

The FCPA and the Anti-Corruption Laws of the PRC



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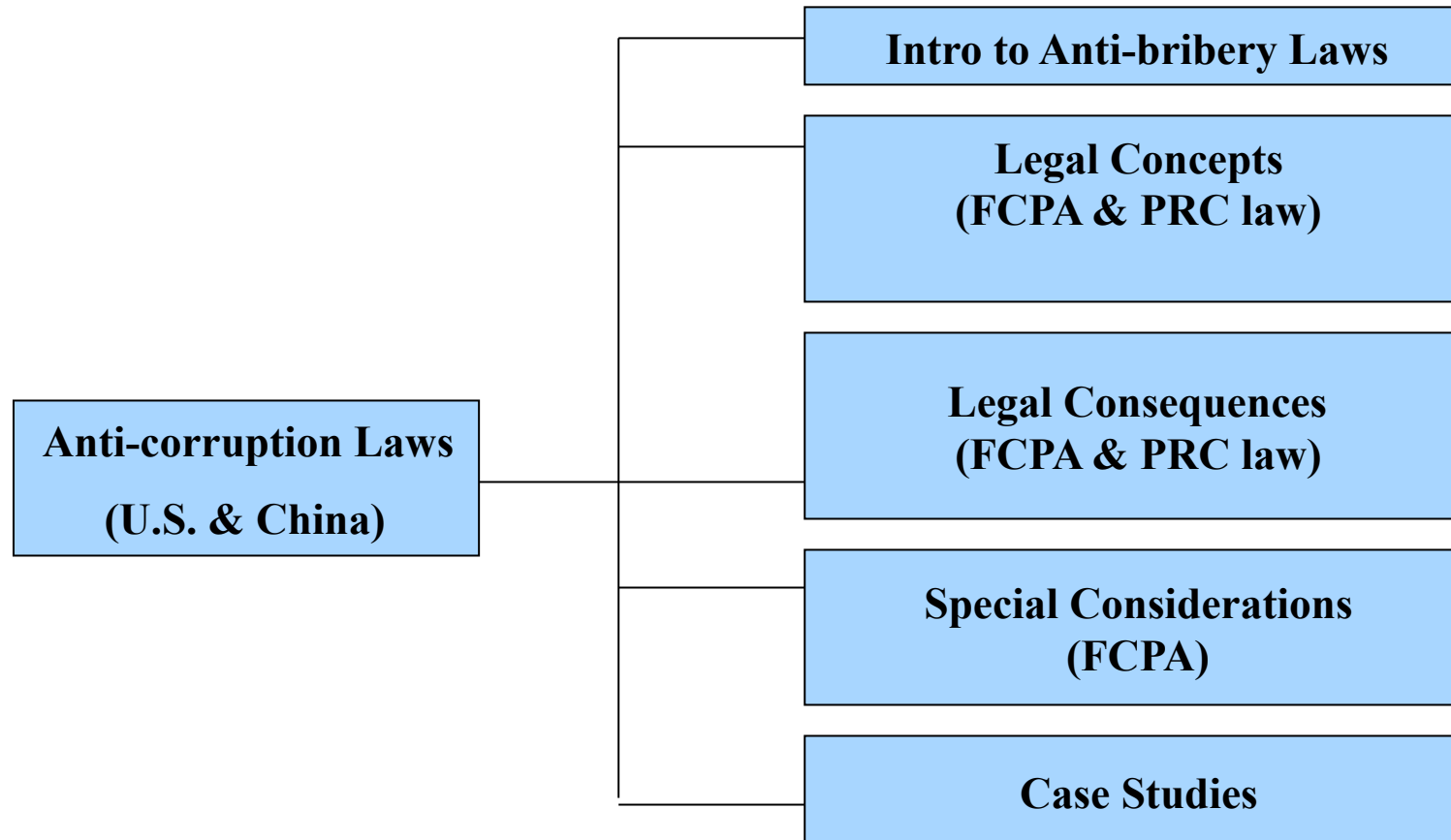
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Helen concentrates her practice on PRC investments and commercial transactions, particularly in the technology/media/telecoms, entertainment and lifestyle sectors. Her recent transactions include structuring offshore and PRC investments for individuals and corporate clients, venture capital rounds for Chinese companies, film co-production projects, joint ventures, asset purchases and commercial documentation.



