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808 The Foreign Corrupt Practices Act: What Corporate Counsel Need to Know

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Faculty Biographies

Mark Haley

Mark Haley is vice president and general counsel for BAE Systems' Electronics and Integrated Solutions operating group in Nashua, NH. Mr. Haley has responsibility for advising on all legal areas for the group, a major defense electronics business with 19,000 employees at more than 50 primary sites in the US and overseas.

Prior to joining BAE Systems, Mr. Haley served as vice president and deputy general counsel at General Dynamics and general counsel of General Dynamics' Bath Iron Works. He also spent many years as a litigator at two Maine law firms, Preti Flaherty and Conley, Haley and O'Neil, a firm he co-founded.

Mr. Haley received a BA from Bowdoin College and is a graduate of the University of Syracuse School of Law.

Brian P. Loughman

Brian P. Loughman is a partner with Ernst & Young in New York, and leads the financial reporting investigations team within the firm's fraud investigation and dispute services practice. He has extensive experience in the investigation and remediation of FCPA and accounting fraud issues, corporate internal investigations, money laundering investigations, and litigation consulting services. Mr. Loughman's clients have included major public corporations and law firms. He has managed numerous complex global and overseas investigation and remediation efforts for audit committees, management, and outside counsel. Investigative topics have included accounting fraud and restatement issues; bribery and corruption; and occupational fraud and money laundering. Mr. Loughman's experience also includes leading cross-cultural teams investigating potential FCPA violations in Asia, Latin America, and Central and Eastern Europe.

Mr. Loughman is a member of the American Institute of Certified Public Accountants, the Institute of Chartered accountants, Ireland, and the Association of Chartered Accountants, United States. Mr. Loughman has spoken extensively on topics including investigative issues, anti-corruption, FCPA, and other related issues.

Managing Risks – International Sales Representatives and Consultants

- Risk
  - Hiring consultants and sales representatives to pursue business opportunities presents compliance risks under antibribery laws.
- Compliance Tool:
  - Implement policies establishing specific authorities and procedures governing the engagement of international consultants and sales representatives, including:
    - Due diligence review and approval of candidates;
    - Use of standardized corporate agreements, including antibribery, right of audit and termination clauses;

Managing Risks – International Sales Representatives and Consultants (Cont'd)

- Compliance tool (cont'd)
  - Process (including approvals) for payments of commissions to sales representatives and retainers to consultants
  - Special approval process for commissions exceeding certain thresholds and/or unusual payments.
  - Requirement that all payments to be supported by specific documentation (reports and supporting receipts),
  - Requirement that detailed books and records, describing all expenses, be maintained.

Managing Risks – Other International Third Party Arrangements

- Risk
  - Engaging third parties (i.e., other than consultants and sales representatives) to pursue business opportunities in the global market can present compliance risks under antibribery laws.
- Compliance Tool:
  - Implement policy and procedures governing due diligence before entering into business relationships with
    - Distributors, resellers, joint venture partners, teaming partners, brokers, finders, subcontractors, and other third parties involved in international business activities.

Managing Risks – Gifts & Hospitality

- Note: The FCPA does not prohibit all gifts or hospitality to government officials
  - Generally, hospitality and gifts can be extended to government officials if they are:
    - Reasonable,
    - Related to a legitimate business purpose, and
    - Not intended to influence a government official to use his authority improperly to direct business or provide an unfair business advantage.

Managing Risks – Gifts & Hospitality

- Risk:
  - Offering gifts and hospitality to foreign government officials present compliance risks under antibribery laws.
- Compliance tool:
  - Establish policies and procedures to governing the offering of gifts and hospitality to foreign government officials.
  - Set clear guidelines about when approvals must be sought and who is authorized to (and responsible for) approving such requests.
  - Make sure expenses are properly recorded for gifts and hospitality. Gift logs are a common practice (and recommended by auditors) to track any and all gifts.

Managing Risks – Gifts & Hospitality

- Generally speaking, you can:
  - Pay for reasonable travel and lodging/meal expenses for government officials if
    - Such expenses relate to company product demonstrations or contract performance activities, and
    - The government officials can accept such hospitality under their applicable government laws and regulations.
  - Provide reasonable entertainment (e.g., meals) expenses to government officials if
    - Such expenses are connected to business meetings, and
    - If the government officials can accept such hosting under their applicable government laws and regulations.

  Note: No side trips , no reimbursements for family member expenses, no per diems (cash payments).

Managing Risks – Gifts & Hospitality (cont'd)

- Generally speaking, you can:
  - Make charitable contributions to organizations in a country where you are seeking or doing business,
    - But you need to inquire about any relationships between the charity and government officials.
  - Provide low-value tangible gifts to government officials (e.g., marketing items with company logos, such as pens, caps, cups, shirts)
    - But you need to confirm if such officials can accept such gifts under their applicable government rules and your company's ethics policies.

Managing Risks – Identifying Risk Countries

- Transparency International (TI)
  - Is a global organization aimed at stopping corruption and improving transparency in elections, public administration, procurement and business.
- The "Corruption Perceptions Index" (CPI)
  - TI publishes the CPI, an annual index that ranks countries in terms of the degree to which corruption is perceived to exist among public officials and politicians.
  - It is a composite index, based on surveys of businesses and assessments by country analysts.
  - The CPI 2007 ranks over 175 countries (New Zealand, Denmark and Finland ranked least corrupt; Iraq, Somalia and Myanmar ranked most corrupt) (United Kingdom ranked #13, Untied States ranked #20).
- See also http://www.tansparency.org

Managing Risks – Identifying Transactional "Red Flags"

- Transaction-Specific Red Flags
  - Rumors regarding unethical or suspicious conduct by an employee, consultant or intermediary or by a government official associated with the transaction
  - Unnecessary third parties or multiple intermediaries performing similar functions
  - Sales Representative/Consultant refuses to agree to abide by FCPA contract clause
  - Sales Representative/Consultant refuses to sign annual compliance certifications
  - Sales Representative/Consultant refuses to allow audits by Company

Managing Risks – Identifying Transactional "Red Flags" (cont'd)

- Transaction-Specific Red Flags (cont'd)
  - Sales Representative/Consultant has family business ties to a government official
  - Sales Representative/Consultant requests that his identify not be disclosed
  - Potential foreign government customer recommends the Sales Representative/Consultant
  - Sales Representative/Consultant lacks the facilities to perform the required services
  - Sales Representative/Consultant is new to the business
  - Sales Representative/Consultant makes unusual requests (e.g., backdating invoices)

Managing Risks – Identifying Transactional "Red Flags" (cont'd)

- Payment-Related Red Flags
  - Requests for commission payments to be paid to bank account in a third country
  - Requests payments to a third party rather than to the Sales Representative/Consultant (or other convoluted means)
  - Request for payments in cash
  - Requests for unusually large commissions or other payments, or payments that appear excessive in relation to services rendered
  - Political contribution request
  - Requests for reimbursement of expenses that are poorly documented; false invoicing
  - Request for an unusually large credit line
  - Requests for unorthodox and substantial up-front payments

The Basic Message

- Make sure Company employees understand Corporate compliance policies and procedures
- Make sure Company employees, particularly those likely to engage in activities relevant to the FCPA, understand applicable antibribery laws
- Train Company employees to be alert to situations ("red flags") where antibribery problems may arise, ask questions, and raise any concerns to management, ethics, or compliance officials
  - Your business partners can create liabilities, so it is important to conduct good due diligence, enter strong agreements and maintain monitoring practices
- Keep accurate and complete records

Purpose of an Internal Investigation

- Determine facts
  - Legal strategy
  - Whether/what remediation needed
- Government will consider whether credible investigation conducted

Who Conducts the Investigation

- Determine who will conduct the investigation
  - Outside counsel – advantages
    - Demonstrates objectivity and independence
    - Resources and expertise
    - May be better able to preserve attorney-client privilege
  - Preliminary in-house inquiry may be followed by outside counsel inquiry (but be careful to preserve privilege)
  - Other company personnel – at direction of counsel. *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677 (1981) (information communicated to counsel by employees for the purpose of obtaining legal advice is privileged)

Investigation Plan

- Develop an investigation plan that includes:
  - Definition of subject matter scope
  - Identification of witnesses/interviewees
  - Identification of relevant document types and sources

Witness Interview Preparation

- Know the relevant legal theories
- Prepare an outline of questions
- Review documents; identify key documents

Document Collection and Review

- Critical to integrity of investigation
- Fundamental to prepare for witness interviews
- Do not destroy notice
- Centralized collection:
  - Electronic documents
    - Identify all sources
    - Forensic or not forensic?
  - Paper documents
- Witnesses as document sources

Interview Tips

- Setting
- *Upjohn* warning
- Start off with easy/light questions
- Try to ask open-ended, non-leading questions
- Do not threaten or promise benefits
- Company wants the truth – wherever chips may fall
- Use documents effectively
- One lead questioner, other responsible for notes

Upjohn Warning

- *Upjohn v. United States*, 449 U.S. 383 (1981)
- You represent the Company, not the individual
- The interview is subject to the Company's attorney-client privilege which belongs to the Company
- The employee must maintain the matters discussed in strict confidence
- Information needed for counsel provide company with legal advice
- The Company may waive the privilege
- Purpose: Insulate investigation confidentially and privilege; prevent invocation of privilege by employee contrary to Company decision; prevent disqualification of attorney if employee's interests become adverse

Employee Right to Counsel

- Statutory Indemnification
  - Typically governed by Delaware law
  - Company may indemnify a director, officer, or employee for fees, judgments, and settlements, 8 Del. C § 145 (a), provided:
    - Acted in good faith and reasonably believed not opposed to corporation's best interests
    - In criminal case, had no reasonable cause to believe conduct unlawful
  - Company shall indemnify a director or officer where the person successful on the merits or otherwise. 8 Del C. § 145(c).
  - Statutory indemnification in Delaware includes "investigative" proceedings; at least includes government investigation. 8 Del. C. § 145(a).

