

FCPA and International Anti-Corruption Enforcement – Trends in 2010

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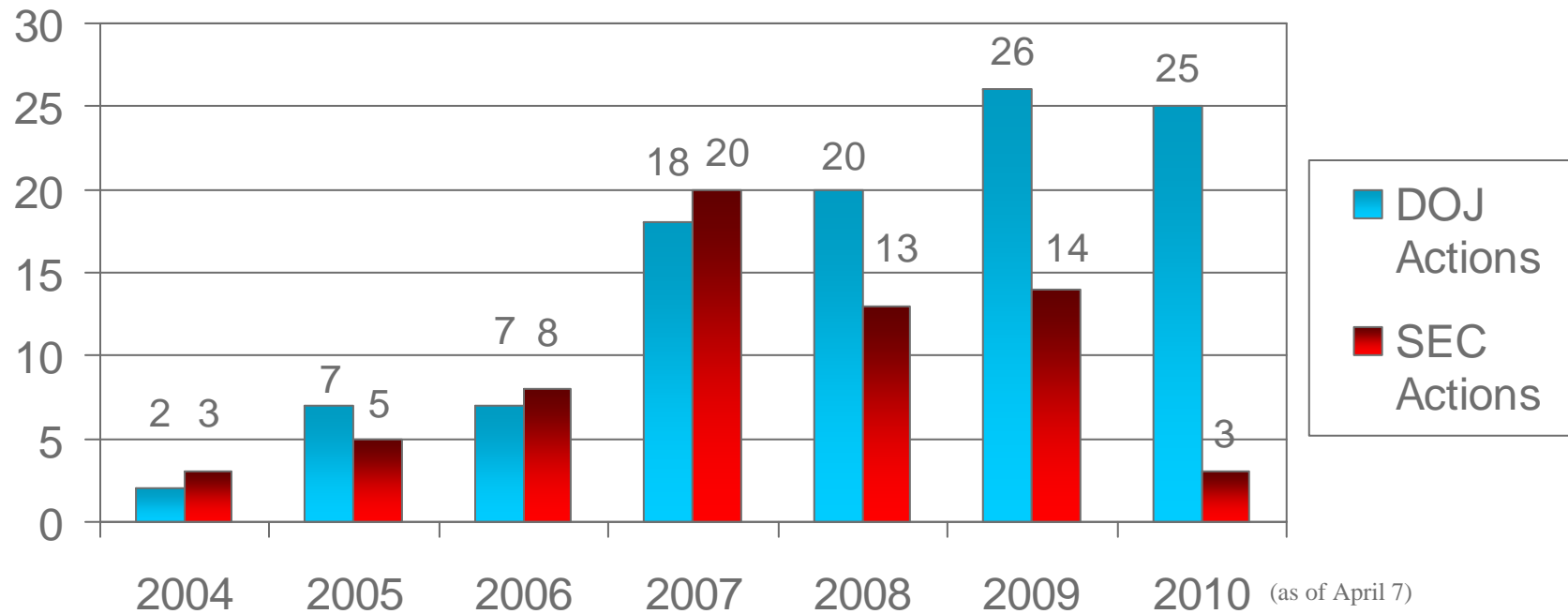
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Securities Docket Webcast

GIBSON DUNN



FCPA Enforcement (2004 – present)



Approximately 140 companies and/or individuals are currently under investigation for potential FCPA violations, according to Assistant Attorney General Lanny Breuer, Criminal Division, U.S. DOJ (Jan. 19, 2010).

The “Great Struggle” Against Corruption



“Corruption is not a new problem. . . . It’s a human problem [C]orruption stifles development It can shield a war criminal Terrorist attacks . . . are facilitated by customs and border officers who can be paid off, by police forces . . . crippled by corruption . . . , and by forged documents that are easy to find in a climate where graft and fraud thrive. Some of the worst actors on the international stage can also take advantage . . . [of] official corruption, as we’ve seen with **Islamic extremists And this is why the struggle against corruption is one of the great struggles of our time.**”

— (Then) Senator Obama, Nairobi, Kenya
(Aug. 28, 2006)

FCPA: A DOJ Priority

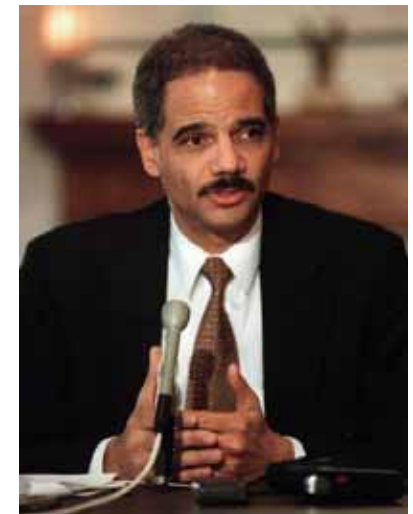
“As President Obama has said, **‘The struggle against corruption is one of the great struggles of our time.’** Corruption is condemned by all religions, all ethical codes, all legal systems. It hinders all development, slows all progress, impedes all advancement—both within our own countries and across our borders. . . . Corruption erodes trust in government and private institutions alike; it undermines confidence in the fairness of free and open markets; and it breeds contempt for the rule of law. **Corruption is, simply put, a scourge on civil society.**

* * *

We must vigorously enforce our own laws that prohibit bribery of foreign officials, such as . . . the Foreign Corrupt Practices Act. And we must work together to support our partners in anti-corruption enforcement.”

