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010 Globalization of Anti-Corruption Enforcement: Is the Playing Field Leveling?

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Faculty Biographies

Jonathon Crook

Jonathon Crook is a partner of Eversheds International in London. He specializes in banking and financial services related litigation, including contentious regulatory matters (FSA/UKLA), international commercial arbitration, commercial fraud/asset tracing, shareholder, and joint venture disputes.

Mr. Crook worked in India and Hong Kong (where he is also admitted as a solicitor) for a number of years before joining Eversheds and has acted for clients involved in disputes in the US, Canada, Australia, Hong Kong, China, the Philippines, Thailand, Japan, India, and Pakistan. He has acted in proceedings for the Securities and Futures Commission of Hong Kong, the Stock Exchange of Hong Kong, Standard Chartered Bank, Merrill Lynch, Credit Lyonnais, Robobank, Banque Nationale de Paris, Bouygues SA, BAE Systems, GE, and a range of other multinational companies.

Mr. Crook is a member of the Chartered Institute of Arbitrators.

Eugene Erbstoesser

Eugene Erbstoesser serves as the deputy counsel for Ernst & Young Global in London, after previously having been Ernst & Young's associate and assistant general counsel.

Mr. Erbstoesser is affiliated with a number of bar associations, including the American, California State, Los Angeles County, New York State (vice chair person, treasurer, and member/executive committee), and Federal Bar Association. He has held various positions on committees including that of the Association of Corporate Counsel, Association of Business Trial Leaders, Association of Business Trial Lawyers, Association for California Tort Reform, and USC Institute of Corporate Counsel Advisory Board. In addition to his legal work, Mr. Erbstoesser has also contributed to the world of literature as co-author of *Capital Markets Law Journal*, as well as a chapter written as part of an annual treatise entitled *Lawyers' Opinion Letters.*

Mr. Erbstoesser graduated cum laude with a BA from the University of Southern California and received his JD at the University of California.

Fredric D. Firestone

Fredric D. (Rick) Firestone is an associate director of the division of enforcement at the Securities and Exchange Commission in Washington, DC. He is a senior official in the division assisting in the planning and directing of Commission investigations and other enforcement efforts. Mr. Firestone has overseen investigations in major program areas, including the Foreign Corrupt Practices Act, and has contributed to significant enforcement actions involving, financial fraud (WorldCom, Enron Peregrine Systems, Inc.), insider trading, investment advisers fraud, market manipulation, municipal securities fraud, and registered representative misconduct.

Prior to joining the enforcement division, Mr. Firestone was in private practice as a trial lawyer in the Washington, DC area. His litigation practice included commercial, insurance, securities, and employment matters. Before private practice, Mr. Firestone served on active duty as a judge advocate in the United States Navy. He tried numerous courts-martial and was appellate defense counsel in espionage and capital murder cases, among others.

Mr. Firestone received both his BA and JD from Washington University in St. Louis.

Michael J. Hershman

Michael J. Hershman is both the president and CEO of The Fairfax Group in McLean, VA. As an internationally recognized expert on matters relating to transparency, accountability, governance and security, Mr. Hershman has guided The Fairfax Group as governments, corporations and international financial institutions have retained the company to assist on issues relating to the conduct of senior-level officials and/or the entities with which they do business.

Immediately prior to founding The Fairfax Group in 1983, Mr. Hershman served as deputy auditor general for the Foreign Assistance Program of the US Agency for International Development (AID), where he led investigations and audits of major U.S. funded projects overseas and was responsible for worldwide security at all foreign AID missions. Mr. Hershman was awarded the Superior Honor Medal for his service at AID.

In 1993, along with Peter Eigen, Mr. Hershman co-founded Transparency International, the largest independent, not-for-profit coalition promoting transparency and accountability in business and in government. For the past six years he has served Interpol as a member of the International Group of Experts on Corruption, and for the past 12 years, he has sat on the board of the International Anti-Corruption Conference Committee.

Christine Uriarte

Christine Uriarte is senior legal advisor and general counsel for the anti-corruption division, OECD in Paris. She has coordinated numerous phase one and phase two examinations of Parties' implementation of the OECD Anti-Bribery Convention and the mid-term study of phase two reports. Ms. Uriarte is also currently coordinating the review of the OECD Anti-Bribery Instruments.

Ms. Uriarte holds a BA from the University of Toronto, and is a graduate of Queen's University Law School, Kingston, Canada. She also is a barrister, solicitor, and member of the Law Society of Upper Canada (Ontario).

PUBLICATIONS

2008 Mid-Year FCPA Update

July 07, 2008

The frenetic pace of Foreign Corrupt Practices Act ("FCPA") enforcement set in 2007 has carried through the first half of 2008. Mid-year prosecutions are up – substantially so – from last year's record-setting totals. And corporate disclosures and media reports of ongoing investigations evidence that this trend of continually increasing enforcement is here to stay for the near future.

This client update provides an overview of the FCPA and other foreign bribery enforcement activities during the first half of 2008, a discussion of the trends we see from that activity, and practical guidance to help companies avoid or limit liability under these laws. A collection of Gibson Dunn's publications on the FCPA, including prior enforcement updates and more in-depth discussions of the statute's complicated framework, may be found on our FCPA website.

FCPA Overview

The FCPA's anti-bribery provisions make it illegal to offer or provide money or anything of value to officials of foreign governments or foreign political parties with the intent to obtain or retain business. The anti-bribery provisions apply to "issuers," "domestic concerns," and "any person" that violates the FCPA while in the territory of the United States. The term "issuer" covers any business entity that is registered under 15 U.S.C. § 78l or that is required to file reports under 15 U.S.C. § 780 (d). In this context, the approximately 1,500 foreign issuers whose American Depository Receipts ("ADRs") are traded on U.S. exchanges are "issuers" for purposes of this statute. The term "domestic concern" is even broader and includes any U.S. citizen, national, or resident, as well as any business entity that is organized under the laws of a U.S. state or that has a principal place of business in the United States.

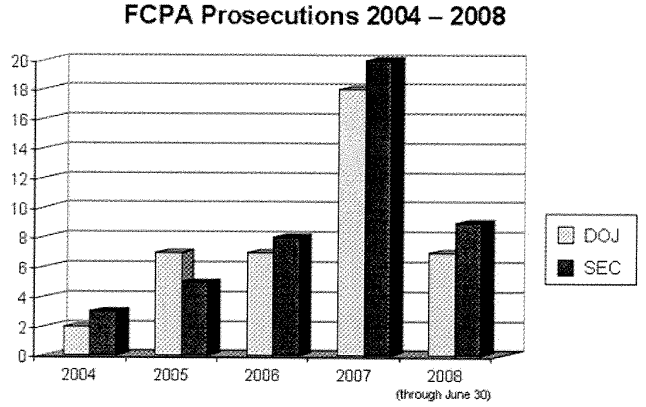
In addition to the anti-bribery provisions, the FCPA's books-and-records provision requires issuers to make and keep accurate books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets. Finally, the FCPA's internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations. Regulators have frequently invoked these latter two sections – collectively known as the accounting provisions – in recent years when they cannot establish the elements of an anti-bribery prosecution. Because there is no requirement that a false record or deficient control be linked to an improper payment, even a payment that does not constitute a violation of the anti-bribery provision can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to an internal controls deficiency.

2008 Mid-Year Figures

The continuing explosion of FCPA prosecutions during the first half of 2008 is best captured in the following chart and graph, which each track the number of FCPA enforcement actions filed by the DOJ and SEC during the past five years. In these first six months, there have been more FCPA prosecutions than in any other full year prior to 2007. And although the careful reader will notice that year-to-date numbers are less than half of 2007's record numbers, by this point last year the DOJ and SEC had filed 5 and 4 enforcement actions, respectively, substantially fewer than we have seen thus

far in 2008.

2008 (through June 30)		2007		2006		2005		2004	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
7	9	18	20	7	8	7	5	2	3



2008 Mid-Year Enforcement Docket

Westinghouse Air Brake Technologies Corp.

On February 14, the DOJ and SEC announced settlements with Westinghouse Air Brake Technologies Corp. ("Wabtec") resolving allegations that Wabtec violated the anti-bribery and accounting provisions of the FCPA. The SEC's complaint and administrative order allege that Wabtec's Indian subsidiary, Pioneer Friction Ltd., made $137,400 in improper payments to officials of the Indian Railway Board. Pioneer allegedly made these payments to influence the Board to award it new contracts to supply brake blocks and to approve Pioneer's pricing proposals for existing contracts. Pursuant to the SEC settlement, Wabtec agreed to pay an $87,000 civil penalty, to disgorge $288,351 in profits plus prejudgment interest, and to retain an independent compliance monitor to review and make recommendations concerning the company's FCPA compliance program for two years.

The DOJ's non-prosecution agreement with Wabtec additionally alleges that Pioneer made improper payments to various railway regulatory boards to facilitate the scheduling of product inspections and the issuance of compliance certificates and to the Central Board of Excise and Customs to put an end to excessively frequent audits. Although these payments totaled more than $40,000 over the course of one year, individual payments were as miniscule as $67 per product inspection and $31.50 per month to lower the frequency of Pioneer's audits. To resolve these allegations, Wabtec agreed to pay a $300,000 fine and conduct an internal review of its FCPA compliance program.

The Wabtec case, in particular the non-prosecution agreement, paints a sobering picture of the DOJ's view of the facilitating payments exception to the FCPA, arguably to the point of reading the exception out of the statute. Companies that permit facilitating payments as a matter of corporate policy should carefully consider this settlement.

Flowserve Corp.

On February 21, Flowserve Corp. became the seventh company to settle with the DOJ and SEC for its conduct under the United Nations Oil-for-Food Program. Although we have described the Oil-for-Food scheme in greater detail in prior updates, the essential allegations (as they concern the "Humanitarian" side of the Program) are that the Iraqi government imposed a 10% "after sales service fee" ("ASSF") as a condition of sales under the Program. To fund these mandatory payments, contractors typically increased the value of their contracts by 10%, thereby receiving an additional 10% from the United Nations escrow account, and passed the increase on to the Iraqi government through third-party agents and Iraqi-controlled bank accounts.

The SEC's complaint alleges that Flowserve violated the FCPA's books-and-records and internal controls provisions through the incorporation into its ledger of $646,487 in inaccurately recorded ASSF payments made (and $173,758 in additional ASSF payments agreed to but not paid) by its French and Dutch subsidiaries, Flowserve Pompes SAS and Flowserve B.V. To settle these allegations, Flowserve agreed to pay a $3 million civil penalty and to disgorge $3,574,225 in profits plus prejudgment interest.

Flowserve's settlement with the DOJ was limited to the conduct of its French subsidiary, Flowserve Pompes, as the DOJ (in a fascinating move described in greater detail below) declined prosecution of Flowserve B.V. in recognition of a pending home state prosecution of that subsidiary in the Netherlands. Flowserve entered into a deferred prosecution agreement with the DOJ, paying a $4 million criminal penalty, and consented to the filing of a criminal information charging Flowserve Pompes with conspiracy to commit wire fraud and to violate the books-and-records provision. Assuming Flowserve's successful compliance with the deferred prosecution agreement's terms, the DOJ will defer prosecution of Flowserve Pompes for the agreement's three-year term and ultimately dismiss the charges.

AB Volvo

One month later, on March 20, AB Volvo became the eighth company to settle with the DOJ and SEC on Oil-for-Food charges. Alleging essentially the same scheme as with Flowserve, the SEC's complaint charges AB Volvo with violations of the books-and-records and internal controls provisions through the incorporation into its ledger of $6,309,695 in inaccurately recorded payments made (and $2,388,419 in additional payments agreed to but not paid) by its French and Swedish subsidiaries, Renault Trucks and Volvo CE. To settle these allegations, AB Volvo agreed to pay a $4 million civil penalty and to disgorge $8,602,649 in profits plus prejudgment interest.

To resolve the DOJ's investigation, AB Volvo entered into a deferred prosecution agreement and agreed to pay a $7 million criminal fine. It also consented to the filing of criminal informations against its two implicated subsidiaries, each alleging a conspiracy to commit wire fraud and to violate the books-and-records provision. As with the Flowserve settlement, assuming AB Volvo successfully completes the three-year term of its deferred prosecution agreement, the DOJ will dismiss the charges against Renault Trucks and Volvo CE.

It is a virtual certainty that AB Volvo's will not be the last of the Oil-for-Food settlements – likely not even the last of 2008. At least a dozen other companies have publicly disclosed ongoing Oil-for-Food investigations by the DOJ and SEC in their securities filings. And in announcing this most recent settlement, then-Assistant Attorney General Alice Fisher noted that the DOJ "will continue its pursuit of companies that abused the U.N. Oil for Food program."

Martin Self

On May 2, Martin Self pleaded guilty to a two-count criminal information charging him with violating the anti-bribery provision of the FCPA. Mr. Self was the President and a part owner of Pacific Consolidated Industries ("PCI"). According to the plea agreement, Mr. Self caused PCI to execute a "marketing agreement" with a relative of a United Kingdom Ministry of Defence ("UK-MOD") official and subsequently caused the payment of approximately $70,350 to the relative pursuant to the agreement. The problem, according to the charging documents, was that Mr. Self was not aware of any genuine services that the relative provided for PCI and, in fact, Mr. Self believed that the

payments were truly for the benefit of the UK-MOD official, who was in a position to influence the award of equipment contracts to PCI. Holding these beliefs, Mr. Self purposely failed to investigate and deliberately avoided becoming aware of the full nature of PCI's relationship with the UK-MOD official's relative.

Mr. Self is not scheduled to be sentenced until September 29, 2008, but the DOJ has publicly announced that he has agreed to serve eight months in prison as part of the plea deal. This case is the second prosecution of a former PCI executive, the first being the 2007 indictment of Leo Winston Smith. Mr. Smith has not settled the charges against him and is presently set to go to trial on October 7, 2008. Additionally, the U.K. government prosecuted the U.K.-MOD official, who is now serving a two-year prison term.

Willbros Group, Inc., Lloyd Biggers, Carlos Galvez, Gerald Jansen, and Jason Steph

On May 14, Willbros Group, Inc. and four of its former employees entered into a joint civil settlement with the SEC, and Willbros additionally settled criminal charges with the DOJ. According to the SEC's complaint, Willbros, acting through various subsidiaries and employees, including the individual defendants:

- agreed to make more than $11 million in corrupt payments, at least $2,869,111 of which was actually paid, to senior Nigerian officials, the ruling Nigerian political party, and officials of a commercial joint venture operator to influence the award of several major pipeline contracts collectively worth more than $600 million;
- made at least $300,000 in corrupt payments to Nigerian revenue officials to lower tax assessments and judicial officials to obtain favorable treatment in litigation;
- agreed to make $405,000 in corrupt payments, at least $150,000 of which was actually paid, to officials of PetroEcuador, Ecuador's state-owned oil and gas company, in order to obtain a $3.4 million pipeline modification contract; and
- paid $524,000 to commercial vendors in Bolivia to obtain dummy invoices that purported to increase Willbros's subcontractor costs, thereby reducing its value-added tax ("VAT") liability to the Bolivian government by approximately $2.5 million.

In summary, Willbros made approximately ***$3.8 million*** in corrupt payments, and agreed to make another ***$8 million*** in payments upon which it did not deliver, to influence the assessment of taxes, the judicial process, and the award of more than ***$630 million*** in pipeline contracts.

To settle the SEC's complaint, which charged violations of the anti-bribery, books-and-records, and internal controls provisions of the FCPA in addition to violations of the antifraud provisions of § 10 (b), Willbros agreed to disgorge $10.3 million in profits plus prejudgment interest. Willbros additionally entered into a deferred prosecution agreement with the DOJ by which it agreed to pay a $22 million criminal penalty and consented to the filing of criminal informations against both it and its subsidiary, Willbros International, charging violations of the anti-bribery and books-and-records provisions. Willbros will also retain an independent compliance monitor for the three-year term of the agreement. Willbros's combined $32.3 million settlement is thus far the largest of 2008, as well as the second largest in the FCPA's thirty-one year history.

The SEC's complaint also permanently enjoins the four Willbros employee defendants from future violations of the FCPA. Additionally, Messrs. Galvez and Jansen agreed to pay civil penalties of $35,000 and $30,000, respectively. Mr. Steph, who pleaded guilty to criminal FCPA violations arising from the same conduct in 2007, will have his civil penalty, if any, determined in conjunction with his sentencing for the criminal case later this year. And in addition to these four Willbros defendants, a fifth, ***Jim Bob Brown***, settled criminal and civil FCPA charges with the DOJ and SEC in 2006 and, like Mr. Steph, is awaiting sentencing.

One final noteworthy aspect of the Willbros settlement is that this case includes a criminal books-and-records prosecution unrelated to corrupt payments. The allegations stemming from Willbros's

Bolivian tax fraud scheme are predicated on the company's falsification of its accounts to avoid tax liability. This potentially foreshadows a broad expansion of the DOJ's FCPA enforcement practice.

AGA Medical Corp.

On June 3, AGA Medical Corp. entered into a deferred prosecution agreement with the DOJ and consented to the filing of a two-count criminal information charging it with violating the anti-bribery provision of the FCPA as well as conspiring to violate the same. According to the information, a high-ranking AGA officer authorized the company's distributor to make corrupt payments to government-employed physicians in China to induce them to buy AGA products and Chinese patent officials to induce them to approve AGA patent applications. AGA agreed to pay a $2 million criminal penalty and retain an independent compliance monitor for the three-year term of the agreement.

FARO Technologies, Inc.

Exemplifying the perilous challenge of FCPA compliance in China, two days later, on June 5, the DOJ and SEC announced another China-based FCPA settlement, this one with FARO Technologies, Inc. FARO consented to the filing of an administrative cease-and-desist order by the SEC and entered into a non-prosecution agreement with the DOJ alleging that FARO violated the anti-bribery, books-and-records, and internal controls provisions of the FCPA through the actions of its wholly owned Chinese subsidiary, FARO Shanghai Co., Ltd. The settlement documents allege that FARO Shanghai's country manager made $444,492 in corrupt payments, disguised as "referral fees," to various employees of Chinese state-owned or state-controlled businesses in order to obtain sales contracts. FARO's regional sales director for the Asia-Pacific region approved the payments, despite knowing that they were bribes and that they exposed FARO to liability, and despite explicit instruction from other FARO officers not to make such payments.

Pursuant to the non-prosecution agreement, FARO agreed to pay a $1.1 million criminal penalty and retain an independent compliance monitor for the two-year term of the agreement. The SEC's cease-and-desist order requires FARO to disgorge $1,850,943.32 in profits plus prejudgment interest.

David Pinkerton

Although not a 2008 enforcement action – David Pinkerton was indicted for his alleged role in an Azeri bribery scheme in 2005 – defense victories in FCPA cases must be celebrated when they come. On June 30, the U.S. Attorney's Office for the Southern District of New York moved to dismiss (which motion was granted on July 1) the charges against Mr. Pinkerton, advising, "further prosecution . . . in this case would not be in the interests of justice." As we reported in our last update, Mr. Pinkerton and his co-defendant, Frederic Bourke, were successful in persuading Judge Shira Scheindlin to dismiss most of the charges in the indictment on statute-of-limitations grounds. The DOJ appealed Judge Scheindlin's decision to the Second Circuit, where the case has been briefed, argued, and is awaiting a decision, but *ab initio* elected to dismiss the remaining charges against Mr. Pinkerton in this motion. The charges against Mr. Bourke, as well as his fugitive co-defendant, Victor Kozeny, are still pending.

2008 FCPA Opinion Procedure Releases (through June 30, 2008)

By statute, the DOJ must provide a written opinion at the request of an "issuer" or "domestic concern" as to whether the DOJ would prosecute the Requestor under the FCPA's anti-bribery provisions for prospective conduct that the Requestor is considering taking. The DOJ publishes these opinions on its FCPA website, but only a party who joins in the request may authoritatively rely upon the opinions. That said, opinion releases provide excellent – perhaps the best – insight into the DOJ's views on the scope of the statute.

In the FCPA's thirty-one year history, the DOJ has issued only forty-nine such opinions, including three in 2007 and two thus far in 2008. In 2006, then-Assistant Attorney General Alice Fisher commented that "the FCPA opinion procedure has generally been under-utilized" and noted that she

wants it "to be something that is useful as a guide to business."

FCPA Opinion Procedure Release 2008-01

On January 15, the DOJ issued its first FCPA opinion release of 2008. This Opinion is unusually lengthy as compared to prior releases, and contains a myriad of details specific to the Requestor's proposed transaction.

According to the Opinion, the Requestor sought to make an investment in a joint venture, majority-owned (56%) by an unnamed foreign government, that provides public services to foreign municipalities. The foreign government wished to completely divest its interest in, and thereby privatize, the joint venture. The Requestor agreed to purchase the government's 56% interest in the joint venture, but only after the interest was first purchased by the private foreign entity that owned the minority (44%) share. Thus, the private foreign entity would form a new company with the foreign government's shares and then sell those shares to the Requestor.

The Requestor conducted extensive pre-acquisition due diligence focused on FCPA compliance. It considered the owner of the foreign private company to be a "foreign official" under the FCPA because he also served as general manager of the then still government-controlled joint venture. This concerned the Requestor because it planned to purchase the shares from the general manager at a substantial premium over purchase price. Accordingly, the Requestor sought an opinion from the DOJ that neither the projected payments to the owner of the private foreign entity nor any shares received by the owner from the divesting government entity would violate the FCPA. It made certain representations to the DOJ, including that the foreign private company owner's purchase of the foreign government's shares would be lawful under the foreign country's laws and that the owner will cease to be a "foreign official" once the private company purchased the government's majority stake in the joint venture (*i.e.*, before the Requestor would pay the premium purchase price).

The DOJ concluded that it would not pursue an enforcement action with respect to this proposed transaction based on a number of factors. First, the Requestor conducted reasonable due diligence of the anticipated seller of the privatized shares and would maintain the relevant documentation in the United States. Second, the Requestor required complete transparency in the transaction and that adequate disclosures be made to the foreign government. Third, the Requestor plans to obtain from the private foreign entity owner representations and warranties regarding past and future compliance with anti-corruption laws. Fourth, the Requestor agreed to retain contractual rights to discontinue the business relationship if the joint venture agreement were breached for any reason, including for a violation of anti-corruption laws.

FCPA Opinion Procedure Release 2008-02

The DOJ's second FCPA opinion release of 2008, issued on June 13, is a groundbreaking statement on an acquiror's successor liability for FCPA violations by a target company. The Opinion creates a framework through which U.S. acquirors might seek amnesty for pre- and even post-acquisition FCPA violations by the target, particularly in deals negotiated under the laws of foreign jurisdictions (such as the U.K.) where pre-acquisition due diligence is less open than in the United States.

