Cleaning up corruption
Why anti-corruption compliance is now on the C-Suite radar

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The heart of the matter

Global anti-corruption enforcement has placed companies on notice

In the last several years, risks surrounding bribery and corruption have risen as prime concerns among business leaders and nations alike. Corruption saps economic output and can lead to economic inequalities fueling social and political change. Just in the last year, corruption acted as one of the triggers of social unrest during the Arab Spring and political protest in India.

Yet there has been progress, and reason to expect more to come in the near future. A semblance of global alignment in anti-corruption law is taking shape, led by continued aggressive enforcement by the US Department of Justice ("DOJ") and Securities and Exchange Commission[1] ("SEC")—but also through advancements made by the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Convention"), which in 2012 has at least 39 parties, with Russia's membership effective as of April 17, 2012. The UK Bribery Act ("UKBA"), effective July 1, 2011, will also likely prove not only an important enforcement tool, but also a model for other countries to follow. At the same time, global corruption investigations increasingly involve collaboration among different countries, creating the beginnings of a coordinated, international dragnet.

In the US, the Foreign Corrupt Practices Act ("FCPA"), which has been the prime weapon in the global crackdown on corruption, with numerous enforcement actions each year, continues to be a clarion call to multinational companies ("MNCs"). The whistleblower protection provision of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") (Section 922) was intended to incentivize an increase in the number of corruption issues coming to the attention of enforcement authorities. US enforcement has continued unabated, with a robust number of FCPA enforcements carried out in 2011, and a healthy backlog of cases going into 2012. In total, 2011 saw the commencement of cases against 27 companies and 22 individuals. We also saw regulators employ different law enforcement techniques in cases against individuals, namely those utilized in the well-known 2009 Federal Bureau of Investigation ("FBI") sting operation discussed further on pages 15–16.

Numerous enforcement trends are gathering momentum, including:

A greater focus on the **prosecution of individuals** is resulting in longer prison sentences. In fact, 2011 saw the second-largest number of proceedings against individuals in FCPA history and the longest FCPA-related prison sentence ever.

Third-party intermediaries continue to play an integral role in bribery and corruption schemes and, as such, pose a primary risk to companies for running afoul of the FCPA.

Enforcement actions over the years have also come in clusters within the same industry, suggesting **"industry spotlights"** on sectors including energy, life sciences, and engineering and construction. There are nascent signs that the financial services industry is on the radar for such a sweep going forward.

Recently, however, the concerted FCPA enforcement campaign has faced pushback. Most notably, the US Chamber of Commerce ("the Chamber") has expressed concern about FCPA enforcement mechanisms on the grounds that they hurt the competitiveness of US companies—and has called for certain amendments to the statute. 2011 saw trials leading to convictions, dismissals, mistrials and acquittals, which may open the door to more defendants going to court to contest FCPA allegations.

The C-Suite is also voicing concern over how the spectre of corruption and bribery is shaping how it does business. Consider that corruption ranked among the top two perceived barriers to growth over the next three to five years for CEOs from the 21 Asia-Pacific Economic Cooperation ("APEC") economies, according to a recent PwC survey.[2] Further, 24 percent of global CEOs surveyed in 2011 by PwC reported incidences of corruption and bribery in the last year.[3]

Given the intensifying global legislative and enforcement environment, business leaders will encounter greater exposure to risk, especially in the fast-growing, emerging markets that present the most alluring opportunities for growth through expansion and acquisitions. More than ever, MNCs need to be proactive in addressing their compliance risks and building related programs that can mitigate the risks that bribery and corruption raise.

1 In 2010, the SEC announced the opening of Washington, DC- and San Francisco-based units dedicated to FCPA enforcement.

2 PwC, *2011 APEC CEO Survey*, November 2011.

3 PwC, *2011 Global Economic Crime Survey*, November 2011.

An in-depth discussion

The global dragnet widens

"The SEC has created an FCPA unit to crack down on cross-border bribery… Word is getting out that bribery is bad business, and we will continue to work closely with the business community and our colleagues in law enforcement in the fight against global corruption."

—Robert Khuzami, Director, Division of Enforcement, SEC, 2010[4]

What is the FCPA?

In 1977, the US Congress enacted the FCPA to prohibit bribery and corruption of foreign officials and to promote fair business practices, integrity and accountability, and the efficient and equitable distribution of economic resources. The FCPA created criminal and civil penalties for payments (or even the promise of anything of value) to foreign officials that could be interpreted as bribes for any improper advantage in obtaining or retaining business.

The FCPA has three primary provisions:

- The **anti-bribery provision** makes it a crime for any US person or company to directly or indirectly pay or promise anything of value to any foreign official to obtain or retain business or gain any improper advantage.
- The **accounting and internal control provisions** (the former also known as the books and records provision) require companies to: (1) maintain a system of internal controls that provide reasonable assurance that management's instructions are being carried out and that discrepancies in a company's books and records are detected and remediated; and (2) make and keep books, records and accounts that, in reasonable detail, accurately reflect the transactions and dispositions of assets of the issuer.

Enforcement trends

FCPA enforcement in high gear, backlog piles up

Following 2010's record number of defendants named in cases (72 companies and individuals), the SEC and DOJ maintained momentum in 2011, with cases involving 49 companies and individuals (see Figure 1). Looking to 2012, the swell of enforcement activity is likely to persist, with reports of over 100 open investigations at the end of 2011. Total settlements in 2011 (approximately $632 million), were dwarfed by those in 2010 (nearly $1.82 billion) (see Figure 2), comprised in part by two juggernaut cases that together accounted for about $765 million. A factor that may have contributed to the dip in the number of companies and individuals named in FCPA cases in 2011 was the year's four FCPA trials—which likely occupied time and resources, possibly affecting the regulators' ability to work through the considerable backlog of cases.

The FCPA gets personal: number of enforcement actions against individuals on the rise…

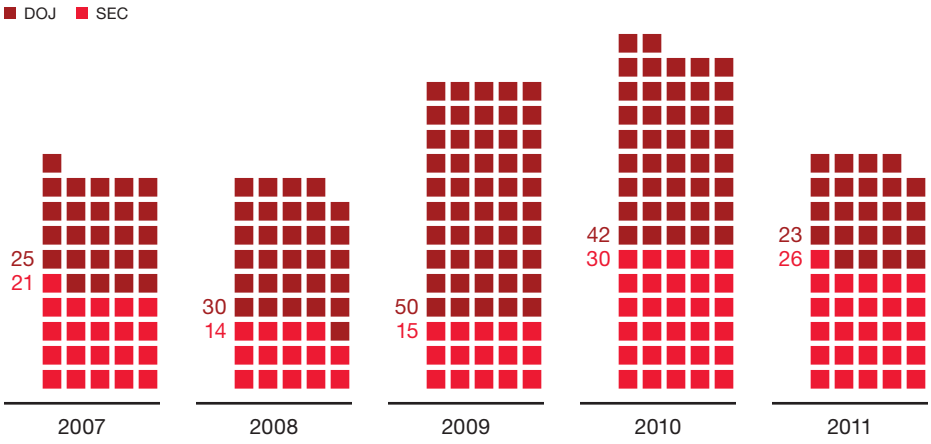
Prosecution of individuals for FCPA violations is somewhat of a recent phenomenon. Over the last decade, the number of prosecutions has risen, reflecting a greater prosecutorial focus on individuals. During the 2002–2006 period, an average of 7 individuals per year were charged with FCPA violations, compared with 18 per year over the 2007–2011 period.[5]

One interesting development in 2011 was the large number of non-US individuals named in FCPA-related cases—13. While this may not constitute a trend, it may well signal one, as US prosecutors seek to send strong messages to the home countries of those charged—messages aimed at pressuring those countries to both intensify their anti-corruption efforts and cooperate in extradition efforts.

4 SEC, "OECD Commends U.S. Regulators for Efforts to Fight Transnational Bribery," press release, October 20, 2010.

5 Average excludes the 2009 FBI sting case in which 22 individuals were charged.

Figure 1. Companies and individuals named in FCPA proceedings, 2007–2011

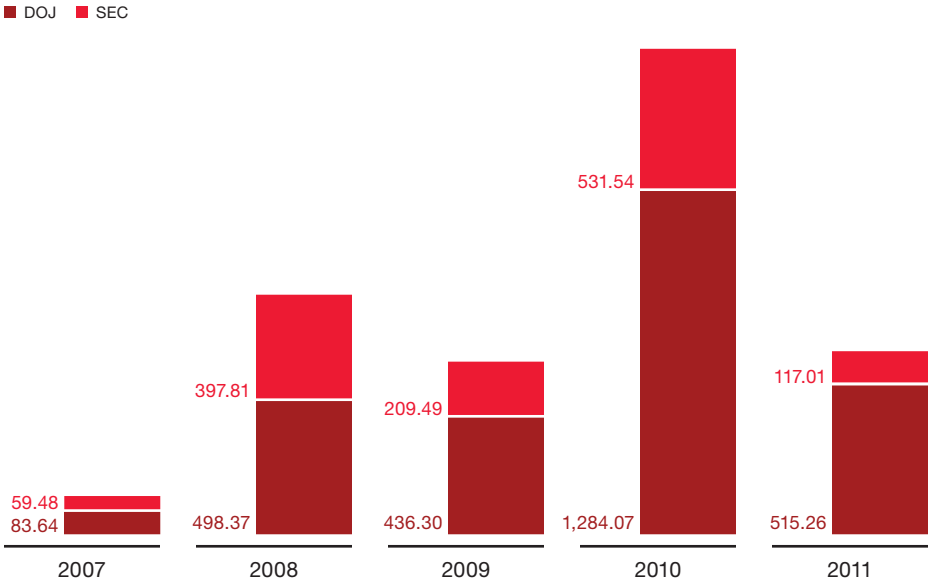


Note: Count of defendants named in either SEC or DOJ cases is not unique; therefore, if a defendant was charged by both the SEC and DOJ, that defendant is counted twice in the above figure.

Source: PwC analysis based on publicly available documents

Figure 2. Total FCPA fines and penalties assessed by year, 2007–2011

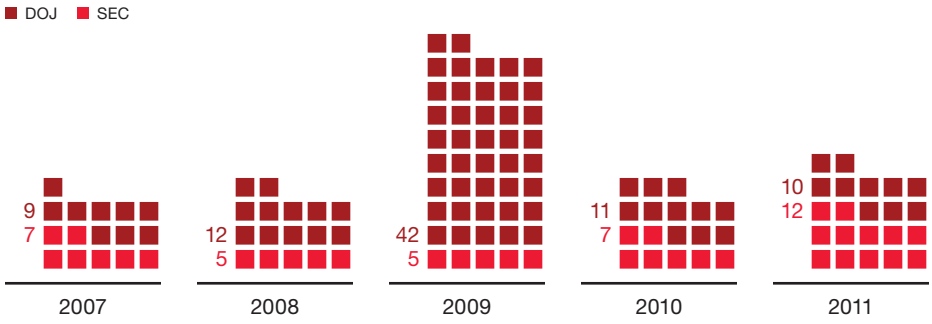
Total fines by year, in $Millions



Note: Fines by year are based on the year payment was ordered, not the year in which the case was initiated. SEC fines include disgorgement, interest, and/or civil penalty. DOJ fines include criminal penalty and/or forfeiture.

Source: PwC analysis based on publicly available documents

Figure 3. Individuals named in FCPA proceedings, 2007–2011



Note: Count of defendants named in either SEC or DOJ cases is not unique; therefore, if a defendant was charged by both the SEC and DOJ, that defendant is counted twice in the above figure.
Source: PwC analysis based on publicly available documents

...With harsher sentences

Penalties for individuals violating FCPA provisions can include prison sentences and substantial fines (and related legal fees) that their employers likely are prevented from paying. Beyond the greater numbers of individuals targeted and prosecuted, the sentences for individuals are tending to be longer, and penalties harsher. Indeed, prosecutors have been aggressive in invoking the recommended prison sentence range, which was increased in 2002 as a result of the US Sentencing Commission's amendment to the Federal Sentencing Guidelines. That amendment reclassified FCPA bribery from commercial bribery offences to public corruption offences, effectively extending sentencing from a 6-month maximum per violation to a range of 10 months to 5 years per FCPA bribery violation. As of early 2012, the five longest prison sentences associated with FCPA enforcement were 180, 87, 84, 63 and 60 months.

Executives on watch

In the wake of extended FCPA prison terms—and the well–publicized headline prosecutions—it has been made abundantly clear that prosecutors are using the sentencing of individuals to trumpet the increased personal liability of executives and directors when it comes to bribery and corruption. In October 2011, for example, the former president of a Miami-based telecommunications firm received the longest FCPA-related prison sentence to date—15 years—for bribing officials at Haiti's state-owned telecommunications company (discussed in more detail on page 8).

