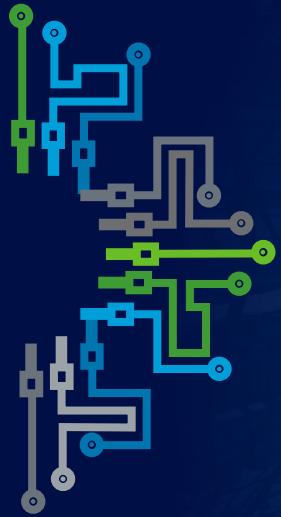


Anti-Bribery & Corruption Program Guidance and Perspectives

Correspondent Banking Academy



Overview and Legal Framework

Bribery

- The offer or acceptance of anything of value in exchange for influence on a government/public official or corporate employee
- “Anything of Value” including cash, gifts, employment offers, loans at a discount, etc.

Corruption

- The abuse of public or private office to obtain an undue advantage.
- Often, but not always, Bribery is a vehicle for and enabler of corrupt behaviour.

ABC Laws & Regulations Across Markets



United States
Foreign Corrupt Practices Act (FCPA)



Canada
Corruption of Foreign Public Officials
Act (CFPOA)



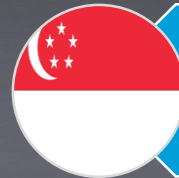
China
Anti-Unfair Competition Law/Criminal
Law of the PRA



Brazil
Clean Companies Act



UK
Bribery Act (UKBA)



Singapore
Prevention of Corruption Act (PCA)



Hong Kong
Prevention of Bribery Ordinance (POBO)

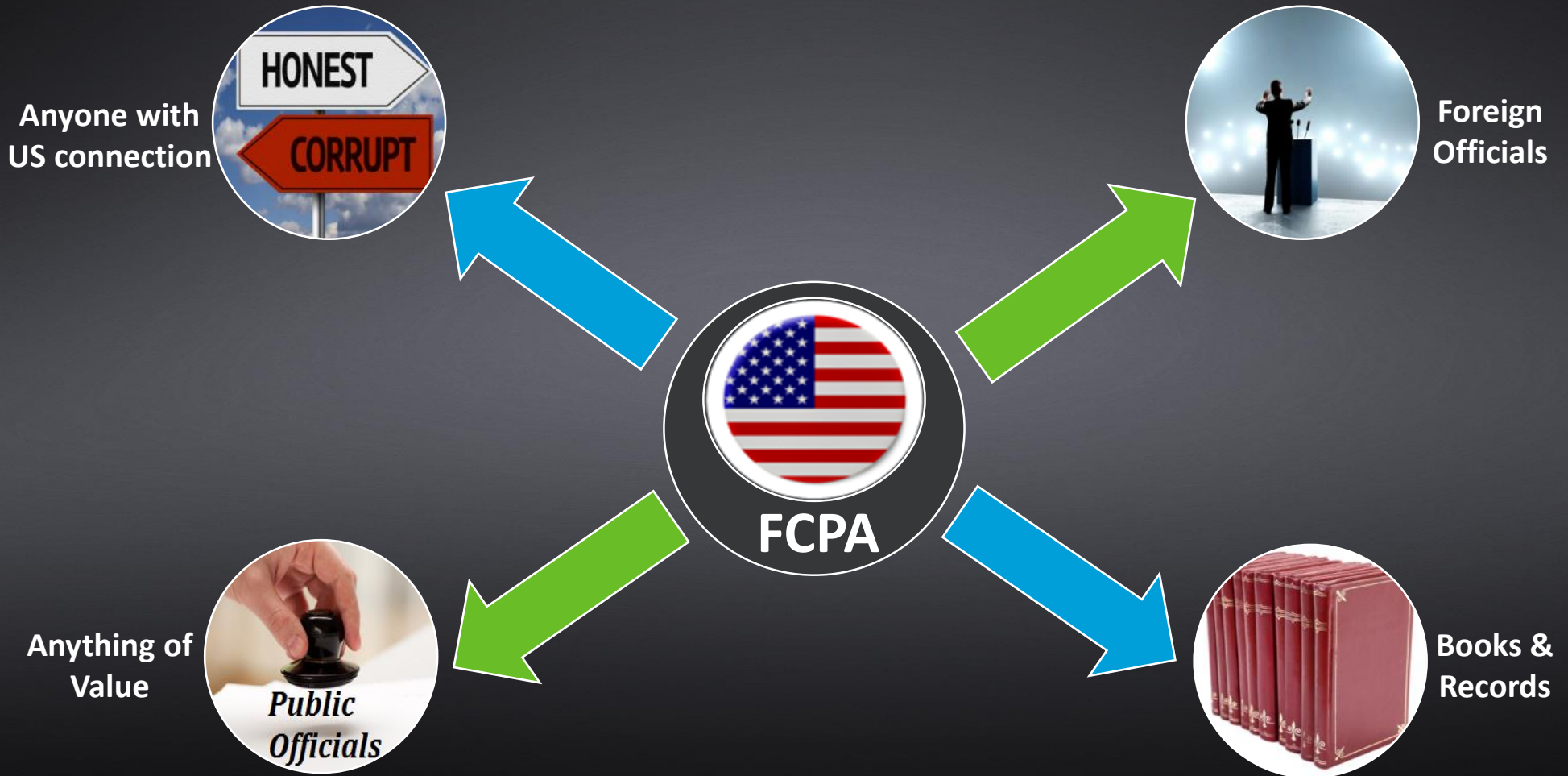


India
Prevention of Corruption Act (PCA)