— *U.S. Attorney General Eric Holder (Nov. 7, 2009)*

In DOJ’s 2011 budget, the Criminal Division’s Fraud Section requested an additional \$550,000 to fund three additional attorneys and two additional staff members, an increase in the number of fraud-focused attorneys to 45 from 42.



FCPA: A DOJ Priority

“The Department places a significant and high priority on its FCPA program. You can see that commitment in the prosecutions we’re bringing and the resources we’ve dedicated to enforcement.”

— Mark Mendelsohn, Deputy Chief, Fraud Section, Criminal Division, DOJ (Mar. 23, 2010)



“It’s my view that the United States Government is going [to] focus on corruption in a far more rigorous way than it has in the past. Policy may also further reflect that **corruption is a national security issue and an impediment to security** in combat areas, like Iraq and Afghanistan.”

— Mark Mendelsohn (Feb. 24, 2010)

FCPA: An SEC Priority

The SEC creates a dedicated FCPA unit

“[T]he new unit will give us the resources and the ability to do even more going forward. People on the ground will be focusing exclusively [on FCPA investigations], making them smarter about industry practices [and] problem areas. . . . They will really learn this area of the law, the mechanisms used to pay and conceal bribes, the problems and industries around the world. Every time we get smarter on that, we are able to identify the next investigation that much quicker. There are lots of hurdles in conducting international investigations. Once you’ve done that once you’ll be able to do it much faster next time.”

—Cheryl Scarborough, SEC FCPA Unit Chief (Feb. 25, 2010)



FCPA: An FBI Priority

“Investigating corruption at all levels is the number one priority of the FBI’s Criminal Division. In this era of global commerce, the FBI is committed to curbing corruption at home or overseas. Companies should prosper through honest business practices, not the practice of back room deals and bribery.”

— *Assistant Director Kevin Perkins, Criminal Investigative Division, FBI (Jan. 19, 2010)*

- In 2007, the FBI established a dedicated FCPA unit in its Washington Field Office.
- After a 30-month investigation, in 2010, 150 FBI agents conducted raids netting 22 individual defendants on FCPA charges.





Recent Blockbuster Enforcement Actions



“[T]his past year was probably the most dynamic single year in the more than 30 years since the FCPA was enacted. We saw a record number of trials, a record number of individuals charged with FCPA violations, and record corporate fines” — *Lanny Breuer (Nov. 17, 2009)*

- Siemens AG (\$1.6 billion globally) (2008)
- KBR/Halliburton (\$579 million) (2009)
- BAE Systems (\$447 million globally^{①②}) (2010)
- ENI (\$339 million, *forecast*) (*est.* 2010)
- Technip (\$333 million, *forecast*) (*est.* 2010)
- Daimler (\$185 million) (2010)



*BAES' settlement with the U.K. SFO is still pending judicial approval.
Charges are FCPA-related.*

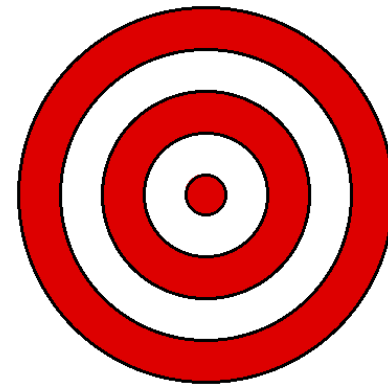
Recent Anti-Corruption Enforcement Trends

- 1. Individual Prosecution — A “Cornerstone” of DOJ’s Enforcement Strategy**
- 2. Expanding Enforcement Theories Reach Corruption by Any Means**
- 3. Industry-Specific Scrutiny**
- 4. DOJ Expands Prosecutorial Net to Capture Third Parties and Bribe-Takers, including Foreign Government Officials**
- 5. Aggressive Use of Enforcement Techniques**
- 6. Asset Forfeiture and Recovery: “A Global Imperative”**
- 7. The Changing Model of Monitorship**
- 8. The Continuing Specter of FCPA Successor Liability**
- 9. Increasing International Coordination**

Trend #1: Individual Prosecution – A “Cornerstone” of DOJ’s Enforcement Strategy

FBI’s FCPA “SHOT Show” Sting Nets 22 Defendants

- In the first large-scale undercover operation in FCPA history, the FBI arrested 22 people in connection with an alleged scheme to bribe an undercover FBI agent posing as a representative to the Minister of Defense of Gabon.
- Largest single investigation and prosecution of individuals in the history of the FCPA.
- 150 FBI agents and London police executed coordinated search warrants in connection with the arrests.
- The defendants operated or were employed by companies in the military and law enforcement products industry and were alleged associates of Richard Bistrong, a cooperating witness who is himself the target of FCPA charges.



DOJ's Focus on the Individual

Control Components, Inc. (CCI)

- DOJ charged CCI and eight of its senior executives for authorizing — and sometimes personally making — allegedly corrupt payments of more than \$5 million to employees of state-owned companies in 36 countries over ten years.
- CCI pleaded guilty to FCPA and Travel Act violations and two executives pleaded guilty to FCPA violations. The remaining executives are awaiting trial.

Gerald and Patricia Green Convicted at Trial

- Hollywood film producers were convicted of FCPA violations, money laundering, and tax evasion (as to the wife only) for bribing a Thai government official in exchange for contracts to operate the Bangkok International Film Festival.