The requestor, Halliburton Corp., sought to acquire Expro International Group, a publicly traded British oilfield services provider. Halliburton's principal competitor in the bidding, Umbrellastream, had made an unconditional bid to Expro (neither Expro nor Umbrellastream is identified in the Opinion, but both are named in numerous media accounts of the bidding war). Halliburton represented to the DOJ that, "as a result of U.K. legal restrictions inherent in the bidding process for a public U.K. company, it has had insufficient time . . . to complete appropriate FCPA and anti-corruption due diligence." Further, under the U.K. Takeover Code, an acquiror has no legal ability to insist upon a specified level of due diligence until after the acquisition is completed. Accordingly, if Halliburton conditioned its bid upon satisfactory completion of pre-acquisition FCPA due diligence, Expro would be free to reject this conditional offer in favor of Umbrellastream's unconditional bid, even if Umbrellastream offered a lower price.

Accepting the restrictive nature of U.K. due diligence procedures, the DOJ agreed to grant Halliburton a 180-day grace period post-closing during which Halliburton could self-report pre- and post-acquisition FCPA violations without itself being prosecuted, provided Halliburton adhered to a stringent post-acquisition due diligence and integration plan (described below). Although reserving the right to proceed against Expro for any FCPA violations, the DOJ stated that it does not intend to pursue any enforcement action against Halliburton in connection with (1) the acquisition of Expro in and of itself; (2) any pre-acquisition unlawful conduct by Expro that Halliburton discloses to the DOJ within 180 days of closing; and (3) any post-acquisition unlawful conduct by Expro that Halliburton discloses to the DOJ within 180 days of closing (or within one year if, in the judgment of DOJ, the conduct cannot be fully investigated in 180 days).

Five Key Takeaways from the First Half of 2008 FCPA Enforcement

Beyond the frenzied nature of the prosecution environment, there are five developments in FCPA enforcement from the first half of 2008 that every general counsel of a business with international operations and every lawyer practicing in this area must key into. They are:

1. The outburst of civil litigation collateral to FCPA investigations;

2. The introduction of legislation that would provide for a private right of action under the FCPA;

3. The increasing number of foreign corruption investigations;

4. The growing importance of FCPA due diligence in business transactions, particularly acquisitions; and

5. Substantial jail terms for individual defendants convicted under the FCPA.

Civil Litigation Collateral to FCPA Investigations

Like a broken record, our recurring advice to clients and friends has been to expect and prepare for "tag along" civil litigation when a governmental FCPA investigation becomes public. In the first half of 2008, we have witnessed this admonition borne out as never before, with a new diversity of FCPA-inspired civil litigation theories. Over the last few months we have seen four distinct types of collateral litigation emerge: (1) § 10(b) securities fraud actions; (2) shareholder derivative suits; (3) lawsuits brought by foreign governments; and (4) lawsuits brought by business partners.

As we have previously reported, the first two categories – § 10(b) securities fraud and shareholder derivation actions – are not new to the FCPA world. But ***FARO Technologies, Inc.*** has the unfortunate distinction of facing both arising from the same investigation – on top of criminal and administrative settlements with the U.S. government. As noted previously, on June 5, FARO entered into dispositions with the DOJ and SEC through which it agreed to pay just over $2.95 million. Only three days earlier, the U.S. District Court for the Middle District of Florida gave preliminary approval to a $6.875 million settlement resolving a § 10(b) suit filed on behalf of purchasers of FARO stock alleging that FARO "knowingly or recklessly attested to the accuracy of [its] internal controls system, when [it] knew that the system was, in fact, seriously inadequate." And as if that were not enough, FARO is additionally in settlement negotiations with a plaintiff shareholder who filed a derivative suit on January 11, 2008.

Other companies currently engaged in shareholder derivative litigation stemming from FCPA investigations include ***BAE Systems PLC*** and ***Chevron Corp.*** A Michigan public pension system filed suit in 2007 in federal district court in the District of Columbia against BAE's officers and directors alleging that they breached their fiduciary duties by permitting the company's managers to make and authorize more than $2 billion in bribes and kickbacks in violation of the FCPA and other foreign anti-corruption laws. The defendants have moved to dismiss the complaint arguing that plaintiffs lack personal jurisdiction over the leadership of the British company and that, in any event, English law grants plaintiffs neither standing to sue nor a cause of action against BAE's officers and

directors. The plaintiff shareholder in the Chevron matter filed suit in California state court in May 2007, just two weeks after the New York Times reported that Chevron was in settlement negotiations with the U.S. government concerning its conduct under the Oil-for-Food Program (Chevron would ultimately settle its U.S. government liability in November 2007 for $30 million). The plaintiff ultimately converted his suit to a shareholder demand on Chevron's Board of Directors, but a Special Committee of the Board recently declined, after investigation, to file suit against the directors. The plaintiff shareholder has since refiled his lawsuit.

Chevron has also found itself part of a new wave of FCPA-inspired civil litigation: one where foreign governments sue U.S. companies that allegedly corrupted the foreign government's own officials. On June 27, 2008, the Republic of Iraq filed suit in Manhattan federal district court against ninety-one companies and two individuals alleging that the defendants conspired with Saddam Hussein's regime to corrupt the Oil-for-Food Program by diverting as much as $10 billion in funds intended for the humanitarian use of the Iraqi people to the illicit use of Hussein's government. Iraq claims, *inter alia*, that the defendants violated the Racketeering Influenced Corrupt Organizations ("RICO") Act, with mail fraud, wire fraud, money laundering, and violations of the Travel Act constituting the necessary predicate violations. In addition to Chevron, ten other defendants named by the Republic of Iraq have already settled with U.S. government regulators for allegations arising from the Oil-for-Food Program.

Iraq's Oil-for-Food lawsuit follows closely on the heels of another RICO action filed by a foreign government, that brought by the Kingdom of Bahrain against ***Alcoa, Inc.*** Bahrain's state-owned aluminum smelter, Aluminum Bahrain ("Alba"), filed suit in federal district court in Pittsburgh on February 27 alleging that Alcoa and its affiliates conspired to corrupt one or more of Alba's senior officials, influencing the officials to cause Alba to pay inflated prices for Alcoa's products and to favor the sale of a controlling interest in Alba to Alcoa. Alba is seeking more than $1 billion in damages, including punitives, but the court has stayed the suit on motion of the DOJ as an intervener. DOJ sought the stay of proceedings, which neither party opposed, so that it might conduct its own criminal investigation – which does not appear to have been open prior to the civil suit – without the ongoing distraction of civil litigation. But the DOJ's stay of Alba's lawsuit did not stay all of the civil litigation arising from this matter, for on May 1, 2008 a Hawaiian pension fund filed a shareholder derivative action. Interestingly, the DOJ has not (yet) moved to stay those proceedings, which are presently at the stage of defendants moving to dismiss for failure to make a pre-suit demand upon Alcoa's Board of Directors.

The final category of FCPA-inspired civil litigation emerging in 2008 is commercial litigation brought by a private plaintiff against its business partners. On February 21, 2008, Jack Grynberg filed a RICO suit against ***BP plc*** and ***StatoilHydro ASA*** alleging that they bribed Kazakh officials to win oil rights for joint ventures in which he had an interest, thereby diverting his share of the joint venture profits. Bringing the classic aphorism "the best defense is a good offense" to the FCPA context, Mr. Grynberg recently told the Daily Telegraph that he brought this suit in an effort to head off a potential prosecution by the DOJ, stating, "Unless I assert that I am an unwilling participant in this, my neck could be on the line."

Another recent example of such a business partner lawsuit with FCPA connotations is that brought by Agro-Tech Corp. against its Japanese distributor, ***Yamada Corp.*** Yamada is presently under investigation by Japanese government authorities for its dealings with Japan's Ministry of Defense, an investigation that has led to the arrest of a senior Yamada executive as well as the former Vice Minster of Defense. On March 24, 2008, Agro-Tech filed suit in the U.S. District Court for the Northern District of Ohio seeking a declaratory judgment that it may now lawfully terminate its distributor agreement with Yamada on the grounds that Yamada has breached its contractual obligations to use "ethical means" and to "obey the letter and spirit" of anti-bribery laws, including the FCPA. Yamada has since counter-sued Agro-Tech, claiming that Agro-Tech's lawsuit is just a ploy to terminate unlawfully the fifty-year exclusive distributorship arrangement Yamada has with Agro-Tech.

Foreign Business Bribery Prohibition Act of 2008 (H.R. 6188)

In a pending development related to our collateral civil litigation discussion above – yet significant

enough to warrant individual mention – on June 4, 2008 Rep. Ed Perlmutter (D. Colo.) introduced in the House of Representatives the Foreign Business Bribery Prohibition Act of 2008. This bill would provide for a limited right of private action under the FCPA; such a right does not presently exist. Rep. Perlmutter's bill would amend the FCPA to permit issuers and domestic concerns to bring suit seeking treble damages against "foreign concerns" for FCPA violations that both assist the foreign concern in obtaining or retaining business and prevent the plaintiff from obtaining or retaining that business. The bill would provide a right of action only against "foreign concerns," defined as any person other than an issuer or domestic concern, and even then only where the foreign concern's actions violate the FCPA. Therefore, the class of potential defendants under this bill would be limited to foreign persons and businesses unaffiliated with U.S. stock exchanges and who corruptly use instrumentalities of interstate commerce within the United States in furtherance of their bribes. Still, this would be an important development in the effort to "level the playing field" of FCPA enforcement worldwide. The bill is presently awaiting consideration in the House Judiciary and Energy and Commerce committees.

FCPA Acquisition Due Diligence and Post-Acquisition Compliance Integration

One of the most pressing issues facing the FCPA bar right now is how to assess successor liability of an acquiror for pre-acquisition FCPA violations by a target company. The government's right to impose successor liability as a matter of law is difficult to challenge. Yet as a policy matter, such prosecutions can have a perverse effect: discouraging the "race to the top" created where companies with superior FCPA compliance programs acquire those with less thorough programs, inculcating the latter into the former's culture of compliance. At the end of the day, everyone, including the U.S. government, benefits when companies with superior compliance programs acquire companies with less effective programs, even when they come with warts.

The DOJ's focus on this issue in the two FCPA opinion releases issued this year is encouraging. Particularly so is the DOJ's acknowledgement in FCPA Op. Proc. Rel. 2008-02 that providing Halliburton with a limited safe harbor in which to conduct post-acquisition due diligence without fear of prosecution "advances the interests of the Department in enforcing the FCPA and promoting FCPA due diligence in connection with corporate transactions."

In detailing the procedures that Halliburton must follow in order to avail itself of the protection afforded by 2008-02, the DOJ has set forth its view on "best practices" for post-acquisition compliance integration. Halliburton agreed to take the following steps:

- Immediately upon closing, imposing Halliburton's Code of Business Conduct on all Expro operations and meeting with the DOJ to discuss whether the information that Halliburton has learned to that point shows potential pre-acquisition FCPA violations;
- within 10 days of closing, preparing and presenting to the DOJ a comprehensive FCPA due diligence work plan that addresses and categorizes each of the following into high, medium, and low risk elements: use of third-party representatives, commercial dealings with state-owned customers, joint ventures, teaming or consortium agreements, customs and immigration matters, tax matters, and government licenses and permits;
- utilizing in-house resources, outside counsel, and third-party consultants (*e.g.*, forensic accountants) as appropriate to conduct post-acquisition due diligence, including a review of Expro e-mails and financial records and interviews of legacy-Expro employees;
- requiring legacy Expro third-party representatives that Halliburton intends to use post-acquisition to sign new contracts with Halliburton that incorporate audit rights and FCPA and other anti-corruption provisions;
- providing FCPA training to legacy Expro employees "whose positions or job responsibilities warrant such training on an expedited basis" within 60 days of closing and providing such training to all other employees within 90 days; and
- disclosing to the DOJ all "FCPA, corruption, and related internal controls and accounting issues that it uncovers during the course of its 180-day due diligence."

Although not all of these measures will be practical in all acquisitions, companies should take note of these procedures and structure their integration measures in line with these steps where possible. For additional guidance on the topic of transactional due diligence, please see the article by F. Joseph Warin, et al., *Acquisition Due Diligence: A Recipe to Avoid FCPA Enforcement*, TEXAS STATE BAR OIL, GAS, & ENERGY RESOURCES LAW SECTION REPORT 2 (June 2006).

Parallel Foreign Proceedings

Another key trend that we have been following during the first half of 2008 is that the enforcement of foreign bribery statutes is increasingly becoming a global enterprise. After years of not-too-subtle nudging by international anti-corruption watchdogs, most notably the Organization for Economic Cooperation and Development ("OECD") and Transparency International ("TI"), foreign jurisdictions are finally beginning to launch their own investigations that parallel those brought by U.S. enforcement agencies. Although some jurisdictions have not pursued bribery investigations aggressively and none can claim to match the torrid pace set by the DOJ and SEC, we believe that the trend of parallel foreign enforcement actions and investigations will only intensify in the future.

Investigations arising out of the Oil-for-Food Program comprise a significant portion of the foreign parallel proceedings. For example, the United Kingdom's Serious Fraud Office ("SFO") is actively pursuing Oil-for-Food investigations against several major companies, including at least one (***GlaxoSmithKline plc***) that has publicly disclosed being under investigation by the DOJ and SEC. Other foreign countries with open Oil-for-Food investigations include Italy, which has initiated preliminary court proceedings against a number of companies and their employees, Ireland, and Switzerland, which has already imposed $17 million in fines against eight unnamed companies.

Although international anti-corruption activity is increasing overall, not all countries have been consistent in investigating and prosecuting corruption offenses. As we have reported previously, in 2006 the SFO controversially dropped on national security grounds its investigation concerning allegedly corrupt payments made by ***BAE Systems plc*** to senior Saudi governmental officials. On April 10, 2008, the High Court of London declared the SFO's decision to close the investigation illegal and ordered the agency to reopen the investigation. The British government is now appealing that decision to the House of Lords, the U.K.'s highest court.

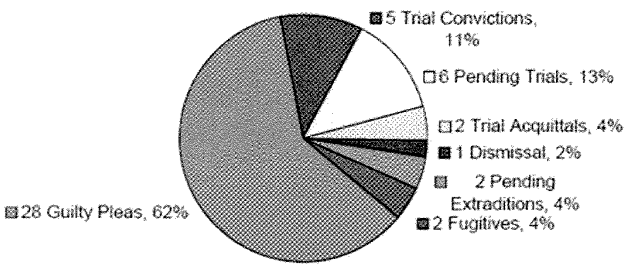
A fascinating development in the interplay between foreign and domestic corruption investigations is the DOJ's recent decision to forgo – in two Oil-for-Food cases – criminal sanctions against foreign businesses in light of pending actions against the companies in their home states. In our last FCPA review, we reported that the DOJ elected not to impose a criminal fine in connection with its December 2007 non-prosecution agreement with Akzo Nobel provided that Akzo Nobel caused one its Dutch subsidiaries to enter into a criminal disposition with the Dutch Public Prosecutor and pay a fine of at least €381,602 ($549,419) within six months. And during the current reporting period, on February 21, 2008, the DOJ completely declined prosecution of a Dutch subsidiary of Flowserve in return for Flowserve agreeing to cause that subsidiary to enter into a criminal disposition with the Dutch Public Prosecutor. Although these prosecutions in the Netherlands are not publicly reported, a Dutch representative recently informed TI that Dutch prosecutors have filed seven Oil-for-Food cases.

It took the United States many years to reach its current state of enforcement and we expect that other nations will experience growing pains as well. But with an enhanced commitment on the part of many nations, coupled with pressure from non-governmental organizations and a newfound willingness by the DOJ to defer to home state prosecution in appropriate circumstances, we expect anti-corruption enforcement to take on an increasingly global character in the future.

Substantial Jail Time for Individual Defendants

As we have reported previously, efforts to prosecute individuals for violations of the FCPA have skyrocketed in the past few years. Focusing on criminal prosecutions, we have identified forty-six individual defendants charged by the DOJ over the last ten years for allegedly participating in foreign bribery schemes, including many former senior executives and other high-ranking employees.

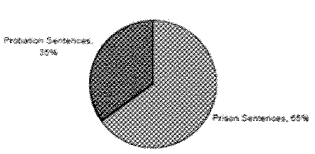
Approximately ***91%*** of the individuals to resolve their charges – thirty-three of thirty-six – have pleaded guilty or been convicted at trial of at least one charge. Only three defendants has been acquitted at trial or have had their charges dismissed.



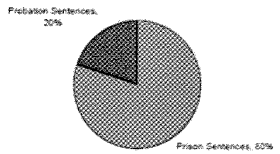
Resolution of Criminal FCPA Anti-Bribery Cases Brought Against Individuals from 1998 to the Present.

Of the thirty-three convicted individual defendants, only twenty have gone to sentencing. This reflects the DOJ's common practice in FCPA prosecutions of postponing sentencing for lengthy periods – even years – as the convicted defendant cooperates with the government's investigation. Of the twenty sentenced defendants, thirteen have received jail terms, ranging from several months to more than five years. This figure includes sentences of incarceration for all four defendants to have been convicted at trial and sentenced.

These figures are not trending more favorably to individual FCPA defendants. In the past five years, eight out of ten individuals sentenced for their role in a foreign bribery scheme have been sentenced to a term of imprisonment.



Sentences for Individual Criminal Defendants Convicted in FCPA Cases from 1998 to the Present.



Sentences for Individual Criminal Defendants Sentenced in FCPA Cases from 2003 to the Present.

This trend is unmistakable: incarceration is becoming a near certainty for individuals convicted of violating the FCPA. One recent example is ***Ramendra Basu***, a former World Bank official, who on April 22, 2008 was sentenced to 15 months incarceration for assisting consultants in bribing a Kenyan official. Additionally, sentencing is pending for thirteen defendants, all of whom face the prospect of at least several months' imprisonment. We anticipate that many, if not all, of these individuals will receive jail time. Given the zeal with which the DOJ has pursued FCPA cases in recent years, it does not appear that the trend toward aggressive prosecution of individuals and imposition of severe penalties will soon abate.

Conclusion

As breathtaking as the pace of FCPA enforcement was in 2007, the first half of 2008 has proved a worthy successor. With many large matters pending in the investigative stage, we expect more of the same for the second half.

■ ■ ■ ■ ■

Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding these issues. We have more than 20 attorneys with substantive FCPA expertise. Joe Warin, a former federal prosecutor, currently serves as a compliance consultant pursuant to a DOJ and SEC enforcement action. The firm has 20 former Assistant U.S. Attorneys and DOJ attorneys. Please contact the Gibson Dunn attorney with whom you work, or any of the following:

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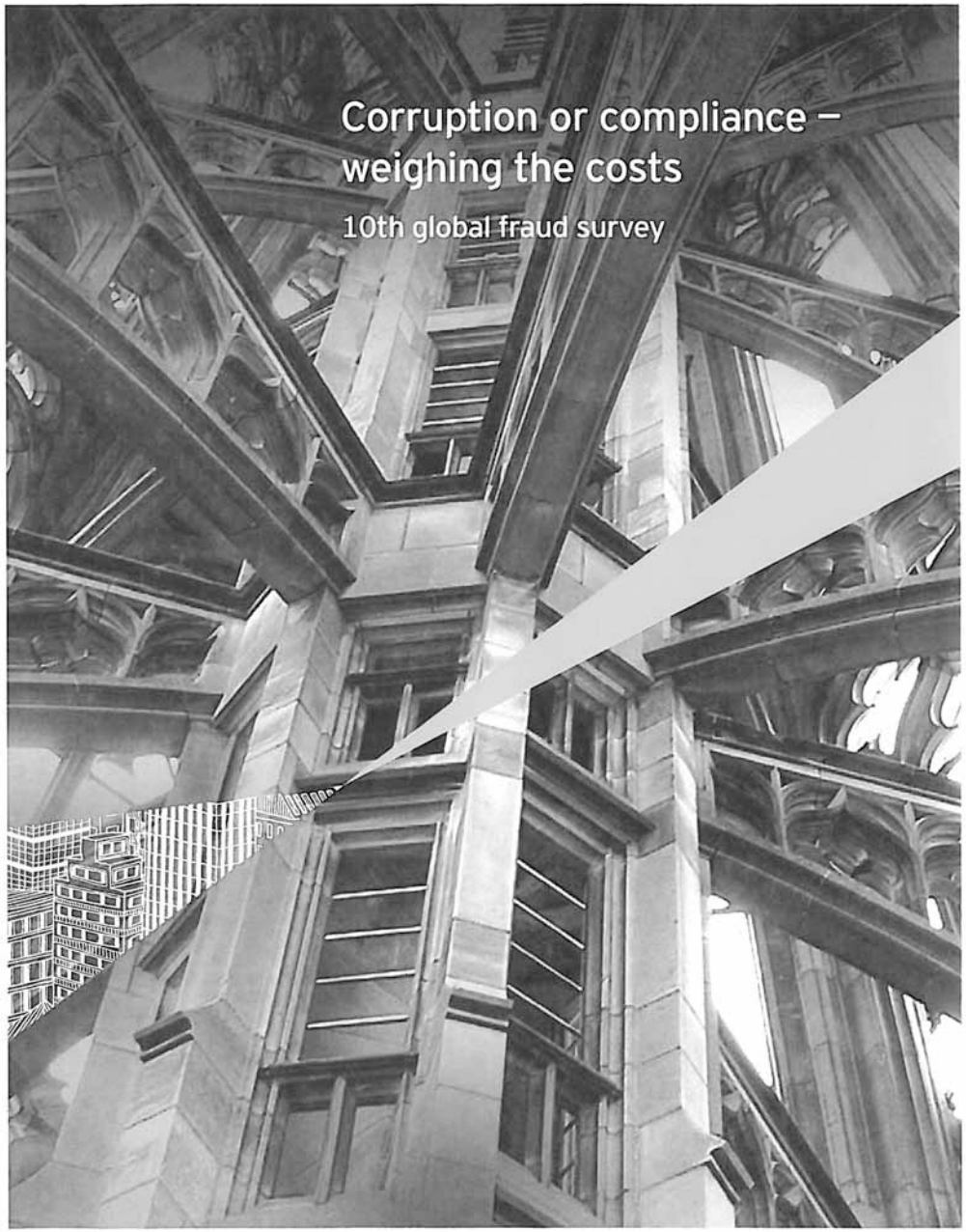


Contents

1 Foreword

2 Executive summary

3 Our findings

- I. Curbing corrupt practices remains a significant challenge
- II. Companies show an appreciation of the risks – but are they doing enough?
- III. Investigations and reputational risk
- IV. Caveat emptor – companies are failing to effectively weigh corruption risks during due diligence
- V. Aggressive enforcement action demands greater corporate response
- VI. Achieving potential, promoting compliance

21 Risks and rewards

22 Survey approach

24 Contact information

Foreword

Investigations of corrupt business practices have been among the headlines in recent months. Companies have seen their reputations diminished as fines were imposed, profits disgorged. In some instances, executives have been sent to prison.

Whether this reflects an increase in the underlying levels of bribery and corruption is difficult to tell. What is certain, however, is that enforcement efforts in many countries are intensifying.

Executives in some companies today may still believe that paying bribes is good business; it "works." But the risk of such action has certainly increased markedly in recent years. International organizations, like the United Nations and the Organization for Economic Cooperation and Development, have adopted numerous conventions. Many countries have enacted anti-corruption legislation – regulating corporate behavior in their home and international markets. Non-governmental organizations, such as Transparency International, have kept up the pressure by measuring both the demand and supply side of bribery.

