

● **Anti-Corruption, Intermediaries and Import/Export: The Basics**

This information is not intended or offered as legal advice and it is not a substitute for a legal advisor. These materials have been prepared for educational and information purposes only. You are responsible for instituting your own compliance program and ensuring compliance with all local and international laws and regulations.

Agenda

- Anti Corruption Training – why is it necessary?
- Foreign Corrupt Practices Act
- The Bribery Act 2010
- TMO's Intermediary policies and procedures
- Import/Export Requirements
- Backup

Why Is Anti-Corruption Training So Important?

- The FCPA and UK Bribery Act 2010 prohibit corrupt payments through **“intermediaries”**
- TMO could be liable for the actions of our distributors/agents if TMO “knows” about the improper payments (“knowing” includes “conscious disregard and deliberate ignorance”). Accordingly TMO must pursue careful due diligence before hiring an agent or distributor:
 - We need to know who we’re doing business with
 - We need to be able to control and mitigate our risk profile
 - TMO employees need to exercise reasonable diligence to ensure our agents and distributors are not making bribes or other improper payments
- Our customers/suppliers/competitors are enhancing their compliance programs
- Regulators expect enhanced programs and are becoming more active, therefore the risks are high



● **FCPA**

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FCPA – Basic Prohibition

- **Prohibition:** Publicly traded companies, U.S. citizens, resident aliens, and businesses organized under U.S. law, and anyone within the territory of the U.S., *may not, directly or indirectly, make payments, promises, or offers of anything of value to foreign officials to obtain or retain business or to secure an improper advantage.*
- **Mandate:** Companies whose securities are listed on a U.S. exchange *must keep accurate books and records and must establish and maintain a system of internal controls* to ensure accountability for assets (i.e., no bribery).
- **Penalties:**
 - Companies fined up to \$2M or 2x the gain obtained from the conduct violating the Act
 - Companies may lose export privileges or be barred from entering into govt contracts
 - Individuals may be penalized up to \$250k or be imprisoned up to 5 years, or both
 - External monitors and/or expansion of compliance program
 - Lengthy and disruptive criminal investigations
 - Reputational injury
 - Private securities litigation.

FCPA – Requirements

- **Who:** Who does the FCPA apply to?
 - Any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm
 - Foreign companies and individuals not subject to FCPA unless it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States (*“abide / comply by the Act” versus “violate the Act”*)
 - U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question
- **Corrupt Intent:** What Does “Knowing” Mean?
 - It is unlawful to make a payment to a third party while knowing that all or a portion of the payment will go directly or indirectly to a foreign or government official
 - *The term “knowing” includes conscious disregard and deliberate ignorance of known circumstances*
 - It doesn’t matter if the payment is “the way business is done here”

FCPA – Requirements (continued)

- **Payment:** FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value
- **Recipient:** Who/What is a Foreign Government Official?
 - Anyone acting in an official capacity on behalf of a foreign (i.e., non-U.S.) government, regardless of rank or position;
 - Foreign political parties, party officials or candidates;
 - Employees of foreign state-owned companies or entities;
 - Employees of public international organizations; and
 - Members of the armed services.
- **Business Purpose Test:**
 - FCPA prohibits payments made to assist the firm in obtaining or retaining business for or with, or directing business to, any person. The DOJ interprets "obtaining or retaining business" broadly, such that the term encompasses more than the mere award or renewal of a contract.
 - Compare: "Facilitation payment" exception which permits payments to facilitate or expedite performance of a "routine governmental action." Examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply,
Note: While some laws may allow facilitation payments in very limited circumstances, Thermo Fisher policy prohibits facilitation payments. If there are any questions, contact the Thermo Fisher Group General Counsel.

