



A New Era in Global Anti-Corruption:

Governments Get Serious about Enforcement

by Andrea Bonime-Blanc and Mark Brzezinski

After two decades of lax enforcement and half-hearted commitment, global anti-corruption efforts appear poised to intensify. But achieving the goal shared by both policymakers and international businesspeople to eradicate at least the most blatant forms of public corruption will require a more concerted and integrated approach—not only within companies and governments but across industries and borders.

A Surge in Anti-Corruption Activity

For the first two decades of its existence, the U.S. Foreign Corrupt Practices Act of 1977 (FCPA) was an isolated national legislative effort to combat overseas public corruption. Seldom enforced, it was not quite the inhibitor of bad practices its authors had intended. But the past eight years have witnessed the anti-corruption movement evolving into a complex global web of public and private, national and multilateral, voluntary and forced, grass roots and imposed, and academic and practical initiatives, policies, practices, laws, treaties, and enforcement efforts.

The first year of the Obama Administration has seen a surge in FCPA enforcement, producing a buzz among corporate executives that the old ways of doing business with “a wink and a nod” are over and that business decisions taken years ago may now result in serious liability. The year 2010 began with a burst of cross-border prosecutorial collaboration. In February, one of Europe’s largest arms suppliers, UK-based BAE Systems, was fined \$400 million following a joint U.S./UK corruption investigation.



The long-awaited disposition of the Daimler Chrysler 22-country bribery case investigated by U.S. and German prosecutors since 2005 took place on April 1, 2010, with the U.S. courts imposing a \$185 million fine as well as a deferred prosecution agreement on Daimler AG.¹

A significant rise in completely non-U.S.-based anti-corruption investigations and prosecutions is also taking place. In a highly publicized case involving the Anglo-Australian mining company Rio Tinto, the Chinese government prosecuted and convicted four executives on bribery and corporate espionage charges in late March.² And in another international case, a joint Swiss-UK investigation involving 150 police officers and the UK's Serious Fraud Office led to the brief detention of three senior executives/board members of Alstom, a global infrastructure company, on corruption allegations.³ Finally, on April 8, 2010, the British House of Commons passed a groundbreaking anti-corruption bill that has even more expansive enforcement and punishment provisions than the FCPA.⁴

These developments signal an important step in the globalization of standards. For years after the passage of the FCPA, some businesses and their executives played by two sets of rules, conducting business one way in the United States and in an entirely different way in the developing world. Now the U.S. government, other governments, and private companies (both U.S. and foreign), with the critical help of the non-governmental community, are playing leading roles in the global anti-corruption movement.

Historical Context

Until the enactment of the FCPA in 1977, few legal incentives inhibited companies—including U.S.-based companies—from bribing foreign public officials to obtain business. No laws with explicit extraterritorial reach forbade companies and their executives from engaging in corrupt behavior. Businesses ran the risk of violating local or national laws forbidding bribery within specific jurisdictions, but many were willing (and even eager) to risk such violations to enter new markets. The business culture was that “everyone else was doing it, so you had to as well to be competitive.”

Following prominent defense industry scandals in the 1970s, the U.S. Congress passed the FCPA in 1977, forbidding U.S. companies (and non-U.S. companies publicly listed on U.S. stock exchanges) from bribing foreign government officials to gain or retain business. It was the first time an extraterritorial law of this kind was passed by any country; however, its enforcement was another matter.

Early on, the U.S. government was not very vocal about prosecution and enforcement of the FCPA. In the first 25 years of its existence, there were only 39 criminal prosecutions. But even in those early days, some companies—especially those in the defense industry—began to pay serious attention, as the creation of the voluntary Defense Industry Initiative in 1986 would attest.

Until the beginning of the new century and the adoption of the Organization of Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Transactions in 1997 (OECD Convention), several leading industrial countries (including Germany and France) not only lacked FCPA-like laws, but allowed companies to treat the payment of foreign bribes as a legitimate business expense and legal tax deduction.

1 “Judge Approves Daimler Bribe Settlement,” *Wall Street Journal*, April 1, 2010.

2 “Rio Tinto Employees Sentenced in Chinese Bribery Case,” *New York Times*, March 29, 2010.

3 “Alstom Executives Arrested in UK raids,” *London Daily Telegraph*, March 25, 2010; and “Alstom at Center of Web of Bribery Inquiries,” *New York Times*, March 29, 2010.