Employee Right to Counsel Ethical Duties

- Duties towards represented persons
  - If witness is represented by counsel, communications must be through counsel. See, e.g., DC Rules of Professional Conduct 4.2; Virginia Rules of Professional Conduct 4.2; Maryland Rules of Professional Conduct 4.2.
  - Nature of duty may be different for non-legal personnel working for company. But counsel conducting an internal investigation must abide by ethical rules governing attorney conduct.

Employee Right to Counsel – Ethical Duties

- Duties towards unrepresented persons
  - If the interests of an unrepresented witness are or reasonably may be in conflict with the company's, the only advice you may give is that they seek counsel.
    - "a lawyer shall not…[g]ive advice to an unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client" DC Rules of Professional Conduct 4.3(a).
  - If asked by such a person, "Do I need a lawyer?" do not answer "No." Generally this is a question only their own lawyer can answer.

Employee Right to Counsel – Duty to Cooperate

- An employee who refuses to provide information pursuant to a lawful and reasonable internal investigation may be disciplined for failure to cooperate
  - Discipline should be administered by HR
  - Be aware of any limitations under applicable employment law or employment contract (e.g., is employment "at will" or does termination require "cause"?)
  - Disciplinary action should be applied equally and consistently
  - Particular care should be taken with respect to "whistleblowers" due to heightened statutory protections
- An employee who refuses to cooperate based upon advice of counsel can still be disciplined for the refusal

Interview Memos and Investigation Report

- May include the following:
  - Factual findings/documentation
  - Summary of investigative steps
  - Summary of interviews/information provided by witnesses
  - Discipline/remedial actions taken
  - Recommendations
- Keep in mind, the company could decide to turn these documents over to the government
- Mark privileged and state that contains attorney impressions
- In some cases you and client company may determine that keeping factual summaries and mental impressions separately is best course.

Reporting Up Obligations

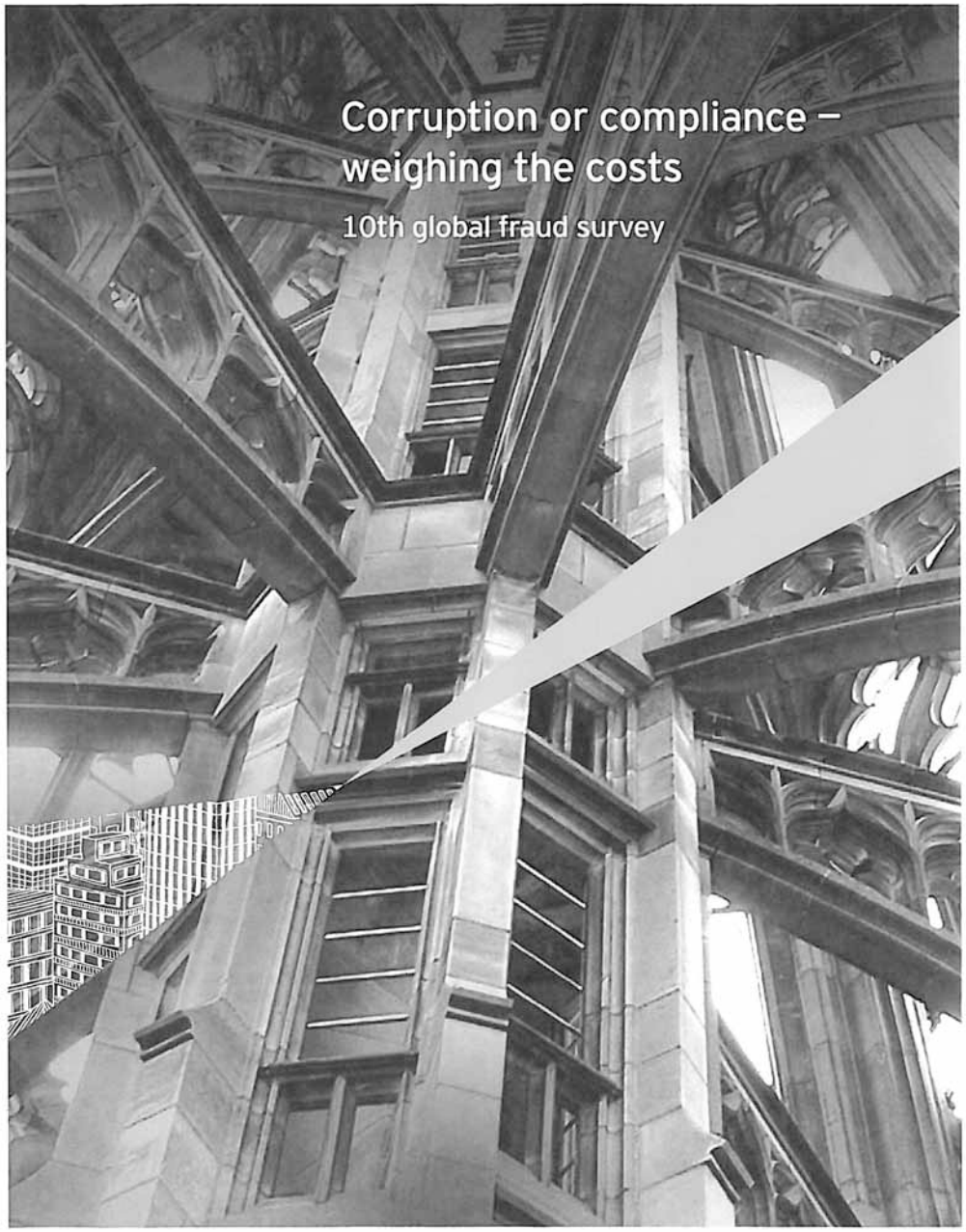
- Pursuant to Sarbanes Oxley, SEC issued certain rules of professional responsibility for attorneys "appearing and practicing before the Commission." 17 CFR Part 205
- Rules establish standards for when evidence of a potential securities law violation – including the FCPA – must be reported to the company's Board or committee thereof (such as Audit Committee)
- The rules reinforce that the issuer as an organization is the client

Reporting Up Obligations (Cont'd)

- Chief Legal Officer
  - Where an attorney retained to investigate evidence of a material violation reports the results to the CLO, the CLO is obligated to report the results to the Board or committee thereof unless the investigation attorney and the CLO "each reasonably believes that no material violation has occurred, is ongoing, or is about to occur." 17 CFR Part 205.3(b)(6)
  - Requires affirmative belief of no material violation if there is to be no report
  - Materiality is a complex question; qualitative as well as quantitative
  - A violation of the anti-bribery provision will in practice by deemed material.

Reporting Up Obligations (cont'd)

- Investigation Counsel
  - An investigating attorney has a duty to report up the ladder to the Board or a committee thereof if the CLO does not satisfy her reporting obligations. 17 CFR Part. 205.3(b)(6)



Contents

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."

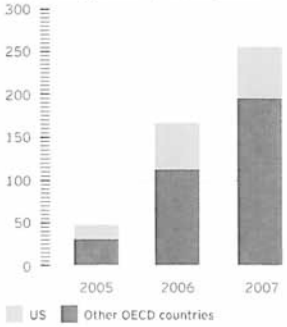
Christopher Cox, Chairman of the Securities and Exchange Commission

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.

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

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

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.

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

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.

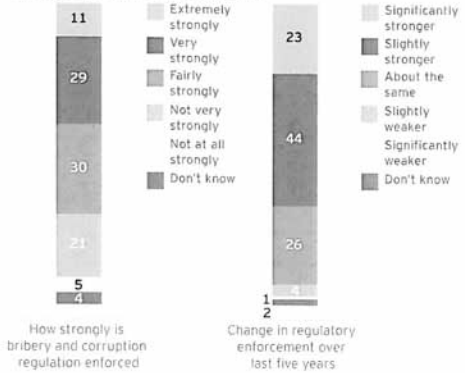
Table 1
Percentage saying corrupt practices are prevalent within their sector

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?
Show: 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.

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.

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

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.

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).

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

CFO, Australia

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.

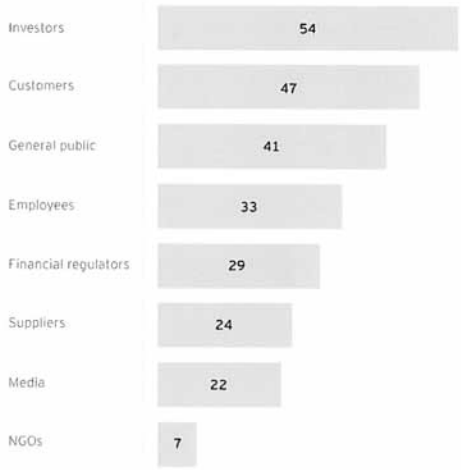
III. Investigations and reputational risk

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.

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.

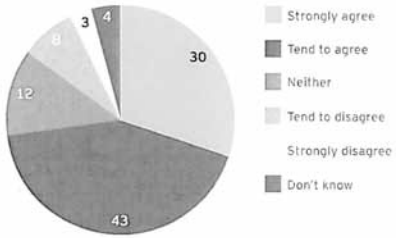
Investigations offer management the opportunity to demonstrate that, while everyone will be treated fairly, dishonest or unethical behavior will not be tolerated. Commitment from the top to do the right thing and act responsibly builds a culture in which employees with concerns will come forward, confident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

If we identify an incidence of fraud, we shorten the internal audit cycles, while keeping intervals random."