FCPA – Enforcement Update


Year	Company	Industry	Criminal Penalties (millions)	Civil Penalties (millions)	Monitor Required
2012	BioMet	medical device	\$17	\$6	Yes (ordered to retain an independent compliance consultant for 18 months to review its FCPA compliance program)
2012	Tyco Intl	security systems	\$14	\$13 (SEC considered Tyco's extensive efforts to identify & remediate its wrongdoing; voluntarily disclosed its findings to the SEC)	Yes (These additional violations discovered as part of companywide review required under 2006 Deferred Prosecution Agr)
2012	Smith & Nephew	medical device	\$17	\$5	Yes
2012	Pfizer (Wyeth)	pharma	\$15	\$45	Yes **
2011/2012	Lindsey Mfg	electric utilities	1 st Corp conviction – case dismissed (prosecutorial misconduct) **	Gov't sought \$24 disgorgement	No
2011	Johnson & Johnson	medical device	\$21	\$49	Yes

FCPA – Enforcement Update

Year	Company	Industry	Criminal Penalties (millions)	Civil Penalties (millions)	Monitor Required
2014	Bio-Rad	medical Diagnostics/ life Sciences	\$14 Misconduct re: sales in Russia	\$40 SEC Cease & Desist Order	Required to report to DOJ for 2 years
2014	Alcoa World Alumina LLC	alumina sales	\$209 Bribes Bahrain government	\$14 Forfeiture paid to IRS	4 years probation in which they must cooperate with DOJ officials in follow up visits and audits.
2014	Hewlett Packard	technology	\$108 Bribes to Russian government	\$31 SEC civil penalties	N/A
2014	Marubeni	trading company including power generation	\$88 Bribes to Indonesian government	N/A	Must maintain & implement enhanced global anti-corruption compliance program & cooperate with the ongoing investigation
2013	Weatherford and subsidiaries	oil services	\$187 Bribes to officials in several countries, export control violations	\$65 SEC civil penalties	18 month monitor
2013	Bilfinger SE	engineering services	\$32 Bribes to Nigerian officials	N/A	18 month monitor



Bribery Act 2010



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UK Bribery Act 2010 – Offences

- Came into effect on July 1, 2011 – applies to all bribes and other corruption post that date
 - General offences of bribing another person (sec 1) and being bribed (sec 2)
 - Bribery of foreign public officials (sec 6)
 - Failure of a commercial organization to prevent bribery (sec 7)
 - Senior officer consent or connivance offence (sec 14)
- Covers bribery of governmental officers and private citizens/corporations
- Intra and extra territorial effect – offences committed abroad can be caught if there is a “close connection with the UK”
 - A body corporate incorporated under any UK law
 - Any other body corporate that carries on business or part of a business in any part of the UK

UK Bribery Act 2010 – Section 7 Corporate Offence

- Strict liability offence
- A commercial organization commits an offence if a person associated with it bribes another for that organization's benefit.
 - “associated” – performing services for or on behalf of the organization regardless of capacity: Agents, distributors, employees, subsidiaries, joint venture partners, suppliers.
- Vital that we understand who we’re doing business with – we are trusting them with our reputation.
- NB: differences with FCPA
 - Imposes strict corporate liability for failure to prevent bribery by “associated person”, i.e., employee, agent, or third party acting on company’s behalf.
 - Private sector bribery is prohibited.
 - Facilitation payments to the government are prohibited.
 - Prison terms can be up to twice as long as those under FCPA.

UK Bribery Act 2010 – Adequate Procedures

- Adequate Procedures Defense – Ministry of Justice Guidelines:
 - Proportionate procedures
 - Top level commitment
 - Risk assessment
 - Due diligence
 - Communication
 - Monitoring and review
- Mitigation **BUT** the Serious Fraud Office (SFO) expects that these procedures should be in place.
- Rosemary Donabella, Head of Investigations at SFO says SFO doesn't feel bound by the Adequate Procedures guidance.
- SFO expects organisations to have anti-corruption at the top of their corporate agendas.

