



# Beyond Checking the Box - How Recent Trends in FCPA Enforcement Affect Your Due Diligence Efforts



Association of Corporate Counsel  
Annual Meeting 2011  
Denver, Colorado

October 24, 2011





# Panelists

## John Brownlee

**Chair, National White Collar Defense and Investigations Practice**

**Holland & Knight**

**Washington, DC**

## Kevin Gross

**Senior Counsel, Global Contracts, Policy and Compliance**

**Chevron Upstream and Gas, a division of Chevron U.S.A. Inc.**

**San Ramon, California**

## Larry Parsons

**Vice President, Legal and Chief Ethics and Compliance Officer**

**Freescale Semiconductor, Inc.**

**Austin, Texas**

# A Global Leader of Embedded Processing Solutions

\$4.5 Billion in Revenue in 2010

## Three Core Product Groups

- Microcontrollers
- Networking and Multimedia Processors
- RF, Analog and Sensors

## Four Primary Markets

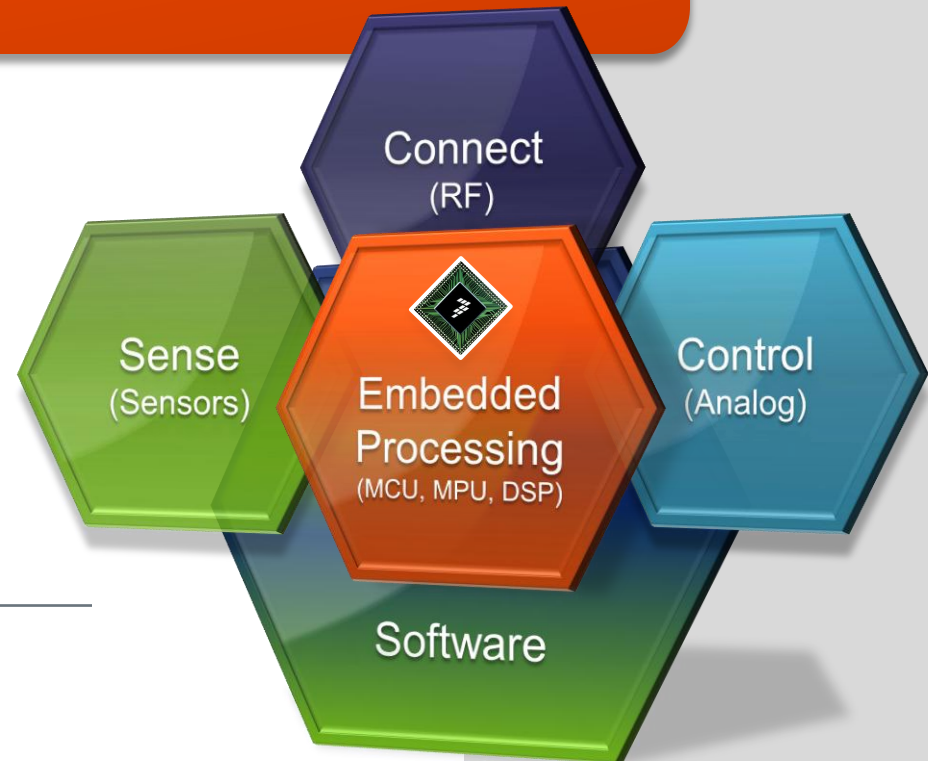
- Automotive
- Industrial
- Networking
- Consumer

**>50**  
Year Operating History

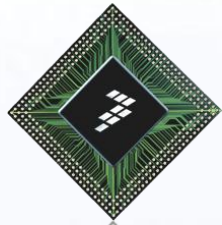
**>5,500** Engineers

**>6,100**  
Patent Families

**>18,000** Customers



**Platform-Level Solutions**



# Freescale Company Overview

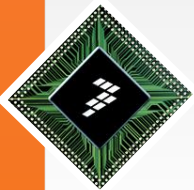
Headquartered in Austin, Texas  
More than **20,000** employees in **26** countries

**\$4.46 billion** in sales in 2010

Separated from Motorola in **2004** (IPO/Spin) –  
Traded on NYSE under symbol **FSL**

Leveraged buyout by consortium of private  
equity funds completed **December 1, 2006**