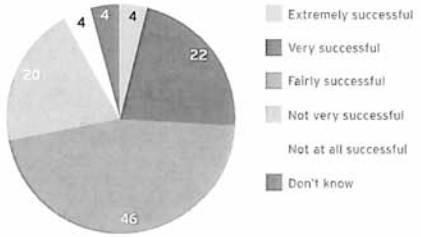
Chief Risk Officer, Germany

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)

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)

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.

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.

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.

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

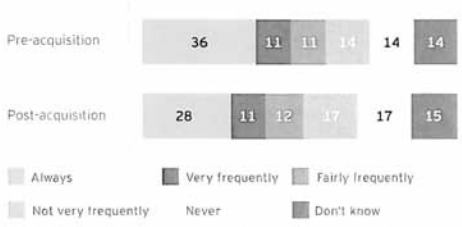
Finance Manager, Brazil

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.

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

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

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.

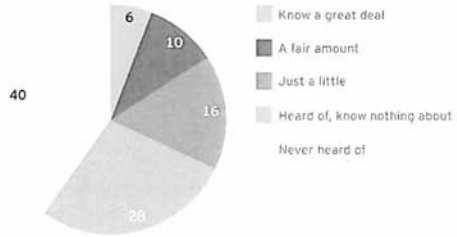
In perhaps an extreme example, given its enormous population and recent explosive economic growth, the Central Commission for Discipline Inspection of China's Communist Party indicted nearly 30,000 party and other officials for corruption in 2007. High-level officials are clearly not exempt from these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

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.

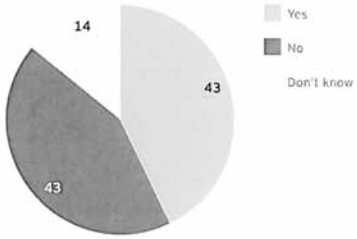
Despite this, only 43% of the respondents indicated that their company had specific procedures in place for dealing with government officials (Figure 10, overleaf). These results indicate a significant opportunity for risk mitigation.

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."

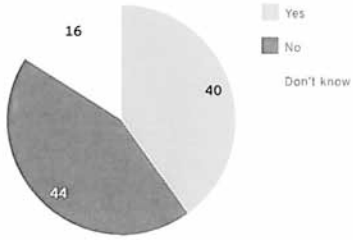
Franz-Hermann Bruner, Director General, European Anti-Fraud Office, European Commission

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 (118c)

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.

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.

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

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.

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

Shown: 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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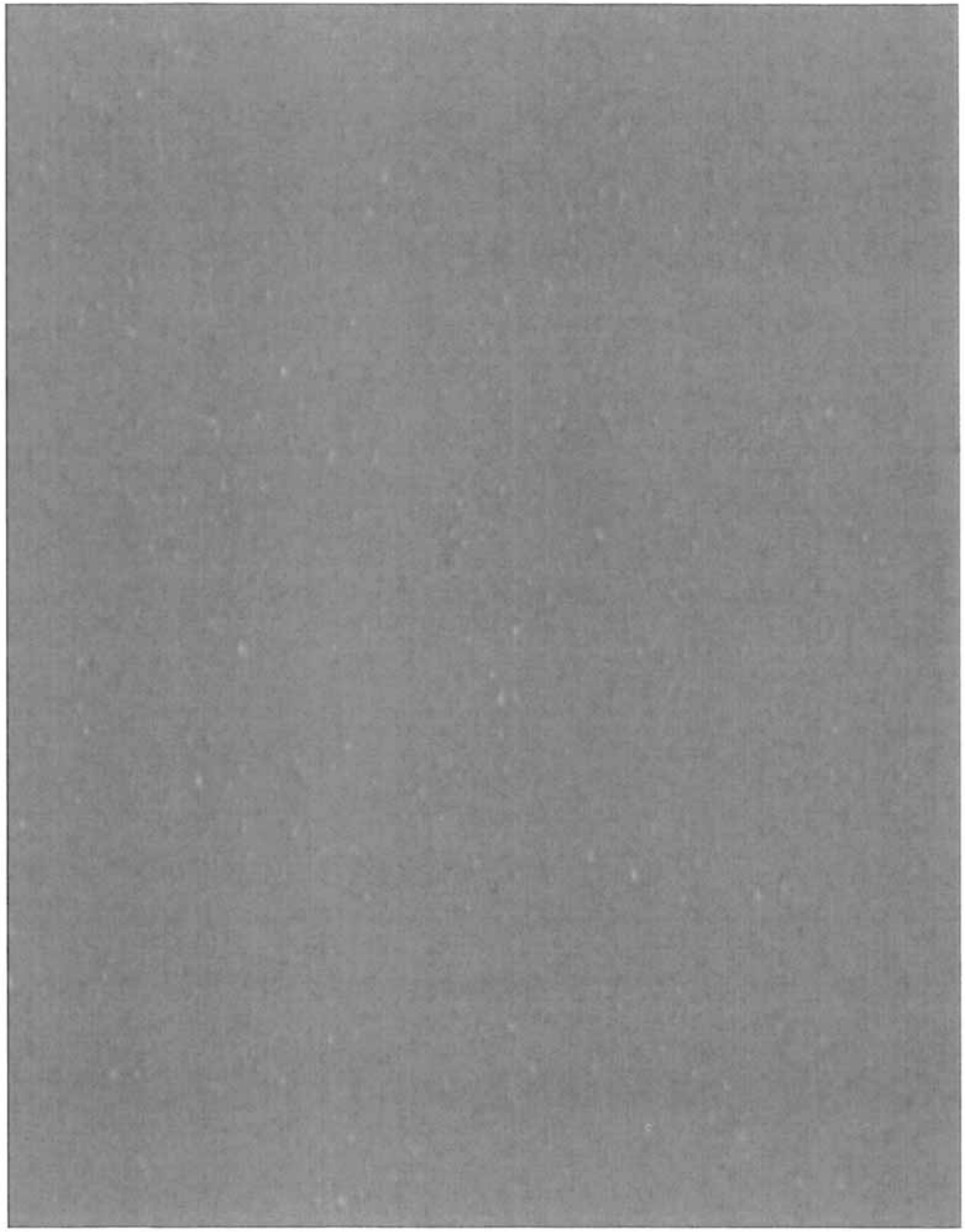

STAYING OUT OF TROUBLE

The Role of a Global Anti-Corruption Program | BY WILLIAM HENDERSON

THE WORLD IS GETTING SMALLER and the reality of a truly global marketplace now puts the spotlight on less-than-honorable business practices that have for so long inhibited growth in the developing world. This is a very positive forward movement for growing economies. Multi-national corporations are driving a lot of this change, with not-so-little encouragement from regulators. In the United States, the U.S. Department of Justice and the Securities and Exchange Commission are spearheading the fight against global corruption. The principal weapon in their arsenal is the U.S. Foreign Corrupt Practices Act.

The anti-bribery provisions of the FCPA make it unlawful for U.S. persons and companies to pay bribes to non-U.S. government officials for the purpose of obtaining or retaining business. The FCPA also requires U.S. and non-U.S. companies with securities listed in the United States to meet its accounting provisions. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require covered corporations to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls.

Regulators, lawyers and accountants have been sounding the alarm about the rising level of prosecutions under the FCPA for quite some time now. This is no Chicken Little situation. Enforcement is on the rise and FCPA violations are serious business for companies and executives.

FCPA compliance is top of mind for companies doing business in emerging markets. Executives and boards are scrambling to understand just what the Act means to them, what they can do to address compliance risk, and how they can proactively develop programs to address concerns. While some are still reacting to the growing volume of warnings, many companies have already designed and implemented successful programs that effectively mitigate FCPA risk. These proactive policies and procedures serve as important examples for other companies. So what can you do?

It is critical also to communicate the importance of FCPA compliance to business unit controllers, accounts payable and other accounting professionals.

CREATE AN ANTI-CORRUPTION PROGRAM
Effective compliance starts with effective communication. Words matter when designing and implementing an FCPA compliance program. The program should be couched as an "anti-corruption" program—and not in terms of the more legalistic and U.S.-centric "FCPA."

CONDUCT A CORRUPTION RISK ASSESSMENT
An anti-corruption program should focus on the specific risks of corruption and bribery facing your company. These risks are derived from the nature of your operations, the degree of business with non-U.S. government entities, your business locations and company size, and the regulatory environment you operate in. Conduct a corruption risk assessment to identify and prioritize these and other risks you face. The first step in building an effective anti-corruption program is to design and implement strategies and allocate resources to manage such risks. Additional risk assessments should be undertaken periodically to ensure that the program in place is meeting new risks and challenges as the business and regulatory environments change.

ADOPT A CORPORATE ANTI-CORRUPTION POLICY
Develop a company-wide policy requiring compliance with the FCPA and other anti-corruption laws. The overall compliance policy should detail how compliance will be achieved and address such issues as facilitating payments, FCPA due diligence in mergers and acquisitions, joint ventures, contracting with agents and consultants, commercial bribery, accuracy of financial reporting and audits of internal controls. The corporate anti-corruption policy should be approved by your board of directors, distributed to your company management, and posted on your internal website with other compliance-related policies.

References to your anti-corruption policy should be included in the written code of conduct issued to all company employees. Make a short and simple statement of FCPA requirements and of employees' duty to comply. Compliance with the anti-corruption policy should have a prominent place in your company's overall compliance regime. Setting clear standards, creating an appropriate tone at the top, educating and training, auditing, monitoring and implementing appropriate investigative and disciplinary action should all be part of the strategy.

CONDUCT ANTI-CORRUPTION COMPLIANCE TRAINING
At a minimum, every person in a position to obtain business through bribery or other improper means should receive anti-corruption compliance training. Also consider training all accounting and financial employees. Consider a mixture of live training for targeted and senior employees and web-based training for all employees. The training should be reviewed and approved by legal counsel and tailored to meet the company's FCPA risk profile. Continually update the training and provide it to new or transitioning employees.