UK Bribery Act 2010 - Penalties

- Individuals can be jailed for up to 10 years and/or receive an unlimited fine and be disqualified as a director for up to 15 years
- Companies can receive unlimited fines
- Mandatory exclusion under EU law from carrying out public contracts in the EU (active corruption); discretionary exclusion for failing to prevent bribery.
- Link to FCPA – SFO work closely with DoJ and DoS



Intermediaries – TMO Process

International Intermediaries

- What is an intermediary?
 - A third party between Thermo Fisher and the end Customer
 - Distributors, Sub-distributors
 - Agents, Consultants
 - Advisers
 - Joint Venture Partners
- Why do we need to perform due diligence in respect of intermediaries?
 - FCPA
 - Bribery Act 2010 – Section 7 Corporate Offence
 - A commercial organisation commits an offence if a person “associated” with it bribes another for that organisation’s benefit
- Is the due diligence territory specific?
 - No – risk-based due diligence must be carried out in all territories and regions.

What is TMO's "Intermediary Process"?

- **"Pre-Hiring" Diligence (and on-going follow-up)**
 - **TMO Distributor Proforma**
 - Looking for **"red flags"** which may raise suspicions of illegal or corrupt activity
 - Maintain Securimate Database, containing online due diligence and screening process for third party intermediaries
 - **Training** – internal and third parties
 - Continuous monitoring by **Securimate Third Party Monitor** compliance tool
- **All Distributors Will Be Required To:**
 - Participate in Due Diligence Process
 - Sign a Distribution Agreement (after Due Diligence is complete), which contains acceptable anti-corruption certification language
 - Or, at a minimum, sign TMO's **FCPA/Trade Compliance Letter**
 - May be required independently for government tenders >\$1 million
- **Supplemental Requirements in China (non-exhaustive list)**
 - China Guidelines on Business Gifts and Entertainment mirroring Code of Conduct
 - Guidelines on Consulting Fees/Commission Payments paid to Third Party Consultants
- **Letter of Authorization**
- **Power of Attorney (e.g., product registration)**



● Import / Export Requirements

U.S. Export Controls and Distributors

- U.S. export controls impact Thermo Fisher businesses and distributors/agents regardless of the location of the business
- Why?
 - All Thermo Fisher business entities are owned by a U.S. based parent company
 - Many Thermo Fisher businesses handle U.S. products
 - Distributors handle many U. S. products
- Because the U.S. government says that its export regulations apply to “U.S. products” and “U.S. persons” – everywhere
- So U.S. export regulations are enforced
 - on U.S. products, even after they have left the U.S.
 - on businesses outside the U.S.
 - on individuals who may never have been in the U.S.

Four Questions – MUST Ask For EVERY Transaction

- Export screening involves 4 key W's of a transaction:
- **Who** is it going to?
 - **End-User** - Check ALL parties and their addresses to the transaction on all government watch lists
- **What** are you exporting?
 - **Product or Technology and/or Service** - Has it been classified as a product that needs a license?
 - Is it of US origin?
- **Where** is it going?
 - **Country or Countries of Destination** - Thermo Fisher policy states NO business with **Cuba, Iran, North Korea, Sudan, and Syria, *directly or indirectly***
 - Bear in mind “countries of concern”
- **Why** do they want it?
 - **End Use** - Nuclear, Chemical, Biological, Missile, Military

WHO – Denied Persons / Entities List (DPEL)

- Who are we selling / exporting to or dealing with?
- The Denied Persons Entity List (DPEL): and Restricted Entities:
 - is a compilation of many government lists
 - contains names of the “bad guys” – e.g., terrorists, diverters and others suspected of wrongdoing with whom governments may not want us to trade with
- The DPEL/RPL is used to check all parties and their addresses in the transaction to determine whether any party is an organization or individual with whom you cannot trade or to determine if a license is required
- How do I access the DPEL?
 - Export. gov: http://export.gov/ecr/eg_main_023148.asp and Consolidated List of persons, groups and entities subject to EU sanctions: http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm
 - Private software companies also offer manual and automated screening solutions

WHAT – Export Classification: Product, Technology and Service Classification

- **WHAT** are we exporting / or could be re-exported
- Export classification of a product determines:
 - Whether the product or technology or service is on a relevant government export control or munitions list
 - If it IS, an export license may be required **prior** to shipping the product technology, or providing service