Companies, therefore, have to abide by anti-corruption laws in their home countries and the foreign countries in which they have commercial interests. If their shares trade in yet further countries, other foreign bribery laws and regulations may also apply.

Among these many laws, it is the Foreign Corrupt Practices Act of the United States that has become the de facto international standard regarding the bribery of foreign officials. Enforcement efforts by the US Department of Justice and the Securities and Exchange Commission are much more aggressive and extraterritorial than we are currently seeing elsewhere. The FCPA is not merely relevant to SEC registrants or US-headquartered companies. US citizens are not the only ones that have been subjected to its enforcement. For the Department of Justice, the fact that corrupt payments traveled through US clearing banks may be enough of a nexus with the US to bring charges.

As a result, companies would be well served by measuring their own anti-corruption efforts against the FCPA and whatever local statutes also apply to foreign and domestic bribery, both public and commercial.

Because of the significant interest in anti-corruption, we at Ernst & Young undertook the *10th Global Fraud Survey* to understand better how companies are managing the risks associated with bribery of government officials outside their home countries. Because the propensity to bribe abroad is higher than at home, we focused on company executives' knowledge of regulations and compliance procedures relating to bribing foreign government officials.

While assessing the level of understanding of our respondents with each of the applicable anti-corruption laws was beyond the scope of this survey, we chose to use the FCPA as a proxy for these other laws. Given that the FCPA is the most heavily enforced foreign bribery statute, companies benefit from a more complete understanding of the law. Taking into account its provisions when performing internal audits or due diligence is undoubtedly beneficial. Establishing an anti-corruption compliance program consistent with its requirements, along with those of other applicable laws, is prudent and increasingly necessary.

Aberrational behavior is inevitable in organizations, large and small. When incidents require investigation, companies need help securing the relevant evidence and establishing the facts. A thorough and independent investigation is often critical to reducing the reputational damage and to reassuring regulators and law enforcement of a company's commitment to transparency and good governance. We explore these and other issues in the report to follow.

This survey was conducted in 2007 and 2008 on behalf of Ernst & Young's Fraud Investigation & Dispute Services practice. We would like to acknowledge and thank all respondents for their time and insights.

David L. Stulb

Global Leader
Fraud Investigation & Dispute Services

Executive summary

Corruption is a growing problem for businesses and executives. Despite the multitude of new anti-corruption legislation and increased enforcement efforts around the world, corruption is still prevalent.

- One in four of our respondents said their company had experienced an incident of bribery and corruption in the past two years
- 23% of respondents knew that someone in their company had been solicited to pay a bribe to win or retain business
- 18% of respondents said that they knew that their company had lost business to a competitor who had paid a bribe
- Over a third of all our respondents felt that corrupt business practices were getting worse

Regulatory enforcement is significantly stronger than in the past. Foreign bribery investigations by prosecutors in OECD countries have increased fivefold from 51 cases in 2005 to 270 cases in 2007. Individuals are increasingly being targeted for prosecution as well.

- Over two-thirds of our respondents said laws and regulations against bribery and corruption were being enforced at least fairly strongly
- Almost 70% of our respondents noted that enforcement has become stronger in their locality during the past five years

Companies are recognizing the risks and claim to be doing more to implement anti-corruption policies and procedures into their compliance programs.

- More than half our respondents cited increased training and awareness assisted in reducing the risks
- More than 45% of our respondents claim to routinely conduct anti-corruption due diligence prior to an acquisition
- Over two-thirds of our respondents believed that their internal audit teams had sufficient knowledge to detect bribery and corrupt practices and half thought compliance-focused audits were successful in mitigating these risks

In contrast, knowledge of the FCPA and its requirements was found to be lacking. Companies could benefit considerably from both increasing their knowledge and awareness of the FCPA and improving their capabilities to mitigate the risk of bribery and corruption.

- Only one-third of our respondents claimed to have some level of knowledge about FCPA
- 58% of senior in-house counsel were not familiar with the FCPA

Basic anti-corruption compliance is lacking when companies' standard processes are questioned.

- 43% of our respondents indicated that their company did not have specific procedures in place for dealing with government officials
- 44% of our respondents indicated that their company did not have specific procedures in place for identifying parties related to government officials

Establishing a robust anti-corruption compliance program so that measures are in place and utilized to actively seek out instances of bribery and corruption are essential in today's regulatory environment. The anti-corruption compliance program needs to be integrated into the company's overall compliance regime. Companies that fail to address their compliance weaknesses continue to take unnecessary risks given increasingly determined and globally active regulators.

A compliance program of this kind is not simply about avoiding penalties, or even about avoiding internal problems. It is about balancing the need to improve the business – achieving its potential – while keeping the company and its executives out of trouble.

corruption by governments and political figures is an unfortunate fact of life throughout the world – as the Commission's enforcement responsibilities under the Foreign Corrupt Practices Act remind us on a daily basis."

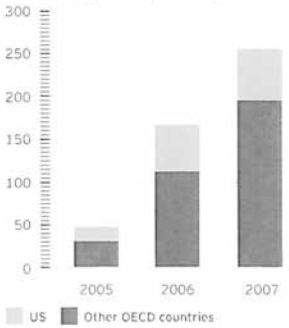
Christopher Cox, Chairman of the Securities and Exchange Commission

Our findings

Corruption remains pervasive around the world and across industry sectors. The fight against it is increasingly a key focus for the world's law enforcement and regulatory agencies, as governments recognize that corruption makes markets unfair, erodes public trust and places a drag on long-term economic development. Indeed, domestic and extraterritorial enforcement actions by regulators, particularly in the US, have accelerated markedly – ensnaring more companies and individual executives than ever before.

While the FCPA is more than 30 years old, enforcing its provisions has recently become an even bigger priority of the US Department of Justice (DoJ) and Securities and Exchange Commission (SEC). With corporations headquartered around the world coming under US scrutiny, other national regulators have joined the campaign to reduce bribery and corruption. In addition to the US, 36 other nations have expressed their commitment by ratifying the OECD Anti-Bribery Convention. Regulatory and law enforcement agencies in these countries are not only launching more investigations themselves (Figure 1), but are actively sharing information with US authorities to aid in their cases.

Figure 1
OECD foreign bribery investigations[1]



The FCPA has become the de facto international standard regarding international bribery. The US Congress has amended the FCPA over its legislative life to broaden its scope, including making key changes to the law following the signing of the OECD Anti-Bribery Convention. Any company that is registered with the SEC is subject to the FCPA, which applies to all operations and subsidiaries wherever they may be in the world. But the FCPA also covers any transaction that transits through the US banking system or takes place on US soil. Thus an illicit payment from a European company to an Asian consultant that passes through a US clearing bank could provide jurisdiction for US enforcement. A holiday for a Canadian doctor and her family in New York, improperly paid and accounted for by a Brazilian pharmaceutical company, could similarly be subject to investigation by US authorities.

As a result, any company looking to acquire businesses or conduct commerce abroad is now stepping into an increasingly active global regulatory fight against bribery and corruption.

In this edition of the Global Fraud Survey, we have interviewed nearly 1,200 major companies in 33 countries. Their collective experience comes from interacting with a wide range of national regulators and law enforcement agencies.

The executives we spoke to would appear to be well positioned to combat bribery and corruption. They are also executives with significant potential personal liability. Over half were from finance, with chief financial officers making up almost a quarter of our survey, and another 15% were senior internal audit directors. The other senior executives we talked to included chief executive officers, chief operating officers, heads of legal, compliance and strategy, as well as audit committee directors and other board members.

Many of our respondents showed little surprise at being asked about anti-corruption policies at their company. Their willingness to discuss these delicate matters openly confirms that the issue now has a high-profile on the corporate agenda.

While there was a general sense that bribery and corruption was a growing problem, there may have been a lack of appreciation that enforcement of existing anti-corruption statutes is fast becoming the significant issue. Only a few years ago, the focus of a survey such as this would have been on detection – now it is on compliance.

The regulatory landscape

A number of global organizations have adopted international conventions, such as:

- United Nations' Convention Against Corruption
- The Organization of American States' Inter-American Convention Against Corruption
- African Union's Convention on Preventing and Combating Corruption
- Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Officials in International Business Transactions

Signing on to these international conventions often required countries to subsequently enact enabling legislation that strengthened penalties and fines for corrupt practices. Among the more than three dozen countries adopting such legislation are:

Country	Legislation	Year passed
Australia	Criminal Code Amendment (Bribery of Foreign Public Officials) Act	1999
Canada	Corruption of Foreign Public Officials Act	1998
France	Criminal Code and the Code of Criminal Procedure	2000
Germany	Act on Combating Bribery of Foreign Officials	1999
South Korea	Act on Preventing Bribery of Foreign Public Officials in International Business Transactions	1998
United Kingdom	Anti-terrorism and Security Act	2001

enforcement partners see our commitment to combating corruption around the world and to enforcing our own anti-corruption laws, it is more likely that they will prosecute corruption in their own countries."

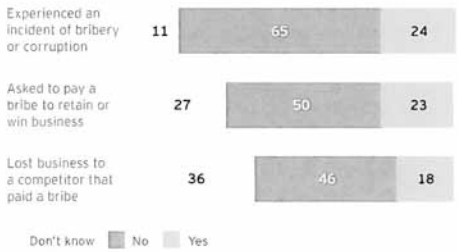
Alice Fisher, Assistant Attorney General, US Department of Justice

I. Curbing corrupt practices remains a significant challenge

Despite the best efforts of some governments, non-governmental organizations and law enforcement agencies, the risk of bribery and corruption remains prevalent. One in four of our respondents said that their company had experienced an incident of bribery or corruption during the last two years (Figure 2).

Among the regions of the world, the Middle East, India & Africa and the Far East indicated substantially higher amounts of corruption (48% and 56% respectively). Surprisingly, Japan led all regions with some 72% of respondents experiencing recent bribery or corruption. This is at odds with Transparency International's *Corruption Perceptions Index* which, in 2007, ranked Japan the 17th least corrupt country, a better ranking than the United States.

Figure 2
Incidence of bribery or corruption



Q Has your company had an incident of bribery or corruption in the last two years? Do you know if anyone in your company has ever been asked for a bribe to retain or win business? Has your company ever lost business to a competitor as a result of them paying a bribe?
Shown: Percentage of all respondents (1186)

Our research also found that 23% of respondents knew that someone in their company had been asked for a bribe in order to win or retain business (Figure 2). Perhaps more distressingly, 18% of respondents said that they knew that their company had lost business to a competitor who had paid a bribe.

Spotlight on Japan

Our survey respondents in Japan stood out from the pack. About 72% said that their company had experienced an incident of bribery or corruption in the last two years. Half said that business had been lost to competitors who paid bribes. However, when we asked them about local conditions, only 2% felt that corruption was prevalent in their sector. The difference between the respondents' view of local conditions compared to their overall experience with corruption may suggest that Japanese companies are encountering substantially more corruption in their overseas operations.

When we asked companies how strongly laws and regulations concerning bribery and corruption are enforced, Japanese companies topped the list of those who felt that local enforcement is very strong.

Certainly public awareness of fraud, bribery and corruption has never been greater in Japan. The regulatory environment is undergoing significant change, following a number of high-profile fraud cases. These cases undoubtedly caused great embarrassment.

In part in response to these developments, Japan adopted the Financial Instruments and Exchange Law to strengthen corporate accountability. This so-called J-SOX legislation clarified management's responsibility for internal controls over financial reporting. Japan's Financial Services Agency, the key markets regulator, has significantly strengthened enforcement in a number of areas, including accounting fraud and insider trading. Fines and penalties are on the rise.

Given its importance to the global economy, Japan is right to be keen to protect and strengthen its reputation. Criticism by the OECD regarding its anti-corruption enforcement has led to more discussion of the challenge of bribery and corruption amongst business leaders, regulators and academics. As our study shows, corporate Japan is ready to talk openly about the issue. Stronger enforcement will further reinforce changing standards of behavior.

Over a third of all our respondents felt that the problem of bribery and corrupt business practices was getting worse. We asked respondents about the prevalence of bribery and corruption in their industry sector, and overall, despite some variation across sectors, the figure was high, with two in five saying bribery was prevalent in their industry. Respondents from the mining and utilities sectors saw it as more prevalent, with those from banking and energy viewing it as relatively less prevalent. This would appear to be at odds with regulatory actions in the US, where the energy sector is currently facing widespread scrutiny for corrupt business practices from the DoJ and SEC.

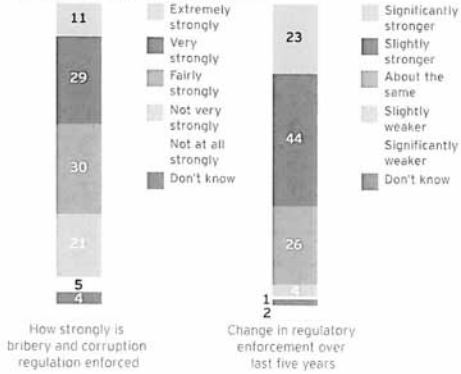
Table 1
Percentage saying corrupt practices are prevalent within their sector

Mining	47
Utilities	43
Insurance	41
Manufacturing	40
Telecommunications	38
Food and beverage	35
Consumer products	34
Pharmaceuticals	33
Banking and capital markets	31
Energy (oil, gas, electricity)	30

When we asked about the enforcement side of the equation, the answers were even more marked. Over two-thirds of our respondents said that laws and regulations against bribery and corruption were being enforced at least fairly strongly in their particular country (Figure 3). Some 40% of respondents chose to categorize local enforcement as very or extremely strong. This figure is surprisingly consistent across economic sectors and across different job functions. It also holds for most regions of the world, rising to over 60% for North America and Japan.

Whether a company experienced an incident of bribery or corruption over the last two years makes little difference to perceptions of enforcement. It is fair to say that close to half of our respondents now regard their local regulators as taking an aggressive posture on this issue. Indeed, local regulators in many jurisdictions are stepping up their cooperation with US authorities. Parallel, or even joint investigations, are much more common today – a fact that reinforces the perception of increased global enforcement.

Figure 3
Strength of regulatory enforcement



Q How strongly are anti-bribery and corruption laws and regulations enforced against companies headquartered in your country? Has the level of regulatory enforcement changed compared to five years ago?
Shown: Percentage of all respondents (1186)

This represents a change from the past, as almost a quarter of our respondents noted that enforcement has become significantly stronger in their country during the past five years.

> Any authorization of a payment by an employee or third party to a government official or employee of a state-owned enterprise is illegal. And the bribe doesn't even have to be successful."
>
> Mark Mendelsohn, Deputy Chief, Fraud Section, Criminal Division, US Department of Justice

Prosecutions in the last year in the US, for example, reveal that the authorities are particularly adept at following the investigative trail from one company to another. Prosecutors are encouraging companies to voluntarily disclose violations and provide cooperation in return for more lenient treatment. This has led to evidence of wrongdoing by other companies and raised the pressure on these others to self-report. In one particularly notable instance in 2007, covered widely in the media, US prosecutors followed leads generated by one case in the oil and gas industry to a service provider of that company, and then on to more than a dozen customers of that service provider.

The simultaneous pursuit of a number of companies in a given industry, as we have seen in the medical device industry in recent months, is increasingly common. Yet despite all the apparent pressure to self-report, DoJ representatives have commented publicly that just 30% of their recent investigations were the result of self-reporting. US authorities continue to prove themselves very capable of developing their cases through whistleblowers, informants or other sources.

In addition to their considerable investigative resources, the DoJ also wields important powers to negotiate deferred prosecution and non-prosecution agreements. Deferred prosecution agreements (DPAs) in FCPA matters often include the imposition of an outside monitor or compliance consultant. Last year, twelve DPAs required such monitors.

The DoJ has also encouraged companies to resolve matters with local prosecutors. In some instances, non-prosecution agreements have made settlement contingent upon the company reaching a resolution with local prosecutors within a fixed time period. There are instances where the company voluntarily disclosed the offending conduct, the DoJ imposed a financial penalty, but agreed not to prosecute the company as long as a number of remedial control and compliance measures were taken.

Whatever form the ultimate resolution takes, settling FCPA prosecutions with US authorities can be a costly affair. Focusing only on the financial penalties themselves, the largest ten FCPA prosecutions since 2007 have cost the companies involved nearly US$175 million. These sums, of course, do not include the significant costs associated with compliance monitors and remedial work on internal controls. Hardest of all to calculate is the damage to the reputation of the company itself.

II. Companies show an appreciation of the risks – but are they doing enough?

Our survey suggests that companies have developed a clear appreciation for the risks associated with corrupt payments. There is a widespread awareness of the reputational, legal and commercial impacts of allegations of corrupt behavior. Indeed 56% of respondents told us that they strongly agree that their management understands the potential exposure of their company to these risks.

In the findings outlined below, companies have expressed their confidence in their approach to corruption risks in the context of mergers and acquisitions. So too have they expressed their view that the internal audit function has the training and resources necessary to detect bribery and corrupt practices. Over two-thirds of our respondents told us that management understands which controls failed or were absent when corrupt payments occurred.

A company's approach to dealing with these risks most often reflects their specific understanding of the potential and probability of punishment or other negative impact. The two negative impacts most cited in our survey were fines and penalties and being debarred from particular markets (Figure 4). Each was mentioned by almost half the respondents. Fines and penalties were a much bigger concern for companies in the US, and for Japan and the UK as well.

The concern expressed in Japan and the UK is of particular interest given the relative lack of enforcement by national regulators. Compared with fines imposed related to fraud and other financial crimes in the US, fines imposed in Japan and the UK appear to have been limited. In France or Germany, concerns were greatest about being barred from particular markets. This may reflect the relative importance of public sector revenues to these respondents.

Increased cost of compliance and the possibility of jail time for employees were mentioned rather less often. With respect to compliance costs, however, US and Australian respondents were nearly twice as concerned as other respondents. This undoubtedly reflects their respective regulatory environments, among the most intrusive and complex in the world.

fraud and bribery will not be tolerated. They should also be made aware of the penalties, should they not comply."

Head of Compliance, The Netherlands

Figure 4
Significant impacts on the business resulting from corruption allegations

		US	UK	Germany	France	Japan	China/ Hong Kong	Australia
Fines and penalties	45	56	55	38	44	84	71	37
Blocked from markets	44	26	42	54	54	45	40	35
Inability to grow or expand business	35	37	40	40	34	14	17	35
Increased cost of compliance	29	54	36	30	28	14	6	57
Shareholder/ competitor litigation	29	48	43	18	22	6	0	57
Jail time for employees	21	17	32	28	22	6	10	22

Q When an allegation of bribery or corrupt business practices is made against a company, what are the three most significant impacts on the business?
Shown: Percentage of all respondents (1186). Country percentages significantly different from global results are highlighted.

We would expect these numbers to rise in the near term for other countries. US regulators remain particularly keen on imposing compliance monitors in settlement agreements. Given their broad scope, fees associated with monitors – and borne by the companies – are substantial. The increasing frequency with which monitors have been required in deferred prosecution agreements led to Congressional hearings in March 2008. Concerns were voiced with regard to potential conflicts of interest in the appointment of former regulators as monitors. Just prior to the hearings, the DoJ issued new guidance with respect to the appointment process. The practical impact of these changes remains to be seen.

Given the costs of investigations, potential for fines, penalties, reputational costs and post-investigation remedial efforts, finding ways to set the proper tone and be proactive in deterring corrupt practices is a top priority for corporations. We asked our respondents which measures they thought might be most successful. The top two measures were increased training and awareness and anti-corruption compliance-focused internal audits. More stringent controls over high-risk payments came a close third. Less than a third put a whistleblower hotline or legal due diligence among the most successful measures. The results are fairly consistent across regions, sectors, and job titles, although it is interesting that North American companies proved to be much more enthusiastic about whistleblower hotlines than those in any other region (77%, Table 2, overleaf).

Table 2
Percentage saying whistleblowing is a successful measure for minimizing bribery and corruption

North America	77
Australia/New Zealand	58
Latin America	50
Middle East, India and Africa	37
Western Europe	23
Central and Eastern Europe	20
Far East	15
Japan	6

Shown: Percentage of all respondents (1186)

From these results, it is clear that companies with global operations need to be sensitive to these regional differences. In regions such as Central Europe, the Far East and Japan, where hotlines are perceived to be less successful, it is critical for companies to find innovative ways to deploy them.

The importance of conveying a clear tone at the top of the organization – management's unwillingness to tolerate corrupt practices – is widely appreciated. Codes of conduct are meant to reflect this tone, and approximately 90% of respondents have one. Some four out of five of those that have such a code believe that it is useful in preventing and detecting bribery. Yet for a code of conduct to encourage ethical behavior, it should demonstrate how it relates to the applicable laws and should include a mechanism by which breaches of the code can be reported and monitored.

Understanding that in certain countries this may not be legally possible, a code of conduct that lacks an anonymous reporting mechanism, or has one that is not widely and constantly publicized, is missing a key element. Our survey indicates that less than half of respondents are aware of the presence of a hotline where they can report any suspicious activity.

III. Investigations and reputational risk

One of the keys to success in dealing with issues of fraud, bribery and corruption is the system a company has for reporting and investigating allegations of misconduct. If the subsequent investigation is perceived by stakeholders to be biased or not competently managed, negative consequences could ensue. Trust in senior management to do the right thing will be eroded and disillusioned employees will think twice about future cooperation.

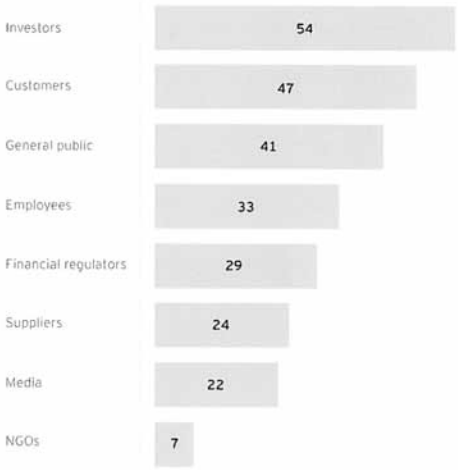
Around half our respondents saw investors and customers as the two groups that were most negatively affected by failures to investigate allegations of bribery and corruption independently and thoroughly. This was ahead of the general public and a company's own employees (Figure 5).

When we look more closely at the results, we notice that there are significant regional variations in how our respondents perceive stakeholders have been affected by failure to effectively investigate incidents of bribery and corruption. For instance, in Oceania 75% of our respondents considered investors to be one of the three most affected while only 21% of Japanese respondents thought similarly. And 54% of North America respondents considered employees to be one of the three most affected in contrast to just 16% in Central and Eastern Europe.

companies by their shareholders, regulators and customers demands constant diligence."

CFO, Australia

Figure 5
Stakeholders negatively affected by bribery or corruption allegations



Q Perceived failures to investigate allegations of bribery and corruption independently and thoroughly can impact many different stakeholders. Which three are most likely to be negatively impacted?
Shown: Percentage of all respondents (1186)

A company suddenly facing the financial and reputation risks associated with an allegation of corruption may be tempted to keep its investigation as low-key and narrow as possible. But that approach carries its own risks, because an investigation sends a strong signal about management's integrity and how management actually feels about corruption. A timely, thorough, visible and independent inquiry shows that senior management really wants to correct misconduct, not simply out of fear of penalties but because of a desire to run an honest and ethical company.

