

ETHAN *Hathaway*
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Fighting Corruption

Webinar

Our Agenda

- ▶ What is corruption?
- ▶ Corruption and the law
- ▶ How does one recognize and fight corruption?
- ▶ Compliance/ Bribery Red Flags
- ▶ A Practical Compliance Checklist
- ▶ A Practical FCAP Checklist

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What is Corruption?



Understanding Corruption

- ▶ Corruption is the abuse of entrusted power for private gain
- ▶ It hurts everyone who depends on the integrity of people in a position of authority

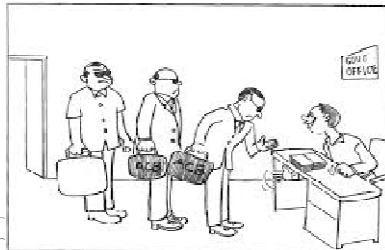
Transparency International



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Dealing with Corruption

- ▶ The risks of doing business in countries with different laws, practices, ownership structures and requirements concerning the use of middlemen
- ▶ Companies should emphasize corporate governance because it is good business
- ▶ Increased and aggressive enforcement activity is now being seen worldwide
- ▶ Investigations of corruption know no geographic boundaries



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Corruption and the Law



US Foreign Corrupt Practices Act (FCPA)

- ▶ **FCPA includes two key elements**
 - Anti-bribery provisions
 - Accounting requirements

- ▶ **The FCPA applies to two broad categories of persons**
 - Those with formal ties to the US
 - Those who take action in furtherance of a violation while in the US

FOREIGN CORRUPT PRACTICES ACT

Anti-Bribery

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What the FCPA Prohibits

- ▶ A payment, offer, authorization or promise to pay money or anything of value. . .
- ▶ The involvement of a foreign government official
- ▶ A corrupt motive
- ▶ Having the purpose to ... (4 sub categories)
- ▶ Assisting in obtaining or retaining business for or with, or directing any business to, any person



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OECD Anti-Bribery Convention

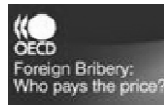
- ▶ The OECD Anti-Bribery Convention was adopted in 1997 and entered into force in 1999.
- ▶ Defines Standards to fight bribery in International Business Transactions



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Convention's Most Significant Provisions

- ▶ Criminalize bribery of foreign public officials
- ▶ Define a foreign public official
- ▶ Impose effective, proportionate and dissuasive sanctions
- ▶ Establish territorial and nationality jurisdiction
- ▶ Link the bribery of foreign public officials to money laundering



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Convention's Most Significant Provisions ..ctd

- ▶ Delink economic & political considerations in investigating and prosecuting the offence
- ▶ Set accounting and auditing standards
- ▶ Facilitate mutual legal assistance and extradition
- ▶ Provide for systematic monitoring



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UK Anti-Bribery Act

- ▶ In effect 1 July 2011
- ▶ Creates the following offences
- ▶ Offering or receiving bribes
- ▶ Bribery of foreign public officials
- ▶ Failure to prevent a bribe being paid on an organization's behalf



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UK Anti-Bribery Act ..ctd

- ▶ Offences of bribing another person
- ▶ GIVING of something ...
- ▶ ACCEPTANCE of something

- ▶ Improper performance
 - Doing something that is a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust



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UK Anti-Bribery Act ..ctd

Where the performance of the function or activity is not subject to UK law then any local custom or practice must be disregarded ...

... unless permitted or required by the written law applicable to that particular country.



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UK Anti-Bribery Act ..ctd

- ▶ Bribery of a foreign public official
- ▶ Offering/ promising / giving a financial or other advantage to a foreign public official with the intention of influencing him/her in the performance of his or her official functions
- ▶ Who is a ‘Foreign Public Official’



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UK Anti-Bribery Act ..ctd

- ▶ Failure of commercial organizations to prevent bribery
- ▶ Commercial organizations liable for prosecution *‘if a person associated with it bribes another person’*
- ▶ Who is an ‘associated person’?



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UK Anti-Bribery Act ..ctd

- ▶ Failure of commercial organizations to prevent bribery – **Special Payments/ Issues**
- ▶ Facilitation payments
- ▶ Duress
- ▶ Prosecutorial discretion



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How does one recognize and fight Corruption?



What is Corruption?

- ▶ Defining corruption can be a challenge.
- ▶ Corruption – ‘the abuse of entrusted power for private gain’

- ▶ Three elements of corruption
 - Public and private sectors
 - Abusing power
 - Bribe-giver & Bribe-taker benefit



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Most common types of Corrupt Acts

- ▶ Bribery
- ▶ Kickback
- ▶ Bribery of foreign officials by private sector
- ▶ Trading in influence
- ▶ Illicit enrichment



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Conditions that Facilitate Corruption

- ▶ Incentives that encourage someone to engage in corrupt transactions
- ▶ Availability of multiple opportunities for personal enrichment
- ▶ Access to and control over the means of corruption
- ▶ The limited risks of exposure and punishment

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How does one Fight Corruption?