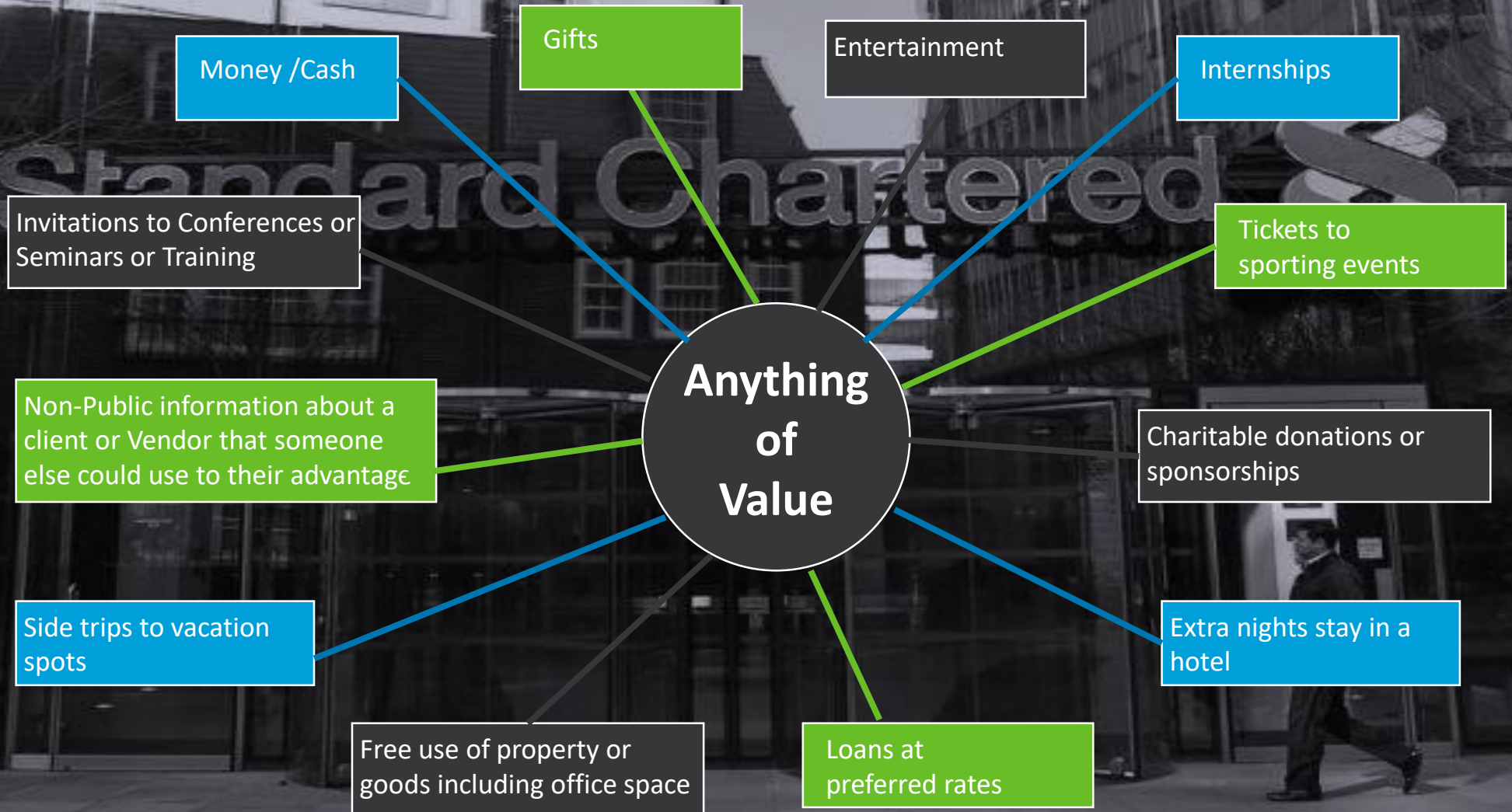


Indonesia
Indonesian Anti-corruption Law & Anti-
bribery Law