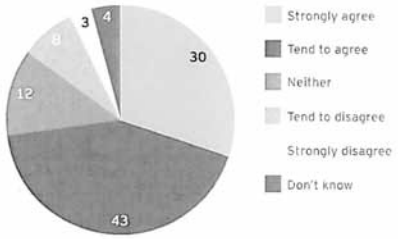
Investigations offer management the opportunity to demonstrate that, while everyone will be treated fairly, dishonest or unethical behavior will not be tolerated. Commitment from the top to do the right thing and act responsibly builds a culture in which employees with concerns will come forward, confident that they will be taken seriously and treated professionally.

A robust investigation helps safeguard a company's reputation. A key aspect is having an experienced and independent investigating team that has the ability to discover the relevant facts and secure the relevant documentary and electronic evidence. Many companies, boards and independent auditors insist on a competent and thorough investigation performed by an independent investigative team. This often includes a law firm and a professional advisory firm with experience in forensic accounting and leading investigation practices.

Internal audit – the best team for the job?

Expectations of the internal audit function have never been greater. Stakeholders expect internal audit professionals to focus on enterprise-wide risk assessments. Business and operational risk are often the top priorities. Personnel and budgets are being stretched thin to address these issues at headquarters and in far-flung international locations. And, as Ernst & Young's 2007 *Global Internal Audit Survey* reported, companies expect internal audit to play a critical role in detecting and investigating fraud.

Figure 6
Sufficient internal audit knowledge to detect bribery and corrupt practices



Q Do you agree or disagree that internal auditors have a sufficiently detailed understanding of the risks and indicators to detect bribery and corrupt business practices?
Shown: Percentage of all respondents (1186)

Table 3
Percentage saying internal audit are not very or not at all successful

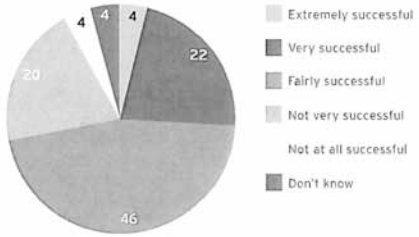
Central and Eastern Europe	44
Australia/New Zealand	32
Western Europe	25
North America	19
Far East	11
Middle East, India and Africa	11
Japan	8
Latin America	7

Q How successful are internal auditors in detecting bribery and corrupt practices?
Shown: Percentage of all respondents (1186)

While some may look at bribery and corruption as a mere subset of fraud, that simplification is fraught with dangerous implications. The vast majority of anti-corruption laws, and certainly the FCPA, do not include a traditional consideration of materiality. Zero tolerance is written into the statutes. Internal auditors, often based in headquarters, under time pressure, untrained and armed with sometimes simple checklists, are expected to detect corrupt practices during quick site visits. Often, the audit team is heavily reliant on local staff and management to help interpret local language materials and area-specific business practices. Questionnaires that ask executives and mid-level managers whether they have bribed anyone in the past year are not sufficient.

Yet the respondents in our survey expressed confidence that internal auditors have sufficient knowledge to detect bribery and corrupt practices (Figure 6, previous page). Two-thirds of CEOs, CFOs and CROs agreed, and there was a similar figure across most of the industry sectors.

Figure 7
Success of internal audit in detecting bribery or corrupt practices



Q How successful are internal auditors in detecting bribery and corrupt practices?
Shown: Percentage of all respondents (1186)

In the view of the majority of our respondents, the internal audit function was putting this knowledge to work effectively. Some 72% indicated that internal audit was successful in detecting bribery and corrupt practices (Figure 7).

But the percentage of respondents that view internal audit as not very, or not at all, successful should raise concern for senior management and board members. Indeed even 22% of heads of internal audit we interviewed stated that their departments were either not focused or not successful in this risk area.

The views among respondents in the various geographies ranged widely. Those interviewed in Latin America and Japan were more sanguine, with just 7% and 8% respectively stating that internal audit had not been successful. On the other hand, respondents in Central and Eastern Europe were by far the most negative. More than 40% of professionals from companies in those countries thought poorly of internal audit's effectiveness in this area.

> If we identify an incidence of fraud, we shorten the internal audit cycles, while keeping intervals random."
>
> Chief Risk Officer, Germany

Our experience would suggest that internal audit professionals would benefit from specific training regarding bribery and corrupt practices. This training is particularly critical given the role of internal auditors as monitors of business conduct and "first responders."

Enhancing their awareness of the obligations of the relevant anti-bribery statutes will increase their capacity to recognize "red flags," or indicators of potential corrupt activity. When serious red flags are uncovered requiring an investigation, executives from the board down to the legal/compliance department and internal audit function need to know when to turn to outside counsel and forensic accountants. Preserving electronic evidence is often one of the most urgent priorities, and one that requires sophistication given that data privacy laws can vary significantly across jurisdictions.

Improving the effectiveness of internal audit teams

Boards, senior management, and key stakeholders are increasingly relying on internal audit teams to do more to address the risk of bribery and corruption as regulatory compliance demands escalate. Teams can increase their effectiveness if given the resources to:

- Select site visits and audits based on potential anti-corruption risks
- Develop and perform specific bribery and corruption audits
- Include risks related to bribery and corruption in the wider risk assessment process when developing audit plans
- Modify current audit scope and procedures to specifically address bribery and corruption risks
- Develop specific protocols for the investigation of identified issues, including:
  - Involvement of counsel
  - Required communications (e.g., senior management, audit committee, external auditor)
- Bring the audit team together with the internal investigations/integrity team when conducting audits so that each team has a better understanding of the processes used by the other
- Achieve as much local language and cultural knowledge as possible in field teams
- Complete bribery and corruption training at least once every two years

In addition, audit teams can take some simple steps to build up their knowledge of bribery and corruption issues inside the companies. These include conducting regular reviews of incidents reported to the compliance hotline and preparing a list of red flags based on incidents that have already been investigated, including a list of internal controls that have been breached.

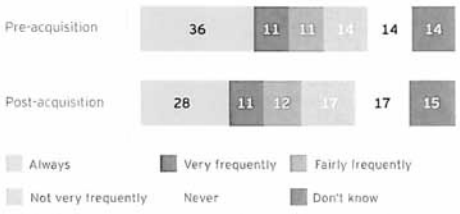
Compiling a database of all reported incidents – not simply those labeled as "significant" at the time – is vital for identifying patterns and trends. It also provides a document that can be shared with senior management and other divisions within the company to give a sense of current compliance issues.

IV. *Caveat emptor* – companies are failing to effectively weigh corruption risks during due diligence

Among US FCPA prosecutions in 2007, nearly half of them arose in the context of a merger or acquisition. Sophisticated companies, well aware of the risks of acquiring a company tainted by bribery or corruption, have found themselves having to disclose FCPA violations at recently acquired companies, potentially having inherited the company's regulatory exposure. Others have chosen to walk away from deals entirely. For these reasons we focused on anti-corruption risks in the M&A context. More than 800 of our respondents had acquired a new business in the last two years, and they shared their views on the risks with us.

Despite numerous high-profile US enforcement actions, nearly 30% of respondents had never – or infrequently – considered bribery or corruption risks in the context of a potential acquisition (Figure 8). It is interesting to note that those for whom this should be of a particular concern, i.e., the heads of legal, did not exhibit a greater degree of concern than the overall population.

Figure 8
Anti-corruption due diligence as part of the acquisition process



Q How frequently has your company considered bribery or corruption-related risks before acquiring a new business in the last two years? And how were they considered post-acquisition?
Shown: Percentage of those that have made an acquisition (636)

More than 45% of our respondents claim to routinely conduct anti-corruption due diligence. This is not consistent with our experience of corporate due diligence. It may well be the case that the respondents consider a check-list approach to these complex risks to be adequate. Procedures meant to address these risks as part of the standard financial due diligence should be met with some skepticism and probed for their sufficiency and rigor.

Representations and warranties relating to bribery and corruption are usually insufficient to protect the acquiring company and its executives from successor liabilities related to a post-deal regulatory investigation and related reputational damage. Besides the successor liabilities, the fundamental assumptions supporting the purchase price may be predicated on revenues that would not have existed but for the existence of questionable payments. These risks are, of course, greatest in deals where the target company has operations in countries or industries prone to high levels of corruption.

But after corruption is identified, this value can become worthless very quickly."

Finance Manager, Brazil

Companies would do well to institute a formal process to assess the bribery and corruption risk of countries of investment interest. Many different academic and other measurement tools exist. A prominent former US regulator, now in private legal practice, has suggested companies link the level of forensic due diligence to country scores in Transparency International's *Corruption Perceptions Index*. Forensic due diligence, he has said, should be conducted in countries with scores of 5 or less. When doing deals in countries with scores of, for example, 3 or less, companies should undertake exhaustive anti-corruption due diligence.

Every company now needs to seriously examine whether anti-corruption due diligence is required for every acquisition target. As we shall see in the next section, what a target company doesn't know about the actions of one of its mid-tier subsidiaries or agents can both overstate value and create significant liability for the acquirer. A thorough and conscientious process of anti-corruption due diligence is the best approach to mitigate these complex risks.

Assessing the risk that the target company may have bribery and corruption issues has a number of advantages beyond the possibility of reducing the acquisition price. Forensic due diligence can reduce the risk of future criminal and civil proceedings and limit future reputational damage. It can also help to establish the true value of an acquisition target by evaluating what portion of its revenues and profits may depend on inappropriate and unsustainable business practices.

Of course, there is enormous time pressure to conclude a merger, joint venture or acquisition. Under such pressure there may realistically only be time for an abbreviated due diligence approach. Experienced counsel and forensic specialists can help companies prioritize areas of focus.

Those responsible for M&A activity should understand that identifying corruption risk is not an automatic "deal breaker" in every context. However, it is always preferable to know as much as you can about corruption exposure prior to closing the deal. Highly effective due diligence processes identify the broad risk areas, allow management to assess their tolerance for the risk and then, if necessary, build decisive remedial action into a post-deal integration plan. The post-deal integration plan should include a detailed follow-through on any unresolved issues identified pre-acquisition and to explore any areas that were abbreviated due to time pressure or other constraints. Should issues subsequently have to be disclosed to regulators, a timely and thorough vetting of the potential risks in the due diligence process pre- and post-acquisition will strengthen the argument for leniency.

Higher-risk transactions merit additional scrutiny

Deals in which target companies have any of these characteristics are of substantially higher risk, making forensic due diligence a worthy investment:

- Subsidiaries and operations or customers in emerging markets or countries which score poorly on Transparency International's *Corruption Perceptions Index*
- Public sector contracts or business dependent on government approvals, permits, authorizations
- Consultancy services that are poorly documented
- Reliance on agents and intermediaries for sales
- Sales commissions contingent on contracts being awarded
- Significant travel, gift or entertainment expenditure
- Industries with a history of problems in this area, such as extractive industries, construction, aerospace, defense, pharmaceuticals and medical devices

V. Aggressive enforcement action demands greater corporate response

High-profile investigations into corrupt practices have continued to dominate the headlines in the past two years. Indeed, in the US, of the more than 80 FCPA investigations that were ongoing at the beginning of 2008, 30 were opened in 2007. Eleven of these new investigations targeted non-US corporations. New records for fines, penalties and disgorgement of profits have been set and broken repeatedly. Individual executives too have been the focus of prosecution efforts. In 2007, the DoJ brought FCPA-related actions against ten individuals, including, for the first time, charges against a member of Congress.

With regard to domestic bribery cases in the US, the DoJ charged 6,900 individuals with public corruption offences obtaining nearly 6,000 individual convictions during the period from 2001 to 2006, an increase of 50% over the previous eight-year period.

Prosecuting public officials – the demand side of the corruption equation – also sends a message to corporations. Emerging market countries that are keen to attract foreign direct investment or secure access to international capital markets for their leading companies have made strides in this area.

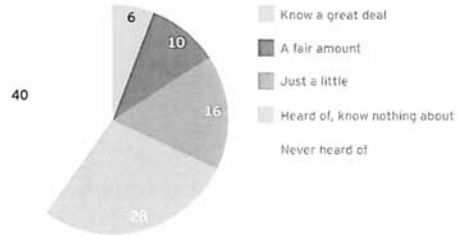
In perhaps an extreme example, given its enormous population and recent explosive economic growth, the Central Commission for Discipline Inspection of China's Communist Party indicted nearly 30,000 party and other officials for corruption in 2007. High-level officials are clearly not exempt from these enforcement efforts.

The FCPA: driving standards, demanding change – but still largely unknown

The aggressive enforcement of the FCPA by US authorities has certainly raised awareness in the world's largest companies of the importance of anti-corruption compliance. Companies with international operations would be wise to consider measuring all aspects of their anti-corruption policies against the requirements of the FCPA.

For this reason, we probed the FCPA knowledge of our respondents.

Figure 9
Knowledge of FCPA regulations



Q How much do you know about the US FCPA which prohibits bribery when dealing with government officials?
Shown: Percentage of all respondents (1186)

individuals and clients we work with that may have government connections highlights the areas where we need to exercise additional caution."

Head of Internal Audit, Spain

Table 4
Respondents that have never heard of or know nothing about the FCPA

SEC registrant	56
Non-SEC registrant	74
US	31
UK	45
Germany	82
France	76
China/Hong Kong	87

Q How much do you know about the US FCPA which prohibits bribery when dealing with government officials?
Shown: Percentage of all respondents (1186)

More than two-thirds of the respondents knew nothing about the FCPA (Figure 9). When the responses are broken down by geography, awareness among US respondents is considerably higher. About half claimed a fair knowledge of the Act, while about a third knew nothing about it. Among European nations, more than 80% of German respondents and 76% of those in France were unaware of the FCPA.

Awareness among companies that are SEC registrants, and thus clearly subject to the FCPA, was surprisingly low. Some 56% of these respondents knew nothing of the Act. Senior executives did not fare much better. When the responses are broken down by job title, about 57% of CFOs and CROs, 48% of internal audit directors, and 40% of senior in-house legal counsel were not familiar with the FCPA.

Another question asked if the respondents knew whether their company was subject to FCPA rules and regulations. Of the individuals who claimed to have a little knowledge of the Act, 53% indicated that their company was subject to it. Among those who claimed to have a fair amount of knowledge, 80% indicated that their company was subject to the provisions of the FCPA.

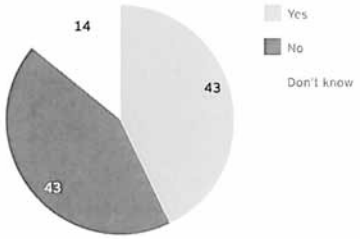
Over a third of the respondents surveyed indicated that FCPA compliance processes were very or extremely embedded into the company operations. Over a half of the respondents indicated that these compliance processes were well embedded, and 18% of the respondents were not aware whether FCPA compliance processes were embedded into the company operations.

Yet for an FCPA, or any anti-corruption, program to be effective, companies need to be able to distinguish which of its customers, supplier or agents, for example, are "government officials" under the applicable laws. If the ownership structure of one of these entities is unknown or opaque, companies cannot properly restrict or monitor its interactions with them. Given that the concept of materiality is absent in the vast majority of anti-corruption statutes, an improper payment, gift, travel reimbursement or charitable donation could be a violation.

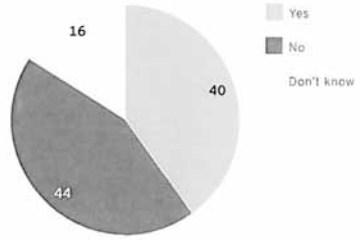
Despite this, only 43% of the respondents indicated that their company had specific procedures in place for dealing with government officials (Figure 10, overleaf). These results indicate a significant opportunity for risk mitigation.

Figure 10
Dealings with government officials

Anti-corruption policies and procedures



Systems to identify government-related parties



Q Does your company have specific procedures for dealing with government officials (in any country) to mitigate the risk of corrupt business practices? Does it have a system that identifies customers, partners or other intermediaries with government ties that would be considered as "government officials" under anti-bribery statutes?
Shown: Percentage of all respondents (1186)

A relatively high number of European companies did not have specific provisions for government officials. This result may be an indication that compliance processes at European companies are designed to combat commercial bribery on a par with public bribery to reflect their local anti-corruption laws. However, the absence of specific procedures to deal with government officials is surprising. As companies develop a broad range of trading relationships in the developing world, the necessity of interaction with government officials brings acute risks.

Companies that had experienced an instance of bribery or corruption in the last two years were more likely to use specific procedures to identify government officials. Interestingly, 29% of the SEC registrants we interviewed did not have such procedures.

Some 40% of the respondents also indicated that their company had a system in place that enabled employees to readily identify people who could be considered "government officials" under applicable anti-bribery statutes.

As companies are increasingly doing business across the world, identifying government officials is getting more difficult. Is that manufacturer in Shanghai from which a newly acquired subsidiary just won a contract still a state-owned enterprise? And does that mean that one of your people should not be taking the purchasing manager and his wife out to dinner? Is the CFO of a company partly owned by a Middle Eastern sovereign wealth fund regarded as a government official for anti-corruption purposes? In this new world where compliance is key, companies need to provide their employees with the answers to increase the likelihood that their actions are appropriate.

> of Europe to better understand that with good cooperation and the will to share information, through bodies like Eurojust and like OLAF, their [international fraud and corruption] cases will be much more successful."
>
> Franz-Hermann Bruner, Director General, European Anti-Fraud Office, European Commission

The fact that the majority of companies do not yet have a system for doing so means that they have not yet appreciated just how much is now being demanded of them by regulators.

Our results indicate that a misalignment exists between the knowledge of relevant bribery and corruption legislation and the confidence that the company is taking care of the compliance issues. Knowledge and understanding of the law and the regulatory environment would seem to be a prerequisite to adequately assess risk and put in place policies and procedures necessary to mitigate the risk of noncompliance.

This misplaced confidence may allow certain risks to remain unaddressed. Given the increasing regulatory scrutiny, there is considerable benefit in raising awareness and improving compliance capabilities.

VI. Achieving potential, promoting compliance

For many companies, achieving their potential means winning in new and emerging markets. With the growing local, national and international regulatory focus on anti-corruption, implementing a robust compliance program is essential to staying out of trouble. Some key elements of an effective anti-corruption compliance program are described below.

Conduct a corruption risk assessment

A robust anti-corruption program should begin with a thorough assessment of the specific risks of bribery and corruption facing the company. These risks are derived from the applicable laws and regulations governing the company's conduct, and other facts specific to the company's operations, including industry sector, international locations, and amount of business interaction with foreign government officials. Acquisitive organizations should also conduct tailored risk assessments on target companies operating in countries prone to high levels of corruption.

Additional risk assessments should be undertaken periodically to confirm that the program in place is meeting new risks and challenges as the business and regulatory environments change.

Adopt a corporate anti-corruption policy

An anti-corruption policy should be an important component of a company's overall compliance approach. The anti-corruption policy itself needs to address such issues as contracting with agents and consultants, commercial bribery, accuracy of financial reporting and audits of internal controls. It is useful to set out the processes involved in conducting effective internal investigations.

The policies on agents and consultants should include mandates that require a written contract with anti-bribery representations and warranties. Requiring periodic compliance certifications from these third-party vendors is useful. The right to audit agents and consultants is also an essential consideration when negotiating contracts, and actually exercising these rights later is just as important. Regarding gifts, a clearly stated approval process is beneficial as is a gift log that can be audited. Any travel or lodging provided to foreign public officials should undergo a heightened approval process. Charitable giving guidelines should also be included in anti-corruption policies to guard against the use of charities as conduits for bribes.

The anti-corruption policy itself should be approved by the Board of Directors. Distributing the policy to management, and posting on the company's internal website with other compliance-related policies is worthwhile. References to the anti-corruption policy should be included in the written code of conduct issued to all company employees.

Conduct anti-corruption compliance training and audits

As we have already stated, internal audit teams play a crucial role in the company's anti-corruption compliance program. Specific training is required to enhance their awareness and effectiveness in order to increase the likelihood that the company meets its obligations under the relevant anti-bribery statutes.

Every professional in a sales, marketing, or procurement function should receive anti-corruption compliance training. These professionals should clearly understand what internal resources are available to guide them in the event that they should be approached for a bribe or other illicit payment.

Companies should consider identifying local or regional in-house (or external) counsel that would be available to answer urgent questions from the field. For example, when a foreign government official arrives unexpectedly with his family for a business visit, well-meaning employees may be able to benefit from immediate legal and compliance advice that the company can offer.

Once employees have been trained on the policy, taking steps to identify and eliminate any gaps in compliance is critical. Detailed anti-corruption compliance audits should be conducted by internal audit at the various business units to identify any potential violations. These audits should occur on a rotating schedule, based on the relative likelihood of violations occurring in each of the various business units.

Employ an anti-corruption compliance certification program

Many companies have formal programs to certify and re-certify senior employees regularly on anti-corruption compliance. Certifications will not stop the deliberate wrongdoer, but the requirement will serve as a continuing reminder of the manager's compliance responsibility. Certification processes also may identify issues that otherwise might not have surfaced.

No compliance program, no matter how expensive or extensive, can provide absolute assurance of compliance. An effective anti-corruption program, if viewed as a serious program, will positively affect a company's culture and may deter wrongdoing. In the event of aberrational behavior, the existence of an effective anti-corruption program will be a benefit should it be necessary to interact with regulatory authorities. Isolated instances of corrupt conduct do not necessarily make the overall program ineffective. In the past, US regulators have shown certain leniency when the offending conduct was discovered by the company's internal processes, wrongdoers were dealt with accordingly and remedial measures were undertaken quickly.

and fighting corruption, companies not only mitigate reputational risk, but they also live up to their responsibility as corporate citizens and can take an active part in the emerging solutions to some of the greatest issues facing the world today."

Cobus de Swardt, Managing Director, Transparency International

Risks and rewards

The risks that we have discussed in this survey are risks not for corporations alone. Executives and board members could have exposure too. As we noted earlier, US regulators remain focused on what they believe is the deterrent effect of prosecuting individuals. Civil penalties for responsible executives are common. Jail sentences too are possible.

Encouraging your organization to adopt an effective anti-corruption program is in your personal best interest. Becoming knowledgeable about the law – not just the FCPA but the applicable anti-bribery statutes in the countries in which your company has interests – is no longer just the responsibility of in-house counsel. Knowing enough to ask the powerful questions to those building compliance programs or conducting investigations will be of great value.

Promoting ethical behavior in your organization – making a difference – is not just about staying on the right side of the law. It's good business.

Survey approach

Between November 2007 and February 2008, our researchers conducted 1186 telephone interviews with senior decision-makers in large organizations. The sample was structured to include respondents from key parts of the company, including senior financial and risk managers as well as the heads of legal, compliance, and internal audit groups.

The interviews were conducted using local languages in 33 countries.