AUDIT FOR ANTI-CORRUPTION COMPLIANCE
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 FCPA violations occurring in each of the various business units. Potential FCPA violations or "red flags" uncovered in the audits are then reported to the legal or compliance department for consultation concerning further investigation.

Internal audits have a powerful deterrent effect: They send a message that the senior management is committed to compliance. Appropriate follow-up and disciplinary action are crucial to creating an anti-corruption culture. It is also important that persons with the relevant skill sets and training conduct the audits. Some companies choose to have internal audit team with the legal and compliance departments to conduct the audits.

ADOPT POLICIES FOR RETAINING AGENTS AND CONSULTANTS
Create policies to govern the retention of agents, consultants, commercial sales representatives and other third parties to address the risk that such third parties may pay or offer to pay bribes on the company's behalf. The policies could include mandates that the company perform FCPA due diligence, require a written contract with anti-bribery representations and warranties, dictate periodic compliance certifications from the vendor and demand in the contract—and exercise—the right to audit the vendor for FCPA compliance. The vendor could also be required to undergo company-sponsored anti-corruption training. These policies should be tied to, and at least partially administered through, the company's procurement processes.

INCORPORATE INTO TRAVEL, GIFTS AND ENTERTAINMENT RULES
The FCPA is implicated by giving gifts or providing entertainment or travel to non-U.S. government employees. Such payments, or even offers, need to be carefully monitored to ensure against even the appearance of impropriety. A clearly stated approval process for such gifts and a gift log that can be audited are important components of a gifts-and-entertainment policy. Any travel or lodging provided to non-U.S. government officials should undergo a heightened approval process.

CREATE AN APPROVAL PROCESS FOR FACILITATING PAYMENTS
If your policy allows facilitating payments, develop a process to ensure appropriate review and pre-approval of all such payments, including analysis of their legality under local law and the FCPA. Facilitating payments are narrowly defined as payments to government officials for routine and non-discretionary action. If approved, such payments should be recorded in a separate general ledger account to ensure transparency. All authorizing documentation also should be retained. One risk generated by a policy that permits facilitating payments is employees may not understand the policy and misinterpret the authority to make facilitating payments as permission to offer or pay bribes. Accordingly, such payments need to be tightly controlled, carefully monitored and rigorously audited.

Payments for travel and related expenses for non-U.S. government officials are permitted under the FCPA in limited circumstances when related to the promotion of a specific product or to obtaining a contract. Such payments only should be allowed with pre-approval and with mechanisms in place so that they can be carefully monitored and reviewed.

DEVELOP GUIDANCE FOR CHARITABLE GIVING
Charitable giving guidelines also should be included in anti-corruption policies to ensure the charities are not used as conduits for bribes. All charitable giving should be subject to an approval process that asks specific questions related to the purpose of the gift and the bona fides of the organization.

THE HOT ZONE

Corruption risk can be mitigated by employing elevated financial controls in high-risk areas. Here's one way to break them down:

1. Accounting controls to define requirements for booking transactions to increase transparency and facilitate audit and review. These include the creation of specific general ledger accounts and required posting of defined transactions. For example, all bank accounts must have a separate general ledger account and all gifts to government officials must be posted to a specified "Gifts-Government Officials" general ledger account.

2. Cash controls to prevent unauthorized use of funds. Such Controls include limits on the number of bank accounts, review and closure of inactive accounts, limits on the number of and controls around petty cash accounts, access controls around checks and wires, and timely bank reconciliations.

3. Vendor approval process controls to prevent payments to unauthorized vendors, particularly as they relate to high-FCPA-risk entities, such as consultants and agents. Controls might require enhanced vendor approval and authorization processes, heightened access controls around vendor master databases — and additional vendor authorization sign-off procedures for sales representatives, agents and consultants.

4. Transaction processing controls to ensure an additional level of scrutiny of high-FCPA-risk transactions and to mitigate risks of improper or unauthorized transactions. These could include enhanced customs invoice review and approval processes, enhanced review and signoff of executive time and expenses, and enhanced review of transactions with sales representatives and agents.

5. Transaction monitoring controls to audit high-risk transactions. These can include maintenance and review of a gift log, monthly petty cash transaction reports, or the use of data analytics and other system-generation reports, such as payments to sales representatives or agents below approval thresholds or reports detailing annual spend by each sales representative.

Certifications will not stop the deliberate wrongdoer, but the requirement serves as a continuing reminder of the manager's compliance responsibility.

DUE DILIGENCE FOR M&A AND JOINT VENTURES

Develop a policy to require specific anti-corruption due diligence in any contemplated merger, acquisition or joint venture. Statements accurately disclosing any past FCPA violations should be included in the seller's representations and warranties related to the transaction or as part of the merger or joint venture contract. Address future compliance with the FCPA in the contract.

IMPLEMENT ANTI-CORRUPTION FINANCIAL CONTROLS

Consider implementing specific anti-corruption financial controls around high-risk operations and processes. Focus these controls on high-corruption-risk areas such as transactions with government customers, procure-to-pay, cash, petty cash, gifts, customs and cross-border shipping, executive travel, meals and entertainment. Such heightened financial controls are focused on deterring and detecting illicit payments and can be a critical firewall in avoiding FCPA books and records violations.

Anti-corruption controls include accounting controls, controls for bank accounts and cash, vendor approval processes and transaction processing and monitoring (see *The Hot Zone*, page 16). It is critical also to communicate the importance of FCPA compliance to business unit controllers, accounts payable and other accounting professionals. Provide specific guidance to ensure accounting professionals are on the lookout for red flags. Be clear about how certain expenses should be recorded. Develop a specific strategy for communicating anti-corruption requirements to key financial reporting and accounting personnel. These communications should be part of a controller's manual or other accounting policies and should be discussed at meetings and in training sessions.

EMPLOY AN ANTI-CORRUPTION COMPLIANCE CERTIFICATION PROGRAM

Many companies have formal programs to certify and re-certify senior employees regularly on FCPA compliance. Certifications will not stop the deliberate wrongdoer, but the requirement serves as a continuing reminder of the manager's compliance responsibility. Certification processes also may identify issues that otherwise might not have surfaced. A specific certification of compliance with the company's anti-corruption policy could be included as part of an existing business conduct certification program.

STAY OUT OF TROUBLE

No compliance program, no matter how expensive or extensive, can provide absolute assurance of compliance. An effective anti-corruption program will positively effect a company's culture and deter wrongdoing, make non-compliance far less likely and, in the unhappy event of a violation, more favorly position your company for potential dealings with regulatory authorities. Be mindful that one byproduct of the increased rate of corporate prosecutions and settlements has been a dramatic increase in criminal prosecutions of executives. For executives, the risks are real and not just about money. These leading practices can provide a good starting point and useful benchmark as you begin to think about how to do business globally while keeping your company, and especially your people, out of trouble.

The views expressed herein are those of the author and do not necessarily reflect the views of Ernst & Young LLP.

CREATING AN ANTI-CORRUPTION PROGRAM

The Checklist

- ✓ Conduct a corruption risk assessment.
- ✓ Adopt a corporate anti-corruption policy.
- ✓ Integrate anti-corruption into your overall corporate compliance program.
- ✓ Implement anti-corruption training.
- ✓ Audit for anti-corruption compliance.
- ✓ Adopt special policies for retaining agents and consultants.
- ✓ Incorporate anti-corruption policy into employee travel, gifts and entertainment rules.
- ✓ Create an approval process for facilitating payments.
- ✓ Develop guidance for charitable giving.
- ✓ Incorporate anti-corruption procedures into mergers, acquisitions and joint ventures due diligence.
- ✓ Implement anti-corruption financial controls.
- ✓ Employ an anti-corruption compliance certification program.

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TRANSACTIONAL ISSUES

Gauging risk in acquisition due diligence – the hidden deal killer?

BY IVAN R. LEHON AND GREGORY E. WOLSKI

Recent media reports highlight a number of significant business transactions gone awry, with the collapse of Sallie Mae's sale to JC Flowers – the most recent failed mega buyout. In September, the KKR and Goldman Sachs deal for Harman hit the rocks. As this article went to press, *The Wall Street Journal* reported Cerberus citing "poor conditions in the debt markets" for its withdrawal of a proposed $6.2bn purchase of Alliance Computer.

Notwithstanding recent market tumult, strategic and financial buyers remain active across the US and Europe. Recently, financial markets saw a piece of Home Depot taken private at a valuation 17 percent lower than expected, and then witnessed KKR significantly restructure its bid for First Data. The re-priced transactions seemed to suggest a step back toward rationality and reasonable purchase prices, attended by a necessary caution about debt levels.

The prevailing mood still seems to be to get good deals done. Fundraising is at historic highs, the amount of capital pouring into private equity funds in Europe has even outpaced that in North America during the last two years, and hedge funds continue to grow in both markets.

The size of private equity war chests alone seems to ensure that acquisitions continue at their present rate into the foreseeable future – even if at multiples slightly less inflated than recently. With more opportunity to wring financial value and strategic advantage out of less mature European markets, strategic investing will arguably move faster in Europe than in the US.

Just as debt financing set the tone in the past few years, supporting ever higher purchase price multiples and driving the perception that values would continue to increase, the recent pullback in debt augurs a different conception of risk and reward. As purchase price multiples fall, leverage and risk profiles also change. It becomes all the more pressing for both financial and strategic buyers to determine acquisition value.

Investors are increasingly aware of factors that diminish acquisition value post-close. Principal among these are fraud, corruption, and the failure of an acquired business to comply with key regulations governing financial conduct, financial controls, and reporting.

The discovery of fraud or a serious regulatory violation after closing is one of the fastest ways to lose value after an acquisition, and potential losses can exceed the original investment. For a strategic buyer, fraud and/or illegal acts pose a barrier to operational efficiency and can be an expensive drain on resources. For a financial investor, it not only erodes the ongoing Internal Rate of Return, but can also savage realisation on an exit.