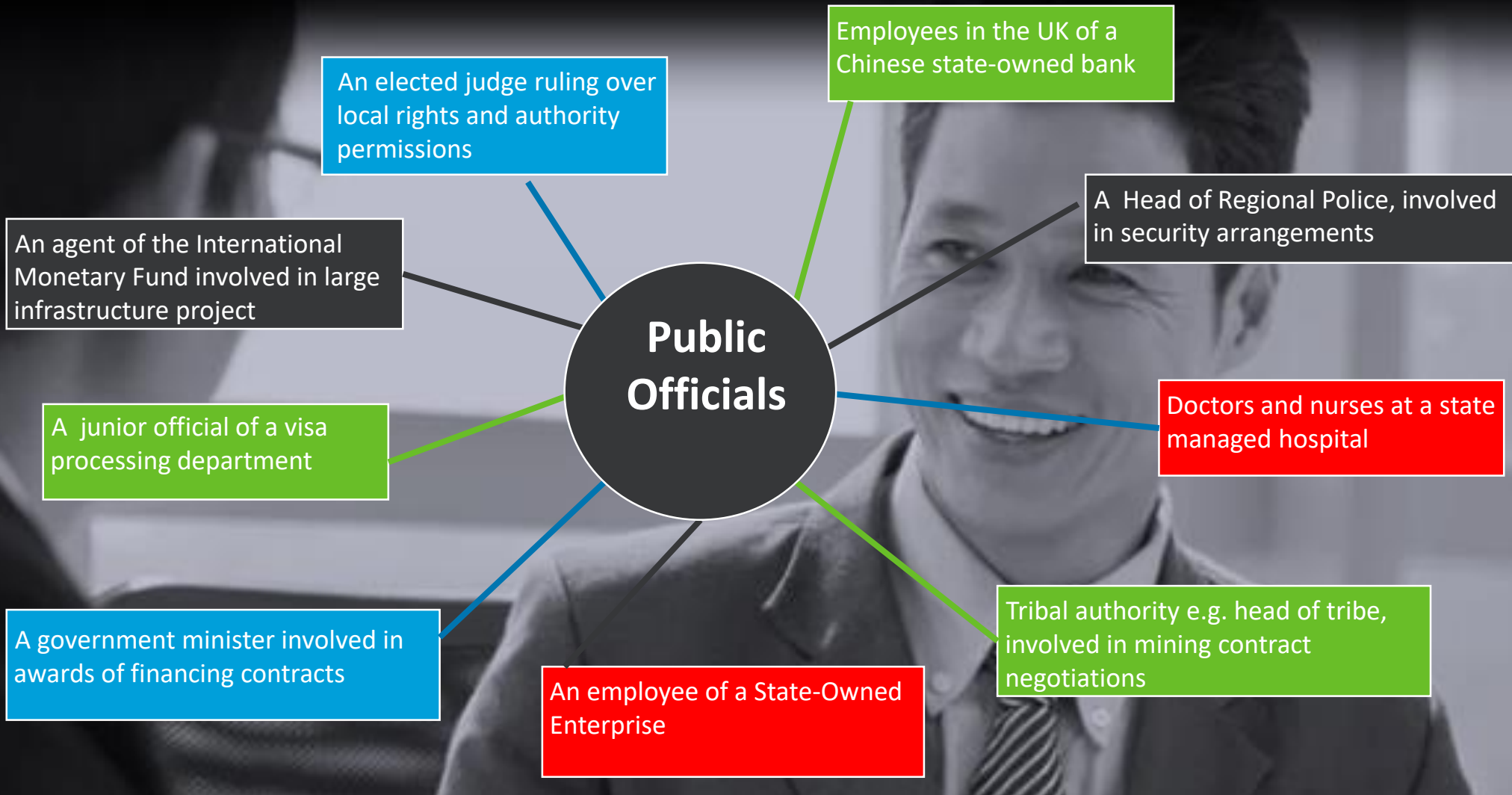
United States Foreign Corrupt Practices Act (“FCPA”)