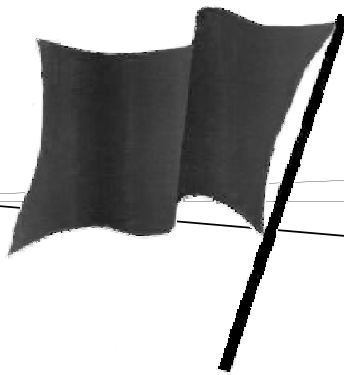
- ▶ Prevention
- ▶ Building transparent, accountable systems of governance
- ▶ Strengthening the capacity of civil society and the media
- ▶ Improving public integrity
- ▶ Strengthening the personal ethics of public and private officials
- ▶ Challenging social norms that encourage corruption



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Compliance/ Bribery Red Flags



General Red Flags

- ▶ “Improper payment” audits
- ▶ Payment in a country with widespread corruption
- ▶ Bad corruption reputation
- ▶ Industry with a known history of corruption violations
- ▶ Due diligence points to possible ethical issues



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Transaction Specific Red Flags

- ▶ Agent refuses to confirm anti-corruption standards
- ▶ Foreign partners in JVs refuse reasonable controls
- ▶ Family/ Business ties to government official
- ▶ Foreign partner is owned by key government official or relative
- ▶ “Rumors” of high government officials as partners



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Transaction Specific Red Flags ..ctd

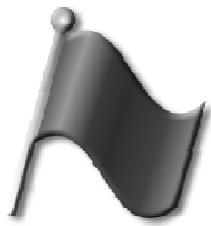
- ▶ Bad reputation of the agent
- ▶ Agent requires anonymity
- ▶ Foreign partner wants sole control of any host country government approvals
- ▶ Proposed relationship with foreign partner not in accordance with local laws or rules
- ▶ Government customer recommends sales agent



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Transaction Specific Red Flags ..ctd

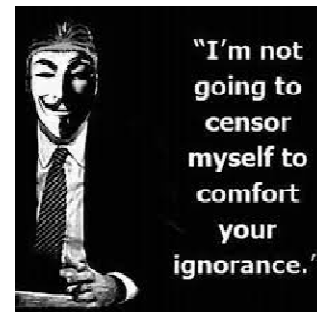
- ▶ Foreign parties contribution is only 'influence'
- ▶ Agents does not have facilities or staff
- ▶ Agent is new in the business
- ▶ Odd requests by the agent



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Payment Red Flags

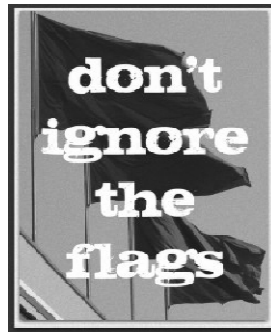
- ▶ Payment of commissions above the going rate
- ▶ Way-out payment instructions
- ▶ Over invoicing
- ▶ ‘Cash’ payment requests
- ▶ Payment to a third country
- ▶ Requests for unusually large credit lines
- ▶ Requests for out-of-the-ordinary payments