The past five years saw charges against individuals up and down company ranks, including those in the upper-most echelons of the C-Suite (i.e., CEO, CFO and COO). Individuals charged range from operational employees to managers, internal auditors, business development executives, vice presidents, presidents, board members, controllers and general counsels.

Hang time: individual charges follow long after company charges

Companies settling FCPA cases with the DOJ and SEC may think that the matter is over and done with, but more damage can follow. Collateral damage can come in the form of actions against individuals—in some cases years after a corporate case has been resolved. This was the situation with a Germany-based multinational electronics and electrical engineering conglomerate, which in 2008 had reached a settlement with worldwide fines and penalties totaling $1.6 billion (by far the largest in FCPA history). Three years later, in late 2011, eight former executives[7] plus one business associate of the company connected to the original action were charged with allegedly bribing Argentine public officials with over $100 million in payments to secure, implement and enforce a contract on the government's national identity card program.

"[P]rosecuting individuals is a cornerstone of our enforcement strategy because, as long as it [bribery] remains a tactic, paying large monetary penalties cannot be viewed by the business community as merely 'the cost of doing business.' The risk of heading to prison for bribery is real, from the boardroom to the warehouse."

—Eric Holder, Attorney General of the US, 2010[6]

6 DOJ, "Attorney General Holder Delivers Remarks at the Organisation for Economic Co-Operation and Development," press release, May 31, 2010.

7 The eight executives included former board members.

"Bribery corrupts economic markets and creates an unfair playing field for law-abiding companies. It is critical that we hold individuals as well as corporations accountable for such corruption as we are doing today."

—Preet Bharara, US Attorney, SDNY, 2011[8]

Corruption and bribery industry spotlights

Investigators have, over the years, clustered their efforts around certain industries by expanding their investigations beyond a known violator to its industry peers and even to vendors and supply chain affiliates. Gone are the days when companies can breathe a sigh of relief and say "better them than us." FCPA prosecutors are learning to leverage investigative resources by following the threads from one probe to others, often tethered to companies in the same industry. While there is a clustering of enforcement actions in some industries, those with few or no enforcement actions are not necessarily off the FCPA radar. Indeed, some industry-wide sweeps have started with the investigation of one company, then spread to that company's industry peers—for example, through the discovery of multiple companies using a common third-party agent. There could also be incentive for companies under investigation to provide information about their competitors, so that a lesser penalty may be imposed on them. Take for example, a life sciences company that entered into a deferred prosecution agreement with the DOJ in 2011 based on the company's cooperation and agreement for continued cooperation in the DOJ's investigation into other companies and individuals with overseas business practices.

From 2007 to 2011, certain industries remained a focus of US regulators, as evidenced in Figure 4. A few sectors of focus are briefly described below.

Energy and engineering & construction

Energy companies—and their executives—have long been on the FCPA radar, especially those firms doing business in oil- and gas-rich nations with reputations for entrenched corruption. The sector has drawn scrutiny for good reason: energy companies generally require government licenses to operate and often do business in countries lacking sufficient anti-corruption controls, and are thus exposed to considerable levels of both commercial and public bribery. In fact, over the 2007–2011 time period, 25 energy companies settled with the DOJ and/or SEC, paying over $592 million in penalties and fines.

Probes have also spilled from the oil and gas sector to the firms that serve it: oil field service companies and engineering and construction companies that design and construct energy infrastructure. This was highlighted in 2011 by the high-profile "Bonny Island" case. The investigation centered on a four-member joint venture consortium charged with alleged bribes to Nigerian public officials exceeding $180 million—dating from 1995 to 2004—for various construction contracts linked to building liquefied natural gas facilities on Bonny Island, Nigeria. The consortium comprised French, US, Dutch and Japanese construction and engineering firms specializing in oil field services and energy infrastructure development. By early 2012, with related cases having spanned since 2008, the consortium's members (and agents[9]), had cumulatively been charged with penalties and disgorgement of about $1.7 billion ($1.5 billion of which is represented in Figure 4). In February 2012, the ex-CEO of the American consortium member was sentenced to two and a half years in prison for his connection to the bribery scheme.

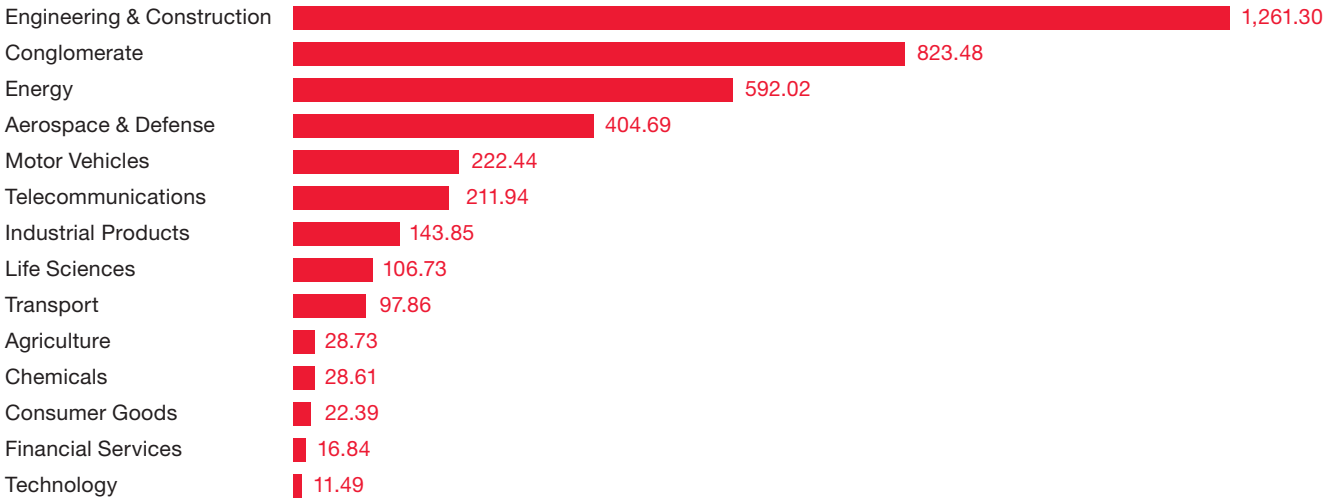
Telecommunications

A continued area of focus for the regulators is the telecommunications industry. In 2011, three telecommunications firms settled with the SEC and/or DOJ for a combined $66.8 million in fines and penalties. This follows a major FCPA case for the industry in late 2010, when a multinational telecommunications firm, headquartered in France, and three of its subsidiaries settled with the DOJ for $92 million in criminal fines and with the SEC for approximately $45.4 million in civil penalties related to the bribery of public officials in Costa Rica, Honduras, Malaysia and Taiwan for public sector telecommunications contracts. Additionally, the company was charged with violating the FCPA's internal controls provision through its dealings with third-party agents in several countries including, Angola, Ecuador, Nigeria and Uganda.

8 DOJ, press release 11-1626, December 13, 2011.

9 Note that Figure 4 excludes settlements and penalties associated with individuals.

Figure 4. FCPA fines and penalties assessed, by industry, 2007–2011
Total SEC and DOJ fines by industry by year—companies only, in $Millions



Note: Fines by year are based on the year payment was ordered, not the year in which the case was initiated. Industries were determined based on SIC code and/or company information. In certain instances where the companies operate across various industries, the industry type has been classified as Conglomerate.
Source: PwC analysis based on publicly available documents

Interestingly, the company also paid $10 million related to corruption charges brought by the Costa Rican government, which signaled the first time in Costa Rica's history that a foreign corporation paid damages to the government as a result of corruption charges.[10]

The DOJ has also carried out investigations connected to bribes of $890,000 allegedly made by two executives of a Florida telecommunications firm to officials at Haiti's state-owned telecommunications company, Telecommunications D'Haiti ("Haiti Teleco"). In 2011, the case ended with the DOJ handing down a prison sentence of 15 years—as mentioned previously, the longest to date.

Also in 2011, a Hungarian telecommunications company agreed to settle with the DOJ by paying $59.6 million in criminal fines for alleged violations of the FCPA's anti-bribery and books and records provisions for alleged bribes made in Macedonia and Montenegro.[11]

Oil-For-Food

One of the first sweeps by FCPA investigators was the cluster of enforcement actions around companies linked to the United Nation's ("UN") Oil-For-Food Program ("OFFP"), which, beginning in 1996, permitted Iraq to sell oil to finance the purchase of humanitarian goods. FCPA violations involved, for example, bribing government officials to secure contracts through the program. Interestingly, of the 36 cases filed between 2007 and 2011 involving improper activities in Iraq, only one was unrelated to OFFP (see Figure 8). To date, at least 33 companies (including their subsidiaries) have settled FCPA charges since the first OFFP action brought in 2007 against a US energy company, which triggered joint SEC and DOJ investigations into the dealings of participants of that program.[12]

Life sciences: pharma and medical devices

Life sciences companies—particularly pharmaceutical and medical device manufacturers—have increasingly been in the cross-hairs of the SEC and DOJ. Indeed, from 2007 to 2011, cases were settled with seven companies in the industry by the SEC and DOJ. In late 2009, Assistant Attorney General Lanny Breuer announced a long-expected initiative targeting pharmaceutical companies: "I would like to share with you…one area of criminal enforcement that will be a focus for the Criminal Division in the months and years ahead—and that's the application of the Foreign Corrupt Practices Act ("FCPA") to the pharmaceutical industry… A typical US pharmaceutical company that sells its products overseas will likely interact with foreign government officials on a fairly frequent and consistent basis. In the course of those interactions, the industry must…resist the temptation and the invitation to pay off foreign officials for the sake of profit. It must act, in a word, lawfully."[13]

10 DOJ, press release 10-1481, December 27, 2010.

11 The company also settled SEC charges in early 2012, paying $31.2 million in disgorgement and prejudgment interest.

12 Based on PwC analysis of publicly disclosed information from the DOJ and SEC.

13 Lanny Breuer, Assistant Attorney General, Criminal Division, DOJ, "Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum," November 12, 2009.

"The FCPA Unit will continue to focus on industry-wide sweeps, and no industry is immune from investigation."

—Cheryl J. Scarboro, (Former) Chief, Foreign Corrupt Practices Act Unit, SEC, 2010[14]

There are signals that the scrutiny in this industry forewarned by Breuer has persisted and could well result in additional actions. Consider that at least 19 companies within the life sciences industry have disclosed—in SEC filings from June 30, 2010, to December 31, 2011—ongoing investigations by US regulators surrounding their practices in other countries and potential violations of the FCPA. One recent case suggests a spectre of further enforcement. In early 2012, a UK medical device maker and its US subsidiary settled with the SEC and DOJ by agreeing to pay $22 million in penalties, disgorgement and prejudgment interest for allegedly paying bribes to Greek physicians who were public employees in exchange for purchasing the company's products. The SEC said the scheme dated back to 1997. In a statement following the case, the SEC made clear this case is indeed part of a wider—and international—web of investigation into the life sciences industry: "The charges stem from the SEC's and DOJ's ongoing proactive global investigation of bribery of publicly-employed physicians by medical device companies."[15]

What's revealing about this and other cases is that the SEC and DOJ clearly define healthcare providers employed by publicly-owned and -operated health centers—for instance, physicians or nurses at Chinese or Greek hospitals—as public officials. Another interesting aspect of cases against life sciences companies is that if the DOJ obtains a conviction stemming from an FCPA violation, the convicted company could potentially be excluded from taking part in US healthcare programs such as Medicare (pursuant to 42 USC 1320a-7(a)).[16] Indeed, then, the stakes are enormously high for some companies in the industry.

Financial services

The FCPA spotlight may now be casting its glow upon financial services firms. In January 2011, the SEC reportedly sent letters to at least 10 financial services firms—including banks and private equity firms—requesting information about their dealings with sovereign wealth funds. Employees of these firms should also remain on alert, as under the FCPA, employees of state-owned investment funds—such as China Investment Corporation—could be defined as public officials.[17] It has also been reported that the SEC is interested in financial services firms' links with foreign national pension funds.[18]

But the scrutiny into financial services firms is unlikely to be limited to commercial banks. For example, the implications for private equity funds could potentially be quite important, especially as such firms continue to add foreign firms to their portfolios, particularly in regions where bribery and corruption are still rather ubiquitous. A few of the looming risks existing for private equity firms include: those linked with client solicitation (particularly sovereign wealth funds); those associated with making acquisitions and doing deals; and those connected with the actions of a portfolio company that the private equity firm controls.[19]

Recent enforcement developments in the US

SEC invokes "control person liability"

The SEC has added to its toolbox of enforcement theories, specifically a provision from an act dating back nearly 80 years. Drawing on Section 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), entitled "Liability of controlling persons and persons who aid and abet violations," the SEC is pursuing cases that push the envelope on the interpretation of "control liability" as it applies to today's FCPA cases. In the words of the Exchange Act, which was amended in 2012: "Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable…"[20] In other words, executives and directors of a US-based company, for example, could

14 SEC, "SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials," press release, November 4, 2010.

15 SEC, press release 2012-25, February 6, 2012.

16 US Social Security Administration, "Exclusion of Certain Individuals and Entities from Participation in Medicare and State Health Care Programs," 42 U.S.C. 1320a–7, Sec. 1128 (2010).

