

# **Corruption Crackdown: The FCPA and Recent Enforcement Trends**

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# Enforcement of the FCPA

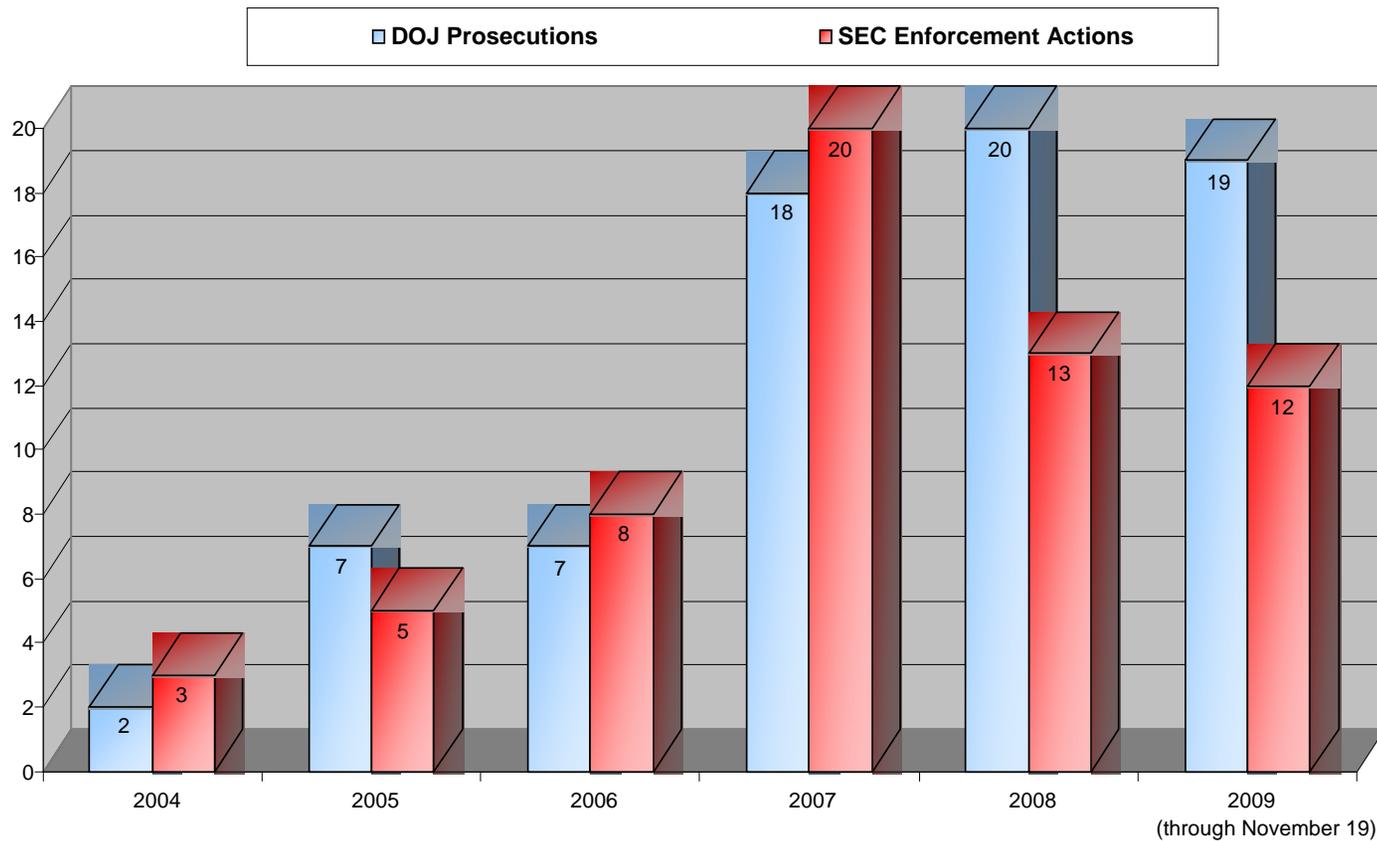


# Increasing Enforcement Activity



- **There has been a recent explosion of enforcement activity by both the SEC and DOJ**
  - **38 enforcement actions in 2007**
  - **33 enforcement actions in 2008**
  - **31 enforcement actions in 2009 through November 19**
- Approximately 130 other companies and/or individuals are currently under investigation for potential FCPA violations.
- Mark Mendelsohn, Deputy Chief of the Fraud Section at the DOJ, noted that the recent flurry of enforcement actions is “just the tip of the iceberg” and that the DOJ has “many more matters under investigation.” (Sept. 27, 2007)