Mitigating fraud losses or helping a company come into compliance can be expensive, tying up resources in investigations, compliance audits, financial restatements, or litigation after the close. In some cases, corruption takes years to combat, involving wholesale changes to business practices, revamped communications, and implementation of rigorous procedures for internal audit.

Globalised business and the resulting flow of capital across borders make assessing the risk of fraud and illegal acts more pressing in the period leading up to a transaction, especially where subsidiaries or business units operate in economies with less developed regulatory standards or where enforcement is historically lax, such as in Brazil, Russia, India, and China. The risk is heightened as calls for more regulation increase, especially of the hedge fund sector. It has become all the more important to manage fraud and regulatory risk before investing.

In short, the exposure of fraud and the recently heightened focus on it have altered deal dynamics – investors are more sensitive to fraud's serious potential to damage the value of the business. Buyers are not the only ones at risk. Sellers must understand their company fully, including the implications of past business practices in an operating unit to be spun off. If nothing else, a forensic investigation alerts both sides to potential problems. In the best case, the two sides resolve a problem before damage is done or disputes can occur. A disciplined, comprehensive approach to forensic due diligence has become a prerequisite, before the buyer and seller sit down at the closing table.

In an environment where information regarding fraud and compliance related exposure has so much potential value, a proper forensic analysis can be vital to achieving deal success.

For a global company involved in an acquisition, the US Foreign Corrupt Practices Act (FCPA) is at the forefront of compliance risk, as enforcement of FCPA has become increasingly stringent.

FCPA enforcement in the US is only part of the risk. Efforts to enforce anti-corruption statutes have become increasingly pronounced in Europe and Asia. International accords such as the Organisation for Economic Cooperation and Development (OECD) Anti-Bribery Convention, the UN Anti-Corruption Convention, the Council of Europe Criminal Law Convention on Corruption and other similar initiatives and regulations have strengthened the framework to deter and prosecute fraud. In other cases, countries have updated their own domestic statutes and enforcement apparatus.

Corruption is particularly difficult to pinpoint and prevent. But certain specific actions of employees or characteristics of a company's business may be indicators of FCPA compliance risk. Companies with operations in emerging markets will benefit from forensic due diligence, as will those with public sector contracts or poorly documented consultancy and other professional services agreements.

Other conditions that heighten FCPA risk include contingent sales commissions, excessive travel, gift, entertainment or miscellaneous expenditures, and operations in industries such as construction, service, manufacturing, and other highly regulated industries. Conditions to consider also include: the history of incidents or significant allegations of bribery or corruption; financial results in one or more countries or operations that are starkly out of line with expectations historical benchmarks, and/or the results of competitors; Transparency International (TI) corruption perception rating for country; use of third party intermediaries, such as brokers, agents, distributors, consultants, etc.; group/institutional sales; ownership structures and/or newly acquired operations; high growth areas, including expanded operations or licensing agreements; the culture and commitment to compliance of the business and its operating units; financial controls; and past audit findings and the frequency of internal audits.

When assessing these factors, the team conducting FCPA due diligence would assess the occurrence of past violations, and seek to assess the possible impact of increased compliance oversight or enforcement. This includes assessing and quantifying risk, identifying red flags, and developing – even if only in thumbnail – a post-close compliance program.

FCPA non-compliance is one risk that can negatively impact transaction value. Others include regulations about competitive practices, rules governing international trade, industry specific rules and regulations, and local country and EU regulations.

As the movement to internationalise financial reporting standards and accounting practices gathers steam, the impetus to share best practices for safeguarding shareholders is likely to accelerate.

A history of non-compliance should be of real concern to the buyer, as the acquirer assumes the risks of the target's less desirable history and/or inadequate anti-fraud and corruption policies. The new owner may also be held liable for not dealing swiftly and appropriately with these issues at the time of acquisition.

Justifiably, the party planning an acquisition will be concerned about the costs of due diligence, but these expenses need not be inordinate. While a detailed pre-acquisition review of exposure to fraud and regulatory compliance risk will contribute to the cost of due diligence, it will prove far less expensive than achieving compliance after the fact. A forensic due diligence investigation allows a buyer to evaluate potential future loss in value resulting from inappropriate or illegal business practices, based on identified revenue streams that rely on such business practices.

In conducting pre-acquisition forensic review, the acquirer can see three benefits. First, they learn in advance what obligations, liabilities, or operating issues they could assume post-acquisition, and what steps need to be taken after the transition to achieve compliance. This helps anticipate costs and may also provide something of a regulatory 'safe harbour' – a good faith conversation with regulators about findings may stand the company in good stead as it moves to full compliance. Second, limited partner investors in a private fund can take comfort that the due diligence considered risks beyond the balance sheet and income statement. Third, in the event fraud is uncovered, acquirers have increased leverage in unwinding potential acquisitions.

Corruption is particularly challenging to investigate because of the generally limited evidence within the company itself. During an acquisition, forensic due diligence must proceed on a timeframe that does not threaten to derail the deal.

For these reasons, a simple process is best. Two areas are particularly relevant: first is having proven investigative interviewing techniques and adequate software and methodologies for investigating electronic data, email in particular. If these are not rigorous, the investigation is unlikely to be effective in discovering inappropriate practices.

To facilitate efficient review, the buyer should embed a team of forensic professionals within the financial and tax due diligence teams, so that forensic procedures are woven into the process and conducted concurrently with that work. Depending on the sensitivity of the situation – especially where there is high likelihood of exposure to fraud or regulatory risk – the forensics team may or may not be identified to the target by the buyer.

At a minimum, the forensic review will: scrutinise historical fraud or incidents of non-compliance; analyse and read fraud awareness programs and hotlines; test accounts with high levels of management discretion, such as reserves and accruals, related-party transactions, travel and entertainment expenses, consulting expenses, and other discretionary spending; test controls on areas such as cash disbursements, cash receipts, segregation of duties, signatory authorisations, and journal entry approval; and discuss audit procedures, reporting, and results with the target's independent accountants and, where possible and necessary, with internal audit.

The final product is a detailed report that considers actual, likely, and conceivable exposures. Depending on the buyer's requirements, the report could be integrated into the results of traditional due diligence and, in the case of a financial investment, made available to investors as part of full disclosure. When circumstances warrant, it can be delivered to the acquirer confidentially as a stand-alone report.

In either case, the benefits of forensic due diligence are manifest. The buyer receives a report on compliance risks and possible exposure to fraud, including a roadmap for enhancing controls, addressing operational risks, and corrective measures to be taken post-acquisition. In an environment where information regarding fraud and compliance related exposure has so much potential value, a proper forensic analysis can be vital to achieving deal success. ■

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FCPA Compliance: How Accounting Professionals Can Help

Editor: The Foreign Corrupt Practices Act ("FCPA") continues to be a significant enforcement priority for both the U.S. Department of Justice and the Securities and Exchange Commission. Please describe Ernst & Young's FCPA practice.

Sibery: I agree with your comment about the FCPA continuing to be a significant enforcement priority. We have seen increased demand for services in that area, and not only in the traditional reactive role of investigating these allegations or concerns. We have also seen more activity in the area of M&A and more proactive steps in terms of risk assessment and training as it relates to FCPA.

We have an internal group of professionals who focus on FCPA matters. We currently have people all over the world working on these assignments. We also have an extensive international network of Ernst &Young fraud investigators who work with us. A large number of our investigations involve both U.S. forensic accountants as well as forensic accountants from the country in which we are working.

Editor: Do you work with corporate counsel and outside counsel on these issues?

Sibery: In most cases, we are part of a team that includes in-house counsel, outside counsel and internal audit. When we are called in to help with FCPA risk assessments, we may work only with in-house counsel and the internal audit function.

Editor: Are there any special characteristics to the current FCPA environment?

Sibery: The biggest emerging issue we are seeing is that many more companies are taking additional steps to raise awareness of the importance of compliance with FCPA among their global employees, to assess whether they have the proper controls in place going forward and to provide training as to how employees should react if an FCPA compliance failure should be detected. They are not waiting for an event to happen and then improvising a response. We are also seeing that kind of proactive thinking when a company is considering an acquisition. Companies will ask us to assist at an early stage of their acquisition discussions to consider the FCPA issues that could be a deal blocker.

Editor: What do you see are the challenges for general counsel?

Sibery: The burden of FCPA compliance often falls squarely on the shoulders of the corporate counsel group, but it is also important to have the appropriate coordination and involvement of other groups like internal audit and the compliance group – often representatives from each of these groups make up the membership of an FCPA working group. For example, the corporate counsel may make sure appropriate FCPA-related code of ethics and training programs exist. The internal audit function may focus on incorporating detection of violations in their internal audits and also take into account any issues previously detected. The corporate compliance group focuses on making sure that any issues are being reported, tracked and monitored.

Editor: What is Ernst & Young's role?

Sibery: We are often engaged because of our previous knowledge and experience in FCPA matters. We have a number of partners and staff here that have been focusing on FCPA investigations, training and risk assessments. We have gained considerable experience as a result of working with many companies – small and large – in a wide range of businesses all over the world. We may be brought in by any of the groups making up the FCPA working group I just mentioned. But in most instances in-house counsel brings us in to help them assess the risk, implement new procedures or investigate problems – our participation is particularly valued in locations where companies do not have extensive resources.

Editor: What would your role be in the risk assessment process?

Sibery: FCPA risk assessments are becoming more and more popular for companies to consider. Companies are trying to stay ahead of the curve in the compliance area. With FCPA being a hot area right now, companies are trying to consider the risk areas they have and what they can do to stay on top of monitoring any problems.