Table 5
Participant profile – job title, sector and revenue

Number of interviews			
Job title		**Sector**	
Chief executive officer	39	Banking and capital markets	209
Chief operating officer	13	Chemicals	23
Chief financial officer	262	Consumer products	156
Chief risk officer	62	Energy (oil, gas, electricity)	165
Head of legal	89	Health sciences	63
Head of compliance	22	Insurance	67
Head of internal audit	120	Manufacturing	338
Head of strategy	11	Mining and metals	44
Financial controller	116	Professional firms and services	6
Treasurer	45	Real estate and construction	6
Senior risk manager	61	Technology, communications and entertainment	55
Senior internal audit manager	23	Transportation	7
Senior finance manager	118	Utilities	20
Tax director	4	Other sectors	27
Business unit head	50		
Corporate development officer	4	**Revenue (US$)**	
Security/anti-fraud officer	17	2 billion or more	174
Other business director	117	1-2 billion	305
Company secretary	13	500 million - 1 billion	277
		100-500 million	306
		10-100 million	81
		Not available	43

Source: All respondents (1186)

Table 6
Participant profile – region and country

Number of interviews					
Central and Eastern Europe	250	Japan	53	Oceania	59
Czech Republic	50			Australia	46
Hungary	50	Latin America	58	New Zealand	13
Poland	50	Brazil	26		
Romania	25	Mexico	32	Western Europe	429
Russia	50			Austria	50
Turkey	25	Middle East, India and Africa	75	Belgium	25
		India	25	France	50
Far East	183	Middle East	25	Germany	50
China and Hong Kong	52	South Africa	25	Greece	25
Malaysia	25			Italy	25
Philippines	29	North America	79	The Netherlands	51
Singapore	27	Canada	25	Spain	25
South Korea	25	US	54	Sweden	25
Vietnam	25			Switzerland	50
				UK	53

Shown: All respondents (1186)

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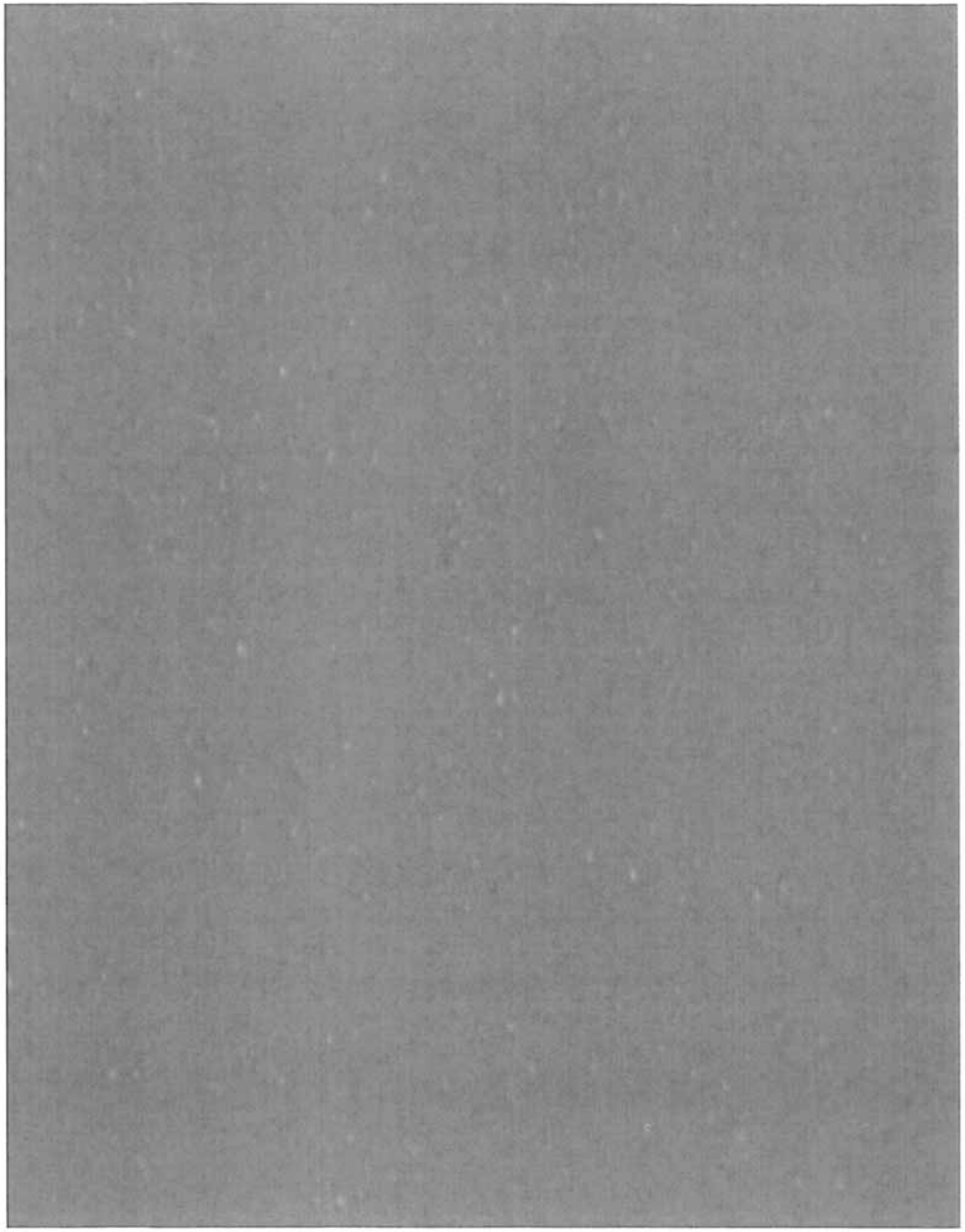

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The FCPA and analogous foreign anti-bribery laws—overview, recent developments, and acquisition due diligence

Eugene R. Erbstoesser, John H. Sturc and John W.F. Chesley*

Key points

- Securities regulators and law enforcement authorities are increasingly active in the application of anti-bribery laws in the global environment. This renewed emphasis on rooting out transnational corruption has substantial implications for participants in the global capital markets engaged in cross-border mergers and acquisitions.
- More than ever, there is a risk that transactions improperly structured or subjected to inadequate due diligence may result in unexpected criminal or civil liabilities of unprecedented scope and severity.
- This article is intended as a brief primer on the essentials of the Foreign Corrupt Practices Act a summary of the most current global developments in global anti-bribery enforcement, and basic guidance on the due diligence efforts that prudent participants in a cross-border transaction should consider.

1. Primer on the Foreign Corrupt Practices Act

What is the Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act, known in common parlance as the FCPA, is a US law passed in 1977 in response to widespread international corruption involving US-based corporations and foreign government officials. The Act was adopted after more than 400 US companies, including 117 members of the Fortune 500, admitted to more than $300 million in questionable payments to foreign officials as part of an amnesty programme administered by the United States Securities and Exchange Commission ('SEC').[1] The SEC's findings sparked concerns within the United States Congress that not only were such payments to foreign officials immoral and 'bad business', but were potentially harmful to US foreign policy interests:

> The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.[2]

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1 H.R. Rep. No. 95–640, at 4 (1977).

2 Ibid, at 5.

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The FCPA consists of two sets of complementary provisions: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions proscribe the bribery of foreign government representatives and the accounting provisions require companies regulated by the SEC to keep and maintain accurate books-and-records as well as a system of internal controls that reasonably assures that corporate assets are used for authorized corporate purposes. Both sets of provisions have criminal and civil applications, with criminal proceedings the exclusive province of the United States Department of Justice ('DOJ') and civil proceedings primarily enforced by the SEC.

The anti-bribery provisions

The anti-bribery provisions prohibit (i) the payment of (or promise to pay) (ii) money or anything of value (iii) to a foreign official, foreign political party or representative thereof (hereinafter collectively 'foreign official') (iv) with the corrupt intent to influence the foreign official in the exercise of his or her official duties (v) to assist the payor in obtaining or retaining business.[3] Several of these terms require elaboration:

- *Payment:* In addition to direct payments to foreign officials, the FCPA also forbids payments to any person (eg a third-party agent) while knowing that all or part of the payment will ultimately be given to a foreign official. The term 'knowing' encompasses conscious disregard and deliberate ignorance.[4] In other words, willful blindness—the so-called 'ostrich' or 'head-in-the-sand' defence—is no defence. This presents significant compliance issues for companies doing business in countries where the use of a local agent, over whom the company has limited control, is a practical if not legal necessity. Of the 35 FCPA cases filed since 1 January 2006,[5] 23 are alleged to have involved payments through third-party agents.
- *Anything of value:* Although the majority of FCPA prosecutions have involved the payment of (or promise to pay) cash or cash equivalents (eg a percentage of profits from a contract), the DOJ and SEC have on occasion asserted that other forms of consideration are also forbidden. Examples of non-cash items of value forming the basis for FCPA prosecutions include donations to charitable organizations with which the foreign official was affiliated,[6] shares of stock in the payor's business,[7] payment of the foreign officials' travel[8] and medical[9] expenses, and even the international transportation of expatriate voters to the polls so that they could cast votes for the foreign official's party.[10]
- *Foreign official:* The FCPA prohibits corrupt payments to any representative of a foreign government, irrespective of the official's rank. Moreover, foreign officials include employees of a foreign government's 'instrumentalities', including state-owned businesses that participate in commercial activities. The People's Republic of China, for example, has been a frequent situs of FCPA actions involving payments to state-owned entities.[11]

3 15 USC §§ 78dd-1(a), (g); 78dd-2(a), (i); 78dd-3(a).

4 US Department of Justice, *Lay-Person's Guide to FCPA*, available at <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> accessed 25 July 2007.

5 For purposes of all statistics cited herein, the authors have counted charges against each defendant separately, even if arising from the same investigation, but have not double counted actions brought by both the DOJ and SEC against the same defendant. Most FCPA matters are resolved by negotiated settlement with these two agencies. Accordingly, most factual descriptions of cases discussed herein are taken from the government's allegations.

6 *SEC v Schering-Plough Corp.*, 04-cv-00945 (DDC 2004).

7 *United States v Kozeny*, 05-cr-00518 (SDNY 2005).

8 *United States v ABB Vetco Gray, Inc.*, 04-cr-00279 (SD Tex. 2004); *United States v Metcalf & Eddy, Inc.*, 99-cv-12566 (D. Mass. 1999). But see 15 USC § 78dd-1(c), discussed at 3–4 subsequently.

9 *United States v Kozeny*, 05-cr-00518 (SDNY 2005).

10 *United States v Kenny Int'l Corp.*, 79-cr-00372 (DDC 1979).

11 See *United States v SSI Int'l Far East Ltd* 06-cr-00398 (D Or. 2006) (payments to employees of state-owned steel producers); *United States v DPC (Tianjin) Co. Ltd*, 05-cr-00482 (CD Cal. 2005) (payments to employees of state-owned hospitals); *SEC v GE InVision, Inc.*, 05-cv-00660 (CD Cal. 2005) (payments to employees of a state-owned airport).

- *Obtaining or retaining business:* On its face, this phrase could reasonably be read to limit the FCPA's scope to a prohibition on payments that influence the foreign official to award the payor new contracts or renew existing contracts. In fact, the first two US district court judges to squarely address this issue so held; dismissing, respectively, a criminal indictment and a civil complaint charging the defendants with making or authorizing payments to foreign officials to persuade these officials to reduce their employers' customs duties and tax obligations.[12] But in overturning the first of these decisions and reinstating the indictment, the United States Court of Appeals for the Fifth Circuit held that 'Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage'.[13] The Fifth Circuit reasoned that payments that beget such benefits assist the payor in obtaining or retaining business by reducing the beneficiary's cost of doing business, thus providing a competitive advantage vis-à-vis its competitors and incentivizing its continued presence in the relevant market.[14]

The FCPA also includes an exception and two affirmative defences to the anti-bribery provisions. The exception provides that the anti-bribery provisions shall not apply to 'facilitating or expediting' payments made to foreign officials to 'expedite or to secure the performance of a routine government action'.[15] But this exception applies only to actions that are 'ordinarily and commonly performed' by the official.[16] The statute provides the following examples of qualifying routine actions: obtaining permits or licenses to do business in the country; processing government papers (eg visas and work orders); providing police protection, mail services or scheduling inspections; providing utility (eg phone, power, water) and cargo handling services and 'actions of a similar nature'.[17] Routine governmental action will never include, however, actions relating to the decision to award new or continue existing business.[18]

The anti-bribery provisions' two affirmative defences are that: (i) the payment was 'lawful under the written laws and regulations' of the foreign official's country; and (ii) the payment was to reimburse a foreign official for 'reasonable and bona fide expenditure[s], such as travel and lodging expenses', incurred in relation to the promotion or demonstration of the payor's products or services or the execution or performance of a contract between the payor and the foreign official's employer.[19]

Although this exception and these affirmative defences are certainly valid, one must approach them with caution. Their boundaries are not clearly delineated and the consequences of overstepping them are great. For instance, while it is acceptable to pay for a foreign official's travel for contract-related purposes (eg to train the official on how

12 *United States v Kay*, 200 F. Supp.2d 681 (SD Tex. 2002); *SEC v Mattson*, 01-cv-03106 (SD Tex. 2002).

13 *United States v Kay*, 359 F.3d 738, 755 (5th Cir. 2004). For unknown reasons, the SEC dismissed its appeal in the *Mattson* case (see n 12 above) after the *Kay* decision.

14 359 F.3d at 759.

15 15 USC §§ 78dd-1(b); 78dd-2(b); 78dd-3(b). In exempting these so-called 'grease payments', Congress noted that although 'payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments'. HR Rep. No. 95–640, at 8 (1977); see also S. Rep. No. 95–114, at 10 (1977).

16 15 USC §§ 78dd-1(f)(3); 78dd-2(h)(4); 78dd-3(f)(4).

17 15 USC §§ 78dd-1(f)(3); 78dd-2(h)(4); 78dd-3(f)(4).

18 15 USC §§ 78dd-1(f)(3); 78dd-2(h)(4); 78dd-3(f)(4).

19 15 USC §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).

to use a product), practices such as upgrading the official's flight accommodations, inviting his family members, detouring him to tourist destinations unrelated to the contract and providing him with 'pocket money' during the trip have all formed the basis of FCPA prosecutions.[20]

The accounting provisions

The FCPA's accounting provisions are two-fold. The 'books-and-records' provision requires that 'issuers' (as that term will be defined subsequently) 'make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer'.[21] The 'internal controls' provision requires that issuers 'devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that': (i) transactions are executed in accordance with management's directions; (ii) transactions are recorded in a manner that facilitates preparation of financial statements in accordance with generally accepted accounting principles and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's directions; and (iv) recorded assets are periodically compared to assets on hand with reconciliation of discrepancies.[22] The accounting provisions apply broadly to all records kept and internal controls maintained by US securities registrants, not just those relating to international transactions. Thus, the full extent of their reach is beyond the scope of this article.

Congress included the accounting provisions as a complement to the FCPA's anti-bribery provisions. The requirement that issuers keep and maintain accurate books-and-records addresses Congress's concern that, prior to the FCPA, issuers were using unrestricted 'off-the-books slush funds' to facilitate illicit payments to foreign officials.[23] The internal controls provision requires that issuers have organizational structures with controls designed to prevent improper payments.[24] It was Congress's belief that the accounting provisions, together with the anti-bribery provisions, would 'go a long way' towards enhancing public confidence in the securities markets that corporate recordkeeping is honest.[25]

To whom does the Foreign Corrupt Practices Act apply

The FCPA's accounting provisions apply to 'issuers', defined as any company that has securities registered with the SEC pursuant to Section 12, or that is required to file periodic reports with the SEC pursuant to Section 15, of the Securities Exchange Act of 1934.[26] Notably, this provision applies to foreign companies that sponsor American

20 See *United States v ABB Vetco Gray, Inc.*, 04-cr-00279 (SD Tex. 2004); *United States v Metcalf & Eddy, Inc.*, 99-cv-12566 (D. Mass. 1999).

21 15 USC § 78m(b)(2)(A).

22 15 USC § 78m(b)(2)(B).

23 HR Rep. No. 95–831, at 10 (1977).

24 S Rep. No. 95–114, at 11.

25 Ibid, at 7.

26 15 USC § 78m(b)(2).

Depository Receipts ('ADRs').[27] It also includes any wholly or majority-owned subsidiary (foreign or domestic) of an issuer. With respect to subsidiaries in which issuers have an ownership interest of 50% or less, issuers are only required to make 'good faith' efforts to exercise their influence to cause these minority-owned entities to maintain a system of internal accounting controls.[28]

The anti-bribery provisions generally apply more broadly. In addition to issuers,[29] these provisions also apply to 'domestic concerns'[30]—which include US citizens, nationals and residents, as well as business entities that have their principal place of business in the United States or which are organized under the laws of a state or territory of the United States—and foreign citizens and businesses who act or cause an act in furtherance of a corrupt payment within the territory of the United States.[31] The anti-bribery provisions also apply to any officer, director, employee, agent or stockholder of an issuer or domestic concern acting on behalf of the issuer or domestic concern.[32] In perhaps the most famous of the FCPA's agency cases, name partner Sonny Harsono of KPMG's Indonesian member firm, KPMG Siddharta Siddharta & Harsono, authorized—at the behest of an issuer client—an allegedly improper payment to an Indonesian tax official in exchange for reducing the client's tax bill.[33]

Although the anti-bribery provisions generally do not apply directly to foreign subsidiaries of issuers or domestic concerns (even wholly or majority-owned ones), such entities can nonetheless find themselves subject to these provisions if they act within the United States or act as an agent on behalf of the parent issuer. Their actions may even form the basis of liability for the parent issuer if the parent knew of or consciously disregarded a risk (eg ignoring a red flag) of the subsidiary's illicit payments.[34]

What are the consequences of violating the Foreign Corrupt Practices Act

As noted previously, violations of the FCPA have both criminal and civil ramifications. Criminal penalties for violating the anti-bribery provisions carry the potential for up to five years imprisonment and/or $100,000 in fines for individuals[35] and up to $2 million in fines for companies.[36] But the DOJ routinely seeks and obtains criminal fines substantially in excess of these statutory maximums by invoking the Alternative Fines

27 ADRs are receipts issued by US depository banks representing an interest in a foreign security held abroad by an agent of the depository. They effectively allow US investors to own foreign stock without having to engage in cross-border transactions.

28 15 USC § 78m(b)(6).

29 15 USC § 78dd-1(a), (g).

30 15 USC § 78dd-2(a), (i).

31 15 USC § 78dd-3(a). Acts within the United States subjecting foreign persons to liability under this provision have been as seemingly inconsequential as an e-mail transmitting a budget from which funds for improper payments were to be made. See *United States v Syncor Taiwan, Inc.*, 02-cr-01244 (CD Cal. 2002). See also discussion *supra* at 8.

32 15 USC §§ 78dd-1(a), (g); 78dd-2(a), (i).

33 *United States & SEC v KPMG Siddharta Siddharta & Harsono & Sonny Harsono*, 01-cv-03105 (SD Tex. 2001).

34 See eg *SEC v Tyco Int'l Ltd*, 06-cv-02942 (SDNY 2006) (holding Tyco responsible for bribes allegedly paid by its foreign subsidiary where Tyco failed to implement adequate controls 'despite its knowledge and awareness . . . that corruption and illicit payments were common practices in the foreign country where the unlawful payments were made').

35 Of course, individual liability under the FCPA must be premised on direct and knowing participation. A board member, for example, would not be liable under the FCPA by mere virtue of his or her supervisory status alone.

36 See 15 USC §§ 78dd-2(g); 78dd-3(e).

Act, which authorizes fines of up to twice the greater of the defendant's gain or the victim's loss from a criminal offence.[37]

Because of the Sarbanes Oxley Act of 2002,[38] the statutory penalties for criminal violations of the accounting provisions are much harsher than those for the anti-bribery provisions. Individuals face prison terms of up to 20 years along with fines of up to $5 million, and companies face criminal fines of up to $25 million.

The civil enforcement responsibilities for the FCPA are shared between the DOJ and SEC, with the SEC empowered to seek civil penalties and injunctive relief against issuers (and their agents) and the DOJ against domestic concerns and foreign persons.[39] In practice, the DOJ has brought relatively few civil actions, leaving the bulk of the statute's civil enforcement to the SEC. One reason for this—in addition to the fact that the DOJ has criminal enforcement alternatives where the SEC does not—may be that the maximum that the DOJ may seek as a civil penalty is $10,000 per violation, while the SEC may seek up to the greater of $100,000 for a natural person or $500,000 for an issuer and the 'gross amount of the pecuniary gain' from the offence.[40] Moreover, as an adjunct to its civil enforcement powers, the SEC has recently begun seeking disgorgement of ill-gotten profits in FCPA prosecutions.[41]

2. Recent FCPA enforcement

After averaging approximately three prosecutions per year between the DOJ and SEC from 1978 through 2000, FCPA enforcement has accelerated since 2001. In the past 19 months alone,[42] there have been a combined 35 FCPA cases filed by the DOJ and SEC. Some of the most significant of these recent cases are profiled subsequently.

Omega Advisors

On 6 July 2007, US hedge fund Omega Advisors, Inc. entered into a non-prosecution agreement[43] with the DOJ to resolve the government's investigation into Omega's investment in a privatization programme in the Republic of Azerbaijan. According to the agreement, Omega invested more than $100 million in an effort to privatize the State Oil Company of the Azerbaijan Republic ('SOCAR') while knowing that its investment partner—Victor Kozeny of Oily Rock Ltd and Minaret Group Ltd—had entered into arrangements with officials of SOCAR and the Azerbaijan State Property Commission, which oversaw the privatization programme, giving those officials a financial interest in

37 18 USC § 3571(d).

38 Pub L No. 107–204, 116 Stat. 745 (2002).

39 15 USC §§ 78u(d)(1) and 78ff(c) (issuers); 78dd-2(d), (g) (domestic concerns); 78dd-3(d), (e) (foreign persons).

40 Cf. 15 USC § 77t(d)(2) (SEC) with 15 USC §§ 78dd-2(g) and 78dd-3(e) (DOJ).

41 The first instance in which the SEC required disgorgement as a settlement condition was its 2004 enforcement action against ABB, Ltd See *SEC v ABB, Ltd*, 04-cv-01141 (DDC 2004). Now, this remedy is a common feature of SEC FCPA settlements, with the SEC seeking it in nearly half of its post-ABB actions.

42 1 January 2006 through 26 July 2007.

43 Non-prosecution agreements, together with deferred prosecution agreements, are a tool that the DOJ has increasingly employed in recent years to resolve corporate fraud investigations short of the company entering a guilty plea. For more on this subject, see F. Joseph Warin & Peter Jaffe, 'The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform', *Andrews Litig. Rep. on White-Collar Crime* 19 (2005).

SOCAR's privatization.[44] The items of value allegedly provided to the Azeri officials included millions of dollars in cash, the promise of a two-thirds share in any profits realized by Oily Rock from the SOCAR privatization, $300 million in shares of Oily Rock, $600,000 worth of jewelry and other luxury items and the payment of medical treatments in the United States.[45] Omega, which lost all of its investment when the SOCAR privatization effort failed, agreed to forfeit $500,000 to the DOJ as part of the non-prosecution agreement.