17 Dionne Searcey and Randall Smith, "SEC Probes Banks, Buyout Shops Over Dealings with Sovereign Funds," *The Wall Street Journal*, January 14, 2011.

18 Joe Palazzolo, "SEC's Sovereign Wealth Fund Probe Is More Than Name Suggests," *The Wall Street Journal*, February 9, 2011.

19 PwC, "Anti-corruption Laws: Private Equity Not Exempt," *FS Regulatory Brief*, 2011.

20 Securities Exchange Act of 1934, as amended, Pub. L. No. 112-90 (2012).

be held liable for an FCPA violation carried out by a person they "control" even if they did not authorize or know about the underlying transaction.

Consider the case of a Utah-based manufacturer of nutritional products, which was settled with the SEC in 2009. The company was charged with violating the anti-bribery, books and records and internal controls provisions of the FCPA as a result of cash bribes allegedly paid by its Brazilian subsidiary to Brazilian customs officials. The company settled with a payment of $600,000. The company's former CEO and former CFO, however, who claimed no knowledge or participation in the bribes, were also fined as "control persons" and settled for $25,000 each. In this case, the executives allegedly had not demonstrated sufficient supervision of the Brazilian employee with respect to FCPA compliance.[21]

The takeaway

As the SEC continues to invoke Section 20(a), companies (and their foreign subsidiaries, no doubt), will likely receive a clearer picture as to what defines "control" from the nuances of each case. The "control person" theory of liability raises the stakes for officers and directors, who are now faced with the prospect of regulatory and law enforcement scrutiny of their leadership, and may perhaps be applicable even in situations where officers and directors lack direct involvement in activities several layers of management below them. The increasing potential for management to be held accountable for actions of those in its organization highlights the importance of implementing controls and continuously monitoring their effectiveness.

DOJ extends reach beyond intermediaries…to government officials

Third-party agents are prevalent in many FCPA cases, as companies charged with bribery violations are often charged based on their dealings with agents, consultants, distributors and other intermediaries, especially in countries in which they need to rely on local knowledge and contacts to do business. Indeed, during the 2007–2011 time period, 115 of the 172 enforcement actions—or 67 percent—involved intermediaries.[22]

A relatively new turn, however, is the increasing prosecution of foreign government officials identified in FCPA cases as bribe recipients. A few recent examples include:

- The former governor of the Tourism Authority of Thailand ("TAT") and her daughter were indicted in 2009[23] by the DOJ on criminal money laundering charges—allegedly taking about $1.8 million in corrupt payments from American film producers in exchange for TAT contracts.
- A former director of Haiti Teleco pleaded guilty in February 2012 to money laundering charges in connection with a bribery scheme involving Haiti Teleco and several Florida telecommunications companies. Two other former Haiti Teleco officials, who allegedly received bribes in the scheme, were also charged with money laundering in the case.[24]

Corporate self-monitoring on the rise

In many cases, where regulators are satisfied that companies cooperated fully with an investigation and put rigorous FCPA compliance programs in place, non-prosecution or deferred prosecution agreements may be offered. These agreements may include penalties, disgorgement of profits and the requirement that companies under investigation install a strengthened FCPA compliance program as well as an independent compliance monitor.

Both the DOJ and SEC have, over the years, shifted from requiring corporate violators to retain independent monitors to allowing them to self-monitor. Self-monitoring can take different forms, but generally requires violators to report their investigative efforts and compliance program progress back to the SEC and/or DOJ on a regular basis.

In 2011, for example, a US maker of military security products resolved an FCPA violation through a non-prosecution agreement and agreed with the DOJ to pay $10.3 million in penalties stemming from allegations that its subsidiary paid bribes to a third-party agent, which it knew would be passed on to a UN procurement official in exchange for contracts to sell body armor to the UN. The company, which had been acquired by a multinational British defense and aerospace company after the alleged violation took place, had voluntarily disclosed the violation. The DOJ determined that the acquired company did not require an independent monitor, due to its implementation of the acquiror's due diligence protocols and review processes.[25]

21 Anne Richardson, "Control Person Liability: A New Weapon in the FCPA Enforcement Arsenal," ethisphere.com, http://ethisphere.com/control-person-liability-a-new-weapon-in-the-fcpa-enforcement-arsenal/

22 Based on PwC analysis of publicly disclosed information from the DOJ and SEC.

23 The 2009 indictment was unsealed in January 2010.

24 C.M. Matthews, "Haitian Telecom Official Pleads Guilty in Connection to FCPA Probe," *The Wall Street Journal*, February 9, 2012.

25 DOJ, press release 11-911, July 13, 2011.

Understanding the nuances of deferred and non-prosecution agreements[26]

Deferred Prosecuction Agreement ("DPA"): "Deferred prosecution agreements are much like the name implies: they are agreements between the DOJ and corporations suspected of committing FCPA violations that defer prosecution for those offenses for a set period of time. At the end of the specified time, if the corporation has complied with the terms of the agreement, the charges against it will be dropped. Criminal charges are still filed, usually in the form of a criminal information—which is similar to an indictment but does not require action by a grand jury—but will be stayed and, if the deferred prosecution agreement is complied with, eventually dismissed."

Non-prosecution Agreement ("NPA"): "A non-prosecution agreement involves many of the same requirements as a deferred prosecution agreement, including the payment of a fine, an agreement to cooperate with the DOJ and any related government agency that lasts for a fixed period of time, and a statement of facts setting out the details of the violations for which the corporation stands accused. However, unlike a deferred prosecution agreement, a non-prosecution agreement does not include the filing of a criminal information or indictment; rather, in exchange for the corporation's concessions, the government agrees not to charge and prosecute the corporation. Non-prosecution agreements allow the corporation to avoid the consequences a criminal charge may have on its ability to operate its business, particularly for companies involved in government contracts, but are far more rare than deferred prosecution agreements."

In January 2010, the SEC announced a series of measures to encourage greater cooperation from individuals and companies, including three primary investigative tools: cooperation agreements, DPAs and NPAs.

26 Sue Snyder and Kimberly Connors, "Deferred Prosecution Under the Foreign Corrupt Practices Act," March 5, 2009 (footnotes omitted).

FCPA liability associated with M&A expansion

Companies may find themselves exposed to FCPA risk when they acquire entities that have potentially violated the FCPA, a concept known as successor liability. This exposure may broaden as a result of an increase in the number and speed of acquisitions and the locations of those acquisitions, particularly in unfamiliar markets abroad. A recent case illustrates this risk. In July 2011, a highly acquisitive British spirits producer, and American Depository Receipt-issuer, agreed to nearly $16.4 million in disgorgement of profits, prejudgment interest and civil penalties associated with alleged corrupt payments to government officials in India, South Korea and Thailand. The SEC release pointed out the company's weakness in anti-corruption compliance as a product, in part, of its rapid rate of acquisitions: "[The company's] history of rapid multinational expansion through mergers and acquisitions contributed to defects in its FCPA compliance programs… At the time of these acquisitions, [the company] recognized that its new subsidiaries had weak compliance policies, procedures, and controls." All companies considering acquisitions in foreign markets, especially in emerging economies, where carrying out thorough predeal due diligence may be more difficult than in developed economies, need to recognize potential FCPA risks and take steps to address these risks in their integration and mitigation planning.[27]

27 SEC, Administrative Proceeding Release No. 34-64978, July 27, 2011.

Private equity firms' exposure to successor liability risk

Going forward, private equity firms building their portfolios through the acquisition of foreign companies could particularly be at risk of scrutiny under the FCPA, especially in the absence of stringent predeal due diligence. As private equity firms expand into foreign markets, placing a high priority on knowing what they are buying—and instituting the proper compliance programs immediately after an acquisition—will become increasingly important. Consider that in China alone, there were 580 private equity transactions in 2010, up about 66 percent from a year earlier.[28]

28 PwC, "China: Pearls, Pitfalls and Possibilities," *Marketmap*, 2011.

Travel Act

The Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (the "Travel Act") makes it illegal to travel or use any facility of foreign or interstate commerce with the intent to facilitate or carry on any unlawful activity. Unlawful activities, as defined by the Travel Act, include business involving gambling, liquor on which the excise tax has not been paid, controlled substances, extortion, bribery, and arson, among others. In April 2011, a former employee of a US maker of control valves used in the nuclear, oil and gas, and power generation industries pleaded guilty to violating the FCPA and the Travel Act for taking part in a scheme to secure contracts through bribes of public officials in multiple countries, including Saudi Arabia and Qatar.[29] In using the Travel Act to prosecute US companies, the DOJ is effectively extending its reach beyond the limitations of the FCPA since the Travel Act applies to foreign as well as interstate commerce and, more importantly, applies to government and commercial (private) bribery.

"Aiding and abetting" principle as a deterrent

Traditionally, FCPA enforcement has targeted US persons, issuers and those working in the US. However, recently the DOJ set a precedent of prosecuting foreign issuers and foreign nationals for conspiracy to violate the FCPA. Consider the case concerning a Swiss freight-forwarder that was fined over $70 million in criminal penalties by the DOJ and paid over $11 million in a civil settlement with the SEC. Among other charges, the company was acting as an agent in aiding and abetting (as opposed to violating) certain customers (who are US issuers) in violating the books and records provision of the FCPA.[30] This was a landmark case in that it showed the FCPA's reach to those companies aiding and abetting its clients in violating anti-bribery laws. The SEC has cautioned the use of the aiding and abetting principle is likely to continue into the future, which could mean that more non-US filers could come within the reach of the SEC's enforcement powers.

Retribution/Forfeiture

On top of penalizing entities and persons who violate the FCPA, the DOJ is also issuing forfeiture orders. In the recent Bonny Island case involving several oil and gas companies, a UK solicitor acting as an agent was extradited to the US and pleaded guilty to conspiracy and one count of violating the FCPA's anti-bribery provisions. The solicitor allegedly aided a joint venture in paying more than $180 million in bribes to Nigerian government officials from 1995 to 2004 in exchange for $6 billion in contracts. As part of his plea agreement, he agreed to forfeit approximately $149 million—the biggest individual FCPA forfeiture ever—which represents proceeds traceable to the defendant's FCPA and conspiracy violations. He also faces up to 10 years in prison.

Importance of internal controls and books and records

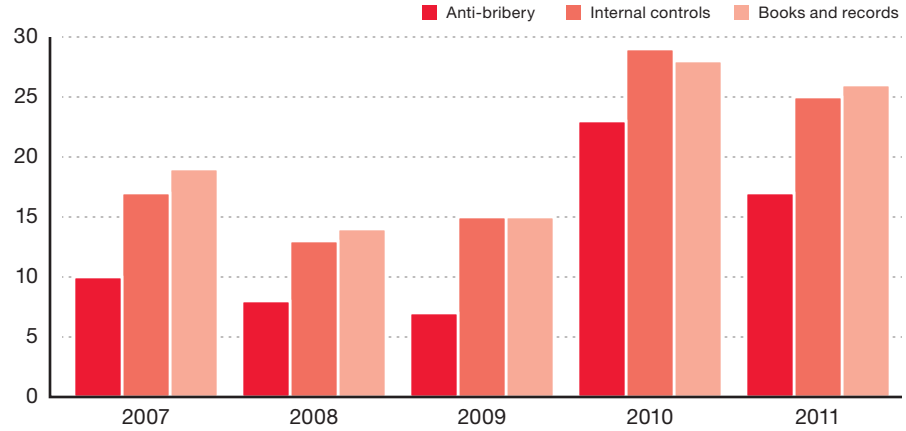
As indicated earlier, the FCPA has three provisions: anti-bribery, internal controls and accounting (books and records).[31] While the anti-bribery provisions are the ones readers may be most familiar with, the internal controls and the accounting provisions are often the ones used by the SEC in enforcing the FCPA, as shown in Figure 5.

29 DOJ, "Italian Executive of California Valve Company Pleads Guilty to Foreign Bribery Offenses," press release, April 29, 2011.