What is a Bribe? Anything of Value



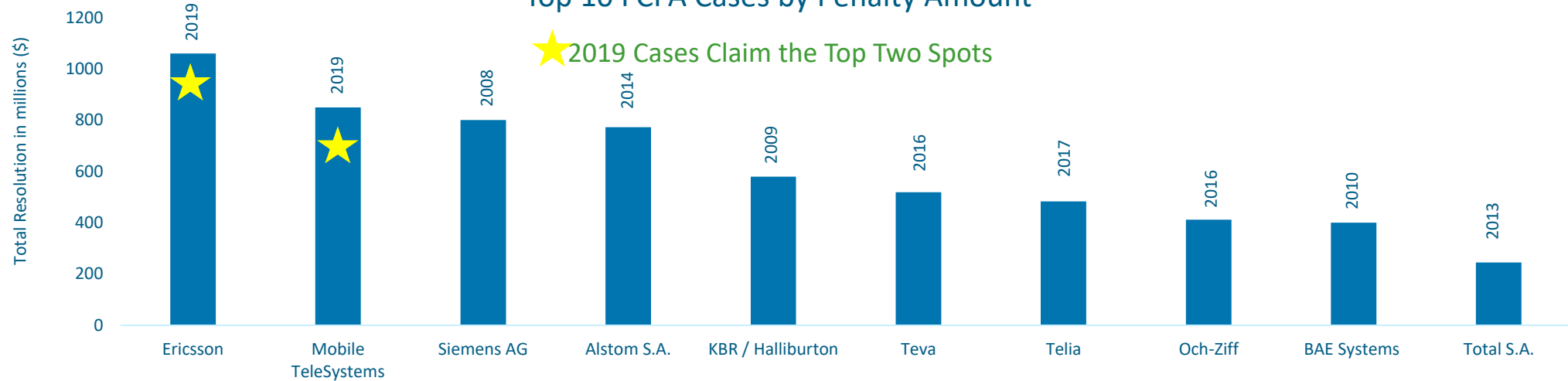
Examples of Public Officials



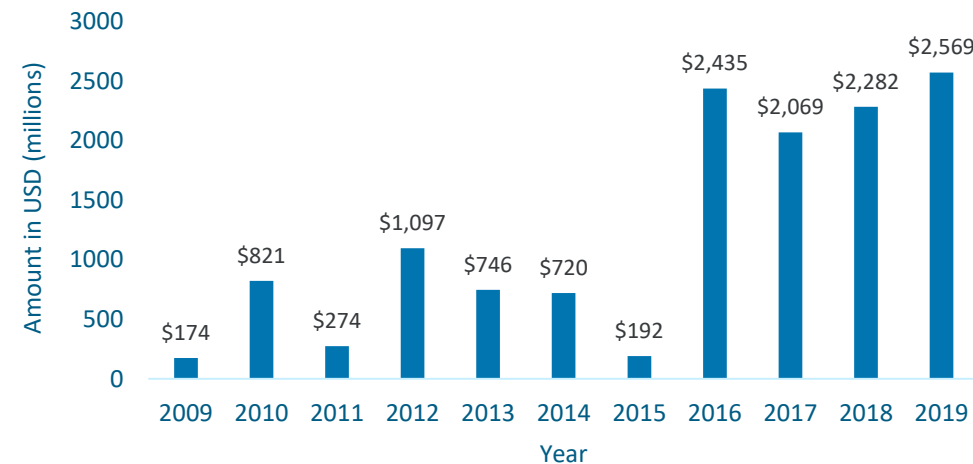
US FCPA Enforcement Trends

Top 10 FCPA Cases by Penalty Amount

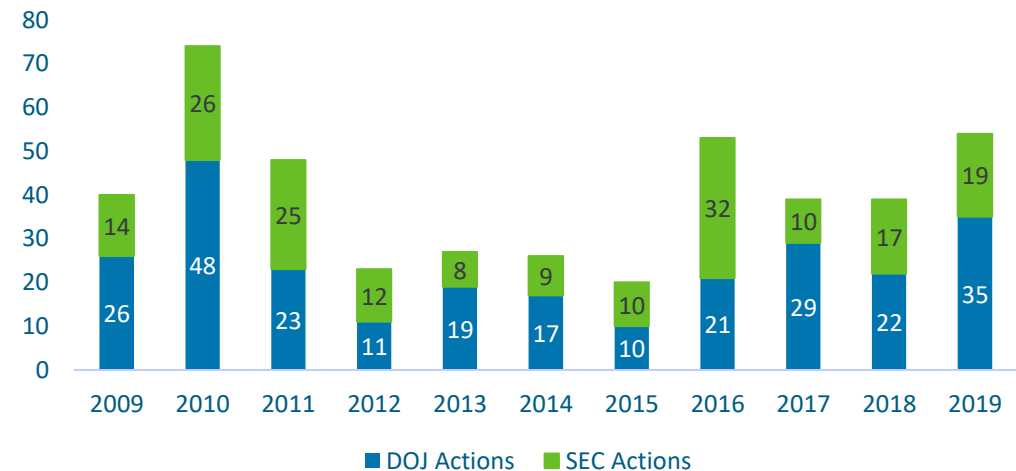
★ 2019 Cases Claim the Top Two Spots

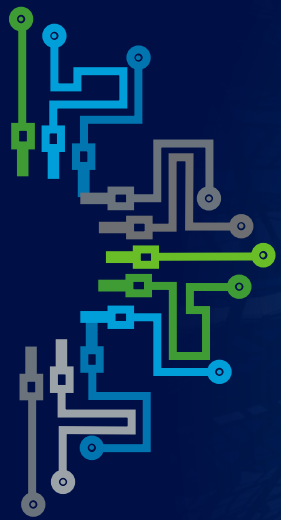


Total Value of Corporate FCPA Monetary Resolutions



FCPA Enforcement Actions by Year





Year in Review

2019 ABC Enforcement Themes

Continuing the trend from 2018, anti-corruption enforcement remains a truly global affair. 2019 has witnessed yet another **increase in independent anti-corruption investigations by non-US enforcement authorities** and a continued **growth in anti-corruption laws** around the world.