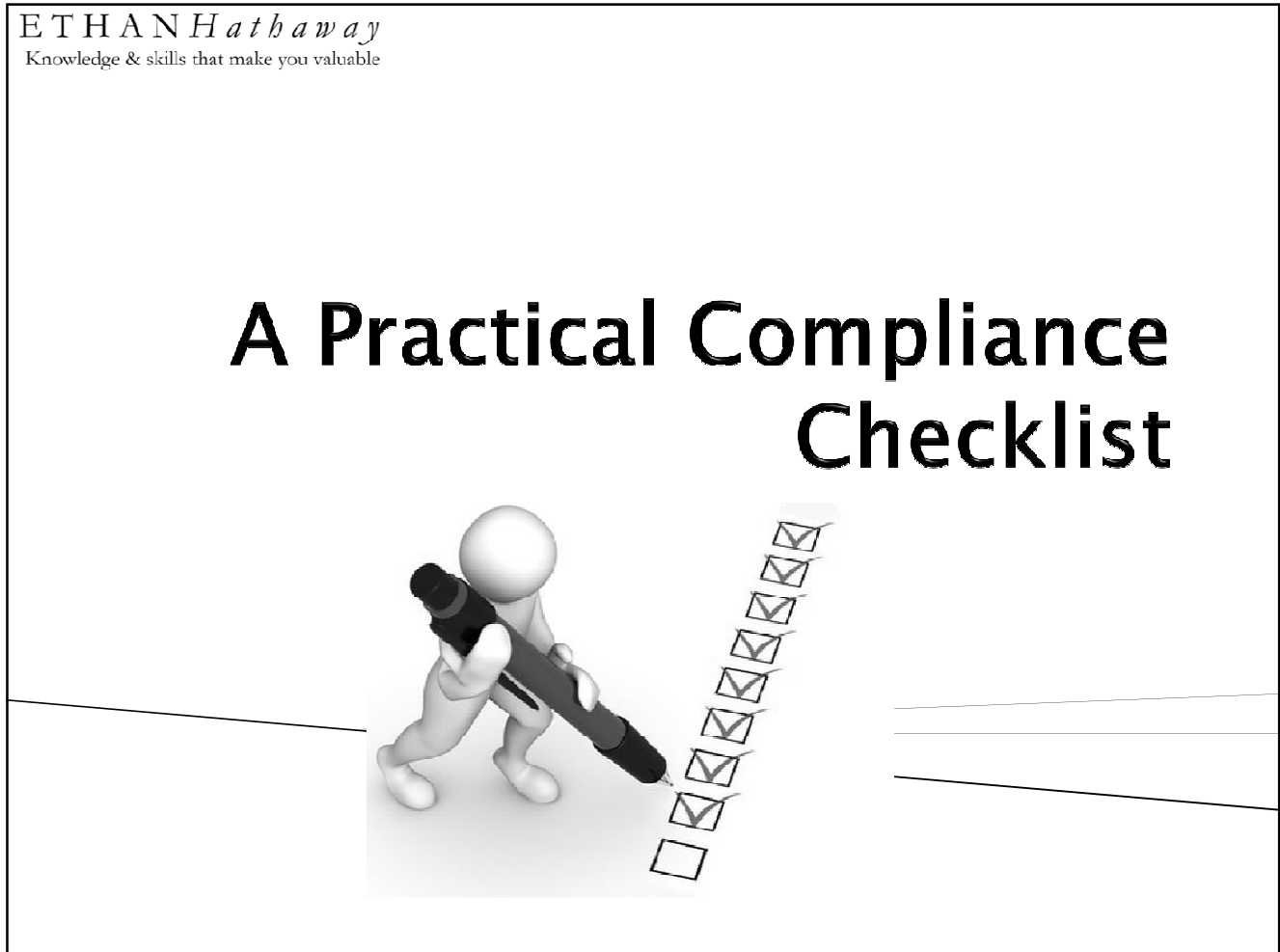
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Payment Red Flags ..ctd

- ▶ Requests of unorthodox/ large up-front payments
- ▶ Mismatch between economic interest and contribution
- ▶ Excessive values ascribed to foreign partner contribution



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Six Principles

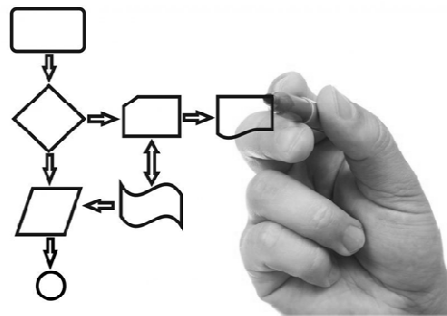
- ▶ Proportionate procedures
- ▶ Top-level commitment
- ▶ Risk Assessment
- ▶ Due diligence
- ▶ Communication (including training)
- ▶ Monitoring and review



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Proportionate Procedures

- ▶ Proportionate to the bribery risks
- ▶ Proportionate nature, scale and complexity of the commercial organization's activities
- ▶ Procedures are clear, practical, accessible, effectively implemented and enforced



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Top-Level Commitment

- ▶ Board of directors, the owners or any other equivalent body or person
- ▶ Committed to preventing bribery
- ▶ Foster a culture within the organization in which bribery is never acceptable



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Risk Assessment

- ▶ The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it
- ▶ The assessment must be periodic, informed and documented



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Due Diligence

- ▶ The commercial organization applies due diligence procedures, taking a proportionate and risk based approach
- ▶ ...in respect of persons who perform or will perform services for or on behalf of the organization,
- ▶ ...in order to mitigate identified bribery risks



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Communication (including Training)

- ▶ The firm/ organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization
- ▶ ... through internal and external communication,
- ▶ ... including training,
- ▶ ... that is proportionate to the risks it faces