30 DOJ, press release 10-1251, November 4, 2010.

31 Please note that the internal controls and accounting provisions apply only to SEC registrants.

Figure 5. Summary of SEC charges, 2007–2011
Number of companies or individuals charged with anti-bribery, internal controls and books and records violations



Source: PwC analysis based on publicly available documents

By way of illustration, in 2010, US regulators alleged that a global telecommunications company used consultants (including a perfume distributor), to bribe government officials in Latin America and Asia. The allegations were that: the company failed to detect or investigate numerous red flags; the company's business model was prone to corruption; and the company's corporate controls were weak. In the settlement, the company paid approximately $137 million in fines, disgorgement of profits and prejudgment interest to the DOJ and SEC.[32]

FCPA-derived litigation: the other shoe

FCPA enforcement actions have given rise to a proliferation of FCPA-based lawsuits with plaintiffs, including shareholders, other governments and business partners. This follow-on litigation is becoming more common, more than making up for the absence of private rights of action under the FCPA.

Because the FCPA does not include provisions for private civil action (as opposed to the SEC's civil actions), increasingly companies and individuals are seeking creative opportunities within existing state and federal laws to bring action against others who have settled and/or disclosed FCPA cases. One such case involved a California-based drug developer, who in December 2011 settled a string of derivative lawsuits following the company's disclosure in 2010 that it was being probed for FCPA violations in connection with its business activity in China. These suits were aimed at both the company as well as some of its current and former directors and officers. The company agreed to pay $2.5 million in attorneys' fees, and to strengthen corporate governance on a number of fronts, including hiring a "compliance coordinator" and sanctioning employees breaking FCPA rules.

Another case stemming from an FCPA matter involved a US chemical company that, in 2010, brought a lawsuit against a US competitor, and its non-US subsidiary that had recently settled with US regulators. The case alleges antitrust violations, arguing that a competitor's alleged illegal bribery activities resulted in the squelching of competition and a loss of business for the plaintiff who had not engaged in illegal activity to obtain business. This marks an important turn in the plight of companies seeking private relief for FCPA violations.

Additionally, other companies are seeing private cases brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Companies should be especially concerned with private cases brought under RICO, as conduct which violates the FCPA may also give rise to RICO claims which provide for treble damages. Even foreign governments whose employees allegedly accepted bribes from US companies are seeking relief under RICO, alleging violators have corrupted their countries' officials. Furthermore, as is the case with the majority of securities litigation cases, shareholders are expressing their discontent with companies and executives involved in FCPA cases by bringing their own class-action lawsuits. Shareholders have alleged breach of fiduciary duty on the part of executives and are increasingly seeking civil penalties to offset those paid by the company in settlement.

In late November 2011, a bill—cited as the Foreign Business Bribery Prohibition Act of 2011—was introduced in the US Congress, which authorizes "certain private rights of action" under the FCPA for "violations by foreign concerns that damage domestic businesses." If signed into law, the implications for companies doing business abroad could potentially be profound.[33]

32 DOJ, press release 10-1481, December 27, 2010.

33 Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. (2011).

Offsets and the FCPA

Offsets, which are essentially reinvestment agreements between companies and foreign government buyers, mandate that companies invest additional funds into countries where their products and services are sold. Such arrangements typically call for a company winning a contract to reciprocate by investing a portion of that contract's value in the country's economy. While prohibited under most trade agreements due to anti-corruption concerns, offsets are often legal and standard practice within the defense industry. For example, the World Trade Organization's Government Procurement Agreement ("GPA"), the European Union ("EU") and the North American Free Trade Agreement all prohibit offsets, yet the GPA and EU provide exceptions for defense procurement.

The risk of corruption with offsets often lies in their lack of transparency, particularly in the lack of disclosure surrounding the actual beneficiaries of the offsets. Companies may run afoul when paying offsets if the payments are made not to the intended source—such as to local vendors of underprivileged classes with intentions of supporting economic growth in poor areas—but rather to government officials and their family members or former government officials. Again, the murkiness around the true use of offsets could place firms at risk of violating the anti-bribery provisions of the FCPA.

Companies also need to be cautious about ensuring that corporate social responsibility payments do not lead to FCPA violations. Payments to charitable groups in foreign countries could deliberately or unwittingly fall afoul of the FCPA if they are made in connection with gaining an improper advantage or to secure business. For example, a medical device company may make a donation to a local health foundation, which unknown to them is led by someone who is also employed by the country's health ministry and is in a position to influence government procurement of medical devices.

Dodd-Frank Act: strong supporting role in FCPA crackdown

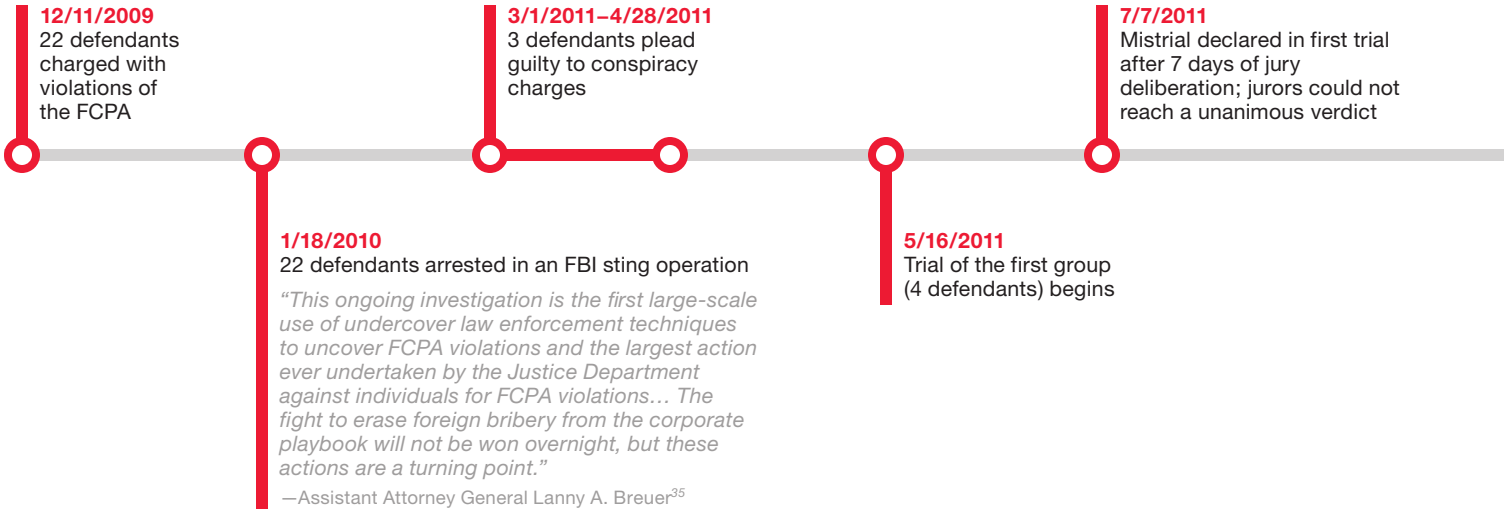
The Dodd-Frank Act may have a profound effect on FCPA enforcement. Among other things, the Dodd-Frank Act encourages whistle blowers to come forward with information and provides the whistle blower with certain protections. Those voluntarily providing original information that directly leads to any monetary sanction exceeding $1 million collected via SEC enforcement or related actions of other agencies, including the DOJ, may earn between 10 and 30 percent of qualifying judgments or settlements.

Beyond the whistle blower provisions, Sections 1502 and 1504 of the Dodd-Frank Act also touch on bribery and corruption topics and will need to be thoroughly considered by companies as they enhance their compliance and risk management programs to address these new requirements. Section 1502 requires the SEC to adopt additional rules surrounding public disclosure by US issuers purchasing conflict minerals—defined as columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives such as tantalum, tungsten, and tin, or any other minerals that the Secretary of State determines help to finance the conflict in the Democratic Republic of Congo ("DRC") and neighboring countries. The law's principle aim was to reduce violent exploitation of the citizens of these countries as a result of conflict mineral mining and exportation. The SEC has estimated that the requirements could impact thousands of international trading companies and manufacturers and even retailers—cutting across diverse industries.[34] The SEC missed its deadline to issue its conflict minerals rule in 2011 and is expected to finalize its draft of the final rule on disclosure requirements in 2012.

Section 1504 of the Dodd-Frank Act amends Section 13 of the Exchange Act and requires issuers to publicly disclose in annual reports all information related to any payment made by the issuer, a subsidiary or an entity under its control, to a foreign government or the US federal government for the purpose of commercial development of oil, natural gas or minerals.

34 SEC, "Conflict Minerals: Proposed Rule," 75 Fed. Reg. 246 (December 23, 2010).

Figure 6. The unraveling of a landmark investigation: timeline of key events



FCPA pushback

Going to trial

FCPA trials are revealing how certain aspects of the statute—and its enforcement—are being challenged, including, for example, the definition of a "foreign official." Historically, defendants have opted to settle FCPA actions, but in 2011, there were at least four trials, perhaps signaling a trend pointing toward more defendants contesting FCPA allegations. In 2009, 22 individuals from 16 different military and law enforcement products companies were charged with violating FCPA provisions, as a result of an elaborate DOJ and FBI sting operation, by attempting to make improper payments to undercover FBI agents posing as Gabonese procurement officials. By early 2012, however, all individuals were acquitted or had the charges against them dropped.

This case is significant in the sense that prosecutors had initiated the case (as opposed to taking on a self-reported case), and had devoted significant resources before the sting, with undercover operatives at work on the investigation for over two years. Mistrials and subsequent acquittals in such a high-profile investigation and case may spur defendants in future cases to take their chances at trial.

In another case, a California US district judge in December 2011 dismissed indictments on foreign bribery charges of the president and CFO of a US maker of electrical transmission and related products. The convictions of the executives, made in May 2011, were in connection with the company's dealings with Mexico's state-owned electricity utility, Comision Federal de Electricidad. Federal District Judge A. Howard Matz, who oversaw the jury trial and dismissed the case, had cited government misconduct including unauthorized searches, incorrect testimony and providing false information to secure a search warrant. The dismissed charges had carried up to 30 years in prison for both defendants.

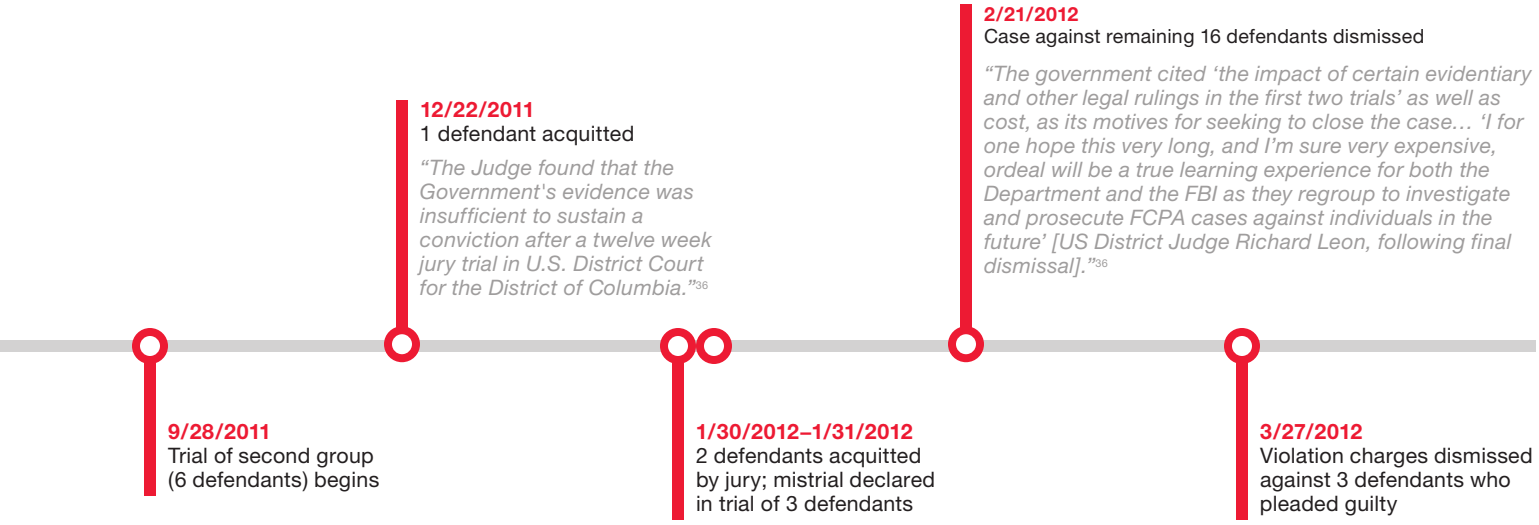
Too aggressive?

In October 2010, the Chamber articulated its position on the recent barrage of FCPA enforcement activity, calling for five amendments to the FCPA. The Chamber's suggestions include adding a compliance defense (similar to the adequate procedures defense under the UKBA), limiting an entity's liability for the previous actions of an acquired company, adding a "willfulness" requirement for corporate criminal liability, limiting a company's liability for the acts of a subsidiary, and clarifying the term "foreign official" under the statute.[37] The Chamber has hired former attorney general Michael Mukasey to advocate for these changes.