Frederic Bourke Convicted at Trial

- Individual investor convicted of conspiracy to violate the FCPA and the Travel Act and for making false statements to the FBI in connection with his \$8 million investment in a partnership that allegedly bribed foreign officials in an effort to gain control of the state-owned oil company in Azerbaijan.
- Significantly, Bourke neither paid any bribes nor directed others to do so. Rather, DOJ alleged the conspiracy related to his investment in a partnership that he either knew was engaged in bribery of foreign officials, or that he consciously and intentionally avoided confirming his strong belief that bribes were being paid.
- At trial, tapes of Bourke actively seeking to avoid knowledge of the fact that these bribes may be occurring was “damning” evidence, according to the jury foreman.



DOJ Seeks Significant Prison Sentences Against Individuals in FCPA Cases

“Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.”

— *Lanny Breuer (Nov. 17, 2009)*

- For **Gerald Green**, the Government is seeking a life sentence in light of his alleged obstruction of justice and aggravating role in the offense. His anticipated guidelines sentence is 20-25 years and **Patricia Green**'s is 19-24 years. Sentencing is scheduled for April 29, 2010.
- **Congressman William Jefferson** was sentenced to 13 years imprisonment after a jury convicted him of corruption-related charges. His sentencing guidelines range was 22-27 years and DOJ sought a sentence at the high end of the range.
- **Frederic Bourke** received a 366-day sentence. Although his sentencing range was 5-6 years, DOJ sought 10 years.
- **Albert Jack Stanley**, Former Chairman and CEO of Kellogg, Brown and Root, pleaded guilty to conspiracy to violate the FCPA and was sentenced to 7 years imprisonment, subject to reduction for his ongoing cooperation with DOJ.

Trend #2: Expanding Enforcement Theories Reach Corruption by Any Means

DOJ's increasing use of the Travel Act as an alternative anti-corruption tool

- The Travel Act prohibits the use of interstate or foreign commerce or the U.S. mails to further an activity that violates state or federal bribery laws.
- Significantly, the Travel Act can criminalize commercial bribery.
- For example, CCI pleaded guilty to a Travel Act count for the payment of \$1.95 million in bribes to officers and employees of privately-owned foreign and domestic companies in violation of California's anti-bribery law.
- Private, commercial bribery must now be considered in compliance program risk analyses.



The SEC Charges Executives under New Theories

Nature's Sunshine Products

- In this first-of-a-kind case, the SEC also demonstrated that it intends to hold individuals accountable by charging the former CEO and CFO of Nature's Sunshine Products with FCPA violations as "controlling persons" without any evidence that they knew of or authorized the bribery of any foreign official.
- The alleged FCPA violation occurred when the firm's Brazilian subsidiary made improper payments to customs officials and misclassified the payments on the subsidiary's books as "importation advances."
- The SEC alleged only that the executives failed to supervise their employees to ensure that the company's books and records were accurate and that an adequate system of internal controls existed to verify its subsidiaries' financial statements.
- Without admitting liability, the executives settled with the SEC and each paid a \$25,000 civil penalty.



Bobby Benton

- The SEC charged a former VP of Pride International with another new theory of FCPA liability.
- The SEC alleged that Benton violated the FCPA when he edited a document to delete references to suspected improper payments that he had no contemporaneous knowledge of and when he falsely represented to auditors that he was not aware of any FCPA violations at Pride.
- Benton answered the SEC's complaint by invoking his Fifth Amendment rights. A trial date has been set for June 2011.

Trend #3: Industry-Specific Scrutiny

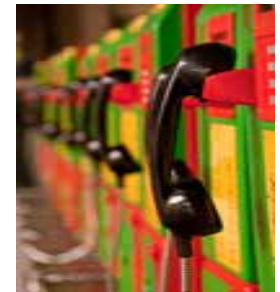
Recent examples:

- Oil and Oil-Services Industry (Panalpina)
- Medical Device and Pharmaceutical Industry
- Military and Law Enforcement Products Industry
- Telecommunications Industry



Recent FCPA enforcement in the telecommunications industry demonstrates this trend:

- 2007: Lucent Technologies resolved alleged FCPA violations. Also, the French telecom firm Alcatel disclosed that two of its employees had allegedly violated the FCPA, and they were subsequently indicted.
- 2008: Three former executives of ITXC Corp., a telecom firm, resolved FCPA charges. Also, Siemens Bangladesh Ltd. resolved FCPA violations in connection with its bid to build a mobile telephone network for the Bangladeshi government.
- 2009: Latin Node, Inc. and UTStarcom, Inc., both telecom companies, resolved FCPA allegations. Also, in the Haiti Teleco case, five individuals were charged with FCPA violations while two others were charged with FCPA-related money laundering.
- 2010: In the Haiti Teleco case, an eighth individual was charged with FCPA-related money laundering. Also, Alcatel, now Alcatel-Lucent, reported that it has reached an agreement in principle to resolve FCPA charges relating to its 2007 disclosure.



The Next Targets? Military Services

The Bistrong Nexus (2001 – 2010)

- FBI “SHOT Show” raids on military equipment suppliers facilitated by Richard Bistrong.
- Previously, Bistrong was an employee of Armor Holdings, a military equipment manufacturer.
- In approximately 2007, Armor Holdings reportedly self-disclosed to U.S. regulators allegations that Bistrong was involved in bribing foreign officials.
- In January 2010, Bistrong was charged with conspiracy to violate the FCPA and export license rules for his alleged conduct during his tenure at Armor Holdings.

Dyncorp Int’l (2009)

- Dyncorp self-disclosed to U.S. regulators \$300,000 worth of subcontractor payments made to expedite the issuance of visas and licenses from foreign government agencies that it believed may have raised FCPA compliance concerns.
- Shortly thereafter, the company announced that its Chief Compliance Officer and Executive Counsel was terminated without cause.

