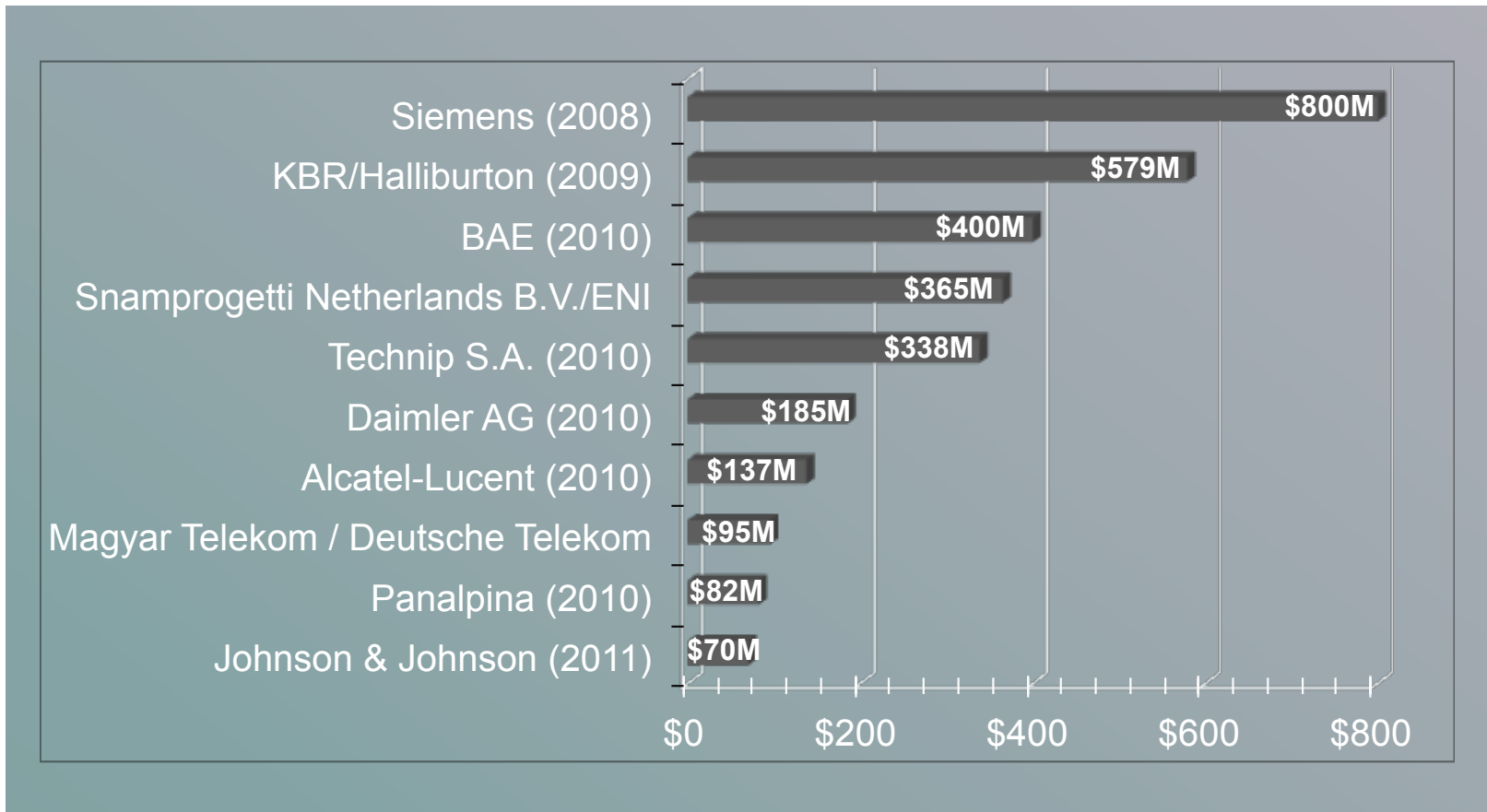
- **Individuals & Corporations:** Up to \$10,000
- Possible Debarment/Suspension
- Disgorgement of profits
- Imposition of corporate monitors

### ❖ Costs of Investigation

- Avon Products Inc., Weatherford International, and Wal-Mart currently under investigation
- **Estimated to have paid \$456 million** to conduct internal investigations and fortify anti-bribery controls