35 DOJ, "Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme," press release, January 19, 2010.

36 TRACE International, "FCPA Sting Operation," *The TRACE Compendium*, 2012.

37 U.S. Chamber Institute for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, October 2010.



In addition to the strong current of opposition to certain aspects of the FCPA by the Chamber and other groups, some business leaders argue that certain FCPA enforcement outcomes are overly harsh and actually place US-based companies at a competitive disadvantage globally, because foreign companies are generally not bound by similar laws.[38] Further, critics argue that there is a lacking of judicial scrutiny applied in FCPA cases, due to the fact that most prosecutions of MNCs are arrived at through settlements, instead of aggressive FCPA enforcement.

In the wake of the Chamber's criticism, Lanny Breuer, Assistant Attorney General for the DOJ's Criminal Division, acknowledged the concerns of aggressive FCPA enforcement, but, at a national FCPA conference, asserted: "The fight against corruption is a law enforcement priority of the United States, and it is also a personal priority of mine. There are few more destructive forces in society than the effect of widespread corruption on a people's hopes and dreams, and I believe it is incumbent upon us to work as hard as we can to eradicate corruption across the globe."[39]

Call for clarity

The FCPA statute—and its enforcement—has drawn a degree of criticism. Most recently, US Senators Chris Coons (D-DE) and Amy Klobuchar (D-MN) coauthored a letter to Attorney General Eric Holder urging the DOJ to provide "clear and concrete guidance" on nine separate points, including what constitutes a foreign official as the term pertains to the FCPA. The present definition is an "officer or employee of a foreign government or any department, agency, or instrumentality thereof."[40] At issue is how expansively "instrumentality" can be applied by prosecutors; for example, what percentage of a company owned by a government would constitute that company as state-owned, thereby making it and its employees an "instrumentality" of that government? The letter also requested details on benefits for companies that self-report violations and work with investigators and on what constitutes a sufficient FCPA compliance program. The letter added: "Indeed, we applaud the Department of Justice's increased commitment to FCPA enforcement in recent years. However, it has become apparent that too many companies are devoting a disproportionate amount of resources to FCPA compliance and internal investigations."[41] The DOJ is expected to release new guidance on the FCPA in 2012.

38 It is important to note that recently countries like China and Russia have passed anti-corruption laws similar to the FCPA, but the effectiveness of these statutes will depend on the consistency and level of enforcement.

39 DOJ, "Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act," press release, November 8, 2011.

40 Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (f)(2)(A).

41 Senator Chris Coons and Senator Amy Klobuchar, letter to Attorney General Eric Holder, February 15, 2012. Sourced at: http://www.mainjustice.com/justanticorruption/wp-admin/documents-databases/265-2-judiciary_FCPA_02_16_12[1].pdf

Global anti-corruption efforts deepen

Beyond the FCPA

While US prosecutors have indeed sent strong messages to US executives through enforcement actions, they are also sending similar messages to their counterparts outside the US. How foreign jurisdictions follow suit through enforcement of their own anti-corruption laws, however, is largely still an open question. For example, the UKBA, which took effect in July 2011 and carries a maximum 10-year prison sentence, has tallied only one conviction through February 2012.

The following represents several highlights of the global anti-corruption movement.

Global alignment

Indeed, while the US has taken an aggressive lead on the anti-corruption front, it is no longer the only kid on the block. Anti-corruption investigators and prosecutors in other countries have collaborated across borders to create an increasingly intricate and effective global matrix of enforcement. In a number of high-profile cases, US investigators have worked closely with counterparts in numerous countries, including the UK and Germany.

Certainly, the FBI's augmented presence in other countries—working with and even training their foreign counterparts—has helped internationalize anti-corruption enforcement. Increasingly, prosecutors and regulators from different jurisdictions are collaborating more closely—both during the investigation and, following a case, in the resolution of fines and penalties. Especially in cases in which two or more countries are making claims to prosecute the same company or individual over the same offence, it is more common for regulators across borders to work closely together. The OECD Convention will also likely continue to tighten international cooperation among anti-corruption regulators and investigators.

G-20 nations galvanize

Over the past two years, the Group of Twenty ("G-20") countries have gathered steam in instituting new—or amending existing—anti-corruption legislation. Of note is progress in countries such as China, India, Indonesia, Russia and Turkey. For example, both India and Indonesia have drafted legislation that would prohibit foreign and commercial bribery.[42] In Brazil, three "Technical Standards for Independent Audits applicable to independent auditors have been in place since January 2010, which, *inter alia*, require auditors to report illicit acts, or non-compliance with laws and regulations, to 'those charged with governance and management.'"[43]

Some noteworthy global developments

The UK Bribery Act

Most notable of recent global anti-corruption legislation is the UKBA, which came into force in 2011. Generally interpreted as more stringent than the FCPA, the UKBA criminalizes bribery in both the public and commercial realms and categorizes bribery as both "active" and "passive." Active bribery is considered the offering, promising or giving of a bribe whereas passive bribery is the requesting, agreeing to receive or accepting of a bribe. Under the UKBA, "facilitation payments"—made to expedite a routine, but nondiscretionary, governmental action—are prohibited, whereas under the FCPA, facilitation payments are permitted. Another UKBA provision introduces a specific corporate offence of failing to prevent bribery, with a defense existing if it can be proven that "adequate procedures" to prevent bribery had been put in place.

The greater implications of the UKBA lie in the possibility that it will nudge other countries to follow suit by adding similar provisions to their anti-corruption legislation to better align international laws. Already, the Australian government is in the process of determining its approach to this controversial topic. It remains to be seen whether other countries—including the US—will revise their local laws to more closely mirror the core provisions of the UKBA.

42 OECD, *OECD Working Group on Bribery*, annual report 2010, 2011.

43 OECD Directorate for Financial and Enterprise Affairs, Working Group on Bribery in International Business Transactions, *Brazil: Phase 2: Follow-up Report on the Implementation of the Phase 2 Recommendations*, 2010.

The World Bank's "smarter" investigations

The World Bank continues its efforts to fight corruption, in collaboration with other development banks, including the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and the Inter-American Development Bank. The World Bank Group's Integrity Vice Presidency ("INT")—an arm of the World Bank responsible for investigating fraud and corruption allegations in World Bank–funded projects—has recently devoted more resources to "screening" and "prioritization" of allegations and, therefore, has been more selective and "smarter" in how it opens cases. As a result, in FY11, the INT opened fewer cases (73) than in FY10 (194). However, this selectivity resulted in 36 percent more opened cases being substantiated and a higher number of cases that were deemed "high priority" (68 percent in FY11 versus 18 percent in FY10).[44]

China's anti-corruption statute

In February 2011, China passed 49 amendments to its Criminal Law. One amendment, to the Law's Article 164, includes a provision that criminalizes paying bribes through "giving money or property" to non-Chinese government officials and to officials of an international organization "for the purpose of seeking illegitimate commercial benefit."[45] China already has laws against bribing Chinese state functionaries and against general commercial bribery. While there have been reform efforts under way, anti-corruption results have been mixed. Indeed, public officials found guilty of bribery, embezzlement, and abuse of power have faced punishments as extreme as execution. Highly publicized arrests of foreign employees accused of bribery and IP infringement placed MNCs on notice as to what is acceptable business practice in China.

Russia passes anti-bribery law, signs on to OECD Convention

In May 2011, Russia enacted a law making foreign bribery illegal and raising the fine for giving or taking bribes to up to 100 times the amount of the bribe, with the maximum fine being 500 million rubles, or US$18.3 million.[46] Amendments to the criminal and administrative offences code criminalize mediation in bribery (that is playing a role in transferring bribes—or other facilitation activities—to reach or realize an agreement on a bribe between parties). Another law passed in 2011 requires banks to disclose government officials' account information if requested by law enforcement agencies or employers.

In February 2012, Russia agreed to join the OECD Convention, with its accession effective in April 2012. The OECD Convention, which prohibits the bribery of foreign public officials in international business dealings, will include 39 member countries with Russia's entry.[47]

Canada's crackdown

Since Canada's Royal Canadian Mounted Police ("RCMP") formed its International Anti-Corruption Unit in 2007, the group has gradually amped up its activity in enforcing the Corruption of Foreign Public Officials Act ("CFPOA")—with about 30 ongoing corruption cases currently across Canada. A recent case led to handing a C$9.5 million fine to a Calgary-based oil and gas exploration company for allegedly bribing a Bangladeshi official.[48]

Nigeria's uphill battle

Nigeria has long been in the cross-hairs of anti-corruption probes. Between 2007 and 2011, 42 FCPA cases have stemmed from violations and/or improper activities in Nigeria, which represents the largest number of cases associated with a single country over that period, followed by Iraq and China. Bribery is clearly still rife in Nigeria and Africa, with the cost of corruption in Africa amounting to about US$300 billion a year, based on estimates by the African Development Bank. Companies operating in Nigeria, according to Transparency International ("TI"), paid about $3.2 billion in 2010–2011 for bribing public officials.[49] Indeed, much of the corruption enforcement—and several high-profile and highly punitive FCPA cases described elsewhere in this paper—surrounds Nigeria's lucrative oil and gas sectors—which have long attracted foreign companies from the extractive industries.

44 The World Bank Group, *INT, Integrity Vice Presidency Annual Report Fiscal 2011*, 2011. Note: The World Bank's fiscal year is July 1–June 30. FY11, then, ended June 30, 2011.

45 Covington & Burling LLP, "China Amends Criminal Law to Cover Foreign Bribery," *Anti-Corruption E-Alert*, March 1, 2011.

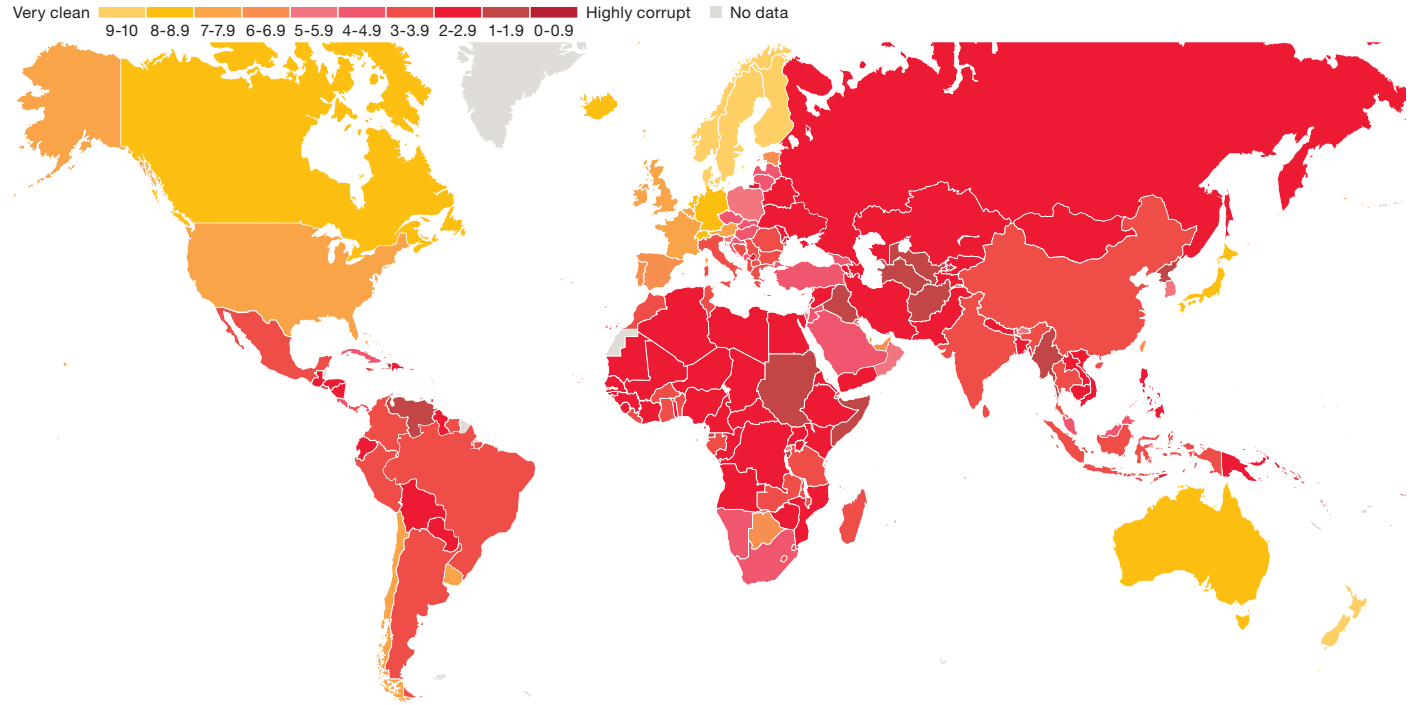
46 "Medvedev Signs Landmark Anti-corruption Law," RIA Novosti, May 4, 2011.