Roadmap





Intro to U.S. Anti-bribery Conventions / Laws

- **Foreign Corrupt Practices Act – 1977**
 - **Inter-American Convention Against Corruption (34 member of Organization of American States + Cuba) – 1996**
 - **Organization of Economic Cooperation and Development – 1997**
 - **Council of Europe – 1999**
 - **U.N. Convention Against Corruption (passed but not ratified) - 2003**
 - **28 US states have anti-commercial bribery statutes**
- * The conventions are inconsistent in substance and application**



History of the FCPA

- Pre-1977 bribing foreign officials common and often a permitted business expense
- In 1977 Congress passed 15 U.S.C. §78dd-1. et seq
- Generally recognized that bribery threatens the proper functioning of democratic institutions, market economies and leads to misallocation of resources and jeopardizes relations among nations

Since 1995 many countries (including China) have domestic laws prohibiting improper inducements to government officials



What is the FCPA?

- Two main components:
 - Anti-bribery Provisions

FCPA makes it a crime to offer anything of value (no minimum) to foreign government officials for the purpose of corruptly influencing an official decision in order to obtain or retain business or improper advantage for oneself or another person

- Recordkeeping and Accounting Provisions

Also requires companies with stock traded on a U.S. exchange (Issuers) to keep accurate books and records and maintain an adequate system of internal controls over domestic and foreign operations

This training will focus on the anti-bribery provisions

However, all business expenses must be properly accounted for this includes business expenses reimbursements



FCPA – Jurisdiction

Broad coverage:

- Territorial – Connection to U.S. such as interstate commerce by U.S. national, foreign person or entity outside the U.S. if acting on behalf of a US company– for example:
 - Mail, phone, email
 - U.S. flagged vessel
 - U.S. waters
 - Aircraft en route to U.S.

- Nationality
 - U.S. national
 - Entity established under U.S. Law
 - Entity with principal place of business in U.S.