1. Total fines of \$2.9 billion in 2019 broke records, exceeding the U.S. Foreign Corrupt Practices Act (FCPA) enforcement record set in 2018 (\$2.2 billion).
2. Of 2019's foreign anti-corruption enforcement actions, 54 FCPA charges were netted by dual enforcers and an additional 19 FCPA related cases revealed a tendency of an ever-increasing confluence from Anti-Money Laundering (AML), Sanctions and Fraud violations which spawns more anti-corruption prosecution clusters.
3. More FCPA enforcement actions were brought against individuals than ever before, and prosecuting individuals remained a priority for the UK's Serious Fraud Office (SFO) under the UK Bribery Act, as well.
4. Increased scrutiny on Tech companies (Ericsson), while Financial Institutions' ("FI's") hiring practice remained a priority for regulators (Deutsche Bank AG & Barclays PLC).
5. Self-reporting, full cooperation and timely remediation continue to be employed by the US Department of Justice (DOJ) as incentive tools in the enforcement process (Fresenius, Cognizant), despite aggravating factors involving senior leaders' misconduct (Quad/Graphics Inc.). Even repeat offenders were able to use these tools (TechnipFMC plc).
6. Closer collaboration has been visible among cross-boarder enforcement agencies, with a stronger stance on pro-extraterritorial reach in bringing up anti-corruption allegations.
7. Both US (DOJ) and UK (SFO) enforcers continued updating their enforcement policies. The FCPA Evaluation of Corporate Compliance Programs guidance provided more detail and concrete explanations for what prosecutors expect to be effective compliance program; guidance from the SFO emphasized the importance and value of cooperation.

2019 Notable US FCPA Cases

Ericsson – \$1 billion: Internal Controls

One of the costliest and longest-running (spanning 17 years) corruption schemes on record, during which the Swedish telecom giant made millions of dollars in improper payments around the world to solidify its grip on business, with high-level executives involved in falsifying its books and records. Failed internal control around third party agents made it easier for staff to engage in a scheme to pay bribes to high-ranking government officials through sham contracts. While Ericsson had a compliance program, employees circumvented it with sign-off from senior management.

TechnipFMC plc – \$296 million: Payments and Internal Controls

This global oil and gas services company's FCPA violation arose out of the misconduct of its pre-merger predecessor companies -Technip S.A. and FMC Technologies, Inc. - which were involved in two independent corruption schemes whereby their consultants paid bribes to government officials in Brazil and Iraq, respectively. The companies had insufficient compliance programs that did not adequately mitigate the risks of doing business in high bribery risk industries and countries. This case highlights the importance of pre-merger ABC due diligence.

Walmart Inc – \$282.7 million: Internal Controls and Intermediaries

One of the world's largest global retailers failed to implement compliance controls necessary to prevent corrupt conduct by its third party intermediaries. This led to significant misconduct across the globe involving intermediaries bribing public officials to provide Walmart with advantages such as permits and discounted fees. Aside from its significant fine, Walmart spent more than \$900 million investigating potential FCPA offenses and enhancing its anti-bribery compliance program, according to various SEC filings.

2019 Notable US FCPA Cases (Continued)

Microsoft Corporation – \$25.3 million: Payments and Intermediaries

The FCPA investigation arose out of a bid-rigging and bribery scheme in connection with the sale of Microsoft software licenses to Hungarian government agencies. Government Officials were paid through third party vendors, consultants, distributors and resellers, including in circumstances where there was no evidence of any services provided by the third parties. The violations began by at least 2013 and continued until at least 2015.

Cognizant Technology Solutions Corporation – \$25 million: Payments and Intermediaries

This global tech services company was accused of bribing government officers in India through a third-party construction firm to fast track a construction project. Senior executives were involved in doctoring change orders to provide illicit payments to a contractor. These individuals were subsequently charged for FCPA violations as facilitators. Despite the involvement of senior officials (an aggregating factor for an FCPA fine), the DOJ declined to prosecute due to Cognizant's voluntary and prompt self-reporting along with significant cooperation in investigation and its remedial efforts.

Deutsche Bank AG & Barclays PLC – \$16 million & \$6.3 million: Hiring Practices

These financial institutions provided employment positions to the family members of foreign public officials through official, or specially-devised, hiring programs with the intended goal to retain business opportunities, despite some candidates being unqualified. Internal accounting controls around the firms' hiring practices didn't provide reasonable assurances to prevent the bribery to government officials. Rather, internal corporate records were falsified to conceal the true source and reason of the hiring.

A key theme of 2019 ABC Legislation around the world is holding companies liable for **failure to prevent** bribery and corruption.

Europe & Americas

Colombia - Starting January 1, 2020, a series of new anti-corruption measures went into effect: The new legislation precludes the use of house arrest for public officials found guilty of corruption-related offenses; convicted officials will now go to prison.

US - In March 2019, the FBI announced the creation of a dedicated international corruption squad based in its Miami Field Office.

AME

Announced the African Continental Free Trade Area (AfCFTA) Agreement on May 2019 which is expected to strengthen and incorporate further anti-corruption provisions over time among the African Union of 44 signatories; some Middle Eastern countries, like **UAE** have made commitments (changes to its **Penal Code** in 2018) and continue to demonstrate positive strides toward combating corruption.