WHERE – Embargoed & “Of Concern” Countries

- This relates to the **WHERE** of an export
- An export embargo is a prohibition or limitation on exporting, usually to a country or part of a country
- If the embargo on a country is a total embargo, there can be **NO** shipments or other exports
 - Directly to the country, or
 - Indirectly to the country (e.g., to a customer you know or suspect will ship there)
 - This includes providing services (e.g. repairs, servicing, training, etc.)
- Countries currently **embargoed** by OFAC and/or Thermo Fisher Policy: **Cuba, Iran, North Korea, Sudan, & Syria**

WHERE – Other Countries of Concern

- Libya
 - US, UN, Canada, and EU have sanctions
 - Sanctions put in place currently block all property (and interests in property) of the Government of Libya (and its agencies, instrumentalities, and controlled entities), the Central Bank of Libya, and the property (and interests in property) of certain individuals in the Libyan government
 - All orders to Libya must be approved by the GTC team and legal department prior to shipment or money transfer
- Other countries with some OFAC sanctions in place:
 - South Sudan has been recognized as a separate country early 2012, but there are still some restrictions
 - All orders to South Sudan must be approved by the GTC team and legal department prior to shipment or money transfer
 - All orders to Burma (Myanmar) must be approved by the GTC team and legal department prior to shipment or money transfer
 - Balkans, Belarus, Cote d'Ivoire (Ivory Coast), Democratic Republic of the Congo, Iraq, Former Liberian Regime of Charles Taylor, Lebanon, Somalia, Zimbabwe and Diamond Trading Sanctions
 - <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>

WHY – Weapons Proliferation Compliance

- This relates mainly to the **WHY or END-USE** of an export order
- **Weapons proliferation** is the spread of weapons, in particular to “bad people” – we don’t want to help them either obtain weapons, or use our products to develop, test, produce weapons.
- **What kind of weapons?**
- WMD (Weapons of Mass Destruction): Nuclear weapons and other activities related to nuclear facilities; Chemical / Biological (CBW) weapons; Missiles and other systems to deliver such weapons
- **Know the end user and the end use**
 - Whenever you can
 - Know as much as you can
 - Particularly if you know your product could have “weapons” uses
- **Use extra care when exporting to customers**
 - Who are new
 - Who are trading companies who may divert (e.g., UAE to Iran)
 - Who are military, or are affiliated with military organizations
 - Who are institutes of science or technology

Huge increase in Maximum US Export Penalties (per violation!)

	October 2007
Civil	\$250,000 and denial of export privileges
Criminal	\$1million or 2x value of export, whichever is greater, and/or 20 years in prison, denial of export privileges

- Also consider the negative publicity involved.
- There can be multiple violations per transaction.
- Denial of export privileges: can not sell, receive, buy or in any way be involved in a transaction that involves items exported from the U.S.
- In many cases, companies (U.S. or not) will not want to transact business with denied entities anymore because it would put them at risk.

Some Interesting Cases

- **PPG Industries Inc.**
 - Penalized **\$750,000** for 2 exports (and one attempted export), Howard Coombs, Director of Business Development ordered to pay **\$250,000** and placed on **Denial List for 5 years**
 - Epoxy paints and thinners (EAR99 items) to Chashma Nuclear Power Plant, a Pakistan entity on the Commerce Department's Entity List. Shanghai, China affiliate, PPG Paints Trading Company, Ltd., paid **\$2.25 million** in criminal and civil penalties for transshipping the goods
- **China Nuclear Industry Huaxing (Wa-ZING) Construction Co**
 - Chinese government owned company to pay **\$2 million** for export violations
 - Huaxing supplied U.S.-manufactured nuclear coatings for a nuclear power plant the company was building in Pakistan. Court documents showed Huaxing used a distributor in China to evade U.S. export law, by concealing that the destination was the Pakistani nuclear plant.
- **ITT**
 - **\$100 million** violation
 - Military equipment and technology to China, Singapore, UK
- **Export Privileges Suspended for Brazil Man for Attempted Transshipment to Iran**
 - Violated the U.S. export regulations by conspiring to export an engineering software program to Iran via Brazil without the required U.S. government authorization.
 - The US government has **suspended the man's export privileges for three years** relating to any commodity, software or technology or any other activity subject to the US regulations.