4 “UK Companies Face Tough New Bribery Laws,” *The Telegraph*, April 9, 2010.

Multilateral Agreements Proliferate

Beginning in 1989, the U.S. government lobbied the OECD to consider promulgating an international anti-corruption convention. In 1993, several ex-World Bank officials founded Transparency International (TI), the first and, arguably, still foremost non-governmental organization (NGO) in the anti-corruption space. In 1991, the passage by the U.S. Congress of the U.S. Sentencing Guidelines provided additional strong incentives to U.S. companies to develop and adopt a comprehensive internal compliance program.

By the mid 1990s, broader international recognition and acceptance emerged of how public corruption is an endemic and socioeconomically pervasive problem, especially in the most vulnerable societies. Several intergovernmental anti-corruption efforts culminated in the adoption of the OECD Convention in 1997. Of lesser impact, but still significant, were several regional intergovernmental anti-corruption initiatives, such as the Inter-American Convention against Corruption, also adopted in 1997.

By the turn of the century, the number of multilateral agreements committing governments to stemming corruption was proliferating. The United Nations Global Compact voluntary initiative was launched in 2000 in cooperation with private enterprise and civil society, focusing on, among other principles, anti-corruption by 2004. As of 2010, the compact has more than 7,700 signatories from 130 countries. The African Union Convention on Preventing and Combating Corruption was adopted in 2003, and, capping many years of intense negotiation, the UN adopted its Convention against Corruption (UN Convention) in 2005.

A Snapshot of Current Global Trends

Within the public sector, the globalization of anti-corruption is demonstrated clearly by the fact that 38 countries (the original 30 OECD members plus eight additional signatories) have adopted, in accordance with the OECD Convention, national legislation that is almost identical to the FCPA. Among the adoptee signatories are countries such as Argentina, Brazil, Mexico, and Greece that consistently rank poorly in TI's Corruption Perceptions Index (CPI). This not only means that each of these countries can investigate, prosecute, and punish its companies and their employees for the bribery of foreign officials in other countries, it also means that two or more signatory governments can collaborate on the investigation, prosecution, and punishment of corruption offenses.

Such international collaboration is no longer theory but reality, starting with the joint U.S.–German investigation of Daimler Chrysler begun in 2005. The same governments also launched a joint investigation and prosecution of the engineering giant, Siemens. The incentive for governments to collaborate in the investigation and prosecution of FCPA violations is clear: governments that successfully collaborate with one another can partake in the settlements emerging from such investigations and prosecutions. In the case of Siemens, the German government collected \$500 million from the settlement spearheaded by the U.S. government in 2008.

There are a number of other joint investigations underway—not only among OECD signatory nations, but also non-signatory nations, including Bangladesh, Greece, Italy, Lichtenstein, Nigeria, Ghana, Switzerland, and several Central European nations. Significant changes are also occurring at the national level in other countries. In 2009, the Serious Fraud Office (SFO) of the UK Financial Services Authority brought its first enforcement action against a British executive of Johnson & Johnson for allegedly bribing Greek officials to buy the company's medical products. Even more significant, the United Kingdom just adopted the first FCPA-like anti-bribery law, applicable to companies doing business in the United Kingdom and internationally.

These developments are coupled with public governmental acknowledgments about the malignant nature of corruption in their societies. In December 2009, Greek President Andreas Papandreou made a direct public admission to his European Union colleagues that his government was “riddled with corruption.”⁵ Russian President Dmitry Medvedev has publicly committed to reduce corruption in the Russian private and public sectors. And in late 2009, the Chinese government acknowledged that last year China suffered from approximately US\$35 billion in fraud and corruption.⁶

Demonstrating the globalization of anti-corruption efforts well beyond the United States was the publication in early 2010 of the OECD’s “Good Practice Guidance on Internal Controls, Ethics and Compliance,” adopted by the OECD Council on February 18, 2010, as an integral part of its overall program to combat global public official corruption.⁷ In it, for the first time ever, clear and specific guidelines are provided to OECD nations’ companies on how to implement an effective corporate anti-corruption program with guidelines even more specific than anything the U.S. government has provided on implementation so far.

Another key trend in the global fight against corruption is the proliferation of NGOs, think tanks, and academic research regarding the causes, development, and prevention of corruption. This sector has contributed a wealth of new knowledge in this area, with such tools as TI’s annual CPI, Bribe Payers Index (BPI), and Global Corruption Barometer (GCB). It has also raised public awareness and pressure on the private and government sectors to continue to work on finding lasting solutions.