Completed IPO on **May 26, 2011** – Trade on  
NYSE under symbol **FSL**



# Recent Enforcement Trends

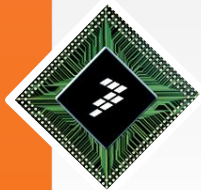
# FCPA Developments

## **FCPA enforcement actions (SEC and DOJ) against companies and individuals increasing**

- FCPA passed in 1977 – but remained largely unused until last few years
- In 2004, only 6 enforcement actions
- In 2006, 13 enforcement actions
- In 2009, 45 enforcement actions
- In 2010, 76 enforcement actions
- 2011 through June 30: 17 enforcement actions
- In 2011, so far the DOJ and SEC have collected over \$333 million in fines, penalties and disgorgement (three matters account for 76% of this amount – see next slide)
- In 2010, DOJ and SEC collected over \$1.5 billion

## **FCPA enforcement actions against individuals down from high in 2009**

- In 2004, only two enforcement actions against individual defendants
- In 2009, 42 enforcement actions (note: 22 individual defendants from SHOT sting operation)
- In 2010, 17 enforcement actions against individual defendants
- 2011 through June 30: two enforcement actions against individual defendants



# FCPA – Deferred Prosecution Agreement

## May 17, 2011 – SEC Announced first Deferred Prosecution Agreement involving FCPA allegations.

The agreement with Tenaris involves allegations that the global manufacturer of steel pipe products violated the Foreign Corrupt Practices Act (FCPA) by bribing Uzbekistan government officials during a bidding process to supply pipelines for transporting oil and natural gas. The SEC alleges that Tenaris made almost \$5 million in profits when it was subsequently awarded several contracts by the Uzbekistan government. Under the terms of the DPA, Tenaris must pay \$5.4 million in disgorgement and prejudgment interest.

Under the terms of the DPA, Tenaris agreed to enhance its policies, procedures, and controls to strengthen compliance with the FCPA and anti-corruption practices. Tenaris also agreed to implement due diligence requirements related to the retention and payment of agents, provide detailed training on the FCPA and other anti-corruption laws, require certification of compliance with anti-corruption policies, and notify the SEC of any complaints, charges, or convictions against Tenaris or its employees related to violations of any anti-bribery or securities laws.

# FCPA Developments

## **J&J to Pay \$70 Million to Settle Cases Brought by SEC and Criminal Authorities**

**FOR IMMEDIATE RELEASE  
2011-87**

*Washington, D.C., April 7, 2011* – The Securities and Exchange Commission today charged Johnson and Johnson (J&J) with violating the Foreign Corrupt Practices Act (FCPA) by bribing public doctors in several European countries and paying kickbacks to Iraq to illegally obtain business.

The SEC alleges that since at least 1998, subsidiaries of the New Brunswick, N.J.-based pharmaceutical, consumer product, and medical device company paid bribes to public doctors in Greece who selected J&J surgical implants, public doctors and hospital administrators in Poland who awarded contracts to J&J, and public doctors in Romania to prescribe J&J pharmaceutical products. J&J subsidiaries also paid kickbacks to Iraq to obtain 19 contracts under the United Nations Oil for Food Program.



# FCPA Developments

## Department of Justice

Wednesday, April 6, 2011

### **JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty**

WASHINGTON – JGC Corporation has agreed to pay a \$218.8 million criminal penalty to resolve charges related to the Foreign Corrupt Practices Act (FCPA) for its participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction (EPC) contracts, the Justice Department’s Criminal Division announced today.

With today’s resolution, each of the four companies in the TSKJ joint venture, the former chairman of the U.S. joint venture partner, and several other individuals have now been held accountable for a massive conspiracy to bribe Nigerian government officials to obtain lucrative construction contracts,” said Principal Deputy Assistant Attorney General Mythili Raman of the Justice Department’s Criminal Division. “The approximately \$1.5 billion in criminal and civil penalties that have been imposed on the members of the joint venture far exceed their profits from the scheme. Foreign bribery is a serious crime, and as this case makes clear, we are investigating and prosecuting it vigorously.”

According to court documents, JGC authorized the joint venture to hire two agents - Jeffrey Tesler and a Japanese trading company - to pay bribes to a range of Nigerian government officials, to assist JGC and the joint venture in obtaining the EPC contracts.