## FCPA Enforcement Trends



## **FCPA Enforcement Trends**

- ❖ **In 2010, judgments and settlements totaled \$1.8 billion**
- ❖ **In 2011, judgments and settlements reached \$652 million, but included 3 of the largest settlements in history.**

*“I’m proud to say that our FCPA enforcement is stronger than it’s ever been – and getting stronger.” Asst. Attorney General Lanny Breuer*



## **New SEC Whistleblower Provisions**

- ❖ **Part of Dodd-Frank Act**
- ❖ **Apply to FCPA violations**
- ❖ **Strong Incentives**
  - Reward of 10%-30% of monetary sanction; over \$1 million for “original information”
- ❖ **Greater protections for whistleblowers**



## **DOJ/SEC Guidance: What it is and is not**

- ❖ **History**
- ❖ **Context**
- ❖ **Structure**
- ❖ **Does not “create any rights”**
- ❖ **Does not create any law either**
- ❖ **Does not break new ground**
- ❖ **Does not cover all issues extensively**



## Highlights of the DOJ/SEC Guidance

- ❖ **Definition of foreign official**
- ❖ **Facilitation payments**
- ❖ **Gifts, entertainment & promotional expenses**
- ❖ **Parent-subsubsidiary liability**
- ❖ **Successor liability**
- ❖ **Declination decisions**
- ❖ **Effective compliance programs**



## Foreign Officials

- ❖ **Guide gives detail on DOJ view regarding the disputed definition of “foreign official”**
  - Any officer or employee of, or “any person acting in an official capacity for or **on behalf of**[,]. . .[a] foreign government or any department, agency, or **instrumentality** thereof . . . .” 15 U.S.C. § 78dd-2(h)(2)(A)
  - “Instrumentality” can include state-owned or state-controlled commercial entities, depending on ten-plus factors addressing ownership, control, status, and function
- ❖ **No guidance regarding “on behalf of”**

## **Facilitation Payments**

- ❖ **Exception for facilitation payments**
- ❖ **Examples of legitimate payments**
- ❖ **Little cover or comfort**
- ❖ **Beware**
  - Local law
  - UK Bribery Act, other
  - Failure to accurately record



## **Gifts, Entertainment & Promotional Expenses**

- ❖ **Nominal gifts are unlikely to interest prosecutors**
- ❖ **Distinguish from systemic or long-standing course of conduct**
- ❖ **Focus on bigger ticket items**
  - More likely to influence officials, reveal corrupt intent
- ❖ **Openness and transparency are hallmarks of gift-giving with no corrupt intent**



## **Parent-Subsidiary Liability**

- ❖ **Parent can be responsible for subsidiary's unlawful conduct**
- ❖ **Not automatic**
- ❖ **Traditional agency principles apply**
- ❖ **Emphasis on degree of control**
  - Generally and specifically
  - In law and in fact

## **Successor Liability**

- ❖ **Implicitly rejects calls for immunity for successors in certain cases**
- ❖ **Robust due diligence, self-reporting, and compliance improvements can help avoid successor liability**
- ❖ **Compliance integration must be prompt and complete**
  - Notwithstanding potential disruption to the business

## **The Declination Decision**

- ❖ **Hypothetical fact patterns promote:**
  - Swift and thorough investigations of potential violations
  - Robust compliance program improvements
  - Voluntary disclosures
- ❖ **Fact that a payment is small and isolated is relevant**
- ❖ **Rewards of voluntary disclosure not sufficiently certain to justify self-reporting in all cases**





## **Effective Compliance Program**

- ❖ **Senior Management Commitment**
  - Clearly Articulated Anti-Corruption Policy
- ❖ **Risk Assessment**
  - Geographic and Activity Risk
- ❖ **Policies/Procedures Communicated**
  - directors, officers, key personnel, agents, partners
- ❖ **Confidential Reporting/Internal Investigations**
- ❖ **Intermediary and Third-Party Due Diligence**
  - agents, distributors, consultants, J-V partners



## **Effective Compliance Program**

- ❖ **Incentives and Disciplinary Measures**
- ❖ **Continuous improvement and sustainability**
  - Evolves along with business model and target markets
  - Periodically reviewed, updated and adjusted
- ❖ **Internal controls regularly tested**
  - Targeted audits
- ❖ **Anti-corruption training and certification**
  - Initial training and regular refresher sessions
  - Carefully documented

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