47 OECD, "Russia joins OECD Anti-Bribery Convention," press release, February 17, 2012.

48 Brian Burton, "Canada Clamps Down on Corruption," *Calgary Herald*, December 1, 2011.

49 Transparency International, "Companies from Emerging Giants China and Russia Most Likely to Bribe Abroad," press release, November 2, 2011.

Figure 7. Corruption perceptions index, 2011
The perceived levels of public-sector corruption in 183 countries/territories around the world



Source: Transparency International, *Corruption Perceptions Index 2011*, www.transparency.org

Perceptions and realities of corruption

The TI Corruption Perceptions Index ("CPI")

The CPI measures the perceived levels of public-sector corruption in a given country and is a composite index, drawing on different expert and business surveys. The 2011 CPI scores 183 countries on an indexed scale from 0 (highly corrupt) to 10 (very clean). The map depicted in Figure 7 illustrates the CPI scores globally. It is interesting to compare the CPI scores against Figure 8, which illustrates the countries from which FCPA enforcement actions have stemmed and the order of magnitude of cases in these countries.

A look at how countries have migrated up or down the CPI list over the last three years (2008–2011) does not reveal major, over-arching improvements regionally. But what is striking is how the biggest economies have made so little progress, and that corruption risk in 2011 has generally persisted in regions that had a low CPI score in 2008. Some CPI ranking shifts in the last three years are described briefly below.

Fast-growing Asia, slow-improving CPI ranking

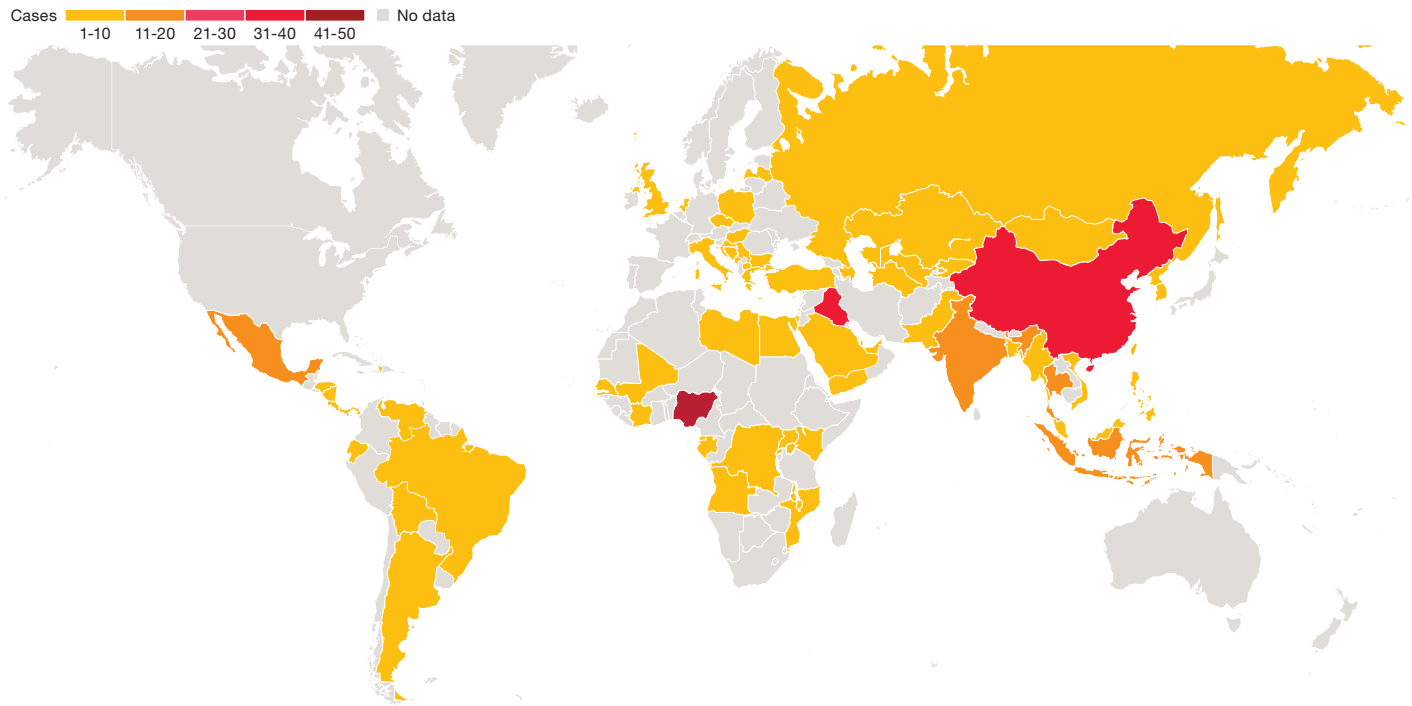
Overall, Asian economies still have relatively low-ranking CPIs, and have not demonstrated major improvement, given their rapid economic growth and collective size. Some Asian countries' CPIs have even fallen—most notably India (3.4 to 3.1), as well as Malaysia (5.1 to 4.3). Some, however, have moved up the CPI ladder since 2008 including: Indonesia, Japan, Philippines, Vietnam and Taiwan. TI commented on 2011's Asia Pacific CPI results in this way: "If the 21st century is to truly be Asia's as predicted, comprehensive actions are needed to increase integrity and structural equality throughout the region. But to do this, governments and civil society must work together to counter corruption effectively," adding that, "In China, greater economic freedom has failed to bring along a framework that hinders corruption, posing a serious challenge to sustained economic growth in the country."[50] In the last three years, China's CPI score was unimproved at (the relatively low) 3.6.

African countries crowded at lower end

Consider also that of all sub-Saharan African countries, just three (Botswana, Cape Verde and Mauritius) ranked at or above an index of 5 in 2008 and by 2011, just four did: Botswana, Cape Verde, Mauritius and Rwanda. Other countries, such as Angola, Burundi, Chad, the Democratic Republic of Congo, and Sudan, ranked in the

50 Rukshana Nanayakkara, "2011 Corruption Perceptions Index: Alarming results in Asia," *Asia Pacific* (blog), *Transparency International*, November 30, 2011.

Figure 8. Count of countries named in SEC and DOJ actions, 2007–2011



Note: Figure 8 represents the number of times each country was named in an FCPA case as the location of improper activities between 2007 and 2011.
Source: PwC analysis based on publicly available documents

bottom 20 countries globally. In 2011, Somalia ranked last, as it had in 2008—with a CPI of 1.0. Public institutions in many of these countries have been weakened through political, tribal, religious and geographic conflicts which can have a profound effect on governance and the prevalence of corruption.[51]

Steady in the West

Among major Western economies, there was little shifting from 2008 to 2011: USA (7.3 to 7.1); UK (7.7 to 7.8); Germany (7.9 to 8.0); France (6.9 to 7.0); and Canada (remained at 8.7).

Latin American countries do not provide a clear indication of trends…in any direction

While countries such as Chile (6.9 to 7.2) and Brazil (3.5 to 3.8) demonstrated some improvement in their perceived corruption, others like Colombia (3.8 to 3.4), Mexico (3.6 to 3.0), and Paraguay (2.4 to 2.2), experienced a decline. Uruguay (6.9 to 7.0), Argentina (2.9 to 3.0), and Venezuela (remained at 1.9) are examples of Latin American countries that remained steady with relatively little change.

The reality: mapping FCPA enforcements

Enforcement, in the case of many countries, does not measure up to the realities of corruption, meaning that the playing field of international business remains by no means level. It does not necessarily follow, then, that a country's paucity—or complete absence—of anti-bribery cases means encountering bribery is unexpected. In fact, no enforcement actions in one nation could very well be the most red of flags for endemic corruption through the judiciary, police and government layers of that nation's society.

A glance at the enforcement map (Figure 8), showing countries named (and how frequently they were named), in SEC and DOJ enforcement actions over the 2007–2011 period, reveals a general congruence to the CPI map (Figure 7). The three countries named most often in FCPA enforcement actions are: Nigeria (42), Iraq (36), and China (33). As discussed elsewhere in this paper, a preponderance of cases in Iraq stemmed from the UN Oil-For-Food Program. In China, corruption has grown to be a contentious issue, often involving lavish meals, travel and entertainment. Natural resource-rich Nigeria, an FCPA target since the mid–2000's and perennial lure to the oil and gas industry, is notorious for business-as-usual bribery—as well as for the ubiquity of "touts," or quasi-official intermediaries, soliciting MNCs to act as a go-between to bribe public officials.[52]

51 Chantal Uwimana, "Corruption Perceptions Index 2011: A call to Action," *Africa and Middle East* (blog), *Transparency International*, November 30, 2011.

52 David Elesinmogun, Obumneme Egwuatu and Marcus Cohen, "From the Experts: Secret Agents Causing FCPA Violations," *Corporate Counsel*, October 3, 2011.

Figure 9. OECD's leaders and laggards in bribery enforcement, 2011

Active enforcement (7 countries)	Moderate enforcement (9 countries)	Little or no enforcement (21 countries)
Denmark, Germany, Italy, Norway, Switzerland, UK and US	Argentina, Belgium, Finland, France, Japan, Netherlands, South Korea, Spain and Sweden	Australia, Austria, Brazil, Bulgaria, Canada, Chile, Czech Republic, Estonia, Greece, Hungary, Ireland, Israel, Luxembourg, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, South Africa and Turkey

Source: Fritz Heimann, Gillian Dell and Kelly McCarthy, *Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention*, Transparency International, 2011

Mixed messages on the enforcement front in OECD countries

TI's annual *Progress Report on Enforcement of the OECD Anti-Bribery Convention* measures anti-corruption enforcement using several criteria, including the number of cases or investigations, statutory obstacles and organization of enforcement. TI experts collect the information in countries that are party to the OECD Convention to analyze trends and/or indicators of advancement or obstacles. *Progress Report 2011*, which covers the period ending 2010 (with some countries reporting through mid-2011), provides insight into the traction—or, in some cases, the lack of traction—that anti-bribery enforcement has made over the year.

Little advancement in last three years

Despite the fact that the Convention will have at least 39 parties in 2012, and that, as a group, these nations are progressing with anti-corruption legislation, so far, there has been relatively little progress achieved in enforcement, according to TI's most recent progress report. From 2008 to 2010, there was only a slight uptick in countries with improved anti-bribery enforcement. Namely, Denmark, Italy and the UK jumped to "active enforcement" over the period (see Figure 9 for 2011 standings). Interestingly however, there was no improvement in the number of countries within each category over the past year. The fact that 21 countries still have demonstrated "little or no enforcement" (defined as "only brought minor cases… only have investigations…have no cases or investigations"[53]), signals the potential lack of momentum on the part of their governments in translating anti-corruption regulation and goodwill into hard enforcement outcomes.

As MNCs expand in emerging markets, so will corruption risks

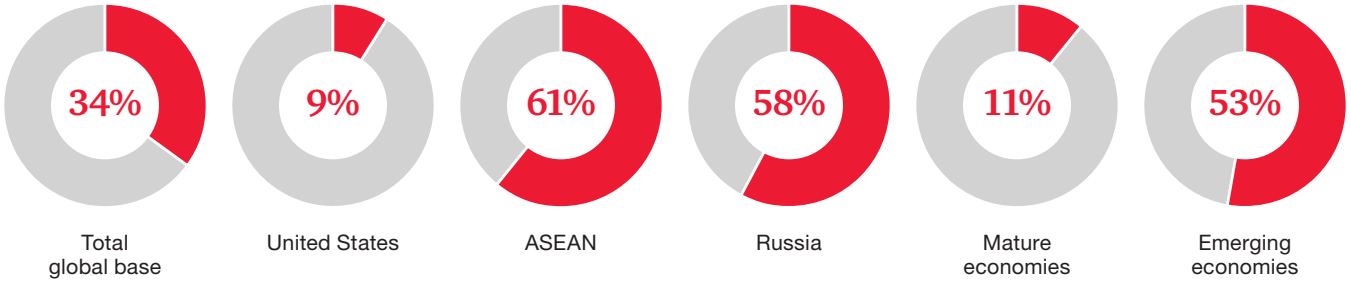
Creating "second home markets" in fast-growing regions

In the wake of the sluggish US economy and the perpetuated debt crisis in Europe, MNCs are continuing to expand their footprint in fast-growing economies, such as Asia Pacific. Consider India, for example, where US MNCs have increased not only their research and development expenditures at their foreign affiliates from $20 million in 1999 to $1.2 billion in 2009 but also their hiring—from 65 thousand employees to 491 thousand over the same period. Elsewhere, US MNCs also made significant capital expenditures and expanded hiring in Africa, China, Eastern Europe and Brazil over that decade—compared to modest increases in Western European economies.[54]

53 Fritz Heimann, Gillian Dell and Kelly McCarthy, *Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention*, Transparency International, 2011.