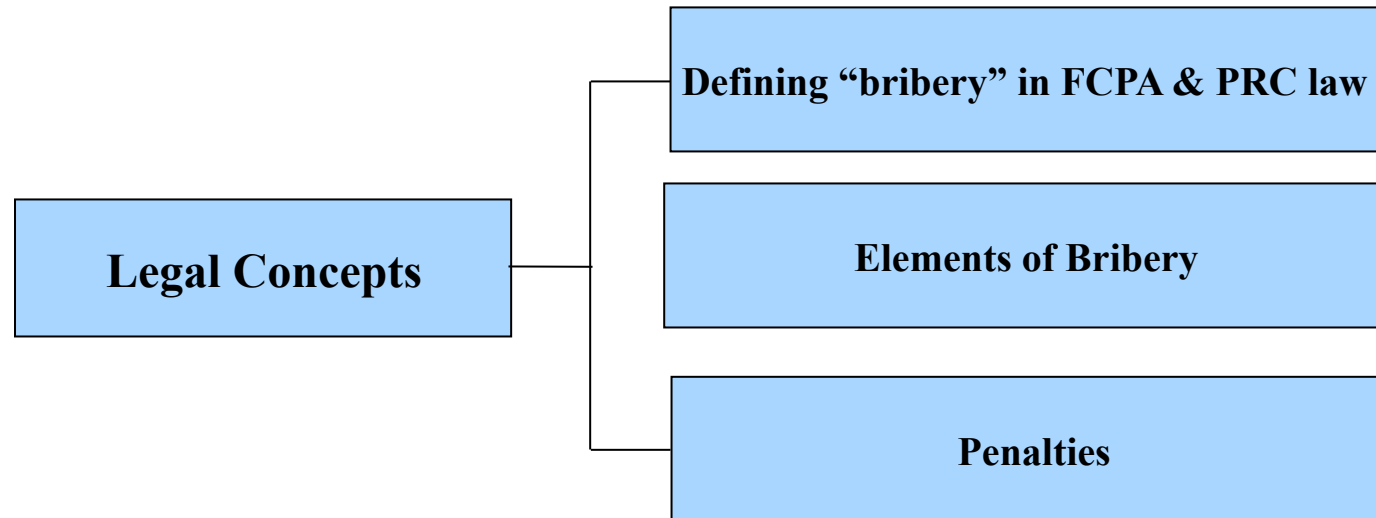
Intro to PRC Anti-Corruption Laws

Key laws on bribery in the PRC:

- *Law Against Unfair Competition* (Anti-unfair Competition Law)
- *Criminal Law* (Criminal Law)

PRC law differentiates between:

- Public sector bribery (government officials)
- Private sector bribery





FCPA – Anti-bribery Provisions (I)

- The FCPA prohibits

a U.S. citizen, resident or company from

acting corruptly

in furtherance of an offer, promise, or payment of money or anything of value

to a foreign government official,

directly or through a third party,

in order to influence an official government act or decision in order to obtain or retain business



FCPA – Anti-bribery Provisions (II)

- Key elements:
 - Foreign government official
 - Obtain or retain business or an improper advantage
 - Corruptly influencing
 - Anything of value
 - Indirect actions by 3rd parties

- Thus:
 - Who is a “government official”?
 - What is “corruptly influencing”?
 - What is “business or an improper advantage”?
 - What is “anything of value”?



PRC Corruption Laws – Public Sector (I)

Definition of the crime of bribery (Criminal Law, Art 389):

- **Where someone**

for the purpose of securing an illegitimate benefit,
gives money or property
to a government official

OR

- **Where someone**

in commercial activities, violates state regulations by
giving a relatively large amount of money or property
to a government official or
by giving him/her rebates or service fees of various descriptions



PRC Corruption Laws – Public Sector (II)

Key elements:

- Presence of a government official
- Intent to secure an illegitimate benefit
- Acceptance of a relatively large amount of money or gift

Thus:

- Who is a government official?
- What is an “illegitimate benefit”?
- What is a “relatively large amount”?



PRC Corruption Laws – Private Sector (I)

Definition of the crime of commercial bribery (Criminal Law, Art 164):

- **Where someone**

offers a relatively large amount of money or property

to a non-government official

for the purpose of securing an illegitimate benefit



PRC Corruption Laws – Private Sector (II)

Key elements:

- Intent to secure an illegitimate benefit
- Acceptance of a relatively large amount of money or gift

Thus:

- Who is a non-government official?
- What is an “illegitimate benefit”?
- What is a “relatively large amount”?



FCPA – Who is a Foreign Government Official?

- Ministry, agency employee
- Judge or legislator
- Local officials
- Employee of state owned/controlled company (even partially controlled)
- Employees of state-owned universities
- Private person acting officially
- Official of public international organization
- Candidates for office, political parties, or party officials
- Spouse/dependent/sibling of an official
- Member of the Armed Forces



PRC Law – Who is a Government Official?

- Any personnel of state agencies and departments
 - e.g., a ministry official
- Any personnel who performs public service in a state-owned enterprise (SOE), social organization or political party
 - e.g., an employee of People’s Education Press
- Any personnel assigned by a state organization or SOE to a company, enterprise or institution not owned by the state to perform public service

Note: This concept can extend to family members



FCPA – What is “Corruptly Influencing”?

- Any attempt to:
 - **Influence** an official act or decision of a government official
 - **Induce** a government official to do or omit to do any act in violation of his/her lawful duty
 - Induce a government official to use his/her influence with the government to affect or influence any government decision
 - Receive a *quid pro quo* related to official capacity (i.e., seeking influence with U.S. government or private enterprise)
 - Secure any improper advantage



FCPA – What is “business or an improper advantage”?

