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# Managing Third Party Relationships

## Lessons from Recent Enforcement Actions

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# Third Parties Anti-Bribery Enforcement

## *Liability for Conduct of Third Parties*

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- Under most anti-bribery laws, corrupt payments made by third parties can be imputed to companies under various legal theories:
  - FCPA third-party liability provision
  - Section 7 of the UK Bribery Act
  - Similar theories under national laws implementing the OECD Anti-Bribery Convention
- Historically, third parties conduct has been the most sensitive anti-bribery risk area and the one that has generated most enforcement actions across all industry sectors
  - “About 60% to 70% of the SEC’s FCPA actions involve third-party intermediaries - payments to agents who then pass money to government officials” (*Kara N. Brockmeyer, former Chief of the FCPA Unit at the SEC*)
  - Intermediaries were involved in 3 out of 4 foreign bribery enforcement actions conducted by OECD countries from 1999 to 2014 (*OECD Foreign Bribery Report*)
- **All the Top 20 FCPA** enforcement actions and the **Top 10 UKBA and EU** enforcement actions feature direct third party involvement

# Third Parties Anti-Bribery Enforcement

## Top 20 FCPA Enforcement Actions

No.	Company	Year	Amount (millions)
1	<b>Telia Company AB (Sweden)</b>	<b>2017</b>	<b>\$965</b>
2	Siemens (Germany)	2008	\$800
3	VimpelCom (the Netherlands)	2016	\$795
4	Alstom S.A. (France)	2014	\$772
5	KBR/Halliburton (U.S.)	2009	\$579
6	Teva Pharmaceutical (Israel)	2016	\$519
7	<b>Keppel Offshore (Singapore)</b>	<b>2017</b>	<b>\$422</b>
8	Och-Ziff Capital Management Group (U.S.)	2016	\$413
9	BAE Systems PLC (UK)	2010	\$400
10	Total S.A. (France)	2013	\$398
11	Alcoa (U.S.)	2014	\$384
12	Snamprogetti NL B.V. / ENI S.p.A (the Netherlands/Italy)	2010	\$365
13	Technip S.A. (France)	2010	\$338
14	Odebrecht/Braskem (Brazil)	2016	\$257
15	JGC Corporation (Japan)	2011	\$218.8
16	Daimler AG (Germany)	2010	\$185
17	Weatherford International (Switzerland)	2013	\$152.6
18	Alcatel-Lucent (France)	2010	\$137
19	Magyar Telekom / Deutsche Telekom (Hungary/Germany)	2011	\$95
20	Panalpina (Switzerland)	2010	\$81.5

# Third Parties Anti-Bribery Enforcement

## Top 10 UKBA and EU Enforcement Actions

NO.	COMPANY	YEAR	AMOUNT (MILLIONS)	ENFORCEMENT AUTHORITY
1	<b>Rolls-Royce</b>	<b>2017</b>	<b>€73</b>	<b>UK SFO</b>
2	Siemens (Germany)	2007	€596	Munich Public Prosecutor's Office
3	VimpelCom (Netherlands)	2016	€357,2	Dutch Public Prosecution Service
4	<b>HSBC (UK/Switzerland)</b>	<b>2017</b>	<b>€300</b>	<b>French Financial Prosecutor</b>
5	SBM Offshore (Netherlands)	2014	€214	Dutch Public Prosecution Service
6	<b>Telia Company AB (Sweden)</b>	<b>2017</b>	<b>€11</b>	<b>Dutch Public Prosecution Service / Swedish Public Prosecution Service</b>
7	Siemens (Greece)	2012	€170	Athens Public Prosecutor's Office
8	MAN Group (Germany)	2009	€150.6	Munich Public Prosecutor's Office
9	Ferrostaal (Germany)	2011	€149	Munich Public Prosecutor's Office
10	Yara International (Norway)	2014	€43,5	The Norwegian Economic and Environmental Crime Authority