# Increasing Enforcement Activity



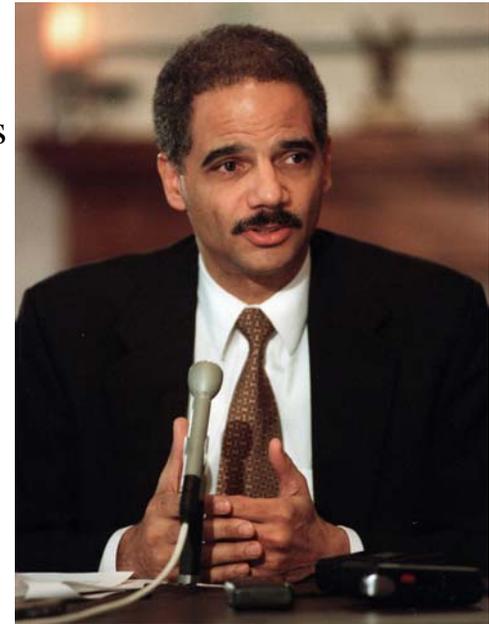
# FCPA Enforcement: DOJ Priority

“As President Obama has said, ‘The struggle against corruption is one of the great struggles of our time.’ Corruption is condemned by all religions, all ethical codes, all legal systems. It hinders all development, slows all progress, impedes all advancement—both within our own countries and across our borders. . . . Corruption erodes trust in government and private institutions alike; it undermines confidence in the fairness of free and open markets; and it breeds contempt for the rule of law. *Corruption is, simply put, a scourge on civil society.*”

- U.S. Attorney General Eric Holder (Nov. 7, 2009)

*“We must vigorously enforce our own laws that prohibit bribery of foreign officials, such as . . . the Foreign Corrupt Practices Act. And we must work together to support our partners in anti-corruption enforcement, and expose all efforts to undermine the effectiveness of anti-corruption initiatives. Together, we can make a difference.”*

- U.S. Attorney General Eric Holder (Nov. 7, 2009)



# FCPA Enforcement: DOJ Priority

*“Our focus and resolve in the FCPA area will not abate, and we will be intensely focused on rooting out foreign bribery. . . . That will mean investigation and, if warranted, prosecution of corporations to be sure, but also investigation and prosecution of senior executives. Effective deterrence requires no less. Indeed, we firmly believe that for our enforcement efforts to have real deterrent effect, culpable individuals must be prosecuted and go to jail where the facts and the law warrant.”*

- Lanny A. Breuer, Assistant Attorney General, DOJ (Nov. 12, 2009)

“[T]he Department will continue to pursue vigorously violations of the [FCPA]. The Department does not simply react to self-disclosures and rely on internal corporate investigations. To the contrary . . . ***the Department is being proactive and aggressive.*** We have a dedicated FCPA squad at the FBI, are training additional agents on FCPA investigations, and are using all available law enforcement tools to actively investigate and pursue these cases. . . . I fully expect that ***the number of FCPA prosecutions—of corporations and individuals alike—will continue to rise,*** as will the extent of our cooperation with foreign law enforcement partners.”

- Lanny A. Breuer, Assistant Attorney General, DOJ (Oct. 1, 2009)



# FCPA Enforcement: SEC Priority

*“FCPA violations have been and will continue to be dealt with severely by the SEC and other law enforcement agencies. Any company that seeks to put greed ahead of the law by making illegal payments to win business should beware that we are working vigorously across borders to detect and punish such illicit conduct.”*