The Omega resolution is the most recent in a string of FCPA cases arising out of the failed attempt to privatize SOCAR. In 2004, former Omega partner Clayton Lewis pleaded guilty to a two-count criminal information charging him with violations of the anti-bribery provisions and conspiracy to commit the same.[46] In 2005, Victor Kozeny, President and Chairman of the Board of Oily Rock and Minaret, was indicted on anti-bribery charges and is presently awaiting extradition from the Bahamas.[47] Kozeny's two co-defendants, Frederic Bourke of Blueport International, Ltd and David Pinkerton of AIG's Global Investment Corporation, recently persuaded the court to dismiss the FCPA charges against them on statute-of-limitations grounds.[48] And finally, Hans Bodmer, a Swiss lawyer who advised Omega in the SOCAR privatization efforts, pleaded guilty in 2004 to money laundering charges stemming from his role in the Azeri scheme—including setting up Swiss bank accounts to receive $151 million in investment funds from the United States and then chartering jets to fly the $151 million in cash into Azerbaijan.[49]

The SOCAR cases raise a number of issues of specific interest to capital market participants, particularly the substantive and jurisdictional FCPA theories advanced by the DOJ. The government's substantive theory of FCPA liability for Lewis—and by extension through the principle of *respondeat superior*, Omega Advisors—is that Lewis invested in the SOCAR privatization effort while knowing that Kozeny had entered into arrangements giving Azeri officials an interest in the privatization and 'with the understanding that [he] was taking advantage of the arrangements that Kozeny had already set up'.[50] Under this theory, anyone who invests in a venture while 'knowing'[51]

44 US Department of Justice, 'U.S. Announces Settlement with Hedge Fund Omega Advisors, In. in Connection with Omega's Investment in Privatization Program in Azerbaijan', (6 June 2007).

45 *United States v Kozeny*, 05-cr-00518 (SDNY 2005).

46 *United States v Lewis*, 03-cr-00930 (SDNY 2003).

47 *United States v Kozeny*, 05-cr-00518 (SDNY 2005).

48 *United States v Kozeny*, 2007 US Dist. LEXIS 45590 (SDNY 21 June 2007). Prosecutions under the FCPA generally must be filed within five years of the completion of the crime. 18 USC § 3282. But the DOJ may seek a court order suspending the statute-of-limitations for up to three years while it makes an 'official request' (eg letter rogatory) from a foreign sovereign to obtain evidence located in a foreign country. 18 USC § 3292. Although the DOJ obtained such an order in connection with this investigation, the court held that the judicial tolling order was not obtained until after the statute-of-limitations on the FCPA counts had expired. *Kozeny*, 2007 US Dist. LEXIS at *33–34. Bourke and Pinkerton still face charges of making false statements to federal agents during the course of the investigation.

49 *United States v Bodmer*, 03-cr-00947 (SDNY 2003).

50 *United States v Lewis*, 03-cr-00930 (SDNY 2003), Plea Transcript at 14 (on file with the authors).

51 As discussed at page 2 above, the term 'knowing' encompasses willful blindness.

that the venture will receive an improper advantage by virtue of unlawful payments tendered to foreign officials will be liable under the FCPA.

The jurisdictional theory advanced in Kozeny's indictment is that Kozeny—a Czech national and Irish citizen who headed the operations of two companies (Oily Rock and Minaret) incorporated in the British Virgin Islands and based in Azerbaijan—is subject to the FCPA because the majority of the investors in Oily Rock and Minaret were US citizens. Because US citizens are 'domestic concerns' under 15 USC section 78dd-2(h)(1)(A) and because Kozeny was allegedly the agent of these investors, the DOJ asserts that he is an 'agent' of a 'domestic concern' subject to the FCPA's anti-bribery provisions pursuant to 15 USC section 78dd-2(a). This theory, while not yet tested before a judicial body, should grab the attention of anyone who solicits money from US citizens to invest in industries outside of the United States.

Si Chan Wooh

On 29 June 2007, Schnitzer Steel executive Si Chan Wooh pleaded guilty to a criminal conspiracy to violate the FCPA's anti-bribery and books-and-records provisions and entered into a civil settlement arising from the same conduct.[52] The DOJ and SEC filings allege that over a five-year period Wooh made and authorized more than $200,000 in corrupt payments to officials of government owned steel producers in China, and $1.7 million in bribes to managers of privately owned steel producers in China and South Korea, to induce these officials to purchase scrap metal from Schnitzer. Although the terms of Wooh's plea agreement are not yet public—he is currently scheduled to be sentenced on 17 September 2007—Wooh's SEC settlement requires him to disgorge approximately $15,000 in bonus commissions (plus pre-judgment interest of approximately $1,000) he received in connection with the tainted contracts and to pay a $25,000 civil penalty.

Wooh's guilty plea followed a criminal and administrative resolution by his employer in October 2006 arising from the same course of conduct. Schnitzer Steel entered into a deferred prosecution agreement with the DOJ and consented to an administrative cease-and-desist order from the SEC on anti-bribery and books-and-records charges.[53] Its Korean subsidiary, SSI International Far East, Ltd, pleaded guilty to criminal violations of the same provisions.[54] Schnitzer Steel paid $7.7 million to the SEC and SSI International paid $7.5 million to the DOJ in connection with these resolutions.

The Wooh case is significant for at least three reasons. First, it is exemplary of a trend in FCPA enforcement of targeting individual corporate officers, even after the successful prosecution of their employers. Nineteen of the 35 defendants in FCPA actions filed since 1 January 2006 have been individuals, including a sitting United States Congressman.[55]

52 *United States v Wooh*, 07-cr-00244 (D Or. 2007); *SEC v Wooh*, 07-cv-00957 (D Or. 2007).

53 *United States v Schnitzer Steel Indus., Inc.* (D Or. 2006) (deferred prosecution agreement); *In the Matter of Schnitzer Steel Indus., Inc.*, Admin. Proc. File No. 3-12456 (16 October 2006).

54 *United States v SSI Int'l Far East, Ltd*, 06-cr-00398 (D Or. 2006).

55 *United States v Jefferson*, 07-cr-00209 (ED Va. 2007).

Sanctions in these actions have been severe—with jail terms as high as three years[56] and financial assessments as high as $114,675.[57] But even these stiff sanctions fall well short of the highest penalties doled out in the history of individual FCPA prosecutions: seven years imprisonment and $1,741,453 in criminal fines in the 1994 prosecution of Herbert Steindler.[58]

Second, the Wooh case is significant because it demonstrates that even payments to private, non-government officials can violate the FCPA if they are not accurately accounted for in the company's books-and-records. According to the SEC's complaint, Wooh caused his employer to violate the books-and-records provision with respect to the bribes paid to private industry members 'by failing to properly account for and disclose the bribes in [Schnitzer's] internal records and public filings'.

Third, the Wooh case—albeit a negotiated settlement and thus without formal precedential effect—presents an expansive interpretation of the books-and-records provision. Included in the criminal information is a chart that details the descriptions of the company's accounting entries for the payments to the foreign officials. Some of these payments were logged as 'Gratuity to Customer Representative' and 'Gratuity Commission to Customer'. It is difficult to posit how Schnitzer Steel could have more precisely recorded these transactions, suggesting that the DOJ views the books-and-records provision as requiring not only an objectively accurate description, but also a normative tag (eg 'bribe') when recording an improper payment.

Baker Hughes

In the largest FCPA settlement to date, on 26 April 2007 the DOJ and SEC announced criminal and civil actions—worth a combined $44 million—against Houston-based oilfield services contractor Baker Hughes, Inc. and its wholly owned subsidiary Baker Hughes Services International, Inc. ('BHSI'). Baker Hughes and BHSI acknowledged in their respective resolutions with the DOJ that BHSI paid approximately $4.1 million to an Isle of Man-based consulting firm knowing that portions of these payments were intended to bribe an official of Kazakhoil, then Kazakhstan's state oil company, to influence this official in awarding business to BHSI. Baker Hughes's settlement with the SEC covered a broader range of conduct, involving contracts in Angola, Indonesia, Nigeria, Uzbekistan and Russia in addition to Kazakhstan, and implicated additional Baker Hughes subsidiaries.

In its settlement with Baker Hughes, the DOJ agreed to defer prosecution for a three-count criminal information charging the company with violating the FCPA's anti-bribery provisions, conspiring to violate the same, and willfully falsifying its books and records.[59]

56 *United States v Salam*, 06-cr-00157 (DDC 2006).

57 *SEC v Samson*, 06-cv-01217 (DDC 2006) ($50,000 civil penalty plus $64,675 in disgorgement and pre-judgment interest).

58 *United States v Steindler*, 94-cr-00029 (SD Oh. 1994). Although this was an FCPA prosecution, the sentence was imposed for violations of the money laundering statute (18 USC § 1956). The highest jail term ever imposed for an FCPA count of conviction is five years. See *United States v Murphy*, 02-cr-02908 (SD Tex. 2002). The highest monetary assessment for an FCPA count of conviction is $400,000 in restitution. *United States v Pitchford*, 02-cr-00365 (DDC 2002).

59 *United States v Baker Hughes, Inc.*, 07-cr-00130 (SD Tex. 2007).

Baker Hughes's settlement with the SEC included charges that it violated the FCPA's anti-bribery, books-and-records and internal controls provisions, and that it violated a cease-and-desist order entered in connection with a 2001 FCPA settlement with the SEC.[60] BHSI pleaded guilty to a three-count criminal information charging it with violating the FCPA's anti-bribery provisions, conspiring to violate the same, and aiding and abetting in the falsification of parent company Baker Hughes's books-and-records.[61]

In connection with the SEC settlement, Baker Hughes agreed to: (i) disgorge nearly $20 million in profits from the relevant transactions; (ii) pay more than $3 million in prejudgment interest; (iii) pay a $10 million civil penalty for violating the 2001 cease-and-desist order; (iv) cease and desist from future violations of the FCPA; and (v) retain an independent compliance consultant to review Baker Hughes's compliance programme and monitor the implementation of new internal controls related to the FCPA. BHSI agreed to pay an $11 million criminal fine in connection with its guilty plea. There was no monetary assessment associated with Baker Hughes's deferred prosecution agreement, but Baker Hughes agreed to abide by various terms of probation, including the independent compliance consultant, during the deferred prosecution agreement's two-year term. If Baker Hughes violates these terms, it will be subject to prosecution for the presently deferred three-count criminal information.

Separate from the respective corporate resolutions, the SEC charged Roy Fearnley, Baker Hughes's former Business Development Manager for Kazakhstan, with aiding and abetting Baker Hughes's FCPA violations. Fearnley, a British national residing in Kazakhstan, has yet to enter an appearance.

In addition to setting the record as the highest FCPA monetary resolution to date, the Baker Hughes case is also significant for several other reasons. First, and foremost, the SEC's assessment of a $10 million civil penalty for Baker Hughes's violation of its 2001 cease-and-desist order is the first of its kind in the FCPA context. Noting that Baker Hughes committed the instant FCPA violations while subject to the cease-and-desist order, SEC Director of Enforcement Linda Thomsen said, 'The $10 million penalty demonstrates that companies must adhere to Commission Orders and that recidivists will be punished.'[62] Because SEC orders are of indefinite duration, imposition of such an order or consent to a judicial injunction may expose a company to additional jeopardy for a significant period of time. Indeed, many US corporations remain subject to FCPA injunctions issued several decades ago.

A second noteworthy point about Baker Hughes's resolution is the wide-ranging scope of the SEC settlement. With the exception of a few very early cases,[63] up until approximately 2002 FCPA resolutions typically focused on a limited set of events taking

60 *SEC v Baker Hughes, Inc.*, 07-cv-01408 (SD Tex. 2007).

61 *United States v Baker Hughes Servs. Int'l, Inc.*, 07-cr-00129 (SD Tex. 2007).

62 SEC Release 2007–77, 'SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order', (26 April 2007).

63 See *SEC v Page Airways, Inc.*, 78-cv-00645 (DDC 1978); *SEC v Int'l Sys. & Controls Corp.*, 79-cv-01760 (DDC 1979); *SEC v Tesoro Petroleum Corp.*, 80-cv-02961 (DDC 1980).

place in one country. Now it is commonplace for companies—especially those that operate in 'high risk' industries and/or nation states[64]—that identify serious FCPA concerns in one nation to expand their internal inquiry to examine their operations in other parts of the world.

The Baker Hughes resolution also illustrates the desire of US authorities that defendants engage an independent compliance consultant to assure future FCPA compliance. At Baker Hughes's expense, an outside consultant chosen by Baker Hughes but approved by the DOJ and SEC will undertake a comprehensive review of the company's internal controls. The consultant will issue a report with recommendations that Baker Hughes must adopt unless it can convince the consultant that they are unduly burdensome and that a less burdensome alternative would satisfy the consultant's concerns equally as well. The consultant will then periodically review the implementation of the recommendations over the next three years. If at any time during this period the consultant discovers additional violations of the FCPA, the consultant will be obligated to report them to the DOJ and SEC.

Appointment of an independent compliance consultant is a significant corporate event. Without discounting the utility of a new and focused perspective on FCPA compliance that should (hopefully) prevent future FCPA violations, compliance consultants are expensive, may continue to distract employees and officers—who by that point have already undergone a substantial internal and/or federal investigation—from their business mission, and have an obligation to report any new violations to the US government. Some companies have managed to avoid the imposition of compliance consultants by voluntarily revamping their compliance systems and/or retaining their own consultants prior to reaching a resolution with government authorities.[65] This may well be a worthwhile alternative for companies that discover FCPA problems.

Dow Chemical

On 13 February 2007, the SEC filed settled civil and administrative actions charging The Dow Chemical Company with having violated the FCPA's books-and-records and internal controls provisions.[66] According to the civil complaint, DE-Nocil Crop Protection, Ltd, a 'fifth-tier foreign subsidiary' of Dow Chemical's based in Mumbai, India, provided approximately $200,000 in 'improper payments and gifts' to federal and state agriculture officials in India to facilitate the licencing approval and distribution of its pesticides. Dow Chemical consented to the entry of an administrative cease-and-desist order and agreed to pay a $325,000 civil penalty.

The primary significance of this settlement lies in the aggressive assertion of jurisdiction by the SEC over a matter with little connection to the United States.

64 Transparency International, 'TI Corruptions Perceptions Index 2006', available at <http://www.transparency.org/content/download/10825/92857/version/1/file/CPI_2006_presskit_eng.pdf> accessed 25 July 2007.

65 See eg *In the Matter of The Dow Chemical Co.*, Admin. Proc. File No. 3-12567 (13 February 2007).

66 *SEC v The Dow Chemical Co.*, 07-cv-00336 (DDC 2007); *In the Matter of The Dow Chemical Co.*, Admin. Proc. File No. 3-12567 (13 February 2007).

The complaint identifies DE-Nocil as a 'fifth-tier foreign subsidiary' of Dow Chemical. Moreover, the administrative cease-and-desist order explicitly states that DE-Nocil's payments to Indian officials were made 'without knowledge or approval of any Dow employee', thus removing an agency theory of liability for Dow Chemical. The SEC's assertion of jurisdiction must therefore have been premised on the theory that DE-Nocil's books-and-records were ultimately 'folded-up' five levels into Dow Chemical's ledgers—by which point they would have been aggregated and re-aggregated several times over—and that Dow Chemical, an employer of 43,000, was responsible for the failure of low-level sales employees to follow corporate policies some 8,000 miles removed from Midland, Michigan where said policies were formulated.

The Dow Chemical settlement is also noteworthy for the insignificant amount of the payments to the foreign officials. According to the SEC's complaint, most of the improperly recorded payments to the Indian officials were 'well under $100'. Virtually impossible to identify during an audit, double digit payments forming the basis for FCPA liability demonstrates the importance of impressing FCPA compliance upon line-level personnel responsible for authorizing and booking charges in high-risk countries.

El Paso

On 7 February 2007, the DOJ and SEC announced that they had reached settlements with El Paso Corporation arising out of El Paso's involvement in the United Nations Oil-for-Food Programme ('OFFP' or the 'Programme').[67] According to the SEC's complaint, El Paso violated the books-and-records and internal controls provisions by purchasing oil from third parties that had themselves made approximately $5.5 million in 'illegal surcharge payments' in connection with their own purchase of the oil directly from the then Iraqi government. El Paso knew or should have known, the complaint states, that these third parties had paid the 'kickbacks' and were passing the surcharges through to El Paso. El Paso then improperly recorded the whole of the purchase price from these third parties as 'cost of goods sold'.

In settling the SEC's complaint, El Paso agreed to pay a $2,250,000 civil penalty and to disgorge $5.48 million in 'profits', the latter to be satisfied as part of El Paso's agreement with the DOJ. El Paso's resolution with the DOJ took the form of a non-prosecution agreement whereby El Paso agreed to forfeit the $5.48 million 'in illegal surcharges paid . . . by third parties from whom El Paso purchased Iraqi oil' to the United States for transfer to the Development Fund of Iraq as 'restitution for the benefit of the people of Iraq'.[68]

The El Paso settlement is significant because it is the first of what may well be many FCPA cases arising from the OFFP. On 27 October 2005, the Independent Inquiry Committee ('IIC'), an independent international body appointed by then UN Secretary General Kofi Annan, published its final report detailing the results of its 16-month

67 *SEC v El Paso Corp.*, 07-cv-00899 (SDNY 2007).

68 US Department of Justice, 'U.S. Announces Oil-for-Food Settlement with El Paso Corporation', available at <http://newyork.fbi.gov/dojpressrel/pressrel07/settlement020707.htm> accessed 25 July 2007.

investigation into alleged corruption surrounding the OFFP.[69] The IIC accused 2,253 companies worldwide of having provided more than $1.8 billion in illicit payments to the Iraqi government.

Nearly two dozen companies have publicly disclosed that they are under investigation by the DOJ and/or SEC for OFFP conduct. Although El Paso is the first to settle FCPA-related charges arising from the OFFP scandal, several others are reportedly nearing a settled resolution.[70] It is interesting to note, however, that what may be the largest FCPA investigation to date may not even involve the FCPA's bread-and-butter: anti-bribery charges. That is because the OFFP investigation presents the unusual circumstance where the allegedly unlawful payments were demanded by and made to a foreign government, not a foreign official.[71]

Vetco International

On 6 February 2007, the DOJ announced that three subsidiaries of Vetco International Ltd had agreed to plead guilty—a fourth entered into a deferred prosecution agreement—to violations of the anti-bribery provisions and conspiracy to commit the same.[72] According to the plea agreements, from 2002 to 2005 the Vetco subsidiaries authorized a freight forwarding company to make at least 378 separate payments totaling $2.1 million to Nigerian customs officials in order to induce these officials to afford them preferential treatment in the customs process. The $26 million combined criminal fine associated with the guilty pleas is the largest in the history of FCPA. The Vetco subsidiaries were also required to retain an independent consultant to assist them in creating and maintaining a robust compliance programme.

The Vetco case illustrates the potential complications that businesses face when acquiring companies with unresolved FCPA liability. In 2003, the predecessor to one of the Vetco subsidiaries, ABB Vetco Gray UK, uncovered evidence of FCPA violations in Nigeria while negotiating its acquisition by a consortium of investors. ABB Vetco Gray UK management and the acquiring investment group thereafter conducted a comprehensive FCPA compliance review. According to a DOJ report, ABB Vetco Gray and its prospective acquirers reviewed more than four million pages of documents, conducted over 165 interviews of current and former employees, and visited more than 21 countries to analyze hundreds of thousands of transactions stored locally as part of their internal investigation.[73]

69 Independent Inquiry Committee, 'Report on the Manipulation of the Oil-for-Food Programme', (27 October 2005), available at <http://www.iic-offp.org/story27oct05.htm> accessed 25 July 2007.

70 See Claudio Gatti and Jad Mouawad, *Chevron Seen Settling Case on Iraq Oil, N.Y. Times* (8 May 2007) (reporting that Chevron is nearing a $25 – $30 million settlement whereby it will admit that it 'should have known that kickbacks were being paid . . . on oil it bought from Iraq'); Johnson Controls, Inc., 'SEC Form 10-Q Filing' (8 May 2007) (reporting that the company 'has begun discussions with the relevant authorities to explore how these matters may be resolved'); Ingersoll-Rand Co. Ltd, 'SEC Form 10-Q Filing' (10 May 2007) (reporting a 27 March 2007 meeting with DOJ and SEC officials whereat the company 'began discussions concerning the resolution of this matter with both the SEC and DOJ').

71 An alternative ground that the anti-bribery provisions were not violated by the payments to the Iraqi government is that the payments were lawful under Iraqi law—a complete defence under the FCPA. See 15 USC § 78dd-1(c)(1); see also below n 101.

72 *United States v Vetco Gray Controls, Inc., Vetco Gray UK Ltd, and Vetco Gray Controls Ltd*, 07-cr-00004 (SD Tex. 2007).

73 US Department of Justice, *FCPA Review Op. Proc. Rel. 2004–02*, 12 July 2004.

Ultimately, in 2001, ABB Vetco Gray UK settled with the DOJ and SEC on criminal and civil anti-bribery, books-and-records and internal controls charges relating to the company's operations in Nigeria.[74] The acquiring companies then obtained a written opinion from the DOJ that they would not be prosecuted for the pre-acquisition conduct of ABB.[75] But when the DOJ discovered in connection with the 2007 FCPA case against Vetco Gray UK that the payments in Nigeria had in fact continued through at least mid-2005—a full year after the acquisition—it levied the highest criminal fine in FCPA history. For more on the subject of FCPA liability arising from M&A activity, see Section 5 subsequently.

Statoil

On 13 October 2006, the DOJ and SEC announced that Statoil ASA, a Norwegian oil company whose ADRs are traded on the New York Stock Exchange, had agreed to pay a total of $21 million to settle criminal and administrative charges of violating the anti-bribery and accounting provisions. Statoil admitted that it made two bribe payments totalling $5.2 million through a third-party consultant to an Iranian official in order to obtain non-public information—such as competitors' bid documents—relating to a lucrative procurement from the Iranian government.

Pursuant to a deferred prosecution agreement with the DOJ, Statoil agreed to a $10.5 million criminal penalty and the appointment of an independent compliance consultant who will review and report on Statoil's FCPA compliance.[76] In the parallel SEC administrative proceeding, Statoil consented to the entry of an administrative order requiring the company to cease and desist from committing future FCPA violations, and to disgorge $10.5 million.[77]

The Statoil matter marked the first time that the DOJ has taken criminal enforcement action against a foreign issuer for violating the FCPA.[78] Assistant Attorney General Alice Fisher, head of the DOJ's Criminal Division, noted that this case was intended to send 'a clear message' to foreign companies trading on the American exchanges that they too must comply with US anti-bribery laws, adding, '[t]his prosecution demonstrates the Justice Department's commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope'.[79]

74 *United States v ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd*, 04-cr-00279 (SD Tex. 2004); *SEC v. ABB Ltd*, 04-cv-01141 (DDC 2004).

75 See n 73 above. Issuers and domestic concerns may seek written opinions from the DOJ as to whether the DOJ would bring an enforcement action for described prospective conduct involving the requestor. See 28 CFR part 80.

76 *United States v Statoil, ASA*, 06-cr-00960 (SDNY 2006).

77 *In the Matter of Statoil, ASA*, Admin. Proc. File No. 3-12453 (13 October 2006).