- Win, retain or renew a contract
- Increase revenue/profits
- Prevent adverse/obtain favorable government action
- Obtain, or accelerate the obtaining of, regulatory approvals
- Obtain competitor’s confidential information (e.g., pricing)
- Avoid/reduce duties/taxes
- Obtain favorable import/customs treatment



PRC Law – What is “Securing an Illegitimate Benefit”?

- Actions that:
 - Violate national laws, regulations, policies and/or rules of the ministries and departments under the State Council; **and**
 - Are intended to secure a tangible benefit, actual assistance or facility

Note: The definition of “illegitimate benefit” is narrower than “improper advantage” under the FCPA.



FCPA – What is “Anything of Value”? (I)

Payments or other economic benefits offered, paid or conferred on a government official, directly or through an intermediary

VIRTUALLY NO LIMITATIONS

- Cash
- Loans
- Entertainment/Art/Tickets
- Scholarships
- Travel/Upgrades/Side Trips
- Employment
- Permitting official to designate charity for donation



FCPA – What is “Anything of Value”? (II)

- E.g., Pay Here Tollbooths, a U.S. company, bids on a contract to install tollbooths on a highway in a country outside the U.S. A sales representative learns from an employee of the country’s highway administration that the company has made the lowest bid, but the administrator’s son wants an internship with Pay Here
- An internship is something valuable
- Offering employment is highly risky, even if the recipient is qualified for the job



PRC Law – What is a “large/relatively large value”? (I)

- If given by a company: anything over RMB 200,000
- If given by an individual: anything over RMB 10,000
- However, if more than 3 recipients are involved, can be lowered to RMB 100,000 (companies) and less than RMB 10,000 (individuals)



PRC Law: What Gifts Matter?

- “Property or other methods” – include:

Business gifts	Business entertainment
Sponsorship fees	Funds for scientific research
Vouchers	Interest-free loans
Employment	Qualifications



PRC Corruption Laws – CPC Members Etc.

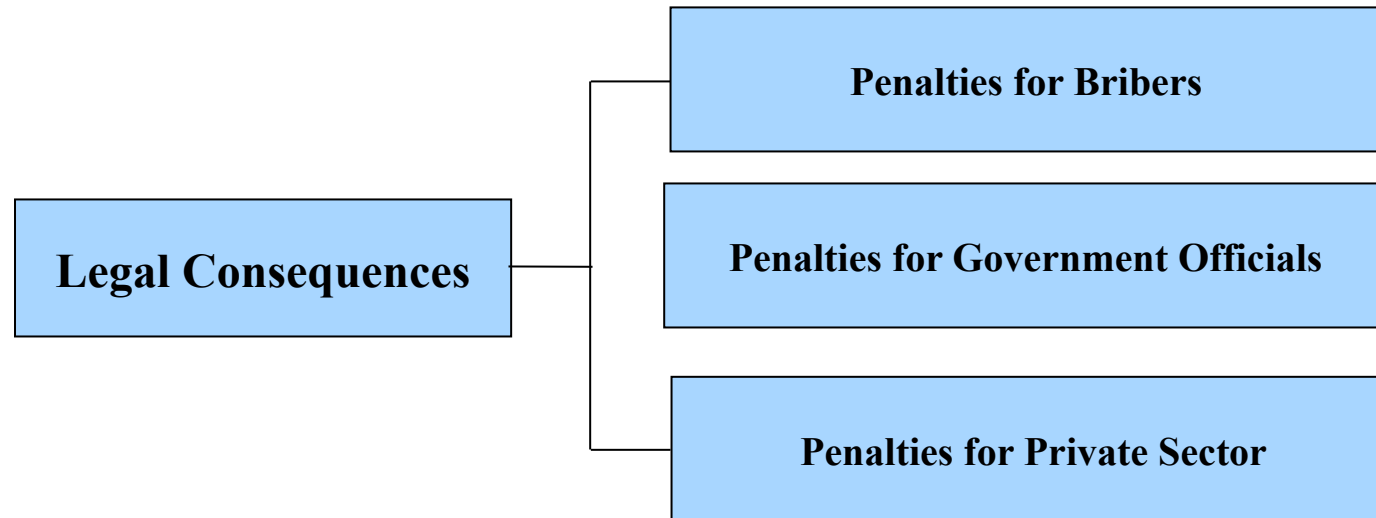
- Special Rules for members of the Communist Party of China (CPC) and those who work for a central government authority:
 - Gifts over RMB 200 (US\$30) in value must be surrendered
 - Officials are prohibited from receiving a total of more than RMB 600 (US\$ 91) worth of gifts per year