Blackwater/Xe Services (2010)

- The New York Times reported that Blackwater Worldwide (now Xe Services) authorized secret payments of about \$1 million to Iraqi officials “to silence their criticism and buy their support” two months after Blackwater guards fatally shot 17 Iraqi civilians in Baghdad’s Nisour Square.
- According to the Times, a federal grand jury in North Carolina is investigating the payments.

Trend #4: DOJ Expands Prosecutorial Net to Capture Third Parties and Bribe-Takers, including Foreign Gov't Officials

DOJ's prosecution of foreign government officials represents a new effort to pursue bribe-takers as part of its anti-corruption strategy.

- In 2009, five third-party agents were charged with FCPA violations.
- In 2010, three former foreign government officials and an intermediary have been charged with FCPA-related money laundering offenses. Money laundering charges are necessary because foreign officials cannot be prosecuted under the FCPA.
 - In connection with the Green's bribery conviction, DOJ unsealed indictments against Juthamas Siriwan, the ex-Governor of the Tourism Authority of Thailand, and her daughter for money laundering. Juthamas was the alleged government official / bribe-taker in the Green's bribery scheme and her daughter was an alleged intermediary.
 - In the Haiti Teleco case, in addition to charging six individuals with FCPA and/or FCPA-related money laundering violations in an alleged scheme to bribe Haitian Teleco officials, DOJ charged two former Haitian government officials with money laundering offenses in connection with the alleged bribery scheme. On March 12, 2010, one official pleaded guilty to conspiracy to commit money laundering.

Trend #5: Aggressive Use of Enforcement Techniques

- Use of undercover FBI Agents and large-scale sting operations

From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent. — *Lanny Breuer (Jan 19, 2010)*
- Electronic and video surveillance (Greens and the “SHOT Show” defendants)
- Mutual Legal Assistance Treaties (MLATs):
 - At least 25 cooperation requests to foreign governments pursuant to MLATs were used in the year ending November 2009.
 - Existing MLATs have been used to gain access to Swiss banking records (Greens) and to facilitate international cooperation (Siemens, Baker Hughes).

Trend #6: Asset Forfeiture and Recovery: “A Global Imperative”

“[W]e must work together to ensure that corrupt officials do not retain the illicit proceeds of their corruption. . . . **In the face of this manifest injustice, asset recovery is a global imperative.**” — *Attorney General Eric Holder (Nov. 7, 2009)*

In 2009, ten of DOJ’s twenty-six FCPA prosecutions included a forfeiture count plus an *in rem* forfeiture action against \$3 million representing proceeds of the alleged bribes.

In 2010, all 22 “SHOT Show” defendants have a forfeiture count in each indictment.

- DOJ also sought forfeiture in the latest FCPA-related money laundering indictments in the Haiti Teleco case against Jean Fourcand as well as against Juthamas Siriwan and her daughter.



Trend #7: The Changing Model of Monitorship

- In two recent cases, UTStarcom, Inc. and Helmerich & Payne, Inc., DOJ permitted corporate self-monitoring.
- In response to Congressional hearings and draft legislation, a proposed amendment to § 8D1.4, Recommended Conditions of Probation – Organizations, specified that a monitor must be independent and properly qualified and that the scope of the monitorship must be subject to court approval. On April 7, 2010, the Commission rejected this proposal.
- On March 18, 2010, U.S. District Court Judge Huvelle approved an FCPA plea agreement for Innospec Inc., which contained a monitorship requirement. Judge Huvelle requested that the parties allow her to review the monitorship plan and the selected monitor.



Trend #8: The Continuing Specter of FCPA Successor Liability

- Over 1/3 of the corporate FCPA enforcement actions filed in 2009 implicate successor liability issues.
- **eLandia's Acquisition of Latin Node**
 - A “cautionary tale” of what can happen when an acquirer conducts “little, if any, [FCPA] due diligence.” — *Mark Mendelsohn (Nov. 17, 2009)*
 - The first FCPA enforcement action based entirely on pre-acquisition conduct that was unknown to the acquirer when the transaction closed.
 - eLandia's entire \$20-plus million investment in Latin Node was wiped out following the revelation that its business was predicated on bribery.
- Pre-acquisition due diligence and/or aggressive post-acquisition investigation/remediation is essential.
 - The “nature and quality” of pre-acquisition due diligence is “one of the most critical factors” that DOJ considers when making charging decisions in the M&A context. — *Mark Mendelsohn (Sept. 11, 2008)*

Trend #9: Increasing International Coordination

Recent simultaneous announcements of global settlements highlights an increase in international cooperation.

- BAE Systems (DOJ and SFO, Feb. 5, 2010): DOJ acknowledged “significant assistance” from the SFO and its “ongoing partnership in the fight against overseas corruption.”
- Innospec (DOJ, SEC, OFAC, and SFO, Mar. 18, 2010): DOJ acknowledges “extensive coordination and cooperation with the SFO.” In fact, DOJ referred this case to the SFO in October 2007.
- Siemens (DOJ, SEC, and the Munich Public Prosecutor’s Office, Dec. 15, 2008): The regulators “closely collaborated . . . in bringing these cases.”

Use of Mutual Legal Assistance Treaties is increasing.

- On February 1, 2010, new MLATs and extradition treaties went into effect between the U.S., the European Union, and each EU Member State. The new MLATs facilitate law enforcement and judicial cooperation by
 - allowing prompt identification of financial account information in criminal investigations;
 - permitting the acquisition of evidence, including testimony, by means of video conferencing; and
 - authorizing the participation of U.S. criminal investigators and prosecutors in joint investigative teams in the EU.