78 Alice Fisher, Assistant Attorney General, US Department of Justice, 'Prepared Remarks at the ABA National Institute on the FCPA' (16 October 2006), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/speech/2006/10-16-06AAGFCPA Speech.pdf> accessed 25 July 2007.

79 US Department of Justice, 'U.S. Resolves Probe Against Oil Company That Bribed Iranian Official' (13 October 2006), available at <http://www.usdoj.gov/opa/pr/2006/October/06_crm_700.html> accessed 25 July 2007.

3. International foreign bribery enforcement

International conventions against foreign bribery

For many years, the FCPA was the only law directed at punishing the extraterritorial bribery of foreign officials. But even the FCPA was incapable of reaching every instance of multinational graft, subjecting only those companies with some nexus to the United States to its restrictions. Congress, as part of the 1988 amendments to the FCPA, expressed its concern that US companies were being disadvantaged in this regard vis-à-vis their international competitors, some of which were not only unrestricted in their domestic laws from international bribery, but were able to deduct the cost of such bribes from their annual tax assessments. Accordingly, Congress directed the Executive Branch to commence negotiations with the Organization of Economic Cooperation and Development ('OECD') regarding the development of an international treaty covering acts then prohibited under the FCPA.[80]

After nearly a decade of US lobbying for an international counterpart to the FCPA, on 21 November 1997 34 countries signed the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[81] Modelled in large part on the FCPA, the OECD Convention requires, inter alia, that signatories undertake to establish that it is a criminal offence under domestic law to:

> promise or give any undue pecuniary or other advantage . . . to a foreign official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.[82]

The Convention also requires signatories to adopt legislation similar to the FCPA's accounting provisions[83] and provides for extradition among Member States as well as for other forms of international legal assistance.[84] Currently there are 38 signatories to the Convention, including all 30 members of the OECD and eight non-OECD Member States.[85]

In addition to the OECD Convention, a number of significant regional treaties concerning international bribery have taken effect across the globe in recent years, including: the Inter-American Convention Against Corruption;[86] the European Union's Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union;[87] the Council on Europe's Criminal Law Convention on Corruption[88] and Civil Law Convention on Corruption;[89] and the African Union Convention on Preventing and

80 HR Rep. No. 100–576, at 924 (1988).
81 37 ILM 1 (1998).
82 Ibid, at Art 1.
83 Ibid, at Art 8.
84 Ibid, at Art 9–10.
85 A full list of signatories is available at: <http://www.oecd.org/dataoecd/59/13/1898632.pdf> accessed 25 July 2007.
86 35 ILM 724 (1996).
87 OJ C195 (1997).
88 ETS No. 173; 38 ILM 505 (1998).
89 ETS No. 174 (1999).

Combating Corruption.[90] The most recent development on the international treaty front is the United Nations Convention Against Corruption.[91] Although it is too early to assess the impact of this treaty on international foreign bribery enforcement—it was ratified but 18 months ago on 14 December 2005—its symbolic importance alone is undeniably important.

International prosecutions for foreign bribery

With legislation passed pursuant to the various international conventions discussed before (primarily the OECD), the vast majority of the world's major economies have implemented laws against foreign corruption.[92] But these legislative efforts notwithstanding, prosecutions outside of the United States have been relatively slow to develop. An OECD working group chartered to assess the actual enforcement of anti-bribery laws by OECD signatories has reported concerns about whether the application of sanctions to date has been 'effective, proportionate and dissuasive', and concluded that there appears to be a 'lack of a firm, proactive approach to investigating and prosecuting foreign bribery'.[93] That said, European authorities have become much more active of late. Several recent, high profile investigations are discussed subsequently:

Oil-for-Food programme investigations (multi-national)

With a budget of $36 million, a staff of nearly 100 attorneys, accountants and law-enforcement agents, and offices in Baghdad, New York and Paris, the IIC's OFFP investigation, referenced at pages 12–13 above, is likely the largest international corruption investigation ever. The IIC's mandate was to investigate: (i) mismanagement and maladministration of the OFFP by UN personnel and agents; (ii) illicit or corrupt activities involving the OFFP by UN officials, personnel or agents; and (iii) illicit or corrupt activities involving the OFFP by UN contractors, purchasers of oil and providers of humanitarian aid.[94] The OFFP was the UN's attempt to maintain the integrity of economic sanctions against the regime of Saddam Hussein—initially imposed as a result of the 1990 Iraqi invasion of Kuwait[95] and thereafter maintained because of Hussein's refusal to comply with post-Gulf War conditions for disarmament and weapons inspections[96]—while at the same time ameliorating the devastating effect said sanctions were having on the Iraqi people. Although initially devised as a

90 43 ILM 1 (2004).
91 2003 UN Doc A/58/422; 43 ILM 37 (2004).
92 Notable exceptions include China and Russia.
93 OECD Working Group on Bribery, 'Annual Report 2006', at 11, available at <http://www.oecd.org/dataoecd/53/29/38865251.pdf> accessed 25 July 2007. Another recent report on OECD signatory enforcement by anti-corruption advocate Transparency International likewise found that there has been 'little or no enforcement in almost 2/3 of the nations [studied]'. Transparency International, '2006 TI Progress Report: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials', at 3 (26 June 2006), available at <http://www.transparency.org/content/download/7489/46695/file/TI_SecondOECDProgressReport.pdf> accessed 25 July 2007.
94 Independent Inquiry Comm., 'Status Report', at 3 (9 August 2004), available at <http://www.iic-offp.org/documents/IICSR.pdf> accessed 25 July 2007.
95 S/RES/661 (6 August 1990).
96 S/RES/687 (3 April 1991).

'temporary measure', the OFFP lasted seven years—from 1996 through the fall of Hussein's regime in 2003—and administered $64.2 billion in petroleum sales and $37 billion in humanitarian aid.[97]

The IIC found corruption within the UN administration reached as high as Benon Sevan, Under-Secretary-General of the UN and Executive Director of the Office of the Iraqi Programme, the UN agency charged with administering the OFFP.[98] As significant as the IIC's findings of internal UN corruption and general maladministration were, the true core of the IIC's findings involved the Iraqi government's imposition of surcharges on the Programme's oil and humanitarian contractors. Beginning in 2000, the Iraqi government conditioned the right to purchase its oil on the purchaser paying a 'surcharge'—generally between 10 and 30 cents per barrel—to the Iraqi government.[99] On the humanitarian side of the Programme, Iraq began requiring contractors to 'kickback' 10% of the value of their contracts to the Iraqi government.[100] In all, the IIC estimated that the Iraqi government collected nearly $1.8 billion from OFFP contractors through these schemes.

For companies without ties to the United States, where the DOJ and SEC immediately initiated their own investigations as described above, the IIC reports were initially little more than an international embarrassment. Although the IIC's findings generated substantial negative press for OFFP contractors, the reports had no legal effect and most nations took little to no initiative to pursue their own investigations.[101] On 9 December 2006, more than a year after the IIC released the last of its investigative reports, former IIC Commissioner Mark Pieth publicly rebuked the international community for its failure to prosecute OFFP-related corruption cases.[102] Now, more than 18 months removed from the IIC's work, the international response to the OFFP corruption allegations finally appears to be making some headway.

97 Independent Inquiry Comm., 'The Management of the United Nations Oil-for-Food Programme', Vol. II at 18–19 (7 September 2005), available at: <http://www.iic-offp.org/Mgmt_Report.htm> accessed 25 July 2007. The remainder of the oil sales was allocated to a fund to compensate victims of the Gulf War as well as to cover the costs of weapons inspectors and Programme administration.

98 Independent Inquiry Comm., 'Third Interim Report', Ch. 1 (8 August 2005), available at: <http://www.iic-offp.org/documents/IICSR.pdf> accessed 25 July 2007. Sevan has since been indicted in Manhattan federal district court on charges relating to his alleged receipt of approximately $160,000 from an OFFP oil trader in exchange for brokering deals with the Iraqi government to ensure that the trader received valuable rights to purchase oil from the Iraqi government. *United States v Sevan*, 05-cr-00059 (SDNY 2007).

99 Independent Inquiry Comm., 'The Manipulation of the United Nations Oil-for-Food Programme', Ch. I at 2 (27 October 2005), available at <http://www.iic-offp.org/story27oct05.htm> accessed 25 July 2007.

100 Ibid, at 8.

101 A notable exception to the early international acquiescence is Australia, whose Australian Wheat Board ('AWB') was perhaps the most prominently featured of all companies in the IIC's reports—accused of making nearly $222 million in illicit payments in connection with $2.3 billion in OFFP contracts. Australia immediately convened its own investigatory body, commonly known as the Cole Commission after Chairman and retired Australian judge Terrence P. Cole, to investigate AWB's involvement in the OFFP. Ultimately, the Cole Commission concluded that there was 'no reasonable basis' for a prosecution under Australia's OECD Convention-implementing legislation because the payments had been levied on behalf of the Iraqi government, rendering them 'akin to a tariff imposed by the Iraqi government on all goods imported under the Oil-for-Food Programme'. *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, App. 26, Vol. V, at 347–48, available at: <http://www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report> accessed 25 July 2007. As such, the payments were lawful under Iraqi law—a complete defence under Australia's OECD Convention-implementing law much as it would be under the FCPA. See 15 USC § 78dd-1(c)(1).

102 Adam Jones and Hugh Williamson, 'Volcker author attacks lack of oil-for-food lawsuits', *Financial Times* (9 December 2006).

- *Italy:* On 18 April 2007, Italian police conducted coordinated raids of the Milan offices of five Italian companies with OFFP contracts.[103]
- *France:* On 11 April 2007, a French magistrate announced that he had completed his preliminary investigation of Total SA's OFFP involvement. Preliminary charges have been filed in that matter against 15 people, including Total CEO Christophe de Margerie, former French Interior Minister Charles Pasqua, former French UN Ambassador Jean-Bernard Merimee and former Secretary General of the French Foreign Ministry, Serge Boidevaix.[104]
- *United Kingdom:* In February 2007, UK Attorney General Lord Goldsmith announced the formation of a 50-person team within the Serious Fraud Office to investigate British companies identified in the IIC reports, including pharmaceutical giants GlaxoSmithKline, AstraZeneca and Eli Lilly, and international oil trader Mabey & Johnson.[105]
- *Germany:* On 29 December 2006, German prosecutors announced a November raid on the Munich offices of industrial gas company Linde as part of an OFFP investigation.[106] Then, in January 2007, German authorities reported the existence of a preliminary investigation of the OFFP involvement of industrial conglomerate Siemens AG.[107]
- *New Zealand:* In December 2006, New Zealand's Serious Fraud Office announced that it had visited the IIC's offices to review evidence compiled by the IIC relating to the three New Zealand companies linked to surcharge payments: Fonterra, Ecroyd Beekeeping Supplies and JB Sales. Progress in the investigation is uncertain, however, as in March 2007 the press reported that the SFO had not contacted any of the companies regarding its investigation.[108]

Siemens (Germany)

On 15 November 2006, German authorities conducted coordinated raids of as many as 30 offices and homes of Siemens AG employees searching for evidence of violations of Germany's Act on Combating Bribery of Foreign Public Officials. What has emerged is a wide-ranging and multi-faceted inquiry reportedly focusing on the operations of Siemens's telecommunications unit in Cameroon, Egypt, Greece, Indonesia, Kuwait, Saudi Arabia and Vietnam and that allegedly involves as much as €420 million in suspicious payments dating back seven years.[109]

In an unrelated case involving Siemens, German prosecutors just recently convicted a former finance chief and a consultant from the power generation unit of foreign bribery in a case involving contracts with the Italian utility company Enel SpA.[110] These and other corruption investigations, including the OFFP inquiry referenced above, are presently pending.

BAE Systems (UK and US)

Perhaps the most controversial ongoing foreign corruption investigation involves BAE Systems. The United Kingdom's Serious Fraud Office is reported to have spent more than

103 Claudio Gatti, *Cinque Aziende Perquisite per Oil for Food, Il Sore 24 Ore* (Milan, 27 April 2007).

104 Pierre-Antoine Souchard, *French Judge Ends Oil-for-Food Probe, Associated Press* (12 April 2007).

105 Christopher Hope, *British Firms Face Iraq Fraud Inquiry, The Daily Telegraph* (London, 15 February 2007); David Leigh and Rob Evans, 'Oil-for-food scandal: Firms accused of bribing Saddam to be investigated by fraud office', *The Guardian* (London, 14 February 2007).

106 Gerrit Wiesmann, *Prosecutors Raided Linde offices in Iraq Bribery Probe, Financial Times* (30 December 2006) 18.

107 *Siemens Investigated Over Iraq Oil-for-Food Scheme, New Zealand Herald* (16 January 2007).

108 *Slow Progress on Oil-for-Food Probe, New Zealand Herald* (22 March 2007).

109 See David Crawford and Mike Esterl, *Widening Scandal: At Siemens, Witnesses Cite Pattern of Bribery, Wall Street Journal* (New York, 31 January 2007) A1.

110 News Roundup, *Siemens Figures Are Found Guilty in Bribery Case, Wall Street Journal* (New York, 15 May 2007) C6.

two years (and £2 million) investigating allegations that Britain's largest defence contractor funnelled more than £1 billion to Saudi-controlled bank accounts in Washington, DC for the benefit of members of the Saudi royal family. The payments were allegedly made in connection with the 20-year, £43 billion al Yamamah contract under which BAE provided Saudi Arabia with more than 100 warplanes.

But on 14 December 2006, Attorney General Lord Goldsmith directed the SFO to close its investigation, citing the potential for 'serious damage to UK/Saudi security, intelligence and diplomatic cooperation'. Lord Goldsmith stated that, in this instance, 'the wider public interest' outweighed 'the need to maintain the rule of law'.[111] He maintained, however, that the SFO would continue to investigate BAE contracts in Romania, Chile, the Czech Republic, South Africa and Tanzania.[112] Acknowledging responsibility for this move, then Prime Minister Tony Blair explained that failure to terminate the inquiry would have led to 'the complete wreckage of a vital strategic relationship and the loss of thousands of British jobs . . .'.[113]

But that would not be the end of the al Yamamah matter for BAE. On 26 June 2007, BAE confirmed media reports that the DOJ has opened its own investigation into the Saudi payments.[114] And on 15 July 2007, SFO Director Robert Wardle confirmed reports that the DOJ had filed a formal request for assistance under its Mutual Legal Assistance Treaty with the United Kingdom.[115] According to one anonymous US government source, the DOJ will be looking not only at the al Yamamah deal, but also more broadly at BAE's operations in Romania, South Africa, Tanzania, Chile, the Czech Republic, Qatar, Argentina and the British Virgin Islands.[116]

4. Special focus—acquisition due diligence

Given the increasing level of cross-border M&A activity, the FCPA and other international corruption statutes pose important issues for prospective acquirers by virtue of the liabilities they may assume as a matter of corporate law and of institutional culture. There are at least two risks attendant to every acquisition that are significant for FCPA purposes: (i) that the acquirer will assume criminal and/or civil liability for the unlawful pre-acquisition conduct of the target and (ii) that the acquirer will be unable to reform any wayward business practices of the target in time to prevent unlawful payments post-acquisition.[117]

111 See David Leigh and Rob Evans, *National Interest Halts Arms Corruption Inquiry, The Guardian* (London, 15 December 2006).
112 Ibid.
113 David Leigh and Rob Evans, *BAE Faces Criminal Inquiry in US Over £1 bn Payments, The Guardian* (London, 14 June 2007).
114 BAE Systems PLC, 'US Department of Justice Investigation', (26 June 2007), available at <http://production.investis.com/investors/news/regulatory> accessed 25 July 2007.
115 Sylvia Phiefer, *US asks UK for Help on BAE, The Sunday Telegraph* (London, 15 July 2007).
116 David Leigh and Rob Evans, *BAE Faces Criminal Inquiry in US Over £1 bn Payments, The Guardian* (London, 14 June 2007).
117 Daniel J. Plaine and Judith A. Lee, *Making Way for International Business Integrity and Compliance Due Diligence in Cross-Border Acquisitions, The Metropolitan Corporate Counsel* (May 2007).

The principle of successor liability

Under traditional principles, a 'successor' is a 'corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation'.[118] Whether an acquiring company vests with the liabilities of a target depends, in the first instance, on the structure of the corporate transaction. Under US law, if the acquisition is a merger or consolidation—meaning that the target loses its corporate form and is absorbed entirely into the acquiring company—the acquiring company assumes the liabilities of the target.[119] But if the acquisition is structured as an asset sale or stock purchase, absent an express agreement to do so the acquiring company generally does not assume the liabilities of the target as long as it continues in its separate existence.[120]

The prospect of imposing successor liability on an acquiror itself 'innocent' of the conduct at issue bears broad policy ramifications, including the potential to chill market efficient M&A activity. Fortunately, the DOJ and SEC have exercised restraint in this regard, with only two SEC civil/administrative actions against an acquiror for pre-acquisition conduct of a target between them in the history of FCPA enforcement.[121] Even in these two instances, the 2004 acquisition of InVision Technologies by the General Electric Company and the 2007 acquisition of Delta & Pine by Monsanto, the conduct at issue was discovered prior to the closing date of the acquisition, presumably meaning that GE and Monsanto at least had the option of walking away from the acquisitions (and their attendant FCPA liability).

But just because US enforcement authorities have thus far exercised their discretion not to bring successor liability prosecutions does not mean that the prospect alone does not have significant M&A implications. One recent acquisition was reportedly abandoned because the putative target was unable to resolve its FCPA issues prior to the expected closing date with the would-be acquirer.[122] At least two more acquisitions in recent years—although ultimately consummated—were delayed until settlements were reached with the targets resolving their respective FCPA liabilities.[123] Shortly after the

118 Bryan A. Garner, (ed) '*Black's Law Dictionary*' 1446 (7th edn West Group, St. Paul, MN 1999).
119 See *Anspec Co., Inc. v Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991); *Smith Land & Improvement Corp. v Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988); William M. Fletcher, '*Cyclopedia of the Law of Private Corporations*', § 7121, at 213–14 (perm. edn 1999). Although the concept of merger is foreign to English company law, the legal proposition of an acquirer inheriting the liabilities of its target is substantially the same under the closest English equivalent, a scheme of arrangement pursuant to the Companies Act 1985. See Tolley's '*Company Law Issue*' 68 (LexisNexis, UK 2003) s10/12 at S1009 (a) and Palmer's '*Company Law Manual*' (Sweet & Maxwell, London 2000) at 8003–6.
120 See eg *Holand v Williams Mountain Coal Co.*, 256 F.3d 819, 824 (DC Cir. 2001) (asset purchase under US law); *Esmark, Inc. v NLRB*, 887 F.2d 739, 751 (7th Cir. 1989) (stock sale under US law); Tolley's '*Company Law Issue*' 68 (April 2003) A35/1 at A.3501 (UK law); Tolley's '*Company Acquisitions Handbook*' (6th edn LexisNexis, UK 2003) p 214, para 8.3 (UK law); Palmer's '*Company Law Manual*' (December 2000) at 8003–6 (UK law).
121 *SEC v GE InVision, Inc.*, 05-cv-00660 (ND Cal 2005) and *In the Matter of GE InVision, Inc.*, Admin. Proc. File No. 3-11827 (14 February 2005); *SEC v Delta & Pine Land Co.*, 07-cv-01352 (DDC 2007) and *In the Matter of Delta & Pine Land Co.*, Admin. Proc. File No. 3-12712 (26 July 2007).
122 See *United States v Titan Corp.*, 05-cr-00314 (SD Cal. 2005); *SEC v Titan Corp.*, 05-cv-00411 (DDC 2005).
123 *SEC v Syncor Int'l Corp.*, 02-cv-02421 (DDC 2002) and *United States v Syncor Taiwan, Inc.* 02-cr-01244 (CD Cal. 2002); *SEC v ABB Ltd*, 04-cv-01141 (DDC 2004) and *United States v ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd*, 04-cr-00279 (SD Tex. 2004).

announcement of each of these settlements, the DOJ issued formal opinions delineating circumstances in which the DOJ will not assert successor liability against an acquirer for the prior FCPA violations of an acquired foreign subsidiary.[124] Among the factors enumerated were the commitment to investigate the violations once they were known, full disclosure and cooperation with the government, discipline imposed on personnel involved in the activity, imposition of an adequate compliance programme and implementation of strengthened internal controls.

Due diligence checklist

The principal vaccine for the successor liability malady is stringent pre-acquisition due diligence. In each of the cases cited immediately above, the improper payments were discovered during due diligence, thus enabling the acquiror to re-evaluate the transaction and, in most instances, insist that the would-be target resolve its FCPA liabilities pre-acquisition as part of or incident to the acquisition. The DOJ's lead criminal prosecutor has publicly stated her belief that '[t]ransactional due diligence in the FCPA context is good for business'.[125] And the SEC, in a recent FCPA settlement, deliberately alleged that the improper payments at issue were made possible by the acquiror's decision to complete the acquisition of the subsidiary who would ultimately make the payments post-acquisition notwithstanding the acquiror's discovery during due diligence that 'illicit payments to government officials . . . were portrayed as necessary' in the subsidiary's business.[126] Adequate M&A due diligence 'best practices' increasingly include specific inquiries designed to ferret out potential FCPA violations so they can be considered as part of the overall transaction terms and necessary remediation and reporting steps taken.

Of course, no one due diligence 'checklist' can be crafted to apply to all situations, as each potential acquisition is driven by individual facts and circumstances, including the acquirer's appetite for risk or offsetting terms. Yet, acquirers and their advisers, investment bankers, accountants and attorneys may well consider some of the following steps:[127]

√ Evaluate the target's compliance programme, particularly with respect to the FCPA and other international corruption laws:
- Is there a code of conduct provision or other form of recognition of anti-bribery protocols?
- Is there an adequate 'whistleblower' or similar mechanism for company personnel to report suspected bribery?
- Is there a basic understanding of these principles both 'at the top' in the ranks of upper management and 'in the field' where interactions with government officials are taking place?

124 US Department of Justice, 'FCPA Review Op. Proc. Rel. 2003-01', 15 January 2003; 'FCPA Review Op. Proc. Rel. 2004-02' (12 July 2004).

125 Fisher, 'Prepared Remarks at the ABA National Institute on the FCPA', n 78 above.

126 *SEC v Tyco Int'l Ltd*, 06-cv-02942 (SDNY 2006).

127 Of course, many of these steps could also inform the implementation of an effective FCPA compliance programme outside of the M&A context. Although the specifics and details of this subject are beyond the scope of this article, there is a plethora of guidance available from other sources. See eg Timothy Coleman and Peter H. Bresnan, 'What Does Law Enforcement Regard as an Effective Compliance Program?', *Practicing Law Institute*, (March–June 2005) 1478 PLI/Corp 543.

√ Evaluate the target's sales/marketing programme:
- Do sales personnel have access to cash and/or are they given excessive marketing budgets?
- What is the target's policy with respect to gift giving on national holidays?
- Are records of entertainment expenditures ever mischaracterized or destroyed out of 'cultural sensitivity' for the government official?