New Amendment to Art 164 of the Criminal Law

- As of **1 May 2011** it is a crime to:
 - Give money or property to
 - Any foreign public official or official of an international public organization
 - For the purpose of seeking illegitimate benefits

- This crime is punishable by:
 - ≤ 3 years prison/criminal detention if the amount is “relatively large”
 - ≥ 3 years ≤ 10 years prison/criminal detention if the amount is “huge”
 - and a fine





FCPA – Enforcement

The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) share enforcement responsibility

- DOJ – criminal enforcement
- SEC – civil enforcement



PRC Corruption Laws – Enforcement

- Administration for Industry and Commerce: administrative enforcement
- The People's Procuratorate: criminal enforcement



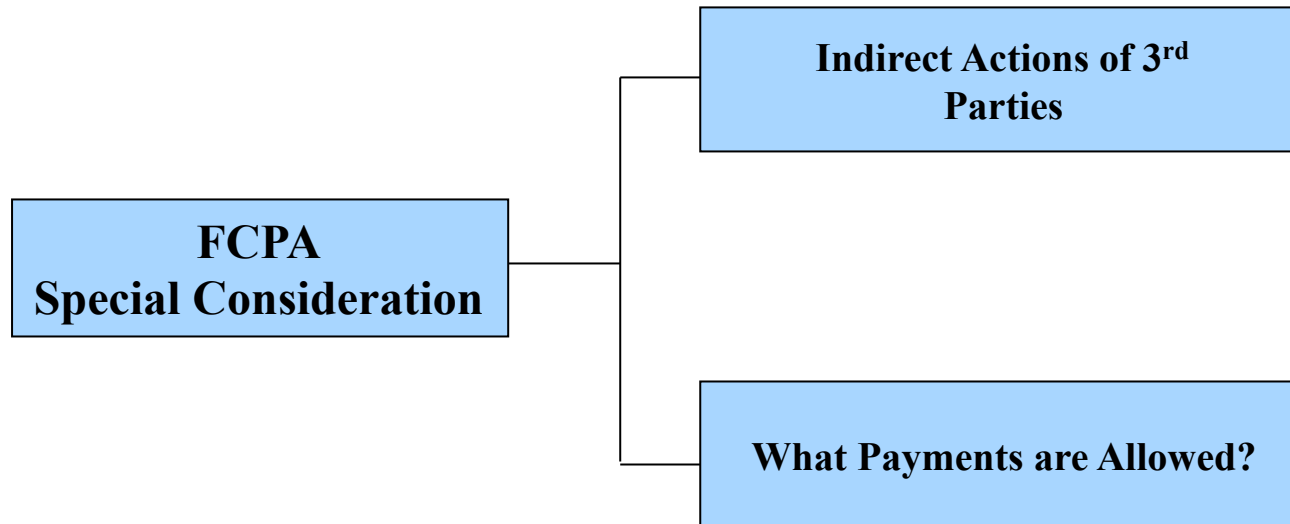
FCPA – Penalties

- Criminal:
 - Company – fines of up to US\$ 2 million or two times the financial benefit sought by making the corrupt payment, or both, per violation
 - Individuals – up to 5 years in prison, a fine of US\$ 250,000 or twice the financial benefit sought by making the corrupt payment, or both, per violation
- Civil:
 - Company – fines up to US\$ 10,000 per violation plus disgorgement of profits; injunctions; suspensions or disbarment from government business; loss or restriction of export licenses
 - Individuals – penalties of as much as US\$ 130,000 per violation or the amount of monetary gain or loss suffered by another