54 Kevin B. Barefoot and Raymond J. Mataloni Jr., "Operations of U.S. Multinational Companies in the United States and Abroad," U.S. Department of Commerce, Survey of Current Business, November 2011.

Figure 10. Bribery and corruption concerns run high in Asia, Russia
Percentage of CEOs who are concerned about bribery and corruption in selected regions



Source: PwC, *15th Annual Global CEO Survey*, 2012

Meanwhile, global CEOs seem to be taking on a greater appetite for risk in exchange for capturing opportunities to expand in fast-growing regions. In PwC's *2012 Global CEO Survey*, only 19 percent of US CEOs said they are revising their strategies because of changes in their tolerance and attitude toward risk, compared to 39 percent last year. And 34 percent of global CEOs are "somewhat or extremely concerned about bribery and corruption." The concern heightens in other areas, particularly in Russia (58 percent), and the ASEAN region (61 percent) (see Figure 10). Still, CEOs surveyed are intent on doing business in some of the regions where corruption risks run high, such as China, Brazil, India and Russia (see Figure 11).

Russia is an example of a country displaying attractive opportunities for commercial growth yet giving foreign companies pause when they consider doing business there based on perceptions of corruption and the often-byzantine administrative environment. Performing proper due diligence is often difficult because corporate financial and ownership data is frequently outdated or unavailable. Success for businesses in Russia—and in other emerging economies with such opportunities and risks—often hangs on choosing the right local partner. Investors need to walk a fine line that links prospects for profits to a disciplined, risk-based decision-making process.

As is the case with other countries burdened with the weight of entrenched corruption, there is still a pervasive resignation and acceptance of bribery amidst Russia's populace. While the country's leadership has shaped the beginnings of an anti-corruption campaign, there still exists a persistent belief that bribery is a necessary part of doing business. Meanwhile, the value of the average bribe is on the rise as well, increasing more than threefold in 2011 to 236,000 rubles (or US$7,770), compared to 2010, according to Russia's Interior Ministry.[55]

Investment, hiring and cross-border deals on rise

Looking forward over the next three to five years, this trend will likely continue. Take China, where 44 percent of APEC CEOs plan to make their largest investments, followed by the US (10 percent) and, to lesser degree, other APEC-Asia economies such as Australia, Singapore and Indonesia, according to PwC's recent survey.[56] A separate survey also found that APEC CEOs are making business combinations a priority in the next year (2011–2012) (see Figure 12). On a regional level, 83 percent of global CEOs expect to expand strongly in Southeast Asia (see Figure 13).

Implications for MNCs

The increased commercial activity in emerging markets such as Asia Pacific, Eastern and Central Europe and Latin America will undoubtedly mean more touch points between MNCs and their affiliates and government officials, on myriad platforms, including customs clearance, securing permits and licenses, and dealing with third-party intermediaries, such as freight forwarders. As MNCs are lured to the opportunities of establishing a "second home" in these fast-growing markets, they will inevitably also encounter a deepened layer of exposure to corruption risk. And, considering that establishing foreign hubs in these economies means, in many cases, a substantial increase in the hiring of and reliance on local talent, MNCs will likely encounter another burden of risk: ensuring that local personnel are well-versed in anti-corruption rules and, more important, that they follow them assiduously.

55 RAPSI (Russian Legal Information Agency), "Average Bribe Amount in Russian More Thank Tripled in 2011—Interior Ministry," January 27, 2012.

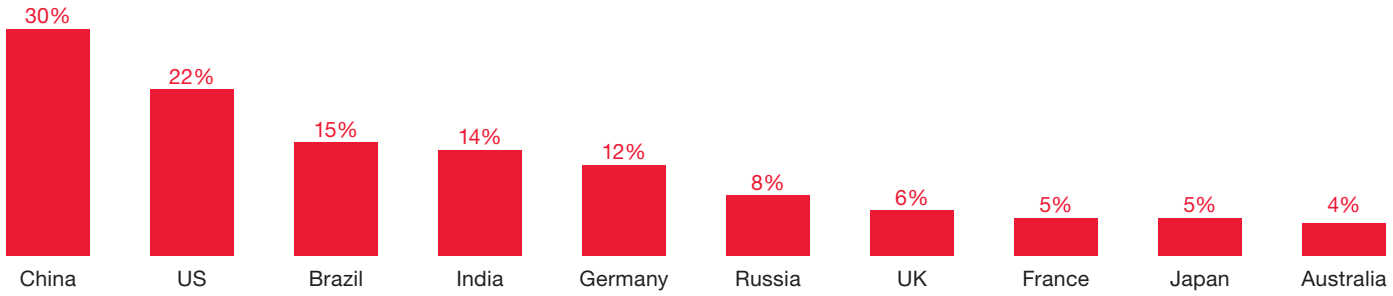
56 PwC, *APEC CEO Survey*, 2011.

"The whole idea of corruption as a tax on the poor, especially, is foundational for something to be done about it, and I think we're seeing that increase. Certainly, the hunger strike in India seemed to garner some support and attention around this issue. Corruption is not a tax on the investor, it's a tax on the people in those societies that bear the burden of the costs that corruption creates. It has to be addressed internally really by citizens, saying, 'we will not put up with this', and that increasingly seems to be happening. So the direction, I think, is positive. Would we like to see it happen faster? Yes, because in many cases it prevents us from investing at all."

—Gregory R. Page, Chairman and CEO, Cargill Inc., in PwC's *2011 APEC CEO Survey*

Figure 11. CEOs are focusing on a mix of large emerging and developing markets

Q11a: Which countries, excluding the one in which you are based, do you consider most important for your overall growth prospects over the next 12 months? (Respondents could choose up to three countries.)



Base: All respondents 1,258

Source: PwC, *15th Annual Global CEO Survey*, 2012

Figure 12. APEC CEOs look to hiring and making deals
Q20b: What do you expect to happen to headcount in your organization globally over the next 12 months? Q9b: Which, if any, of the following restructuring activities do you plan to initiate in the coming 12 months?

Base: Q20b: CEO respondents 962; Q9b: CEO respondents 962
Source: PwC, *15th Annual Global CEO Survey*, 2012

Figure 13. Global CEOs see expanding in Asia Pacific
Q10a: In which regions does your business have key operations? Q10b: Do you expect your key operations in [choice of Asia Pacifc regions] to decline, stay the same or grow?

Base: Q10a: Global CEO respondents 1,258; Q10b: Global CEO respondents who have key operations in the regions: East Asia: 516; Southeast Asia: 403; South Asia: 296; Australasia: 241
Source: PwC, *15th Annual Global CEO Survey*, 2012

What this means for your business

Companies—more than ever—need to meet corruption risk head on

Corporate accountability in the new anti-corruption era

How do you play the game when the rules are changing?

With the recent momentum in the crackdown on corruption, both domestically and abroad, companies with a global footprint, especially those expanding into new and unfamiliar territories, would be remiss if anti-corruption compliance wasn't moved closer to the top of their priority list. A proactive approach that is practical and commensurate with the level of risk faced by the entity in each of its locations is recommended.

Clearly, it is already appearing on the C-Suite radar. It's critical that anti-bribery and anti-corruption compliance permeate through the ranks of the entire organization, given the reality that violations can be originated literally by anyone, anywhere and at any time.

Furthermore, it may no longer be enough to ensure compliance with the FCPA; it's a new legislative environment with a changing playing field. As discussed above, more countries that have previously signed the OECD Convention are now coming to the table with revisions or amendments to their existing anti-corruption legislation, or developing entirely new laws. Most notable is the UK's enactment of the UKBA, but others, such as Russia, China and India are not far behind, as reported in TI's *2011 Progress Report*.

We should be cautiously optimistic regarding some of the newer players, however, as the enactment or update of bribery laws does not necessarily translate into regular and consistent enforcement. As discussed earlier, TI's *2011 Progress Report* reported grim results since its *2010 Progress Report* in terms of OECD Convention countries' enforcement activities.

Indeed, stamping out corruption and bribery from the boardrooms, foreign subsidiaries and government offices alike will surely take time, with progress made at varying speeds across the globe. One potential game-changer going forward is the UKBA's new criminalization of the "failure to prevent" bribery, requiring organizations to demonstrate that they have put in place "adequate procedures" designed to detect and prevent corrupt practices. Indeed, this provision will likely have profound implications for global organizations. Despite a patchwork of progress with respect to anti-corruption laws and enforcement, now, more than ever, it is imperative to keep current with and understand the nuances of such new legislation and how it may impact the way in which companies operate globally.

Crafting a game plan to combat corruption—in every corner of the enterprise

The elements of a successful anti-corruption strategy start with a corporate-wide framework and address all of the entities' vulnerabilities. It is essential that a risk assessment be performed to identify areas of potential risk, in all geographic regions, industry sectors and lines of business.

In designing or enhancing your compliance program, you should ask the following:

- Does the code of conduct strictly prohibit bribery, and are the definitions and descriptions of prohibited behavior broad enough so as to cover some of the newer legislation—for example, the prohibition of facilitation payments under the UKBA (which is also being debated in Australia)?
- Are policies translated into the local language of the various locations in which you operate? Do the translations represent the literal meaning of the words or the spirit of the policies (they're not always the same)? Have the policies been shared with third parties acting on your organization's behalf? Do policies exist that govern high-risk activities? Do policies provide relevant examples that would make it easier for employees to understand the spirit of the policy?

A framework for corporate anti-corruption policies and procedures

Organization and responsibilities

- The Board of Directors (or equivalent) is responsible for overseeing the development and implementation of an effective anti-corruption program, while the CEO is responsible for its implementation.

Raising concerns and seeking guidance

- Employees should be encouraged to raise concerns and report suspicious circumstances to responsible officials through secure and accessible channels.
- The company should link the anti-corruption program to other programs, such as anti–money laundering, where appropriate.

Business relationships

- The company should apply its anti-corruption program to its dealings with subsidiaries, joint venture partners, agents, contractors, and other third-party business partners.

Communication

- The company should publicly disclose its anti-corruption policies.
- The company should establish internal communications for its anti-corruption policies.

Human resources

- Human resources should ensure that no employee would suffer any adverse consequences for refusing to pay bribes, even if that may result in the loss of business.

Internal controls

- The company should maintain accurate books and records.
- The company should establish and maintain a system of internal controls.

Training

- Employees, contractors and suppliers (especially high-risk), should receive training on the company's anti-corruption program.

Monitoring and review

- Senior management should periodically assess the strength of the anti-corruption program.
- The company should periodically evaluate the adequacy of the anti-corruption program.

Source: PwC, *Under the Table, On the Radar: Improving Anti-corruption Compliance for Financial Services Institutions*, August 2011.

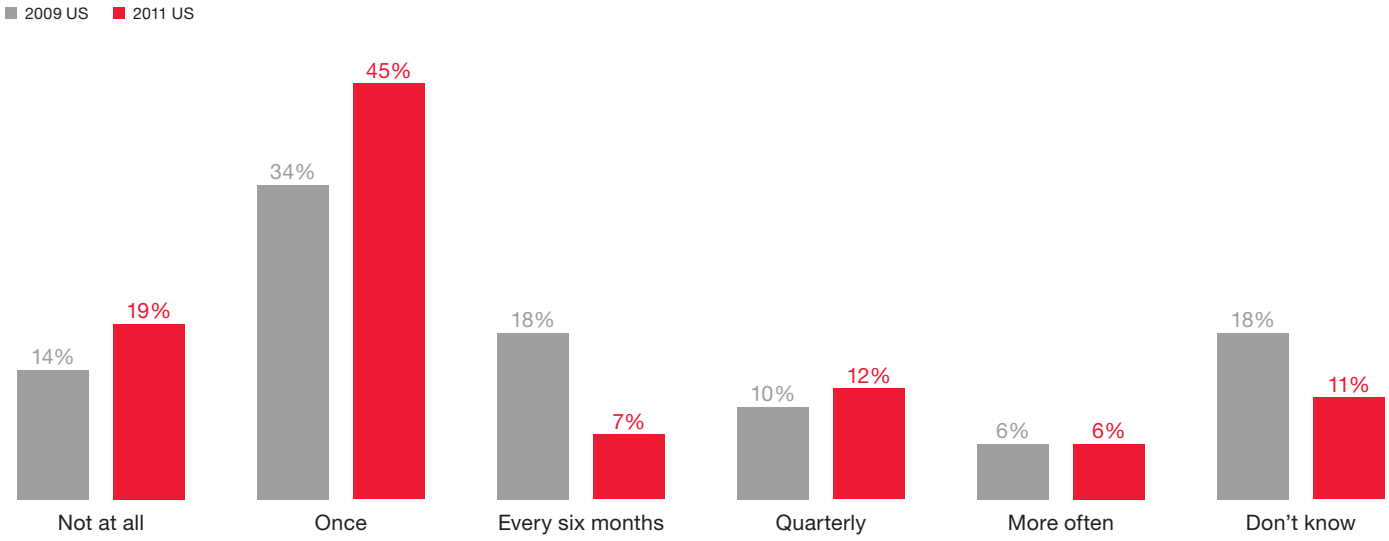
- Are there periodic and relevant training programs available for employees of all levels to ensure a consistent understanding of company policies and applicable laws? Is the training tailored for different groups within the company? Is the training tailored for differences in local customs, practices and/or laws? Do third parties acting on the company's behalf also receive training?
- Do you require employees (and potentially third parties) to certify to their understanding of and compliance with the FCPA and local anti-corruption laws?
- Does the company prepare, and regularly update a risk assessment? Do you proactively identify and monitor compliance sensitive activities and related transactions? Are monitoring activities tailored according to the results of your risk assessment?
- Do you have an adequate understanding of the third parties that play a role in your sales and distribution processes? Do you know the scope of their services for you, and are appropriate contractual safeguards in place? How and when do they interact with your government related customers?
- Are consistent incentive and disciplinary mechanisms in place?
- Is there a process in place to assess and respond to allegations?