A radical, game-changing factor in the growth of anti-corruption awareness and accessibility to information comes from the Internet revolution, accelerated by the explosion of social networking tools. The Internet has spearheaded irreversible change in the speed, manner, and access to information. Technological change is likely to continue and, with it, the ability for people and organizations to share information, videos, data, and documents. Twitter, Facebook, and YouTube are here to stay.

Demonstrating the Need for a Strong Internal Compliance Program

No example demonstrates the need for a strong internal compliance program better than the Siemens corruption case. That case, which was settled with the U.S. and German governments in December 2008, represents the first time in FCPA history that a company was criminally charged for failure of “internal controls.” In all previous cases, companies were charged under anti-bribery or “books and records” provisions of the FCPA. Siemens had a compliance program but it lacked an “effective” compliance program.

In their investigation, the U.S. and German governments focused on certain key internal control failures by Siemens. Among them: Siemens’s failure to conduct proper due diligence on consultants who happened to be Siemens alumni, an inadequate internal training and anti-corruption awareness program, and a seriously

understaffed compliance team. Adding insult to injury, Siemens had petty cash funds allowing for up to €1 million to be spent without permission and it had no procedure to detect bribes as evidenced by false invoices and bogus third parties.

Siemens paid over US\$1.6 billion in criminal and civil penalties to the U.S. and German governments. The fines were almost 20 times larger than any single penalty imposed through that date on any company anywhere for corruption offenses. Also part of the Siemens settlement, specifically reached with the World Bank, was the establishment of the innovative US\$100 million Siemens “Integrity Initiative” to “support organizations and projects that fight corruption and fraud through collective action, education and training” over the next 15 years.

5 “Papandreou Says Greece is Corrupt,” *Financial Times*, December 12, 2009.

6 “China Finds Huge Fraud by Officials,” *New York Times*, December 29, 2009.

7 “Good Practice Guidance on Internal Controls, Ethics, and Compliance,” Organization of Economic Co-operation and Development, February 18, 2010.

Business Starts to Get It

Parallel to these international and national public and NGO sector anti-corruption developments are a series of similar developments within the business community. The private sector has seen dramatic growth in voluntary anti-corruption initiatives both within industry groups, such as the Extractive Industry Transparency Initiative (EITI), and through broader multisector efforts, such as the World Economic Forum's Partnering against Corruption Initiative (PACI). Likewise, there have been major strides in the fight against corruption in recent years from within companies. These efforts are exemplified by the proliferation of corporate compliance programs and global codes of conduct in the last decade by companies headquartered in the United States, the European Union, Oceania, South Africa, and some Asian countries. Companies that take these efforts seriously essentially choose to walk away from business opportunities riddled with corruption dangers. By doing so, and by collaborating with other like-minded companies, they have been able to slowly chip away at the powerful edifice that corruption presents in certain locations.⁸

The Critical Role of the U.S. Government

In the final years of the Bush Administration and especially under the Obama Administration, the United States has aggressively increased the focus and reach of the FCPA. The U.S. government is collecting larger fines and prosecuting more individuals under the Act. In 2001, approximately eight FCPA cases were under investigation at the U.S. Department of Justice (DOJ). By 2009, that number had grown to more than 130—the most in any year since the FCPA's adoption in 1977. The head of the DOJ Criminal Division, Lanny Breuer, stated publically in November 2009 in a speech to the pharmaceutical industry that “One can say without exaggeration that this past year was probably the most dynamic single year in the more than 30 years since the FCPA was enacted.”⁹ In the spring of 2010, the number of cases under investigation or prosecution has grown to approximately 160.

Until recently, what the global anti-corruption movement lacked was the teeth of enforcement. Today, the DOJ is intensifying its efforts at combating international corruption with a more proactive approach. Investigations, prosecutions, enforcement, and cross-border cooperation have been ratcheted up in terms of both the number of investigations and the number of targets within an investigation.

Within the U.S. government, the DOJ is the lead organization handling FCPA cases, with the U.S. Securities and Exchange Commission (SEC) becoming much more proactive in cases involving allegations of accounting books and records violations. The SEC recently established a dedicated FCPA unit in its Enforcement Division.

The role of the Federal Bureau of Investigations (FBI) in investigating cases has also increased. The FBI is now deploying Legal Attaches (known as LEGATS) in more than 75 cities worldwide, and its Washington, D.C., field office has greatly expanded its public corruption squad.