PRC Corruption Laws – Penalties

- Administrative liability: RMB 10,000 to 200,000 + confiscation of illicit income generated
- Civil liability: *Anti-Unfair Competition Law*, the offending bribe giver is liable for compensation for the damages arising
- Criminal liability:
 - Fines
 - Criminal detention
 - Imprisonment





FCPA – Can Indirect Actions of 3rd Parties be Attributable? (I)

- E.g., Acme Company, a U.S. company, retains Leo, a non-U.S. sales representative, to market its products in a country known for its corrupt business climate. Although the company usually pays its sales representatives a 5% commission, it pays Leo 10%. Some employees suspect that Leo intends to pay half his commission to government officials responsible for making purchasing decisions
- The company may be deemed responsible under the FCPA even if it doesn't know for sure that a bribe was paid



FCPA – What Payments are Allowed?

- Payments to government officials are allowed in order to obtain or speed up a **routine governmental action**
- “Routine governmental action” is very narrow: limited to specific types of actions over which officials have very little control or discretion
- Examples:
 - Get through customs
 - Provide phone service
 - Process paperwork
- Note though: what is considered as a “routine governmental action” under the FCPA may constitute “illegitimate benefit” under PRC corruption laws



FCPA – What Payments are Allowed? (Cont'd)

“Common” doesn’t mean “routine”:

- ABC Office Furniture, a U.S. company, wants to renew its agreement to supply a non-U.S. government with computer workstations. A government official tells ABC that it must pay an ‘extension fee’ of US\$10,000 before the renewal will be considered. When ABC hesitates, the government official says reassuringly that the fee is routine, and that companies don’t understand how business is done in his country don’t last long



FCPA – What Payments are Allowed? (Cont'd)

- Is this “common occurrence” permitted by the FCPA? **NO!**
- Here, the government official is asking ABC to make a potentially corrupt payment to extend a contract
- Recall elements of the FCPA provisions:
 - Foreign government official
 - Obtain or retain business or an improper advantage
 - Corruptly influencing
 - Anything of value



FCPA – What Payments are Allowed? (Cont'd)

- Payments to government officials for **reasonable expenditures** are also allowed by the FCPA, but the line between ‘reasonable’ and ‘unreasonable’ is not easy
 - E.g., reasonable travel or lodging expenses related to promoting, demonstrating, or explaining a company’s products or services
- Payments permitted under **written laws of the local country** are permitted
- **Facilitating payments** are permitted
 - E.g., payments for the installation of a telephone – but cannot be to obtain/retain business or in exchange for an additional benefit



Case Studies



Case Studies

DOJ enforcements have increased five-fold since 2004.