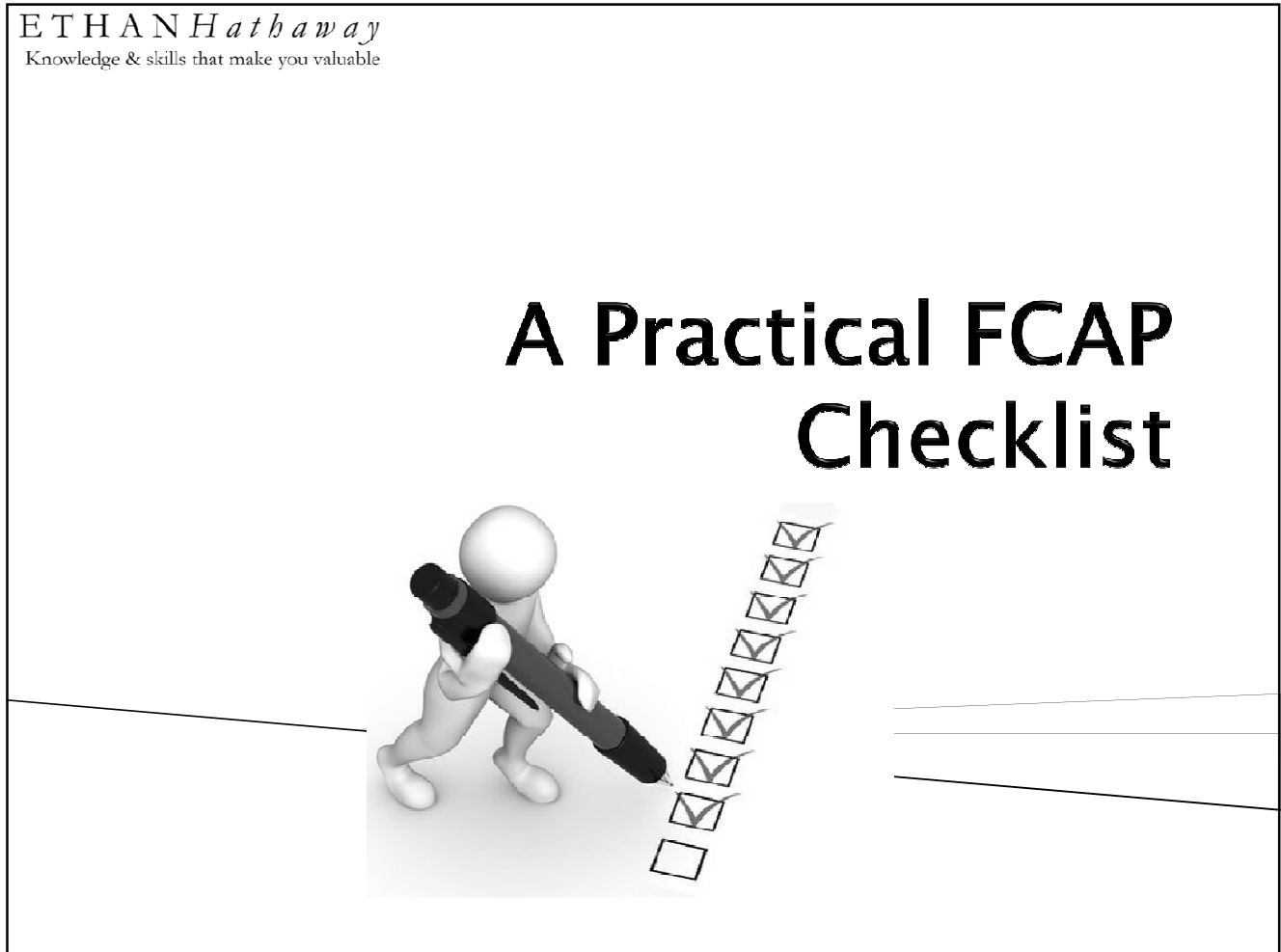
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Monitoring and Review

- ▶ The firm/ organization monitors and reviews procedures
- ▶ ... designed to prevent bribery by persons associated with it
- ▶ ... and makes improvements where necessary



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A Global Compliance Checklist ..ctd

- ▶ Compliance Function & the Board
- ▶ Document retention and litigation freezes
- ▶ Payment of attorneys fees for employees under investigation?
- ▶ Compliance training and education programs
- ▶ Internal accounting controls
- ▶ Disciplinary procedures



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A Global Compliance Checklist ..ctd

- ▶ Reporting systems
- ▶ Contracts & agreements
- ▶ Sponsoring foreign officials on seminars, training, and other trips
- ▶ Gift policies
- ▶ Contributions to foreign charities and nationalization programs
- ▶ Crisis team with documented procedures



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A Global Compliance Checklist ..ctd

- ▶ Appropriate due diligence procedures
- ▶ Compliance program design
- ▶ Pre-payment controls



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To Sum Up



What we have Covered



- ▶ United States Foreign Corrupt Practices Act
- ▶ United Kingdom Anti-Bribery Act
- ▶ OECD Anti-Corruption Treaty

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