# Third Parties Anti-Bribery Enforcement

## *Recent Enforcement Overview - Mondelēz*

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- In **Mondelēz** (January 2017), **failure** on part of Mondelēz to conduct appropriate **pre-engagement due diligence** on an agent in India and **insufficient monitoring post-engagement** led to a USD 13 million sanction by the SEC for conduct of the agent to obtain licenses
  - Mondelēz acquired Cadbury in February 2010
  - Also in 2010, Cadbury India paid an agent to deal with Indian government officials to obtain licenses and approvals for a proposed manufacturing plant
    - Cadbury India did **not** conduct appropriate due diligence **nor** did it monitor the agent
  - From February 2010 to July 2010, the agent submitted five invoices to Cadbury India for preparing license applications, among other things; however, Cadbury employees, not the agent, had prepared the license applications
  - **No direct evidence of bribery was found**, but the failure to implement appropriate pre- and post-engagement safeguards created the risk of improper payments being made through the agent
  - “[F]ailure to conduct appropriate due diligence on, and monitor the activities of, Agent No. 1 created the risk that funds paid to Agent No. 1 could be used for improper or unauthorized purposes”

# Third Parties Anti-Bribery Enforcement

## *Recent Enforcement Overview – Las Vegas Sands*

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- In ***Las Vegas Sands*** (“LVS” – January 2017 and April 2016) **failure** to conduct full pre-engagement due diligence on a consultant, along with **inaccurate and misleading** recording of payments to the consultant led to the imposition of a USD 7 million criminal fine by the DOJ in 2017 and a USD 9 million civil fine by the SEC in 2016
- No direct evidence of bribery was found
  - LVS admitted that from 2006 through 2009, it paid USD 5.8 million to the consultant, based in China, “without any discernable legitimate business purpose”
  - Originally, a finance department employee and an outside auditor warned LVS that USD 700,000 paid to the consultant could not be accounted for
  - LVS fired the employee and paid the consultant more money
- Despite having actual knowledge that USD 700,000 were unaccounted for, “certain [LVS] executives **knowingly and willfully** failed to implement a system of internal accounting controls to adequately ensure the legitimacy of payments to a business consultant who assisted [LVS] in promoting its brand in Macau and the PRC, and to prevent the false recording of those payments in its books and records”

# Third Parties Anti-Bribery Enforcement

## Recent Enforcement Overview – Rolls-Royce

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- In **Rolls-Royce** (January 2017), the extensive use of third parties in several high-risk jurisdictions led to a coordinated enforcement action with UK, U.S. and Brazilian enforcement authorities imposing a total of USD 809 million in sanctions
  - Relevant conduct happened between 1989 and 2013 and involved several countries (Indonesia, Russia, Nigeria, etc.)
- In particular in 2007, Rolls-Royce engaged an intermediary to act in the context of a public procurement auction for PLN, an Indonesian public company
  - The intermediary **bribed a competitor** to submit a non-competitive offer by representing to the company’s president that he would get a cut of a related Rolls-Royce contract through another company that the president controlled
  - The intermediary also **bribed public officials** within the Indonesian public company (PLN) so as to ensure a positive outcome for Rolls-Royce
    - “[The] payment arrangement [with the intermediary] was not subjected to the appropriate scrutiny according to of RR’s evolving compliance procedures”
  - “In March 2013, confirmation was sought that [the intermediary] was not in breach of any contract or applicable law. Despite such confirmation **never being provided** and despite the **apparent knowledge of some RR employees** that the intermediary was acting corruptly on RR’s behalf, RR continued to make ongoing, regular commission payments to [intermediary] until July 2013”

# Third Parties Anti-Bribery Enforcement

## *Lessons Learned*

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- Recent enforcement actions show the importance of implementing effective controls for all phases of the relationship with business partners
- In *Mondelēz* and *LVS*, although there was no actual evidence of bribery, sanctions were imposed on the basis of a failure to maintain effective internal controls
  - Therefore (i) undertaking **pre-engagement due diligence** and **post-engagement monitoring and auditing** and (ii) exercising **termination rights** upon knowing that monies were paid to third parties that were unaccounted for would have likely **avoided liability altogether** for the companies involved
- In *Rolls-Royce*, there was evidence of bribery that adequate compliance safeguards may have prevented
  - In these circumstances, exercising engagement compliance mechanisms would have likely resulted in **earlier detection and escalation** of misconduct, thereby substantially **reducing exposure** of the companies involved
- Moreover, appropriate compliance safeguards may have demonstrated the existence of “**adequate procedures**” required to establish a compliance defense under the UK Bribery Act



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# Questions?