# FCPA Developments

## Developments in investigations and targets

- January 2010 – “Proactive investigation” - SHOT Sting operation resulting in 22 indictments against individual defendants
- FBI agent posed as sales agent representing minister of defense of Gabon, an African country
- For 20% commission, agent guaranteed that individuals would get a \$15 million contract to supply Gabon presidential guard with weapons and other products
- See <http://www.justice.gov/opa/pr/2010/January/10-crm-048.html>
- July 7, 2011 – Mistrial announced in Washington, D.C. trial of four of the defendants
- Cases against remaining defendants scheduled for trial (3 separate trials) later this year

## OECD Guidance

- “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions” (November 2009/Amended February 2010)
- Found at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>

## Deferred Prosecution Agreements

- Panalpina (and five of its oil and gas services customers) FCPA resolution November 17, 2010 - \$236 million
- Each DPA contained an Attachment C – Corporate Compliance Program listing elements of compliance program Panalpina was required to implement (see, e.g., <http://www.justice.gov/opa/documents/panalpina-world-transport-dpa.pdf> at p. 67)
- Elements seem to come from the OECD Guidance and FSG elements

# **Developing an Ethics and Compliance Program to Address the FCPA and Other Anti-Bribery Laws**

# Freescale's Response to Developments: Anti-Bribery and FCPA Compliance

## **Policy: Code Section entitled “It’s Our Responsibility to Governments”**

- “Freescale complies with the anti-corruption laws of the countries in which it does business.”
- “Freescale employees do not directly or indirectly offer or make a corrupt payment to government officials, including employees of state-owned enterprises.”
- Reporting of issues through ETHICSline

## **Policy: Standalone Anti-Bribery and FCPA Policy**

- Issued January 2011
- Prohibits facilitation payments (unless failing to do so would create a health or safety risk to the employee)

## **Corporate Assurance – US FCPA and Anti-Bribery Audit**

# OBCE Communications and Education

**Below are samples of recent communications and education from Freescale's Office of Business Conduct and Ethics (OBCE):**

## **Online Training course on our Code of Business Conduct and Ethics**

- Every other year – most recently delivered July – September, 2010
- All employees worldwide (delivered in five languages)
- Includes a section on Anti-Bribery and Anti-Corruption
- Included Board of Directors

## **Online Training course on Anti-Bribery and FCPA Compliance**

- February 4, 2011
- Approximately 4500 employees participated in this training course (including all Executives, Managers, GSM, Procurement, Strategy, Communications, Legal, Finance)

## **Regular Communications on ESG Topics, e.g.**

- On My Mind article on the FCPA (January 21, 2011)
- Monthly Real Biz short videos and accompanying article on ethics and compliance topics

# Freescale ETHICSline

**The Freescale ETHICSline is available worldwide to employees and third parties to communicate confidentially with:**

- Freescale's Office of Business Conduct and Ethics
- The Audit and Legal Committee of Freescale's Board of Directors.

**The ETHICSline is available**

- to answer questions or concerns regarding compliance with Freescale's Code, and with the laws, regulations and contract provisions that govern Freescale's business.
- to report a concern about Freescale's accounting, internal controls or audit matters

**The OBCE ensures that for all matters reported to the ETHICSline**

- The matters are investigated (by the OBCE, the Law Department, HR or Global Security)
- appropriate actions are taken based on the findings of the investigation, including any discipline or remedial actions

# Due Diligence

# Due Diligence – Apply the Seven Elements of an Effective Program





## Conduct Due Diligence to Prevent Vicarious or Successor Liability

- When engaging third party representatives or agents
- When contemplating an acquisition

## What is due diligence?

An investigation of a business or person prior to signing a contract or entering into a relationship (“**Initial due diligence**”)

## Ongoing due diligence

Periodically evaluating an existing relationship for evidence of illegal or unethical activity

# Due Diligence (cont.)

## Authorities will ask:

- Do you have an effective compliance program?
- Did you discover the issue through your program and controls?
  - Did you act immediately to stop the improper conduct?
  - How widespread was the issue?
  - Did you voluntarily disclose the issue?
- Did you make changes in your program to address weaknesses identified as a result of your investigation?

## Determining the risk of the proposed relationship:

- Geographical and country risk – Transparency International
- Necessity or frequency of interaction with government officials
- Type of Industry and history of corruption in the industry
- Use of third party agents or representatives

## Due Diligence (cont.)

### **Actions to take with third party representatives and agents:**

- Due diligence – initial and ongoing
- Inform third parties of the organization's commitment to following the law
- Inform third parties of the organization's ethical expectations
- Include language in contractual terms and conditions specific to legal, regulatory, financial and reputational compliance.
- Develop and require compliance with a Supplier Code of Conduct (or your own employee Code of Conduct)
- Conduct global database checks (GDC) on third parties and more detailed due diligence based on risk
- Communicate your hotline for use by third parties