Our role is to help companies ask the right questions. While we bring to the table the special insights our training and experience provides, in-house counsel and other members of a company's management team have better knowledge of the company. We work hand in hand with in-house counsel to go through a risk assessment exercise. We may also be asked to help them implement specific training or do risk assessments on a country or regional basis.

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Editor: How can your services be helpful to general counsel?

Sibery: One of the areas in which general counsel look to us for help is in providing them with additional insight into what is going on in operations that may be geographically distant from the general counsel's office, or where there are cultural differences that may complicate FCPA compliance. Our services have been particularly useful to the general counsel in organizations where they have limited contact with inside counsel at the foreign affiliate. Given the FCPA and Sarbanes-Oxley, we have seen a trend toward general counsel's maintaining stronger relationships with in-house counsel of foreign divisions and subsidiaries.

In many FCPA investigations it is advantageous to use a joint U.S.-local team. This provides the benefit of involving U.S. practitioners who are familiar with the FCPA and the current DOJ and SEC enforcement environment. We are frequently invited to participate in these teams. Our people have an understanding of the expectations of the FCPA regulators. We are also able to bring in professionals who are in tune with the area that is being investigated – who know the language and can provide insights about local practices.

Editor: Tell us about FCPA compliance related services that you provide?

Sibery: We are being asked to assist with FCPA training programs and risk assessment profiles. We are also helping to devise internal audit programs or compliance programs that can help companies better prevent and detect FCPA problems. At times, we find that companies may have well thought out and mature codes of ethics and training programs, yet they may not have focused as much on monitoring the adherence to those policies. We are often brought in to develop ways to improve the implementation of their programs. Through that work, we are in a better position to keep general counsel informed about compliance best practices.

Editor: What steps should a company take to assist you in tracking accounting abnormalities that might reveal an FCPA problem?

Sibery: It is important for the legal department to be connected at the local level. It can also be helpful to have a uniform accounting system that provides transparency to the transactions at the local level. Multiple acquisitions make it more difficult to maintain such uniformity. A system with local transparency helps us more easily identify accounting issues that may relate to an FCPA compliance failure. Another valuable tool is the increasing practice that some companies follow of getting subcertifications from officers of affiliates throughout the world to support the certifications required under Sarbanes-Oxley. In connection with these subcertifications, some companies encourage employees to note any areas of disagreement or issues that trouble them – this process can bring to light FCPA issues.

Editor: How can you help prevent FCPA compliance failures?

Sibery: A large part of our business is conducting investigations. However, we are being asked more and more to assess FCPA compliance programs and advise with respect to improvements.

Editor: What about the treatment of facilitating or "grease" payments?

Sibery: For the most part companies have strict rules about "grease" payments, including very detailed approval steps that must be followed. Typically, if there is any question, the legal department will make the decision on the appropriateness of a payment. Companies are making employees aware of the circumstances in which such payments can be made by giving them examples of proper and improper facilitation payments. However, we are seeing fewer facilitation payments being made – perhaps because of uncertainties with respect to their legality.

Editor: Are you involved in helping companies benchmark how other companies are handling FCPA compliance?

Sibery: We are often asked by corporate counsel to help them assess how they are handling FCPA compliance as compared to other companies. Given our FCPA focus, we have seen the standards and methodologies used by a large number of companies. While we can't share specific information due to confidentiality, we can share the trends across similarly situated companies. Audit committee members are also eager to know how their company's FCPA compliance program measures up against those of its peers. We look at specific areas such as tone at the top, organization of the compliance function, reporting relationships, risk assessments, employee training, monitoring compliance, hot lines, etc.

Editor: Where does FCPA fit into Sarbanes-Oxley?

Sibery: The SEC is responsible for monitoring and enforcing the accounting provisions of the FCPA. FCPA compliance is an important element that must be considered by the CEO and CFO when they comply with the certification requirements of Sarbanes-Oxley.

Editor: What provisions of the FCPA are most likely to involve the DOJ?

Sibery: The bribery provisions are of greatest interest to the DOJ. The SEC takes the lead in going after violations of the books and records and internal control provisions. We have seen a close working relationship between the DOJ and SEC on FCPA issues. The DOJ is out talking about the FCPA – and so is the SEC.

Editor: Why is pre-M&A FCPA due diligence a hot issue?

Sibery: News stories and enforcement actions about M&A transactions that have stalled because of concerns about the FCPA compliance status of acquisition partners have attracted a lot of attention. People have become concerned about the adverse publicity that can be generated if an acquisition partner has FCPA violations – and about successor liability. The due diligence teams in which we participate are aware of this. For this reason, we are frequently asked to investigate red flags that may be raised during the due diligence process.

Editor: Are you seeing training programs dealing with FCPA and other controls being implemented by an acquired company?

Sibery: Absolutely. FCPA is part of the integration process. Issues like proper translation of FCPA policies and training programs into the local language rank high on the list of things to do. We have people in many locations who can help. We often work closely with a company to help it design and implement an FCPA training program for an acquired company, no matter where in the world. Sometimes it requires us to train the trainers as opposed to being outsourced as trainers.

Editor: If an FCPA problem is discovered, how should a company deal with it?

Sibery: The company should find out what really happened and the extent of it. Even more important is making sure that the activity is stopped if not appropriate. Every FCPA compliance violation should be investigated to determine why it happened and what can be done to stop it from happening again. Remedial steps may be advisable even before the initial investigation has been completed.

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Global Compliance Readiness – Corporate Counsel

Roundtable: Is Your Global Compliance What It Should Be?

Participating in this roundtable are: ***Jeffrey Carr,*** *Vice President, General Counsel & Secretary, FMC Technologies Inc.;* ***Scott Gilbert****, Chief Compliance Officer, Marsh & McLennan Companies;* ***Thomas Kim****, Senior Vice President, Global Head of Compliance Assurance and Principal Legal Counsel, Reuters;* ***Richard A. Sibery****, Partner, Fraud Investigation and Dispute Services, Ernst & Young LLP;* ***Linda Winter****, Director of Compliance, Armstrong World Industries. The facilitator is Leigh Dance, President of ELD International and one of the conference organizers.*

Editors Note: In advance of the 2007 Global Compliance Conferences in New York City and Livingston, New Jersey, organized by Eversheds in collaboration with MCC and ACC's New York and New Jersey chapters (Oct. 17 and 18, see p. 22 for more info), we asked select conference speakers a few questions. Each of the speakers that participated in the discussion leads either a compliance or a legal function for a major global company. We hope you will find valuable guidance in their sage advice.

Editor: What, in your view, are the most pressing issues today for corporate law departments and compliance functions for companies like yours, regarding implementation and assurance of adequate global compliance?

Carr: The FMC Legal Team helps maintain and align the ethical compass of the company and, in doing so, protects and promotes our values which are among our most important assets. We are merely one part of what must be a holistic, enterprise-wide approach. Setting, communicating and reinforcing the "tone at the top" view on ethical behavior and appropriate business conduct appropriately are probably the most important issues.

Cultural sensitivity is critical for those of us that operate within a large multinational organization. While there is usually broad agreement on "doing the right thing," there is often a lack of clarity around what precisely that means in diverse contexts and cultures. We must take care to avoid overly legalistic or nationalist precepts and instead focus on the basic values those precepts and our company's culture reflects. Perhaps most important, the legal team cannot in and of itself ensure global compliance – but we can and should act as a guide to help our businesses exercise judgment, assess impacts and consider the effects of their actions.

Gilbert: My list is as follows:

(a) *Culture*. Working with the management of the business to make sure that ethical and lawful behavior is seamlessly embedded in the way that the firm does business rather than externally imposed;

(b) *Globalization presents a number of challenges for a compliance department*. These include developing an adequate but efficient compliance organization to keep track of the regulatory requirements and address the needs of regulators in many jurisdictions; addressing and resolving conflicts of law; and implementing uniform global standards that are tailored to local business structures, products and regulatory requirements.

(c) *Risk assessment*. Corporations need to understand proactively their compliance-related risks by regularly engaging in a comprehensive risk assessment that follows a reasonably rigorous process that encourages candid discussion about risks and how to mitigate them.

(d) *Communication and learning*. It is always a challenge to find fresh, effective ways of reinforcing fundamental values and teaching colleagues how to spot compliance issues and to address them.

(e) *Monitoring and measuring*. Monitoring allows an organization to understand how well controlled its risks are and to make informed judgments about where it should spend its resources to minimize risk. It is a challenge to determine what to measure, how to do it, and how to report the results in a way that stimulates action rather than fosters bureaucracy.

(f) *Investigation*. When an allegation of misconduct is made, it needs to be investigated and, if the allegation is sustained, appropriate remedial action must be taken. In the era of email, investigations can be enormously costly, disruptive, and time-consuming. The amount of investigation that may be required is often a judgment call.

Sibery: Companies are being much more proactive. We are seeing increased activity both in risk assessments on the front end of compliance implementation and in monitoring efforts. Risk assessments are being used to highlight areas that may need additional focus or simply to make the best use of limited resources. Monitoring is becoming even more important. Many of our clients have excellent compliance programs that include detailed

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policies and training but are lacking in their monitoring of those policies. Compliance-specific reviews testing the adequacy of the compliance program are one of the tools used to help increase global compliance.

Winter: It's probably the same challenge that many business functions face: share of mind of employees. You've got to find ways to keep the idea of compliance and self-governance in people's minds as they go about their daily work. The issue is not only keeping the general idea of good business ethics in employees' minds, but finding a way to reach out to specific groups of employees with communications, training, etc. that is relevant for *their* job in *their* part of the world.

Editor: An effective program of education, controls and reporting to ensure compliance with laws and regulations globally costs a lot of money. What resources do you draw on most to implement global compliance, and how do you respond to the inevitable cost pressures?