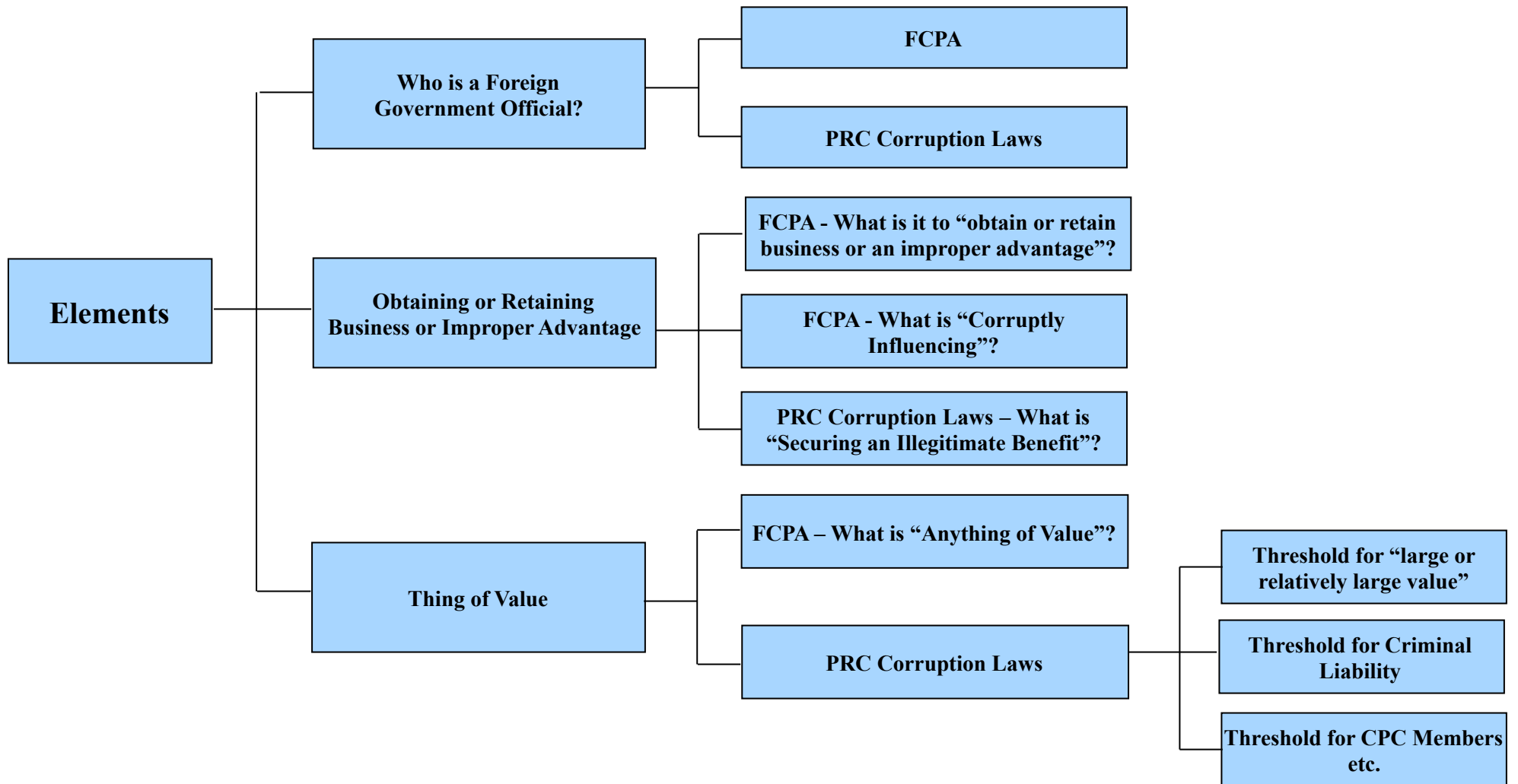
FBI has dedicated FCPA investigation team.

DOJ & SEC – 100+ investigation currently in progress.



Case Studies (Cont'd)

- **Daimler AG (2010)**
 - Made hundreds of improper payments worth tens of millions of dollars to foreign officials in at least twenty-two countries, including China, between 1998 and 2008
 - Form of Improper Payments: “third-party accounts,” corporate cash desks, offshore bank accounts, deceptive pricing arrangements, and third-party intermediaries.
 - Improper payment amounting to US\$5.6 million paid to Chinese government officials in the form of “commissions,” gifts, and travel
 - US\$185 million in criminal penalties and disgorgement.
- **Maxwell Technologies Inc. (2011)**
 - Listed U.S. Company in NASDAQ
 - Maxwell’s Swiss subsidiary engaged a Chinese agent to pay US\$1.26 million to bribe officials at state-owned entities to secure these contracts.
 - In total, Maxwell agreed to pay US\$14 million in criminal penalties and disgorgement.





High Risk Areas

- Agent Payments
- Consultant Payments
- Employee Expenses
- Direct payments or reimbursements to foreign officials
- Fact finding visits
- Logistics and shipping expenses
- Unknown or inadequately monitored resellers
- Contributions to charitable or political orgs



Warning Signs

- Some of the warning signs are general e.g., selling to a country known for widespread corruption
- Other warning signs are more specific e.g., when:
 - A sales representative has family or business ties with government officials
 - A sales representative asks for an unusually high commission or success fee
 - The potential customer recommends someone for the job of sales representative

Thank you !



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