Excerpt from US Government Publication

- Department of Commerce – Don't Let This Happen To You
 - “Parties to an export transaction cannot bypass the EAR by shipping items through a third country.
 - The transshipment, re-export, or diversion of goods and technologies in international commerce may be a violation of U.S. law.
 - For example, an exporter cannot bypass the U.S. embargo against Iran by shipping an item to a distributor in the United Kingdom and asking that distributor to transship the item to a customer in Iran.
 - Under U.S. law, this would be considered an export to Iran, even though it does not go directly to that country, and both the U.S. exporter and the United Kingdom distributor could be liable for violating U.S. law.”


EAR is the U.S. Export Administration Regulations

Key Takeaways

- Anti-Bribery (FCPA, UK Bribery Act, etc.) violations may be hard to detect and are very serious
 - TMO and your company could be liable for your actions
 - Potential civil and criminal fines and penalties
- Export laws and regulations are very serious and can be complex
 - Denied Persons Lists change frequently
 - Failure to properly screen all parties & shipments puts you and TMO at risk
 - When in doubt, check it out! Don't just ship it out.
 - There are many resources available to help-contact the legal team or the Global Trade Compliance Team for assistance



BACKUP



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Additional Information

- US Department of Justice FCPA homepage:
<http://www.justice.gov/criminal/fraud/fcpa/>
- UK Ministry of Justice UK Bribery Act homepage:
<http://www.justice.gov.uk/legislation/bribery>
- Introduction to the U.S. Commerce Department Export Controls:
<http://www.bis.doc.gov/licensing/exportingbasics.htm>
- US. Sanctions Programs: <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>
- Consolidated List of persons, groups and entities subject to EU sanctions:
http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm

Compliance Certification

- We require that **ALL** resellers of Thermo Fisher products certify compliance with antibribery and export rules during the online due diligence process, and/or in a FCPA/Trade Compliance Letter agreement with similar language in order to do business with us.
- This agreement is designed to protect us **and** our resellers because we are interested in a long term, successful business relationship.
- Laws and regulations are complicated and the compliance certification and/or FCPA/Trade Compliance Letter give a high level summary of what you may need to consider (but is not meant as legal advice).
- These agreements may be renewed annually.

Content of the FCPA Compliance Certification– Anti-Bribery

- FCPA – Foreign Corrupt Practices Act
- Similar legislation in place in many other countries, examples
 - United Kingdom Bribery Act of 2010 (even stricter than the US counter part)
 - Germany: Deutsches Strafgesetzbuch § 331 ff, Vorteilsannahme, Bestechlichkeit, Vorteilsgewährung
- Record fine for Siemens bribery scandal
 - Cost of penalties to German firm totals €2.5bn
 - US authorities fined the German engineering group of Siemens a record \$800m (£523m)
 - Siemens also agreed to pay a fine of €395m (£354m) to settle a case in Munich, its home town, over the failure of its former board to fulfill its supervisory duties.
 - It was later fined €201m for bribery by its former telecoms division.

Content of the FCPA Compliance Certification— Export Compliance

- No shipments:
 - Directly or indirectly to embargoed/sanctioned countries: Cuba, Iran, North Korea, Sudan, and Syria, with or without a license
 - Based on U.S. embargoes, EU Sanctions, and /or Thermo Fisher policy
 - To persons or entities that are involved in the improper development or use of nuclear or chemical/biological weapons or missiles, or in terrorist activities.
 - Based on the Export Administration regulations (EAR) and the EU Dual Use regulation 428/2009
 - To persons or entities that are listed by the U.S. or any other country as prohibited from receiving the product, or from participating in export transactions.
 - Based on various lists by the U.S. government, the European Union, and the United Nations (inter alia)