Carr: Unfortunately, a company can spend vast sums without having any impact on fostering and maintaining an ethical and compliance culture. So it's not all about the money. We need only look at recent history to see that playing out in the U.S., the EU and elsewhere. Similarly, a very effective program can be done with internal resources, off the shelf or free content and very little monetary spend. Of course, those "soft costs" are very real.

The key is matching a program with one's culture, industry, and value system. In our case that means a multifaceted approach where we use every opportunity to educate and reinforce those values, learn from and leverage our experience and address issues if they do arise. Those include: codes of conduct, communication programs, hands on/in person training sessions, webinars, online issue specific and targeted training, email blasts, individual certifications, annual top down compliance reviews, quarterly financial representation letters, internal and external audit, hotlines, internal and external investigations, remedial measures and a vigorous after action approach to foster continuous improvement. That being said, budgetary pressures are real and making the case for investment in compliance spending can be a challenge. Until a company has suffered the impact and potentially high costs of a compliance lapse, the focus must be on an investment to avoid somewhat speculative costs and reputational risk.

Gilbert: Most of our compliance resources are deployed at the operating company level. A small corporate team with expertise in particular areas is leveraged for the whole company, and centers of excellence at the operating company level also provide services for the whole company. We work closely with the legal organization and our internal audit staff.

Kim: Compliance officers have to be able to leverage across the assets and resources of a company to address certain needs. Beyond that, however, line managers themselves have to view and be held accountable for ensuring compliance within their business unit. This not only helps company-wide compliance efforts scale efficiently, when compliance is owned by individuals within the business, it is much more likely to become a part of the culture of the company and in turn to be successful.

Sibery: Cost is always a significant concern when we assist a company with a compliance project. Often on global projects we use our international network to assist on a region-by-region or country-by-country basis. While we may have a core team working with the compliance department at headquarters, we can increase the efficiency and lower the overall costs by using professionals with local knowledge and experience.

Winter: The basic processes that support compliance cut across industry or size boundaries, but the way you implement those processes is going to be uniquely determined by your company's infrastructure, organizational structure, resources, and beliefs. At our company, the approach is to leverage our internal resources by partnering with business functions such as legal, internal audit, and human resources. That allows us to create a program tailored to who we are as a company, and selectively use external resources to support our compliance program where needed

Editor: What are the areas of global compliance that Boards of Directors are most attuned to today, and what are the areas where they perhaps should increase their focus?

Carr: The two areas I see are international operations and internal financial controls. I think the area that merits the most attention is making sure there isn't too much of a focus on checklists and procedures and a failure to identify a broader issue while counting grains of sand.

Gilbert: I find that the focus of a Board of Directors varies by jurisdiction, industry and the company's immediate experience. A Board of a UK financial services company, for example, is very focused on the FSA, its principles, rules and current areas of focus. Boards in sectors that have been through some regulatory turmoil have had to focus on the issues that generated the regulatory response. In general, Boards should make sure management is proactively identifying compliance risk and taking the steps to mitigate those risks. In the U.S., I think Boards are moving beyond focusing on Sarbanes-Oxley and are looking more broadly at enterprise risk.

Kim: Across businesses, Boards of Directors have paid much attention in recent years to issues relating to conflicts of interest and misuse of company assets and information, and rightly so. Looking forward, however, companies should be attuned to the risks that are accentuated from ever-increasing globalization.

Sibery: In recent years we have seen a focused interest by Boards of Directors on bribery and corruption. Given the increased FCPA enforcement, news items such as the U.N. Oil-for-Food scandal and information provided by groups such as Transparency International, this hasn't been much of a surprise. Boards have started to ask more questions and have been involved in increasing the focus on strengthening the global compliance function

Editor: What are the job conditions or requirements that you would suggest for any colleague taking on global corporate compliance responsibilities?

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Carr: First, there must be a clear understanding of the company's core values and commitment to acting ethically and in compliance with those values and legal requirements. That requires an assessment of the company's senior management to the tone at the top insistence on not just "talking the talk but also on walking the talk." Second, is knowledge coupled with the independence and freedom to fulfill the demands of the function.

Knowledge requires access to decision making venues and inclusion in processes to make sure compliance and risk considerations are acknowledged and appreciated. Independence manifests itself in many aspects of the job including: access to the board, reporting directly to the CEO or perhaps the GC, coordination and cooperation with internal and external auditors, and control over counsel and advisors. Third, there must be a commitment of appropriate resources – human, organizational and monetary – to accomplish the clearly stated and agreed goals and mission of the function. If one or more of those three legs are lacking, then I'd counsel running, not walking, away.

Gilbert: The chief compliance officer can be most effective if he or she has independence and reports to the CEO and to the Board. The compliance function needs to have adequate resources, i.e. its own budget, and must maintain a collaborative, close working relationship with other key functions, such as the legal organization, human resources, and the finance organization (particularly internal audit).

Kim: Anyone considering heading up a compliance function should spend time ascertaining the views of the executives and the Board of Directors regarding the ultimate ownership of the company's compliance program. Are they truly engaged and understand that they have personal responsibility on a macro level and that on an everyday operational level each employee has responsibility to manage the affairs of the company in a way consistent with the company's agreed values and principles? Is compliance integrated into the company's operational business or is it viewed as something ancillary? Any compliance officer will need the support of executives and the Directors who understand that compliance is not a hindrance to business, but rather a manner in which a well-run business operates and is a key to long-term success.

Editor: In what ways have you found outside counsel to be most helpful in the global compliance function, and in what ways the least helpful?

Kim: Outside counsel can be most useful to corporate compliance officers by drawing upon the experience they have obtained assisting other clients across industries in formulating the specific advice they render to a particular client. This is a perspective that combined with the compliance officer's in-depth knowledge of the company itself can help ensure that whatever course of action is decided both benefits from the experience of others and is tailored to the specific company.

Outside counsel needs to be careful, however, in assuming that recommendations that worked for some clients will work for all clients. While there are general principles that have wide applicability, one should not overestimate how critical it is to have a detailed knowledge of how each company operates and a deep understanding of that company's unique corporate culture.

Carr: As inside counsel we are often far more attuned to practical emerging compliance issues because we understand our business culture and the industries in which we operate. Outside counsel are most helpful when they provide real world counseling and have a view into what other firm clients are doing. Outside counsel are critical if a compliance issue erupts into an internal investigation, response to governmental inquiries or an actual dispute. They are least helpful when their emerging threat radar raises irrelevant issues and when they provide no guidance that is actionable in the real world.

U.S. Foreign Corrupt Practices Act

Some Reasons Why Compliance Programs Still Matter

By Sharie A. Brown, Foley & Lardner LLP, White Collar Defense & Corporate Compliance

Companies are developing and updating their anticorruption compliance programs and spending millions of dollars conducting anticorruption compliance reviews and audits. Private practitioners, in-house counsel, forensic accountants, and investigative firms are attending anticorruption programs and conferences in record numbers. Everyone wants to know all the current anticorruption prevention, compliance, and detection tips. This article is for the companies that already know the antibribery prohibitions[1] and internal controls and accurate recordkeeping requirements[2] of the U.S. Foreign Corrupt Practices Act (FCPA).[3] The following discussion is on those companies that already have an anticorruption compliance program. I wanted to give a short reminder for those in-house personnel who periodically train, teach, and counsel their global business unit and staff employees on anticorruption policies and procedures. It is for those in-house professionals who sometimes wonder if their company is actually preventing corrupt payments or if the effect of their compliance program is to merely document their company's concern about the issue.

So, here are five (but not all) very good reasons why your anticorruption compliance program still matters a lot.

1. EFFECTIVE PROGRAMS MITIGATE FINES AND PENALTIES

In the last few years, many companies have received record fines and penalties amounting to tens of millions of dollars for engaging in conduct that violates the FCPA and local anticorruption laws.[4] In 2007, the corporate defendant in *United States v. Baker Hughes* paid over $40 million in fines and penalties even though the company cooperated with U.S. law enforcement authorities during the investigation. Yet, Baker Hughes had apparently not updated its compliance requirements for agent and consultant vetting, hiring, oversight, and management at the time of the misconduct to sufficiently address the company's FCPA risk in this area overseas. Previously, for another FCPA violation in 2005, in *SEC v. Titan Corporation* and its companion case *United States v. Titan Corporation*, the corporate defendant paid a combined $28 million fine, including criminal, civil, and disgorgement, for an FCPA violation that was at the time among the highest ever imposed.

In contrast, some other companies that recently violated the FCPA hardly received any comparable penalty at all.[5]

The FCPA violations in *Securities & Exchange Commission v. Delta & Pine Land Company and Turk Delta Pine, Inc.*[6] and related federal court administrative actions resulted in the defendants agreeing to pay a fine of only $300,000 in order to settle the two enforcement cases in July 2007. Since the U.S.-based company had violated the internal controls and books and records provisions of the FCPA and Turk DeltaPine was accused of violating the antibribery provisions, this modest penalty seems to be more suited to an earlier era of FCPA enforcement.

Moreover, in September 2007, the corporate defendant that consented to the SEC's administrative cease-and-desist order *In the Matter of Bristow Group, Inc.* received no financial penalty whatsoever in connection with its FCPA antibribery and internal controls violations in Nigeria. This was in part because the defendant promptly investigated the suspected misconduct, timely self-disclosed the misconduct to the U.S. enforcement authorities, cooperated with authorities, and self-remediated the uncovered problems.

Thus, in *Bristow*, the hallmarks of an effective FCPA corporate compliance program were sufficiently present to enable the company to properly investigate a suspected violation and make informed determinations on self-reporting and remediation that substantially mitigated the possible DOJ and SEC fines and penalties that otherwise could have resulted. Mitigation of harsh law enforcement penalties and punishment is an understandably strong incentive for maintaining a robust anticorruption compliance program, but it is not the only incentive.