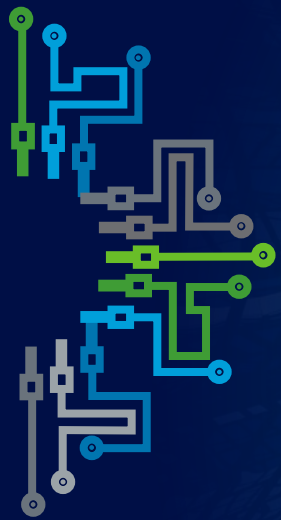
Two 2019 federal cases in the U.S. based on bribery that took place in Africa widened the scope of potential liability under the FCPA. (Chi Ping, Patrick Ho, Chinese citizen and former chairman of China Energy Fund Committee, has appealed his conviction stemming from bribes offered to the President of Chad and Uganda's foreign minister.)

ASA & GCNA

Malaysia – Section 17A was announced in July 2019 by The Securities Commission Malaysia. It aims to improve local standards of corporate governance. This compliments the anti-corruption legislative changes in 2018 to hold corporations, and their directors, officers, and managers, liable for failing to prevent acts of bribery and corruption. Section 17A is expected to be enforced by the authorities by June 2020.

Vietnam - New regulation (Decree No. 59/2019/ND-CP) was issued to implement a stricter Anti-Corruption Law, effective 15 August 2019. This new requirement is imposed on both the public sector and publicly held companies and credit institutions to establish policies that require heads and their deputies to detect and prevent corruption, ensure openness and transparency in their operations, and disclose improper gifts received.

Australia – The Crimes Legislation Amendment (Combating Corporate Crimes) Bill 2019 (Cth) introduced notable provisions including imposing a new strict liability offence for companies who fail to prevent a foreign bribery through its subsidiaries or associated persons; and proposing to adopt DPA regime and encourage companies to self-report serious misconduct.



ABC Red Flags

Bribery & Corruption - Red Flags



High Risk Third Parties (Public Officials; Intermediaries, etc.)

- Client has a close business relationship with a Public Official who has discretionary authority over the business or transaction
- A client or Public Official requests or demands the use of a particular Intermediary
- Clients or Intermediaries insist on dealing with Public Officials privately without the Bank's participation
- A client routinely engages Intermediaries to carry out its business operations



Adverse Media

- Searches on the beneficial owners, senior officials, or management of the clients and/or Intermediaries shows they have been the subject of criminal/civil or regulatory proceedings involving bribery or corruption
- Searches on the client or Intermediary finds negative news for bribery, corruption, or lack of integrity



Inadequate Capabilities

- Client lacks experience or has an inconsistent track record in the type of service, business, or transaction or in the relevant industry
- The client engages an Intermediary to 'get the deal done' or because they 'knows the right people' or engaged at the last minute

Bribery & Corruption - Red Flags (Continued)



Unusual Payments




- Client requests payment to a bank account not held by the client entity
- Client makes large cash payments to an Intermediary
- Client makes last minute payments that are not properly documented



Lack of Transparency



- Client provides unclear answers to due diligence questions
- Client or Intermediary does not have an online presence
- Client or Intermediary requests discretionary authority to handle matters alone
- The client/Intermediary contracts do not clearly or in detail describe the services to be performed



Unusual Invoicing or Documentation



- Client or Intermediary requests an invoice to reflect a different amount than the cost of services rendered
- Client or Intermediary refuses to provide a detailed invoice or invoices include vague description of services
- Client or Intermediary fails to provide supporting documentation for unexplained expenses

Other Risk Indicators



High Risk Jurisdiction and Industry

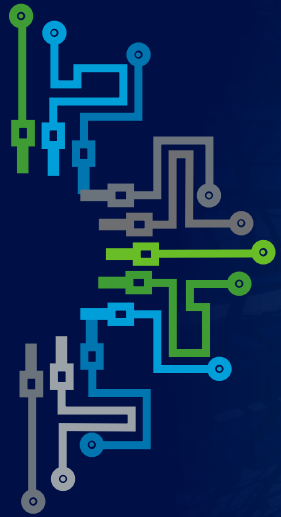
- Client's counterparty, third parties linked to the transaction, or the underlying asset is located in a high risk jurisdiction.
- Industry exposure of the client, client's counterparty and target/underlying asset. Examples of high risk industries are extractive industries (including mining and oil and gas), construction, arms and defence or money services business, gambling, embassies, aerospace, agriculture, transportation and storage, information and communication, pharmaceuticals and utilities.
- The Bank maintains separate lists for ABC risk and AML/Sanctions risks – both lists should be consulted.

Sanctions Nexus, Defence or Dual Use Goods

- Parties to the deal may be connected to a sanctioned party or a sanctioned country.
- Parties to the deal may have other businesses in a sanctioned country.
- Underlying transaction or client's counterparty may have dealings in defence or dual use goods.