The DOJ has also made it clear in recent months that certain industries will be specifically targeted. At the pharmaceutical convention in November 2009, Criminal Division Chief Breuer specifically stated that “over one-third of U.S. sales from this industry are overseas and often involve countries where the entire healthcare industry is run by the government” and made it clear that not only pharmaceutical companies but also medical device manufacturers would be in the DOJ's line of sight for FCPA enforcement.¹⁰

The oil and gas services industry is also high on the DOJ agenda. Most recently, Jack Stanley, a former KBR/Halliburton executive, agreed to a seven-year prison term as well as a payment of US\$10.8 million in restitution (the amount of kickbacks) to his former employer as part of a plea agreement. Between 1995 and 2004, Stanley devised and implemented a scheme to bribe Nigerian government officials to assist in obtaining six contracts on behalf of a four-company joint venture worth more than US\$6 billion to build liquefied natural gas production facilities at Bonny Island, Nigeria.¹¹

⁸ For an overview of the main components of an effective corporate anti-corruption program, see Andrea Bonime-Blanc, “Anti-Corruption & FCPA Enforcement in 2010 and Beyond: A Business Integrity Officer's Perspective,” *Ethical Corporation Magazine*, March 10, 2010.

⁹ “Breuer Sends FCPA Warning to Big Pharma (and Its Executives),” *Wall Street Journal*, November 13, 2009. A copy of the speech is available at the Main Justice website (www.mainjustice.com/2009/11/12/criminal-division-chief-breuer-fcpa-pharma-speech/).

¹⁰ *Ibid.*

¹¹ “Halliburton, KBR Settle Bribery Allegations,” *Washington Post*, February 12, 2009.

And an industry not particularly high on the list previously, the entertainment industry, was given a jolt with the *Gerald and Patricia Green* case decided in September 2009. In that case, film producers were found guilty of conspiring to and actually bribing Thai officials, falsifying tax returns, and conspiring to and engaging in money laundering to run the annual Thai film festival. About US\$1.8 million in bribes were paid for contracts that generated more than US\$13.5 million in revenue. Today, no industry can consider itself immune from review.

The *Green* case illustrates another critical trend currently underway—the DOJ is targeting individuals to investigate and prosecute, especially senior executives. The 22 executives arrested in January 2010 in an undercover FBI sting at a convention in Las Vegas and elsewhere was one of the largest arrests ever under the FCPA. In the Nature’s Sunshine Products case settled in July 2009, the SEC had claims related to bribes paid by the company’s Brazil subsidiary with related falsification of books and records to conceal such payments. Notably, the SEC pursued the CEO and former CFO for violating the “books and records” provision of the FCPA solely based on their capacity as “control persons.” The SEC never alleged that these executives had engaged in any affirmative act relating to improper payments nor that they were aware of such payments. Instead, the SEC believed that, in their roles as corporate officers, they were responsible for the supervision of policies regarding international operations, which included oversight of personnel charged with keeping accurate books and records and maintaining internal controls. By failing to do so, these “control persons” bore ultimate responsibility.

In another important development regarding individual liability for violations under the FCPA, the U.S. prosecutors ascribed “constructive knowledge” to the accused executive, Frederick Bourke, CEO of Dooney & Bourke, in a case decided in July 2009. The CEO received a one-year and one-day jail term for making false statements to the FBI and for conspiracy to violate the FCPA by engaging in “willful blindness.” The trial focused in part on what the DOJ believed was inadequate due diligence by an investor in a corrupt scheme to privatize a company. When instructing the jury on “knowledge,” the judge held that willful ignorance and conscious disregard of evidence that Bourke’s business partner was engaged in public corruption was enough to convict, even though the government otherwise lacked clear evidence that Bourke actually knew his business partner was facilitating the payment of bribes to Azeri officials.