Other Noteworthy Developments: New SEC Initiatives

On January 13, 2010, SEC Director of Enforcement Robert Khuzami unveiled several new policies.

- A new cooperation initiative to encourage companies and individuals to report violations and assist with investigations.
- The official introduction of cooperation agreements, deferred prosecution agreements, and non-prosecution agreements.
- The creation of a “Seaboard Memo” for individuals, designed to foster and incentivize the cooperation of corporate officers and employees.
- A streamlined process for submitting witness immunity requests to DOJ for witnesses who have the capacity to assist in SEC investigations.

Previously, on August 5, 2009, Khuzami also announced

- formation of the previously discussed FCPA Unit;
- a strong policy against routine use of tolling agreements; and
- a streamlined internal review process for issuing formal orders of investigation and the subpoenas that accompany them.





CONVENTION
ON COMBATING
BRIBERY
OF FOREIGN
PUBLIC OFFICIALS
IN INTERNATIONAL
BUSINESS
TRANSACTIONS
and Related Documents

UNITED NATIONS CONVENTION
AGAINST CORRUPTION



International Anti-Corruption Enforcement



International Anti-Corruption Enforcement is Growing

**345 anti-corruption investigations are ongoing worldwide.
Five years ago, only 100 investigations were under way.**
— *Mark Pieth, Chairman of OECD's Working Group on Bribery (Mar. 29, 2010)*

International Framework

- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) and 2009 addenda.
 - Entered into force on Feb. 15, 1999 and presently has 38 signatories. Russia, China, and India are not members.
 - Establishes a “gold standard” system to monitor member countries’ implementation and enforcement of required anti-bribery laws to enhance international cooperation.
- The United Nations Convention against Corruption requires parties to criminalize foreign bribery. It entered into force on Dec. 14, 2005 and presently has 143 parties, including China and Russia.
- Many other entities also support global anti-corruption efforts, including international development banks and organizations as well as public-private coalition efforts (*e.g.*, EITI, PACI, UN Global Compact).

Globally, anti-corruption enforcement is “extremely uneven,” however.

- According to Transparency International, only Germany, Switzerland, Norway, and the U.S. were “active enforcers” of the OECD Convention.
- 21 of the Convention members were described as conducting “little to no enforcement.”

Recent OECD Anti-Bribery Convention News

The 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2009) recommends that Member countries:

- Encourage companies to **prohibit or discourage the use of facilitating payments** because of their “corrosive effect . . . on sustainable economic development and the rule of law” and that “such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies’ books and financial records”;
- Explicitly disallow the tax deductibility of bribes to foreign public officials;
- Create mechanisms to allow the reporting of suspected acts of bribery of foreign public officials and the protection of whistleblowers;
- Enact laws and regulations regarding accounting, external audit, internal controls, ethics and compliance designed to prevent and detect bribery of foreign officials; and
- Cooperate internationally to investigate and prosecute the bribery of public officials.

Good Practice Guidance on Internal Controls, Ethics, and Compliance (Feb. 18, 2010)

- Provides comprehensive anti-bribery compliance guidance, tailored to small- and medium-sized companies, business advisory groups, and professional associations.
- Articulates 12 detailed recommendations that form the backbone of an effective anti-bribery compliance policy.

A stylized version of the Union Jack flag, featuring a white background with a red cross and blue saltire. The text "United Kingdom" is centered over the cross.

United Kingdom

Royal Assent of U.K. Bribery Bill Imminent

Last amended in 1916, the U.K.'s pending draft Bribery Bill is expected to become law imminently. The Bill is significantly more restrictive than the FCPA in several areas because it:

- Criminalizes all bribery, including commercial bribery;
- Criminalizes both sides of the bribe, including the request or receipt of a bribe;
- Does not exempt facilitating payments;
- Holds corporations that “fail to prevent” bribery for lack of “adequate [compliance] procedures” *strictly liable*; and
- Imposes penalties of up to 10 years per offense (rather than 5 years under the FCPA).



Jurisdiction: Enforceable extraterritorially to prosecute bribery committed abroad by persons ordinarily resident in the U.K. as well as U.K. nationals and corporate bodies.

Impact: U.S. companies with U.K. operations, residents, or nationals should update their compliance programs and internal controls in anticipation of the bill's imminent passage.

U.K. Serious Fraud Office: Enforcement Guidance

The SFO issued an “operational note” in July 2009 providing its newly adopted approach to anti-corruption enforcement. The policy:

- Encourages voluntary disclosure and suggests the possibility of leniency for companies that self-report;
- Discusses when it might seek a civil settlement over criminal charges;
- Lists the factors it will consider in evaluating the effectiveness of compliance programs; and
- Sets forth a settlement model similar to the deferred prosecution model commonly employed by DOJ.

In December 2009, the SFO provided additional guidance regarding:

- The criteria used to determine whether to seek a civil rather than criminal resolution for self-reported violations;
- The necessary scope of an internal investigation to prevent an SFO-directed investigation;
- The appointment of monitors;
- The SFO’s position on attorney-client privilege; and
- The rare circumstances in which a voluntary disclosure would not result in any action.

On March 18, 2010, the SFO’s ability to enter into binding plea agreements was called into question.