Complex or Unusual Deal Structure/ Individuals

- Involvement of unrelated third parties in the deal structure with no apparent commercial rationale.
- Payments to and receipts from unrelated companies as part of the deal mechanics with no apparent commercial rationale.
- Transactions requiring the onboarding of individuals or PIVs should be closely scrutinized to understand the purpose and rationale for the use of the product.



Building an ABC Program

Anti-Money Laundering vs Anti-Bribery and Corruption

AML/Sanctions

AML/Sanctions Risks are Outward, Client Focused, i.e., the risk that the bank will facilitate financial transactions for clients who are:

- Moving illicit funds or
- Sanctioned persons or connected to sanctioned persons.

ABC

ABC Risks are Inward, Staff Focused (including Non-Employed Workers, interns and Third-Parties) who are agents of SCB or acting on SCB's behalf.

- Staff
- Intermediaries
- Introducers
- Suppliers, Vendors
- Joint Ventures, Mergers & Acquisitions, Private Equity

Bribery and Corruption Risks for FIs

Procurement:

Engaging a vendor to perform services and that vendor engages in bribery. Heightened risk for Intermediaries, who are engaged to obtain clients or government approvals, licenses, etc.

Hiring Practices:

Hiring a candidate for employment (as staff, intern, etc.) as a way of making a bribe.

Business Deals:

Joint Ventures, Equity Investments, M&A, Project Finance

Gifts & Entertainment:

Business hospitality including meals, travel, gifts, conferences, training, will be used to, or create the appearance it is being used to, make a bribe.

Sponsorships & Donations:

The giving of a sponsorship or donation is used to disguise a bribe or it creates the appearance that it is being used as a bribe.

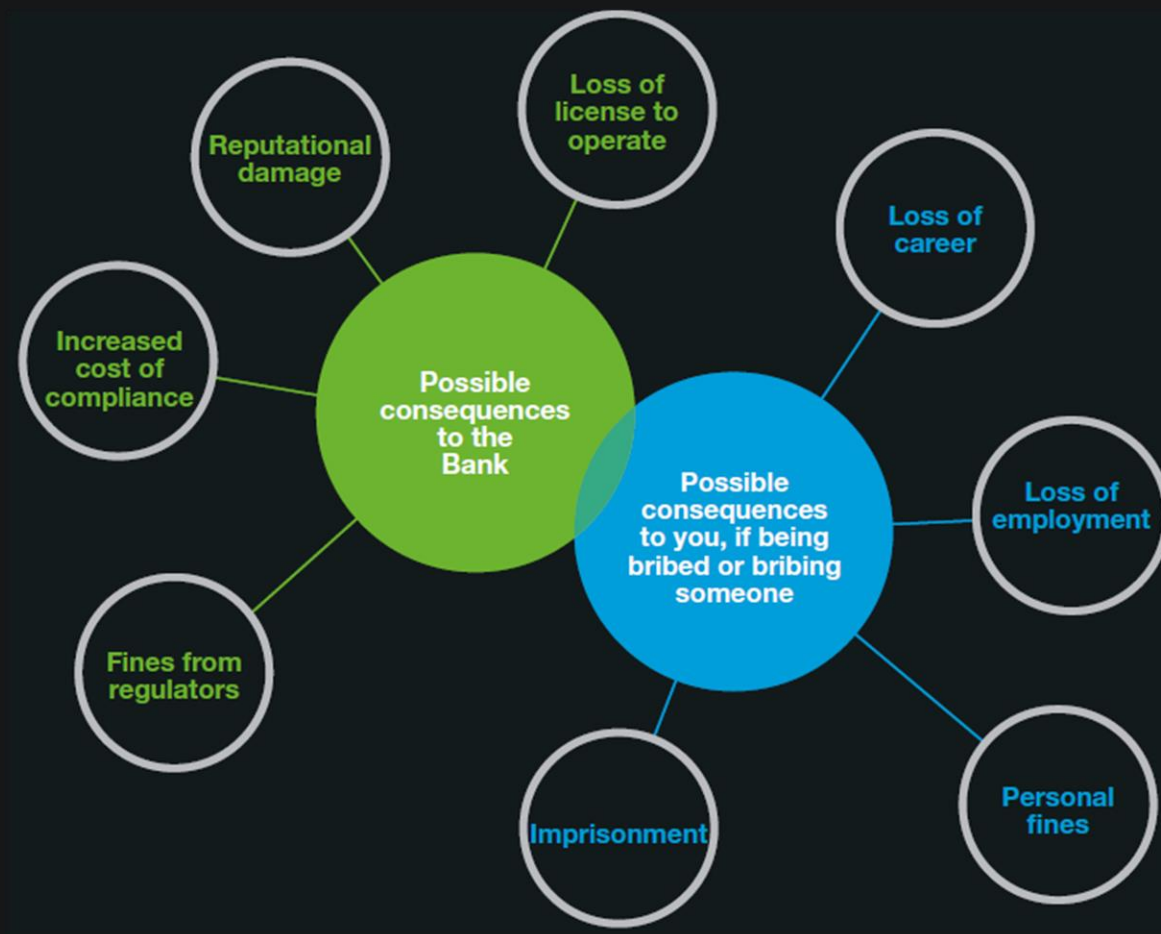
Other Payments:

Facilitation Payments, Lobbying Payments, or other payments constitute a bribe or may be perceived to be a bribe.