√ Evaluate the risk associated with the target's line of business:
- The oil services industry, for example, has a history of demands for corrupt payments.
- Another area of frequent concern is the customs process encountered by any business that needs to import equipment and pay an assessment thereon.
- Does the business entail a high level of interaction with foreign government officials?

√ Evaluate the risk associated with the countries in which the target operates:
- Transparency International's *Corruption Perceptions Index*[128] is perhaps the best-known and most comprehensive source for comparing indicators of corruption across nation states.
- Other useful sources include Freedom House's *Nations in Transit*,[129] the World Bank's *Ease of Doing Business* [130] and the World Economic Forum's *Global Competitiveness Report*.[131]

√ Evaluate the target's business control model:
- How decentralized is the operational supervision of field offices (ie do local operations have a great deal of autonomy)?
- Knowing the true control centre will enable the acquiring company to better focus its due diligence review.

√ Evaluate the target's use of third-party agents:[132]
- Have the agents been implicated in any corruption investigations?
  - A useful source in this regard may be the local embassy of the acquiring company's home state.
- What expertise or abilities do these agents bring to the table justifying their utilization?
- Do the agents have any connection to the government of the country in which they are operating on the target's behalf?
- Has the agent agreed to abide by the target's compliance policy in the past and is the agent willing to abide by the acquiring company's compliance policy in the future?
- Is the agent willing to give the acquiring company audit rights on future contracts?

√ Conduct enhanced due diligence of any 'red flags' that arise during the review process, including:[132]
- Allegations of improper payments and/or other corrupt business practices by the target and/or its agents;
- Large and/or frequent cash expenditures;

128 See n 64 above.

129 Freedom House, 'Nations in Transit', available at <http://www.freedomhouse.hu/index.php?option=com_content&task=view&id=84> accessed 25 July 2007.

130 World Bank, 'Ease of Doing Business', Economy Rankings, available at <http://www.doingbusiness.org/EconomyRankings/> accessed 25 July 2007.

131 World Economic Forum, 'The Global Competitiveness Report 2006–2007', available at <http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm> accessed 25 July 2007.

132 In constructing this list, the authors have liberally borrowed from the work of Messrs. Sturc and Chesley's colleagues at Gibson Dunn. See F. Joseph Warin and Jason A. Monahan, 'Foreign Corrupt Practices Act Due Diligence and Voluntary Disclosure', *The Journal of Payment of Systems Law* (September 2005).

132 In constructing this list, the authors have liberally borrowed from the work of Messrs. Sturc and Chesley's colleagues at Gibson Dunn. See F. Joseph Warin and Jason A. Monahan, 'Foreign Corrupt Practices Act Due Diligence and Voluntary Disclosure', *The Journal of Payment of Systems Law* (September 2005).

- Large and/or frequent political contributions;
- Agent commissions that appear unusually large in comparison to the scope of their work;
- Inaccurate or incomplete books and records and/or poor controls over disbursements;
- Unexplained or poorly documented expense reports relating to the entertainment of government officials;
- References to a 'special arrangement' (or other similar language) with a government official; and
- Refusal by any employee or agent to agree in writing to comply with the FCPA and other international corruption laws in the future and/or to certify past compliance with such laws.

5. Conclusion

The past five years has seen unprecedented interest by US and global regulators and law enforcement authorities in combating international corruption and there is little reason to expect that this level of emphasis will soon abate. Indeed, through the efforts of global organizations like the OECD, even more scrutiny is expected on the issue of actual enforcement of anti-bribery laws. Participants in cross-border mergers and acquisitions thus will have to assess the terms of the transaction with an understanding of the extent and thoroughness of the due diligence focusing on anti-bribery issues under both domestic and foreign law as well as any attendant remediation efforts necessary to redress issues that such diligence reveals. Principals to such transactions are encouraged more than ever to work closely with their professional advisors to ferret out and assess the risks of anti-bribery issues.

GLOBALIZATION OF ANTI-CORRUPTION ENFORCEMENT

ASSOCIATION OF CORPORATE COUNSEL
ANNUAL MEETING 2008
SEATTLE, WA

Michael J Hershman
President
The Fairfax Group

THE WORLD BANK

"THE SINGLE GREATEST OBSTACLE TO ECONOMIC AND SOCIAL DEVELOPMENT IS CORRUPTION"

THE CHANGING COMPLIANCE ENVIRONMENT

- Expanding Legal Environment
  - The FCPA
  - OECD Anti-Corruption Treaty
  - The UN Convention
  - The Inter-American Treaty
  - Regional Treaties
  - National Laws

INTERNATIONAL FINANCIAL INSTITUTIONS

- The World Bank (Asian, African and Inter-American Bank Affiliates).
- EBRD
- European Investment Bank
  - Stronger Suspension and Debarment rules
  - Cross Debarment
  - Public Disclosure
  - More and Better Trained Personnel and Cooperation

STANDARDIZED PROHIBITIONS

- Bribery of National Public Sector Officials
- Bribery of Foreign Public Sector Officials
- Officials of Public International Organizations
- Illicit Enrichment
- Embezzlement and Misappropriation
- Abuse of Functions
- Nepotism
- Money Laundering
- Concealment of Assets
- Aiding and Abetting Corruption
- Obstruction of Justice
- Trading in Influence
- Unexplained Assets

THE NGOs

- Holding Government and Business Responsible for Transparency and Accountability
- Improved Access to Information
- Advocating Stronger Laws and Greater Penalties
- Setting New Standards and Best Practices
- Supporting and Encouraging Media
- Working with Corporate Stakeholders

IMPACT ON CORPORATIONS

- THE SIEMENS CASE

SCOPE OF COMPLIANCE

- Bribery
- Money Laundering
- Anti-Trust
- Workplace Health and Safety
- Child Labor Laws
- Environmental Issues
- Intellectual Property
- Immigration
- Customs
- Political Contributions
- Procurement Fraud
- Vendor Integrity
- Privacy

ANNUAL MEETING '08: ASSOCIATION OF CORPORATE COUNSEL (ACC)

Session Title: "Globalization of Anti-Corruption Enforcement: Is the Playing Field Levelling"

"How the OECD Anti-Bribery Convention is Contributing to a Level Playing Field"[*]

Outline of Presentation by Christine Uriarte[•]

Introduction and goals of presentation

- The goals of this presentation are to show: 1.How the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and the OECD Working Group on Bribery in Business Transactions (OECD Working Group on Bribery) have so far contributed to a level playing field in international business; 2. The areas in which further progress is needed to meet this goal; and 3. The steps being taken by the OECD Working Group on Bribery in International Business Transactions (OECD Working Group on Bribery) to ensure that this goal is met.
- This presentation aims to meet these goals by describing the following:
  - The two principal ways in which the OECD Anti-Bribery Convention has so far contributed to a level playing field in international business: 1. Implementation of the standards under the Convention by the 37 State Parties; and 2. enforcement actions.
  - The three areas in which further progress is needed to ensure a level playing field: 1. Areas of uneven implementation of the standards under the OECD Anti-Bribery Convention; 2. Need for increased enforcement; and 3. Implementation of the Convention by other major economic players.
  - How the OECD Working Group on Bribery is addressing the need for further progress: 1. the review of the OECD anti-bribery instruments; 2. ensuring continuing monitoring of Parties implementation of those instruments; and 3. closer cooperation with other major economic players (i.e. major economies that are not Parties to the OECD Convention).
- Learner outcomes: Following this presentation, participants will have a greater understanding of the role so far played by the OECD Anti-Bribery Convention and the Working Group in levelling the playing field in international business transactions. They will also know how the Working Group on Bribery is addressing areas that have been identified as impediments to a level playing field, such as through the review of the OECD anti-bribery instruments, continued monitoring of implementation of the Convention, and closer cooperation with other major economic players. Moreover, identification of the major cross-cutting issues in implementing the OECD Anti-Bribery Convention will assist participants in developing corporate compliance programs that effectively prevent and detect the bribery of foreign public officials.

[*] The following supporting documents can be downloaded from the OECD's anti-corruption webpage (www.oecd.org/daf/nocorruption): OECD Anti-Bribery Convention; Working Group on Bribery's 2006 Mid-Term Study; Working Group on Bribery's Consultation Paper on the Review of the OECD Anti-Bribery Instruments; and responses to the Consultation Paper by external experts.

[•] Christine Uriarte is a senior analyst and General Counsel for the OECD Anti-Corruption Division.

1. How the OECD Anti-Bribery Convention and Working Group on Bribery have contributed to a Level Playing Field

a) Brief introduction of certain standards under the OECD Anti-Bribery Convention:

- 1. Offence of bribing foreign public official; 2. Corporate liability 3. Sanctions; 4. Jurisdiction; and 5. Investigation and prosecution

b) Brief introduction to OECD Working Group's system for monitoring implementation of Convention:

- Peer review process
- Phase 1 reviews (review of legislative and institutional frameworks for implementing OECD Anti-Bribery Convention), and Phase 2 reviews including on-site visits (review of enforcement efforts)

2. Areas for further Progress in Levelling the Playing Field

c) Selected cross-cutting issues identified in Working Group on Bribery's 2006 Mid-Term Study:

- Selected issues regarding the foreign bribery offence: 1. Bribes through intermediaries; Bribes that benefit third party beneficiaries; and 3. Small facilitation payments
- Criminal versus administrative corporate liability, and evolving standards of corporate liability
- Selected issues regarding sanctions: 1. Confiscation of the proceeds of bribery; and 2. Debarment from government contracting
- Selected issues regarding investigation and prosecution: 1. Level of enforcement; 2. Prosecutorial discretion
- Detecting foreign bribery through systems for accounting and auditing and tax
- Internal company controls for preventing and detecting foreign bribery

3. Steps by Working Group on Bribery for further Levelling the Playing Field

a) Working Group's Review of the OECD Anti-Bribery Instruments, including public consultation (2007-2009)

- Identification of main cross-cutting issues in Working Group's Consultation Paper (January-March 2008)
- External consultation process, including written responses to Consultation Paper and June 2008 meeting between consultation partners and Working Group
- Progress on review of anti-bribery instruments since external consultation

b) Ensuring continuing monitoring

c) Closer cooperation with other Major Economic Players

- OECD offer of enhanced engagement to other major economic players
- OECD Working Group on Bribery's activities with other major economic players

Conclusions

- Since adoption in November 2007, the OECD Anti-Bribery Convention has made a substantial impact on levelling the playing field for international business
- This is largely due to the focus of the OECD Anti-Bribery Convention on the supply-side of the bribery of foreign public officials, and the OECD Working Group on Bribery's rigorous system for monitoring implementation of the Convention
- The OECD Working Group on Bribery recognises that reaching the goal of a level playing field entails further steps, including: 1. Ensuring that Parties rectify shortcomings in implementing standards under the Convention; 2. Ensuring a common understanding of the standards under the Convention; 3. Increasing enforcement actions; 4. Ensuring continued monitoring; and 5. Increasing cooperation with non-Parties to the Convention that are major economic players
- The private sector, including the accounting and auditing profession, has made an indispensible contribution to reaching the goal of a level playing field through its participation in the public consultation on the Working Group on Bribery's review of the OECD anti-bribery instruments. In addition, corporate counsel plays an indispensible role through participation in the development of corporate compliance programs that effectively prevent and detect the bribery of foreign public officials.

ACC ANNUAL CONFERENCE 2008

THE UK RESPONSE TO FOREIGN CORRUPTION AND THE AL YAMAMAH INVESTIGATION

JONATHON CROOK and TOM WHITFIELD

EVERSHEDS LLP

In June 2008 Transparency International published the 2008 Progress Report on Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[1].

The report drew attention to what the authors described as a "*disturbing*" lack of enforcement in many of the countries surveyed creating a risk of "backsliding" by those who were taking enforcement action. Of the G7 Countries, whilst France, Germany and the US were praised for increased enforcement action, the "*laggards*" were said to be Japan, Canada and in particular, the UK.

A key reason for this assertion was the UK's termination of the investigation of the "Al Yamamah" bribery allegations against BAE Systems plc ("BAE") in December 2006. This was described as a damaging setback for the Convention and one which created a dangerous precedent that other Governments could follow. According to the authors, termination of the investigation compounded previous concerns about the lack of UK commitment, evidenced by the failure of the UK to bring any effective prosecutions.

The decision to terminate the investigation was the subject of a concerted legal challenge in the English Courts, resulting in a House of Lords decision in July 2008. This paper examines the proceedings and the judgment of the House of Lords and also looks briefly at other factors which affect the UK's record on prosecuting foreign corruption.

The Background to the Case

On 14 December 2006 the Director of the Serious Fraud Office ("SFO") decided to discontinue a criminal investigation involving BAE. The investigation related to the "Al Yamamah" contract between the UK Government and the Kingdom of Saudi Arabia for the provision of military equipment and on which BAE was the main contractor. It has been estimated that the Al Yamamah contract, signed in 1985 and since extended, has been responsible for arms sales of £43bn ($79bn).[2]

[1] Transparency International Progress Report 2008 on Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, compiled by Fritz Heimann and Gillian Dell

[2] Ibid, page 41

The investigation had been in progress since July 2004 and arose out of allegations that corrupt payments were made by BAE in connection with the Al Yamamah contract. As the criminal investigation was abandoned before its conclusion, the precise allegations were not revealed by the SFO. There have been claims in the British media that as much as $11bn of corrupt commissions were paid.[3] One of the main recipients was alleged to be Prince Bandar, son of Prince Sultan, the Saudi Defence Minister.

During the period of the investigation (i.e. from 2004-2006) negotiations were taking place to extend the Al Yamamah contract to include the supply of Typhoon aircraft. In November 2005 BAE sent a letter stating that bilateral relations between the UK and Saudi Arabia would be damaged by the investigation and in particular that the extension of the Al Yamamah contract would be in jeopardy. The same day the office of the Attorney General, who has "superintendence" of the SFO, was contacted by the Ministry of Defence in similar terms. The Director of the SFO resisted calls for the investigation to cease but the Attorney General (who was by virtue of his post a Government minister himself) wrote to the Cabinet Secretary in December 2005 to invite his fellow ministers to give their views on the matter. The response from the Cabinet Secretary, on behalf of the Government, noted the commercial interests in the relationship between Saudi Arabia and the UK as well as the risks to national security if the relationship were jeopardised. Despite this, and further representations from BAE the Director of the SFO and the Attorney General decided that the investigation should continue.

In September 2006 the SFO was about to obtain access to certain bank accounts in Switzerland. On 29 September 2006 the Cabinet Secretary wrote to the Attorney General's offices to report "*some significant recent developments*". He stated that

> "*...the severe damage to the public interest... we feared was likely in December 2005 is now imminent. If the Saudis are already deciding to take such steps in relation to the Typhoon programme, then we must anticipate that they could follow though (sic)...[the next section of the letter has not been made available to the public]...in relation to counter-terrorism and the bi-lateral relationship... the recent course of the investigation... has taken us to the brink of such consequences.*"

The "*significant recent developments*", according to the Sunday Times[4], involved Prince Bandar contacting Number 10 Downing Street and demanding that the investigation be stopped. It was alleged in that article that Prince Bandar referred to the SFO's proposed scrutiny of Swiss bank accounts and suggested that if the SFO did not stop the investigation the Typhoon contract would be aborted and intelligence and diplomatic relations would be suspended. Cancellation of the contract would have had very significant economic consequences, with a large number of its jobs in the UK dependent both directly and indirectly on the contract being secured.

[3] The Guardian - http://www.guardian.co.uk/baefiles/page/0,,2095831,00.html

[4] The Sunday Times 10 June 2007

From November 2006 the UK Ambassador to Saudi Arabia met with the Director of the SFO on three occasions and stressed that the threats to national and international security were very grave indeed. He went as far as saying that "*British lives on British streets were at risk.*"

In December 2006 the Prime Minister wrote a "*personal minute*" to the Attorney General referring to the risks to national security. This resulted in a meeting between the Prime Minister and Attorney General, which was followed by a number of other meetings at lower levels.

On 14 December 2006 the Director of the SFO announced that the investigation was to be discontinued on grounds of national security. He stated that "*no weight has been given to commercial interests or to the national economic interest.*".

There was widespread and vocal criticism of this decision both in the UK and overseas. Despite the statement to the contrary by the Director of the SFO, there were allegations that the UK had blatantly put economic interests above its obligations under the OECD Convention.

The Application for Judicial Review

Two public interest organisations, Corner House Research and Campaign Against the Arms Trade, brought judicial review proceedings against Robert Wardle, the Director of the SFO. They claimed that the decision of the Director to discontinue the investigation was unlawful, either under principles of English domestic law, or alternatively as being contrary to international law, primarily the OECD Convention.

The Judgment of the Divisional Court

The Court proceeded on the basis that the separation of power between the Executive and the Courts meant that the Courts under UK constitutional law could not trespass on a decision affecting foreign policy. However, the Court held that where the issue involved the criminal jurisdiction of the UK the issue was no longer a matter only for the Government and the Courts were "*bound to consider what steps they must take to preserve the integrity of the criminal justice system.*"

The Court, applying domestic law principles, concluded that the Director of the SFO had acted unlawfully in terminating the investigation. The Court noted that an explicit threat had been made so as to compel the cessation of the investigation. If this had been made purely domestically it would have been a clear attempt to pervert the course of justice. Further, there had been no specific, direct threat made against the life of anyone and the situation was not therefore akin to a case of duress or necessity.

The Court also held that the damage to the rule of law by deciding to cease the investigation was never properly considered by the Director of the SFO and there was no evidence that any consideration was given as to how to persuade the Saudi Government to withdraw its threat of suspending relations.

Lord Justice Moses was dismissive of the SFO's submissions. He summarised one such argument as being that "*the courts are powerless to assist in resisting when the explicit threat has been made by a foreign state. Saudi Arabia is not under our control; accordingly the court must accept that there was nothing the Director could do, still less that the court can do now.*" Lord Justice Moses response to this "*dispiriting*" submission was that "*the courts protect the rule of law by upholding the principle that when making decisions in the exercise of his statutory power an independent prosecutor is not entitled to surrender to the threat of a third party, even when that third party is a foreign state.*"

The Court therefore declared the decision of the Director of the SFO to be unlawful under domestic law principles. The Court held that it could have ruled on the application of the Convention. However, given that it had already ruled that the Director of the SFO had acted unlawfully, the Court decided that it was unnecessary to do so. The Court therefore made no findings as to any breach of the Convention.

The SFO appealed to the House of Lords.

The Judgment of the House of Lords

Lord Bingham (who gave the leading judgment) dealt first with the domestic law argument - that a decision to terminate a criminal investigation on the basis of threats was contrary to the rule of law. He vigorously disagreed with the Divisional Court's dismissal of the significance and seriousness of the threat. Lord Bingham noted that the British Ambassador to Saudi Arabia had described the threats to national and international security as very grave indeed and had said that "*British lives on British streets were at risk*".

The House of Lords held that what was determinative was the Director's judgment that the public interest in avoiding the risk to British lives outweighed the public interest in pursuing a prosecution. He was confronted by "*an ugly and obviously unwelcome threat*" and had to decide what to do. Lord Bingham described the decision to specifically discontinue the investigations on national security grounds as "*courageous*". He noted that "*the Director could have avoided making it by disingenuously adopting the Attorney General's view (with which he did not agree) that the case was evidentially weak*" and that the investigation should cease on that basis.

The House of Lords did not agree that submission to a threat is lawful only when it is demonstrated that there was no alternative course open to the decision maker. The House of Lords recognised the public interest balancing act that the Director of the SFO had to carry out and concluded that the decision had been one that he was lawfully entitled to make.

The House of Lords clearly felt that the Director had been put in an extremely difficult position which he had handled honestly and with integrity. Baroness Hale commented "*...I would wish that the world were a better place where honest and conscientious public servants were not put in impossible situations such as this*".

The House of Lords then went on to consider whether the Courts should have tested the decision of the Director of the SFO against the Convention. It was accepted between the parties that the Convention had not been incorporated into domestic law and so could not be used directly to challenge the decision of the Director of the SFO. The Claimants contended however that as the Director had stated that his decision was in accordance with the Convention, the court was entitled to test the accuracy of that statement, and if it was inaccurate, that the court should quash the decision as being based on an inaccurate belief.

The House of Lords was not swayed by this argument. A statement by a decision-maker that a decision was in accordance with an international treaty did not automatically mean that the courts could challenge that decision. Further, the evidence was that the Director of the SFO would have taken the same decision regardless of whether it was compliant with the Convention. As a result, his interpretation of the Convention was irrelevant to the decision and the decision would therefore stand in any event.

The Aftermath

The House of Lords decision has provoked strong and differing reactions, as the Progress Report indicates. However, the situation with which the Director of the SFO was confronted was unique. His evidence that he disregarded economic considerations and based his decision on security concerns alone was not in dispute. In those circumstances it is difficult to disagree with the conclusion of the House of Lords on the narrow issue as to the lawfulness of his decision.

The UK Government is now proposing as part of its draft Constitutional Renewal Bill to give the Attorney General the explicit power to intervene in investigations/ prosecutions on the ground of national security. The Bill also provides that a certificate signed by a Minister of the Crown, certifying that the decision by the Attorney General was necessary for the purpose of safeguarding national security, will be conclusive evidence of that fact.

The Future

Whilst the Al Yamamah case can be regarded as unique, the reality remains that the UK has struggled for years in effectively tackling corruption issues. Part of the problem is the prolonged lack of progress in enacting a new bribery law that would make it easier to prosecute foreign bribery. The current law is based on the common law and Acts of 1889, 1906 and 1916. In 1998 the Law Commission recommended codification within a single statute. This recommendation, despite being supported by the Government, was not put into place. A new Law Commission consultation paper has now been published and the consultation period ended in March 2008. New legislation will no doubt be introduced in due course which should make a difference. However, it will not resolve some of the other obstacles that continue to exist.

A key problem is that the UK does not have a specific anti-corruption agency. Most serious corruption allegations therefore fall within the remit of the SFO. However, the SFO has a poor record for the prosecution of white collar crime generally compared to many of its overseas counterparts and particularly those in the US.

Indeed, in June 2008 the SFO published a review of the organisation authored by Jessica de Grazia, the former senior New York Prosecutor[5]. The report was in fact commissioned by the Attorney General and the Director of the SFO. The Report highlighted that compared to the Major Crimes, Securities Fraud and Public Corruption division of the US Attorneys Office for the Southern District of New York, the SFO prosecuted significantly fewer cases, utilised much greater resource in doing so and achieved a much lower rate of conviction. The report drew attention to the fact that the English legal system is in many ways weighted in favour of the defence, in particular in relation to expensive and time-consuming disclosure obligations, and has inadequate plea-negotiation arrangements with the result that fewer cases are resolved by a guilty plea. The report recognised these factors and also drew attention to a lack of requisite skills and low morale within the SFO resulting in a risk averse and "pass the buck" culture.

The Report will hopefully provide the impetus for a major reform of the SFO. However, until this happens, then regardless of any legislative changes, it unlikely that the UK's record on prosecuting foreign corruption will improve significantly any time soon.

[5] Review of the Serious Fraud Office, Final Report, June 2008 by Jessica De Grazia http://www.sfo.gov.uk/ publications/ pdfs/ JdeGrazia_Final_Review_of_SFO.pdf