U.K. Serious Fraud Office: Recent Cases



- **Mabey & Johnson Ltd.** (Sept. 25, 2009): The SFO hailed its first conviction of a U.K. company for overseas bribery as a “landmark case.” M&J pleaded guilty to charges stemming from improper payments in Ghana, Jamaica, and Iraq and agreed to a £6.6 million penalty.
- **Robert John Dougall** (Dec. 1, 2009): the SFO charged Robert John Dougall, a former executive at DePuy Int’l, with conspiracy to corrupt for payment to health care professionals in Greece between 2002 and 2005.
 - DePuy is a subsidiary of Johnson & Johnson, which voluntarily disclosed potential FCPA violations to U.S. regulators in 2007.
 - The SFO said that “[t]he case was referred to the Serious Fraud Office by the Department of Justice and accepted in March 2008.”
- **Innospec** (Mar. 18, 2010): Innospec, Inc. and its U.K. subsidiary entered into a settlement with DOJ, the SEC, and the SFO for bribery in Indonesia. Innospec’s agreements with DOJ and the SEC also included allegations of violations of the U.S. arms embargo against Cuba and corrupt payments in Iraq. The agreement provided that Innospec would pay \$40.2 million, including \$12.7 to the SFO.
- As of March 2009, the SFO announced it has 84 active investigations.

Lord Justice Thomas's Remarks that the SFO Lacks Legal Authority to Enter into Fixed-Penalty Plea Agreements

- At Innospec Ltd.'s March 18, 2010 sentencing, the sentencing judge, Lord Justice Thomas, Britain's second-ranking criminal judge, explained that under English law, "The director of the SFO had no power to enter the [settlement agreement]" and that the settlement had "no effect" in English courts. He also remarked that the \$12.7 million penalty paid to the SFO was "wholly inadequate" and should have been measured "in tens of millions."
- Nevertheless, Lord Justice Thomas approved the settlement "with considerable reluctance" because it was unfair to undermine this global settlement at this late stage. He warned, however, that "no such arrangement should be made again."
- Going forward, Lord Justice Thomas indicated that English courts will sentence in accordance with English law — and will disregard any pre-negotiated agreements in as far as they specify a penalty.
- Although the repercussions of this decision are not yet clear, it represents an obstacle to the SFO's recent anti-corruption enforcement efforts and casts doubt on companies' ability to reach global settlements that include the SFO.
- *BAES' plea agreement with the SFO has yet to be approved by a U.K. court, and its fate is uncertain in light of this decision.*



A German flag with horizontal stripes of black, red, and gold, waving on a silver flagpole against a clear blue sky. The word "Germany" is written in a bold, black, serif font across the center of the flag.

Germany

International Anti-Corruption Legislation in Germany



- The Act on Combating International Bribery (1997) extended the reach of the domestic anti-corruption legislation to the active bribery of foreign public officials, foreign judges, and foreign soldiers (“Foreign Officials”) to influence their future actions.
- Germany’s international anti-corruption legislation differs from the technical approach of the FCPA and does not provide for a fully separate and stand-alone legal regime.
- Germany’s recently enacted sentencing statute affords courts discretion to reward cooperating witnesses in limited circumstances.

Penalties and Enforcement in Germany

Penalties

- Only individuals (*e.g.*, directors, employees, agents) are subject to criminal prosecution as German criminal law does not provide for liability for legal entities (*e.g.*, corporations). Penalties include imprisonment for up to ten years and fines of up to €10.8 million.
- Corporations can be liable under the Administrative Offenses Act (*Gesetz über Ordnungswidrigkeiten*, “OWiG”) for violation of supervisory duties that enabled or facilitated the criminal offenses committed by its representatives and employees. Penalties include monetary sanctions which may exceed the net profit that a corporation has achieved as a result of a criminal or administrative offense.
- Legal entities may be subject to disgorgement of illicit profit (*e.g.*, Siemens AG’s disgorgement of €394.75 million in profits).

Enforcement

- Criminal enforcement lies with the state prosecutor. In some states, centralized state prosecutor’s units focus on white-collar crime.
- For example, on October 1, 2009, the General Prosecutor of the State of Hesse tasked three experienced prosecutors to investigate all criminal health care matters within their jurisdiction.
- German authorities continued to pursue foreign and domestic bribery aggressively since the Siemens AG settlement.
- According to Transparency International’s most recent Progress Report, which provides data current through 2008, German authorities have prosecuted a total of 110 foreign bribery cases, including many major cases.
- In 2008, German authorities had 37 active foreign bribery cases and over 150 ongoing investigations.

Noteworthy Post-Siemens Cases in Germany (2009 – 2010)

- **MAN SE**: The Munich Public Prosecutor's Office resolved corruption charges with two MAN subsidiaries for more than €150 million in December 2009. The CEO and CFO of MAN SE, and the CEO of a subsidiary have since resigned. The investigation involved more than 100 individuals in connection with more than €75 million in improper third-party payments to the employees of MAN customers.
- **Fintec Holding GmbH**: Investigating alleged tax evasion and corruption in connection with its hospital projects in Russia, Libya, and Ghana. In May 2009, authorities searched the company and arrested a division chief and the managing director.
- **GILDEMEISTER AG**: Investigating the managing director of the company's Russian affiliate and other key personnel for alleged tax evasion and bribery.
- **Bilfinger Berger AG**: Investigating allegations that it paid millions of dollars of bribes to a Nigerian political party in connection with the construction of a liquefied natural gas facility.
- **Ferrostaal**: Investigating allegations that its employees bribed government officials in Portugal, South Africa and Switzerland in connection with submarine and power plant projects. In March 2010, a board member was arrested and the company was searched.