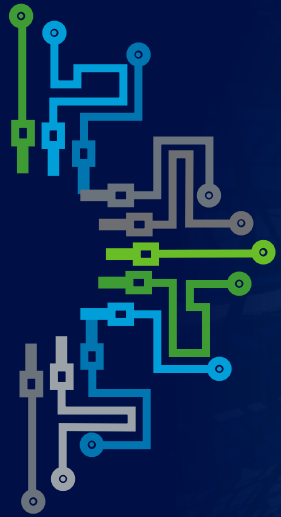
Framework for an Effective ABC Programme



Consequences of ABC breaches



BE DILIGENT. BE CURIOUS. BE VIGILANT.



Case Study

A New Deal Comes in...



One of your clients is a Sovereign Wealth Fund in Nigeria. This client comes to your firm seeking a term loan to support structural expansion of a network of warehouses they need for their physical commodities storage. They plan to lease some of the warehouse space to third parties and want the financing to be structured such that the lease payments are remitted directly to the your firm as part of the repayment structure.

As always, your firm and the client have external counsel assisting with the deal documents, your law firm suggests enlisting another law firm to assist with the legal terms for the nuanced repayment structure suggested here. The new law may need to obtain a tax opinion from the local tax authorities to determine if this payment structure violates local tax laws.

Lastly, you know from the deal documents that there is a contingency on procuring a government permit to import the physical commodities that will be stored. The documents note that an intermediary will be hired to handle the permit, but no other information is provided.



One of your clients is a **Sovereign Wealth Fund in Mexico**. This client comes to your firm seeking a term loan to support structural expansion of a network of warehouses they need for their physical commodities storage. They plan to lease some of the warehouse space to **third parties** and want the financing to be structured such that the lease payments are remitted directly to the your firm as part of the repayment structure.

As always, your firm and the client have external counsel assisting with the deal documents, **your law firm suggests subcontracting another law firm to assist with the legal terms for the nuanced repayment structure suggested here**. The new law firm may need to obtain a tax opinion from the local tax authorities to determine if this payment structure violates local tax laws.

Lastly, you know from the deal documents that there is a contingency based on procuring a **government permit** to import the physical commodities that will be stored. The deal documents note that **the client will use an expeditor will be hired to handle the permit, but no other information is provided**.



Sovereign Wealth Fund (SWF) in Mexico – Government clients will generally pose greater bribery risk. SWFs have been entities of concern for US prospectors because of the significant financial influence these entities have, particularly in emerging markets, such as Nigeria, which are more susceptible to corruption.

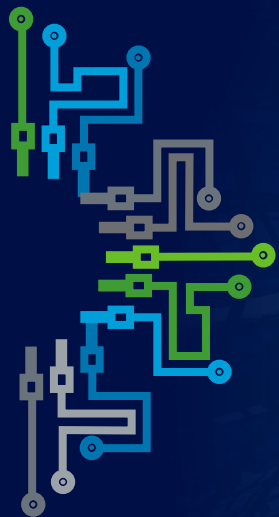
Complex Repayment Structure – Many deals may have complex elements; the key is to understand if the complexity is warranted and sensible, rather than a potential means to hide bribery payments. Further, here, the contingency on the government permit presents bribery risk in itself, which you'll want to better understand. The deal team and, potentially, others in the same business segment not involved in the deal at hand are often best suited to make this assessment alongside compliance/legal.

External Law Firms and subcontracting – Law firms are a form of intermediary and your firm can be liable if they, like any third party, pay bribes on your behalf. You must have risk-based vendor management, which requires commensurate due diligence for all third parties, meaning it will be more stringent for intermediaries. Additionally, your firm could be liable for any bribes paid by the subcontracted law firm. You should have appropriate controls (e.g., control clauses) managing this risk, or engage the second law firm directly and perform appropriate due diligence.



Obtaining a tax opinion – If a favourable tax opinion is required for the deal to close as structured, this could be an incentive for bribes to be paid, suggesting this activity is riskier and more due diligence and oversight over this law firm is required. The risk will be heightened when dealing with government in emerging markets.

Expediter procuring government permit - This situation is slightly more attenuated because, here, the client, not your firm, is procuring the third party. While your risk of liability may therefore be *somewhat* more remote, you are at risk of being implicated if there is a bribery issue and you were “willfully blind.” You’ll need to ask the client for more information about the expediter’s capabilities and credentials and how the client is mitigating the clear bribery risk here (e.g., training and contract clauses with the expediter, clear description of services, itemized invoice, no cash payments, etc.)



Thank You

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