This “ostrich instruction” has reverberated within the business community and underscored that, under the new enforcement regime, rigorous due diligence and proactive compliance is what is expected.¹²

There are a number of other trends illustrating the qualitative and quantitative changes taking place in U.S. FCPA enforcement actions, including:

- The DOJ providing guidance to U.S. companies as to the due diligence that must be conducted by an investor on its third parties prior to investing.
- Statements by the DOJ’s Criminal Division Chief emphasizing harsher, costlier settlements.
- The size of dollar fines has increased substantially, exemplified most dramatically by Siemens’s \$800 million fine paid to the U.S. government.
- Allegations are no longer limited to the bribing of national government officials but are also beginning to include the public officials of international governmental organizations such as the UN.
- When the DOJ pursues an enforcement action, it is not only using the FCPA statute, it is increasingly deploying other relevant laws such as those pertaining to anti-money laundering.
- As the recent Las Vegas arrests indicate, the DOJ through the FBI is now willing to develop extensive and time-consuming undercover operations.
- The government is also using cooperating witnesses, offering them leniency in exchange for testimony against other individual targets.

As these various trends indicate, the U.S. government—and, increasingly, other governments—is likely to expand its repertoire of investigative and enforcement techniques. International businesses, as well as their executives and boards, must now recognize the changing anti-corruption landscape that is unfolding and, particularly, legal developments that may affect not only their companies but potentially their own personal liability and even freedom.

¹² “Bourke Convicted of Bribery in Kozeny’s Azerbaijan Oil Deal,” Bloomberg.com, July 9, 2009.

The Way Forward

Taken together, these trends reflect a recent and potentially game-changing convergence of public and private interests in the fight against public corruption. The interests of the public sector, whether the U.S. government or any other responsible government, in eradicating corruption are clear: corruption is the scourge of economic development, seems to be correlated to more authoritarian and despotic regimes, and is the depriver of goods and services to the masses in favor of the few. Indeed, corruption is associated with a variety of other forms of criminal behavior, including organized crime and terrorism.

And the interest of the private sector in opposing corruption is also growing. Now it is becoming increasingly costly for the private sector to engage in corruption. If a business pays bribes, it not only loses the money paid but it becomes automatically beholden, through extortion, to the payee (and others in the know). Moreover, when a business is caught in the act of bribing, it can suffer serious legal, criminal, and reputational consequences.

For the larger objective of the FCPA and similar laws to be accomplished (i.e., advancing a global culture of anti-corruption), there are several actions that the U.S. and other governments may take over the coming months and years that could contribute to the enhancement of current enforcement measures. These include:

- **Developing a joint DOJ, DOS, DOC FCPA task force**
Much like the U.S. government promoted the adoption of anti-money laundering legislation in other countries (notably Russia), it could deploy DOJ, Department of Commerce (DOC) and Department of State (DOS) resources through a task force with the mandate to develop diplomatic and other incentives for the quicker and more comprehensive passage of FCPA-like laws around the world, especially in developing countries.
- **Expanding multilateral anti-corruption efforts on the ground**
Current DOJ/FBI efforts could be expanded to include greater collaboration with international police (InterPol), national prosecutors, and local ministries of justice and the interior to encompass collaboration on anti-corruption efforts.

Training and practice simulations sponsored by the DOJ and SEC and involving both U.S. and foreign prosecutors, investigators, and police could be conducted to both build the law enforcement network and lay the foundation for joint action. Likewise, governments need to collaborate on finding solutions to the as-yet largely unaddressed other side of the coin of bribery: the coordinated and effective punishment of bribe takers.

- **Creating a federally funded anti-corruption institute**
The U.S. government is collecting record settlements from FCPA enforcement, and some of that money could be specifically dedicated to promoting acceptance and passage of FCPA legislation overseas and its enforcement. Perhaps the creation of a non-partisan think-tank funded with some of these settlements could help to move critical research forward on what works and what doesn't regarding anti-corruption efforts.
- **Developing additional global incentives for corporate compliance**
The U.S. government could continue to deploy and expand existing incentives to promote corporate compliance. For example, debarment from government contracts could continue to be used and expanded in cooperation with other governments and with multilateral institutions so that convicted companies do not "forum shop" for government contracting alternatives and other benefits. This would involve forging alliances between U.S. Eximbank and other countries' export/import financial arms, as well as international and regional financial institutions such as the regional development banks.
- **Continuing to target individual and professional accountability for FCPA violations**
The word is out in the business community that the U.S. government is serious about enforcement. Executives are now more focused than ever on what distant subordinates and sales people do internationally. There's widespread recognition that doing business one way in the developed world and another in the developing world is bad corporate citizenship with serious and sometimes game-changing consequences.

About this report

The purpose of The Conference Board Executive Action Series is to inform, educate, and provoke thought and debate on current business issues. The material contained in this report reflects the views of the authors and not necessarily those of The Conference Board.

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