Recent Developments in German Compliance Law

- On July 17, 2009, the German Federal Supreme Court (*Bundesgerichtshof* or BGH) found a compliance executive (the head of internal audit and legal department) criminally liable for “assisted fraud” for failing to stop his company’s systematic overbilling.
- The defendant reported the scheme to a Board member, who instructed him to take no further action.
- The BGH held that the defendant possessed heightened duties under German law and was obligated as a “guarantor” to actively prevent criminal offenses within the company as well as to prevent the company from harming third parties.
- It is not a defense that a company’s compliance function lacks the necessary resources to prevent future violations.
- **This decision affects the liability of compliance officers (COs) for whom the BGH has now clarified that they must act to eliminate illegal conduct within their area of responsibility or face criminal and civil penalties.**
- The BGH’s decision necessitates certain compliance requirements:
 - COs must remain independent and are obligated to resist unlawful instructions;
 - COs’ responsibilities and duties must be clearly assigned;
 - COs must have unfettered reporting channels to top management; and
 - COs must precisely document every action taken to prevent the company from committing further criminal acts.



An Integrated Anti-Corruption Compliance Approach

Data Shows Firms Still Lack Integrated Compliance Function

More than two-thirds of compliance, legal, and audit executives polled said their overall compliance function was either “Siloed and Inconsistent” (20%) or “Organized but Reactive” (44%).

- Respondents could characterize their company’s compliance function as “Siloed and Inconsistent,” “Organized but Reactive,” “Actively Managed & Proactive,” or “Fully Integrated & Embedded.”
- As to FCPA-related risks, 39% of firms said their compliance function was either “Siloed and Inconsistent” (10%) or “Organized but Reactive” (29%) with another 9% not responding to that question.
- Most firms reported that their compliance function was relatively immature (83% were less than six years old).

Source: Compliance Week and Paisley Compliance Maturity Survey (Sept. 2009)

Sources of Compliance Guidance

“With regard to corporate cases, the Department will continue to pursue guilty pleas or, if necessary, indictments against corporations — when the criminal conduct is egregious, pervasive and systemic, or when the corporation fails to implement compliance reforms, changes to its corporate culture, and undertake other measures designed to prevent a recurrence of the criminal conduct.”
— *Lanny Breuer (Feb. 25, 2010)*



Sources:

- DOJ’s Principles of Federal Prosecution of Business Organizations
- Section 8B2.1 of the U.S. Sentencing Guidelines
- DOJ Opinion Procedure Releases and FCPA settlements
- Committee of Sponsoring Organizations of the Treadway Commission (“COSO”)
- Federal Acquisition Regulation 52.203-13, Contractor Code of Business Ethics and Conduct
- OECD’s Good Practice Guidance on Internal Controls, Ethics and Compliance
- Ethics and compliance practitioners

An Integrated FCPA Compliance Approach

Monitoring & Auditing

- Risk evaluation to monitor compliance, identify problem areas and reduce identified problems.
- Compliance officer to document the monitoring and report suspected breaches to senior management and the compliance committee.

Policies & Procedures

- Policies developed under the direction of the compliance officer and committee.
- Policies provided to all affected employees and business partners.

Communication

- Hotline or other reporting process so employees can make complaints or ask questions.
- Procedures to protect the identity of complainants and to protect them from retaliation.

Compliance Officer and Compliance Committee

- Officer is focal point for compliance and has authority to review documents.

Education & Training

- Require affected employees to participate in appropriate training programs.
- Retain records of training programs including attendance.

Investigation

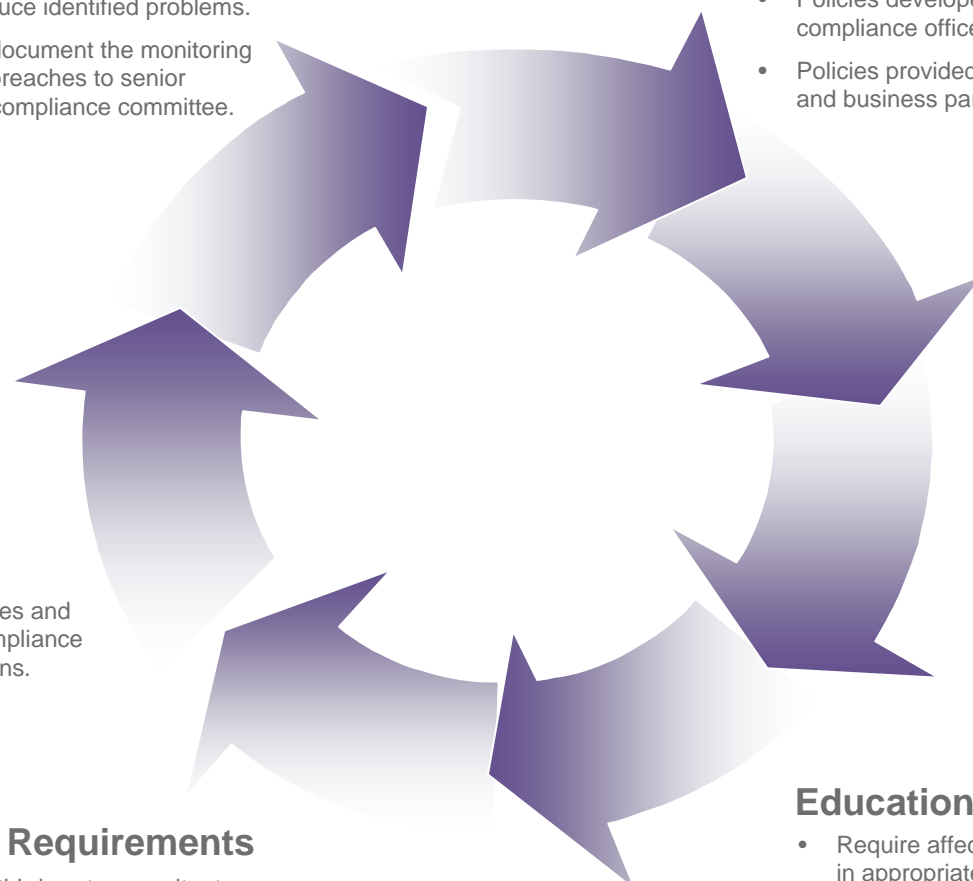
- Develop and implement a response plan and policies to investigate alleged non-compliance.