Know where your vulnerabilities lie

Risk assessments

Periodic assessment of risk should be an integral part of major business decisions including the development of new third-party relationships, analyzing potential M&A targets, breaking into new geographic regions, and entering into certain transactions, such as a joint venture or strategic

Figure 14. Frequency of fraud risk assessment



Note: Due to rounding, figures may not add to 100%
Source: PwC, *Global Economic Crime Survey,* US supplement, 2011

alliance. Understanding the risk profile associated with these activities will allow you to develop appropriate due diligence procedures and implement controls to effectively manage the related risks.

The objectives of a risk assessment include the following:

- Identify the key risk areas based on relevant factors such as location, business function and transaction type;
- Assess the level of exposure to the company based on the identified risks;
- Determine where control and process design and implementation efforts should be focused in order to mitigate such risks; and
- Develop a remediation plan to address other gaps and potential areas of need, including training, monitoring and communication.

Most US organizations, according to the 2011 PwC *Global Economic Crime Survey*, have only conducted a risk assessment once (see Figure 14). Global respondents are even less likely to perform fraud risk assessments; 41 percent of respondents did not perform one, or do not know if they performed one, in the past year.

Due diligence

The objectives of due diligence include getting to know your partners, third-party representatives and acquisition targets, among others, in order to position yourself to make better business decisions, mitigate potential successor and vicarious liability, and plan remedial measures, as necessary.

Due diligence is not a one-size-fits-all situation. Procedures can range in depth and approach, based on a preliminary assessment of the potential risks associated with the relationship or proposed transaction. In some instances, a questionnaire may be sufficient, while in others, a more thorough review of an entity or individual's reputation, books and records and financial stability, may be required.

Regardless of the rigor or manner in which due diligence is performed, the job is not done once the analysis is complete. It is equally important to retain documentation regarding the ultimate decisions and reassess certain relationships (third party, vendor, supplier, etc.) on a periodic basis.

No program can stand on its own

In addition to the points discussed above, keys to the successful implementation of any anti-corruption compliance program include the following:

Internal Controls

- Employ a higher level of scrutiny of compliance-sensitive accounts, including commissions, gifts, expense reimbursements, donations/contributions, petty cash and transactions with state-owned or -controlled entities.
- Establish new/reassess the appropriateness of existing financial controls, to include approval limits, and segregation of duties.

As CEOs eye expansion plans, they need to sharpen due diligence efforts

According to PwC's *2012 Global CEO Survey*, of CEOs responding that their companies had initiated or planned to initiate restructuring activities in the coming 12 months, 49 percent expected to enter in a business combination—with an additional 28 percent contemplating a cross-border merger or acquisition (see Figure 15). This and other initiatives cited by CEOs highlight how companies' expansion plans may well increase their exposure to corruption risks, such as successor liability. Additionally, companies entering business combinations also take on the responsibility of ensuring that employees of newly acquired companies receive proper anti-corruption training and, more importantly, adhere to anti-corruption controls and practices. Furthermore, the top countries considered by CEOs as most important for overall growth prospects over the next 12 months, excluding the home country, are as follows (with corresponding 2011 CPI score): China (3.6), USA (7.1), Brazil (3.8), India (3.1), Germany (8.0), and Russia (2.4).[57]

Given this current appetite for mergers, joint ventures, and business combinations, it is imperative that businesses know their targets—and their targets' partners, past and present. The following represent a few steps to take throughout the deal cycle to help ensure a hard-won merger doesn't bring unanticipated corruption baggage to your doorstep.

Devote more resources to preacquisition due diligence

Resources deployed in the early stages of an acquisition can pay off handsomely by averting costly surprises later on in the process, and can help verify a target's true value.

Focus on major due diligence areas when considering an acquisition target:

- Reputation, professional history and qualifications of those in top management echelons, key decision makers, managers, sales personnel and customers, including any state-owned enterprises
- The target's activity and ethical conduct within the industry it operates in, the anti-corruption programs the target has in place, and the target's adherence to and monitoring of high anti-corruption standards
- Evaluation of any corruption issues in the past and whether they were properly resolved; includes possibly conferring with regulators

Install post-deal measures

Anti-corruption compliance measures must be put in place aggressively throughout the newly acquired target.

Key areas include:

- Regular anti-corruption messages sent loudly through the organization from the top
- Rapid deployment of an anti-corruption program with rigorous training, monitoring and enforcement procedures
- Establishment of a call-in compliance hotline, ensuring that corruption-related issues and queries are addressed in a timely manner
- Compliance oversight and supervision of third-party intermediary activities
- Ensure appropriate controls are in place for those payments/expenses/disbursements "just under" the threshold for certain necessary approvals.
- Ensure that controls were designed appropriately and are operating effectively.

Reporting

- Establish the right reporting channels for employees to share information with respect to potential infractions. Some examples include a whistleblower hotline and a dedicated e-mail address or website; however, these channels can, and probably will, differ by market and region. Ensure confidentiality to allay any concerns of employees fearful of retaliation.
- Once a true issue has been identified, take the appropriate measures to investigate the matter and remediate as necessary. The company should establish an investigation framework or protocol in advance so that important time is not wasted in trying to coordinate initial plans and logistics when a crisis does arise.
- Develop protocols to determine when it is necessary to report externally to certain parties (e.g., DOJ/SEC, other regulatory bodies).

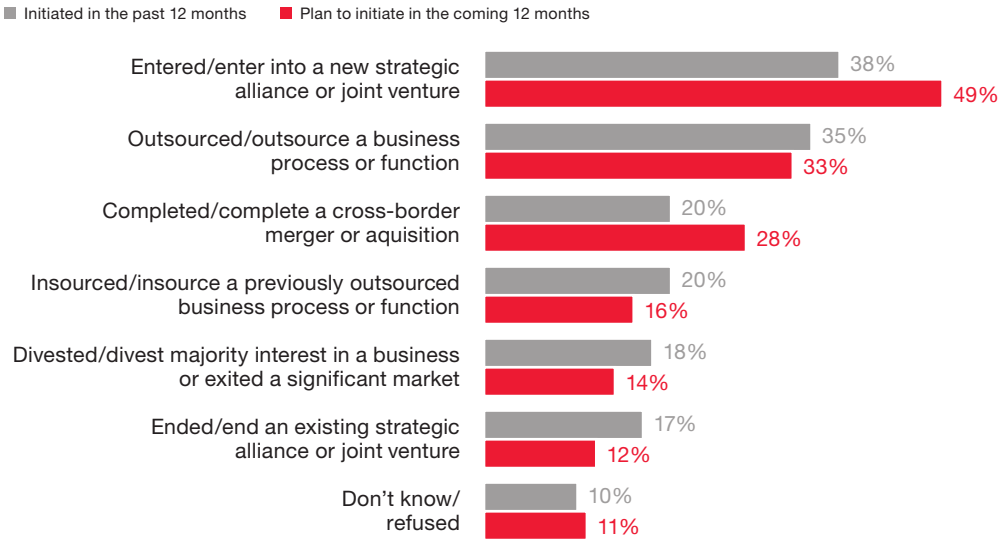
Monitoring

Monitoring could arguably be the most crucial element of an anti-corruption compliance program; however, it is often also the most difficult to implement. Especially with companies operating in various countries, data residing on multiple IT platforms and the evolving nature of other countries' laws, a successful program cannot remain static.

57 PwC, *15th Annual Global CEO Survey*, 2012.

Figure 15. CEOs to remain vigilant over costs

Q9a: Which, if any, of the following restructuring activities have you initiated in the past twelve months? Q9b: Which, if any, of the following restructuring activities do you plan to initiate in the coming twelve months?



Base: All respondents 1,258
Source: PwC, *15th Annual Global CEO Survey*, 2012

Companies should:

- Identify and track government relationships and the nature and volume of related transactions;
- Reassess the risk profile of major vendors, suppliers, third-party agents/intermediaries/other out-sourced functions;
- Revise third-party agreements as necessary to include appropriate language and/or provisions and consider exercising certain right to audit clauses;
- Implement continuous monitoring activities for high risk transactions;
- Design a code of conduct that is truly comprehensive, in that it incorporates the anti-corruption laws (as well as other applicable laws) in effect in the country of incorporation and the key locations where the entity does business; and
- Conduct compliance and/or internal audit site visits and procedures periodically based on the findings of the risk assessments conducted earlier.

If history is an indicator of the future, then global organizations and their executives should be on alert. Claiming ignorance will not be an acceptable defense, should enforcement agencies come knocking on their door. Early detection of potential improprieties is key. "Regulators draw a distinction between a self-reported problem, uncovered by an organization's comprehensive internal controls, and a problem that comes to light later in the process from outside of corporate governance efforts… These perceptions drive prosecutors' and regulators' decisions whether and to what extent they should investigate, sanction or indict."[58]

The message should be clear and it should start at the top

It's important for senior management to take an active role to ensure that the right message is being sent to all within the organization as well as external business partners. It is incumbent upon leadership to provide a strong tone from the top, through means such as employee communications, intranet postings and trainings to reinforce the company's anti-corruption compliance position and views on this important subject. These communications should be backed up by a globally accessible hotline/helpline and clear policies and procedures for personnel to follow. Management should also ensure that the compliance program has resources and support commensurate with the risk faced in the various territories in which the company does business. At the end of the day, the spirit of anti-corruption compliance needs to be embodied and carried out in a collaborative manner by personnel across the company at various levels and in diverse functional areas.

58 PwC, *Global Economic Crime Survey*, US supplement, 2011.

Acknowledgments

PwC editorial team

Subject-matter contributors

Matt Shelhorse
Partner
Forensic Services

Denise Messemer
Director
Forensic Services

Ewa Knapik
Director
Forensic Services

Sulaksh R. Shah
Director
Forensic Services

Janine Tanella
Manager
Forensic Services

Katy Queensland
Associate
Forensic Services

Senior research fellow and author

Christopher Sulavik
Senior Research Fellow
US Thought Leadership Institute

Layout and information graphics design

Samantha Patterson
Senior Designer
US Studio

Contacts

To have a deeper conversation about how this subject may affect your business, please contact:

Manny Alas
Partner
New York
646 471 3242
manny.a.alas@us.pwc.com

Patricia Etzold
Partner
New York
646 471 3691
patricia.a.etzold@us.pwc.com

Matt Shelhorse
Partner
New York
646 471 5749
matthew.j.shelhorse@us.pwc.com

Didier Lavion
Principal
New York
646 471 8440
didier.lavion@us.pwc.com

Chris Barbee
Partner
Philadelphia
267 330 3020
chris.barbee@us.pwc.com

Kris Swanson
Partner and Midwest Leader
Chicago
312 298 6195
kris.swanson@us.pwc.com

Ted Hawkins
Partner
Chicago
312 298 3181
ted.hawkins@us.pwc.com

Fred Miller
Partner
Washington DC
703 918 1564
frederic.r.miller@us.pwc.com

Al Vondra
Partner
Washington DC
703 918 1534
al.vondra@us.pwc.com

Glenn Ware
Principal
Washington DC
703 918 1555
glenn.ware@us.pwc.com

George Prokop
Managing Director
Washington DC
703 918 1148
george.w.prokop@us.pwc.com

Neil Keenan
Principal
Washington DC
703 918 1216
neil.keenan@us.pwc.com

Karyl Van Tassel
Partner
Houston
713 356 4242
karyl.van.tassel@us.pwc.com

Jim Meehan
Partner
San Francisco
415 498 6531
james.r.meehan@us.pwc.com

Owen Murray
Partner
Los Angeles
213 356 6097
owen.w.murray@us.pwc.com

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