1 15 U.S.C. §§ 78dd-1(a), 78dd(a), *et seq.* (2008).

2 *Id.* §§ 78m(b)(2)(a), *et seq.*

3 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, *et seq.* (2008).

4 *See United States v. Baker Hughes Services International, Inc.*, Plea Agreement, Crim. No. H-07-129 (S.D. Tex. April 11, 2007) [hereinafter "Baker Hughes Plea Agreement"] ($11 million criminal penalty; $10 million civil penalty and $24 million disgorgement). *See also SEC v. The Titan Corporation*, Civ. Act. No. 05-0411 (D.D.C. March 1, 2005) ($15.4 million combined disgorgement and prejudgment interest/civil fine); *United States v. Titan Corporation*, Crim. No. 05-CR-0314 (S.D. Cal. February 22, 2005) [hereinafter "Titan Plea Agreement"] ($13 million criminal fine).

5 *See Securities & Exchange Commission v. Delta & Pine Land Company and Turk DeltaPine, Inc.*, Exch. Act. Rel. 20214; SEC Accounting and Auditing Enforcement Release No. 2657 (July 26, 2007)[hereinafter "Delta Pine"] ($300,000 civil fine). *See also In the Matter of Bristow Group Inc.*, Exch. Act Rel. No. 56533 (September 26, 2007); SEC Accounting and Auditing Enforcement Release No. 2727 (September 26, 2007) [hereinafter "Bristow"](no financial penalties).

6 *Supra* note 5.

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2. EARLY DETECTION ALLOWS EARLY COMPANY SOLUTIONS

FCPA and anticorruption policies and procedures that address a company's operational corruption risk profile will likely result in early warning or early detection of misconduct at the company. Such procedures will also enable a company to determine if there are compliance awareness gaps that may create an environment or setting for inappropriate behavior that could lead to a violation of company policy or applicable anticorruption laws. Companies should always be the first to know about their compliance problems so that they can be the first party to propose and implement a strategy for fixing the problem. Third-party remediation or law enforcement-mandated remediation of a company's systemic problems are usually more draconian, less workable, and not sufficiently customized to your company's issues.

> *Companies should always be the first to know about their compliance problems ... Third-party remediation or law enforcement-mandated remediation of a company's systemic problems are usually more draconian, less workable, and not sufficiently customized to your company's issues.*

3. TRUST IS VALUABLE

Companies want to be trusted by their customers, partners, business community, regulatory authorities, and investors, among many others. Customers and investors regularly entrust companies with their financial future and their most private and valuable personal information, as well as their environmental health and safety. To the extent that companies fail to have adequate internal controls and anticorruption policies that prevent misconduct, companies are susceptible to serious violations that breach that trust. A more trustworthy competitor could very easily become the more profitable competitor.

4. GOOD CONTROLS HELP KEEP THE PLAYING FIELD LEVEL

It stands to reason that if more companies operating overseas have serious and robust anticorruption programs with rigorous internal controls and highly accurate and scrutinized recordkeeping, anticorruption awareness will be heightened. Anticorruption awareness is heightened when employees and third parties are provided with tools and training that help them avoid misconduct or an appearance of misconduct. Effective anticorruption compliance programs also foster transparency and good recordkeeping, regardless of whether the company is subject to the jurisdiction of the United States or not. The competitive business development process overseas would likely become somewhat fairer, less costly, and more professional for all companies.

5. ETHICS IS FOREVER AND POSSIBLY UNIVERSAL

Many companies currently have ethics policies, as required. Many companies also want their employees to act ethically when they are presented with an opportunity to engage in corrupt practices. Compliance programs can translate rules and procedures, but they cannot teach values. Nor do most employees or third parties always appreciate the legal nuances that underlay many procedures and policies. However, if companies could convert a compliance process into part of an ethical culture that comprehends the difference between undue influence and appropriate business engagement, companies might have fewer instances of misconduct.

Thus, anticorruption procedures, policies, and processes should be reviewed and updated. These same procedures should be tested, while compliance program execution should be examined, and real world understanding of the processes and controls should also be audited and periodically reviewed. These actions and considerations regarding your company's current compliance program may help lead to an ethical corporate culture; and that still matters a great deal to most businesses. ▪

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Corporate Compliance Practice: Foley & Lardner

By Jocelyn Allison

Law360, New York (September 15, 2008) -- It's easy for many people to see bribery as a clear violation of the law, but in countries where riots are frequent and executives live in danger of being kidnapped or worse, the issue gets a bit thornier, said Sharie Brown, chair of the corporate compliance and enforcement practice at Foley & Lardner LLP.

"If there is a lot of political and civil unrest and you need protection and don't know who to trust ... it's a little harder for some companies to see things in terms as black and white and clear-cut as I see them, sitting in my very safe and comfortable office," Brown said.

Company executives stationed in developing countries might feel pressured to conform with local customs in which bribery is a way of doing business, especially if they live in fear of their employees being kidnapped or of their facility being sabotaged, Brown said.

That's when support from the parent company becomes crucial.

"If you have your employees in that country and they have no ability to have a cover when the officials say, '[all the other companies give bribes], why should I deal with you?,' then that employee is going to feel pressed," Brown said.

"So having a parent company that really backs up their overseas operations on this issue can give those local employees some cover to say, 'I'm sorry, I would get fired, terrible things would happen to me, because my company is watching,'" she said.

As the growth of the caseload under the U.S. Foreign Corrupt Practices Act would seem to show, many companies today are watching. Brown, who has handled cases under the act since 1993, has seen the number grow from one every year or two to three cases a month.

Despite the boom in enforcement, especially in the last three years, the amount of alleged violations has shown no sign of slowing, Brown said.

"For all of the tightening of laws around the world, there just seems to be more activity in this than ever," Brown said. "It doesn't seem to have had the preventive or punitive effect that I guess I expected that harsher, tighter laws would. Or maybe the problem is just more pervasive culturally in the world than people ever imagined."

An increased level of cooperation among nations since the late 1990s and since the Sep. 11, 2001, terrorists attacks has contributed to the rise in enforcement under the FCPA. Many countries, such as Germany, that once condoned bribery now have laws against it and are working across borders to crack down on the practice, Brown said.

As enforcement increases, more companies are starting to come forward with possible violations in the hopes of receiving leniency from agencies such as the U.S. Department of Justice and U.S. Securities and Exchange Commission, she said.

"We just have a world that is getting smaller, in some ways, with respect to cooperation among governments and government prosecutors and officials who care about certain issues that cross all borders, whether it be corruption, or terrorism or money-laundering," Brown said.

"Through this cooperation, these officials or prosecutors get information that they probably would not have had access to if this level of cooperation did not exist," she added.

Another development that has burgeoned enforcement under the FCPA is the rise of e-mail as a primary method of communication. People often are far less guarded in what they say over e-mail, making it much easier for prosecutors to show intent than when the law was passed in the mid-1970s.

And, as many companies don't realize, the offer or promise of a bribe will get them in as much trouble as actually paying it, Brown said.

"If they can prove that the offer was made or the promise was made with a corrupt purpose to a foreign official, it's as good as if they paid it," she said. "So people have to be careful with what they say, because it could be misinterpreted, and they have to be careful with what they write in e-mails, which are a great source of evidence."

Although best known for its anti-bribery provision, the FCPA catches companies most often on the sloppiness or inaccuracy of their books and records.

Companies with slipshod financial statements are more likely to invite scrutiny from enforcement officials wary of whether those inaccuracies are hiding something more sinister, even if there is no blatant wrongdoing. Either way, they're in violation of the FCPA, Brown said.

"It's something that trips up a lot of companies," she said.

Companies also run afoul of the FCPA with so-called facilitating payments they sometimes make to people in low-level clerical positions to speed things along, such as releasing goods at customs. They're not illegal in the U.S., but they can start to look it if they get too high, Brown said.

"Once you get past double digits, you bear the risk of the payment being viewed by officials as a bribe," Brown said. "Even with $20,000, you're going to have a harder time making the case that this is a facilitating payment."

Even if the payment is within range, companies can still end up violating the FCPA if they fail to record the payment properly in their books and records.

Depending on the violation, companies can receive severe fines for violating the FCPA. One company recently received a $500 million fine, though many can receive far less, or none, if they come forward voluntarily, Brown said.

The costs of violating the FCPA don't stop with fines, but can climb to millions of dollars if a company is subjected to long-term scrutiny through a monitor appointed to sniff out further violations. It can cost some companies $10 million a year to fund the outside review, which usually turns up something, Brown said.

"If someone came in and their sole job were to find wrongdoing, they're bound to find something that isn't being handled overseas the way it should be handled," she said. "So it's a nightmare for public companies."

To avoid such entanglements, companies should start by making sure they don't have people with a history of questionable ethics in management positions, then create a clear separation of powers in which one person authorizes a payment and another records it, Brown said.

Having a robust compliance policy in place can often tip the scales in a company's favor if

they do end up under the microscope for an alleged violation, said Scott Fredericksen, practice group chair of the securities litigation and white collar practice.

"If you can show that the company made absolutely A-plus efforts to make sure they had an effective compliance policy in place, that will go a long way toward preventing the kind of criminal enforcement action that we want to avoid," Fredericksen said.

That means having live compliance training on a regular basis for employees, not some dusty compliance manual that never leaves its spot on the shelf. More than ever, it's critical for companies to plan ahead and take steps to ensure compliance now instead of waiting until something goes wrong, he said.

"Companies are too large, and the government has increased enforcement in all areas so much, it is probably the wisest investment to be involved with a robust compliance policy, due diligence reviews and audits now, as opposed to dealing with the results of a federal grant jury investigation," Fredericksen said.

Foley's corporate compliance and enforcement practice is part of its securities litigation and white collar practice, which includes 89 attorneys.