Enforcement

- Develop and enforce policies and procedures to address compliance breaches including sanctions.

Due Diligence Requirements

- On employees and third-party consultants, distributors & joint venture partners.



Integrated Anti-Corruption Compliance Approach: Key Themes

1. “Tone From the Top”: Business leaders should promote anti-corruption principles and be personally accountable for compliance and ethical behavior in their units.
2. Compliance Organization: Intelligently structured compliance organizations identify and mitigate risks, scrutinize high-risk activities, and advise business leaders and the Board directly on operational and compliance matters.
3. Training: Training ensures that employees are able to identify and respond to risks.
4. Review & Approval Tools: Automated and user-friendly review and approval tools facilitate centralized decision making on global compliance matters.
5. Reporting: Employees should be able to report corruption concerns easily, anonymously, without fear of retaliation, and with assurance that the issues will be addressed promptly.
6. Incentives & Discipline: To provide incentives for employees to comply with laws and company rules, organizations should consider compliance in determining compensation and take appropriate disciplinary actions.

Integrated Anti-Corruption Compliance Approach: Key Themes

7. Investigating Potential Problems: Quickly and objectively investigating potential compliance problems projects a strong “tone from the top” and allows organizations to identify areas of risk.
8. Financial Controls: Robust financial controls ensure that funds are only released as authorized by company policies—and not for illicit purposes.
9. Integrity Due Diligence: Due diligence is the best way to guard against potential counterparties acting corruptly or fraudulently. Companies should conduct significant due diligence on potential M&A targets.
10. Sales & Marketing Controls: Companies should implement controls to govern interactions with government officials, procurement, contracting, lobbying, marketing expenditures, and financial transactions.
11. Supplier Contracting Controls: Because procurement presents risks, vendors should be treated as counterparties and subjected to compliance due diligence, which should include screening for risk factors and “red flags.”
12. Monitoring & Auditing: Vigilant monitoring and internal audits play key roles in evaluating the effectiveness of companies’ compliance controls and activities.

Consequences of Noncompliance

➤ Direct Costs

- Settlements
- Criminal fine
- Appointment of compliance monitor
- Prejudgment interest
- Disgorgement of profits
- Burden on the company (defense costs, executive time, lost resources)
- Asset forfeiture

➤ Collateral Costs

- Lawsuit by parties harmed by misconduct
- Derivative lawsuit by shareholders
- Class action lawsuits by investors
- Tax law implications regarding improper payments

➤ Costs to Continuing Business

- Ineligibility for necessary licenses or permits
- Ban from doing business with governmental entities, including mandatory debarment in the EU
- Suspension or debarment from agency/World Bank/UN/IMF activities
- Prison sentence

➤ Reputational and Market Costs

- Loss of reputation or goodwill
- Detrimental effect on stock price
- Impact on mergers & acquisitions

Counterparty and Third-Party Due Diligence

- Counterparties and third parties must be subject to significant risk-based integrity due diligence.
- It is essential to scrutinize agents, consultants, distributors, suppliers, joint venture partners, and M&A targets by:
 - Conducting risk-based due diligence prior to hiring or contracting;
 - Performing appropriate and regular oversight (*e.g.*, third-party audit rights);
 - Communicating the company's prohibition against foreign bribery clearly (*e.g.*, codes of conduct); and
 - Requiring that contracts and agreements contain standardized, FCPA-specific language.

KPMG's Anti-Bribery and Anti-Corruption Survey (2008)

- 68% of respondents have never exercised their contractual audit rights with third parties.
- 82% of respondents found performing effective due diligence on foreign agents/third parties “somewhat” to “very” challenging.
- 82% of respondents found dealing with variations in country requirements and local laws (*e.g.*, data privacy, privilege, facilitating payments) “somewhat” to “very” challenging.
- Only 45% of respondents have continuous monitoring protocols in place.

Proactive Continuous Monitoring & Auditing

Early warning of possible misconduct allows a company to minimize harm, control the investigation, and earn credibility with the Government.

Reporting Protocols

- Do mechanisms exist to allow potential violations to be effectively detected?
- Communicate anonymous hotline or other reporting process so that employees can make complaints or ask questions — consider opening to business partners.
- The 2008 KPMG survey demonstrated that although 75% of respondents had whistleblower mechanisms, only 27% had extended them to parties outside their organization.
- Install procedures to protect the identity of complainants to protect them from retaliation (*e.g.*, outsourcing of reporting function).

Data Analysis and Transaction Testing

- Identify higher-risk transactions for testing.
- Build controls into accounting system.
- Train Internal Audit and incorporate red flags into procedures.
- Implement data mining.
- Update detection tools as necessary.



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