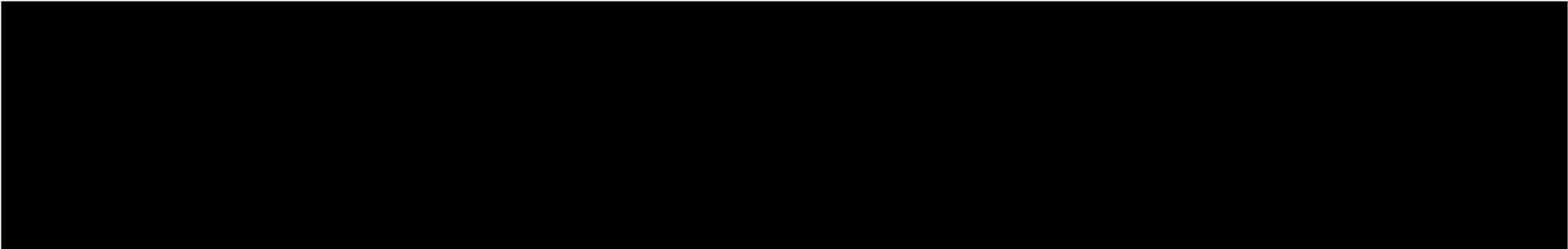
- Mary Schapiro, SEC Chairman (Feb. 11, 2009)



*“The [new FCPA] unit will focus on new and proactive approaches to identifying violations of the [FCPA]. . . . While we have been active in this area, more needs to be done, including being more proactive in investigations, working closely with our foreign counterparts, and taking a more global approach to these violations.”*

- Robert Khuzami, SEC Director of Enforcement  
(Aug. 5, 2009)





# **Recent Enforcement Actions**

# Kellogg Brown & Root (Halliburton)

To settle charges that it bribed Nigerian officials, KBR paid a **\$402 criminal million fine**.

- KBR and Halliburton also agreed to pay **\$177 million in disgorgement** and KBR agreed to retain an **independent monitor for three years**.
- To obtain engineering and construction contracts, KBR **bribed Nigerian officials with at least \$182 million**.
- KBR paid the bribes **between 1995 and 2004**, seeking to build liquefied natural gas facilities on Bonny Island, Nigeria.
- The contracts KBR sought were worth more than **\$6 billion**.
- KBR's **former CEO**, Albert "Jack" Stanley, pleaded guilty in September 2008 to conspiring to violate the FCPA. Stanley's sentencing is pending.

The logo for Kellogg Brown & Root (KBR) is displayed in white, bold, sans-serif capital letters on a solid red rectangular background.

# Siemens AG

**Siemens AG** entered into a settlement as a result of paying more than **\$1 billion in bribes** and maintaining deficient internal accounting controls.

- Siemens paid a **\$450 million criminal fine** and **\$350 million in disgorgement and prejudgment interest**.
- Siemens AG agreed to retain an **independent compliance monitor** for up to four years.
- Siemens AG's settlement was the largest FCPA liability in history and was accompanied by **€96** in fines from the Munich Public Prosecutor.

The Siemens logo, consisting of the word "SIEMENS" in a bold, teal, sans-serif font.

# AGCO Corp.

Agricultural equipment maker **AGCO** settled charges that it **paid kickbacks to the pre-war Iraqi regime** under the **UN Oil-for-Food program**.



- AGCO Corp. settled with the DOJ by paying a **criminal fine of \$1.6 million** and entering into a **three-year deferred prosecution agreement**.
- In settling civil charges with the SEC, AGCO agreed to disgorge **\$13,907,393 in profits** and **\$2,000,000 in pre-judgment interest** and pay a **civil penalty of \$2,400,000**.
- The SEC charged AGCO with failing to maintain an adequate system of **internal controls** and failing to **record the payments properly**.

# Frederic Bourke

Individual investor **Frederic Bourke** was sentenced to **one year and one day in prison** and fined **\$1 million**.

- Bourke participated in a scheme with Viktor Kozeny to bribe senior government officials in **Azerbaijan** to privatize the country's State Oil Company (SOCAR).
- Bourke invested \$8 million in “privatization vouchers,” which would become valuable if SOCAR were privatized.
- Bourke and his co-conspirators **paid or caused to be paid millions of dollars of bribes to government officials** to ensure that their investment consortium would gain a controlling interest in SOCAR and its significant oil reserves.
- **Jurors may not have grasped Judge Scheindlin's “conscious avoidance” instruction.** The jury foreman stated after the trial: “We thought he knew and he definitely should have known. He's an investor. It's his job to know.”
- The court admitted **testimony and evidence** about Azerbaijani officials' general reputation for corruption and tape-recorded conversations between Bourke and other investors regarding concerns that the head of the investor consortium was paying bribes.



# Gerald & Patricia Green

A jury found **Hollywood film executives** guilty of violating the FCPA for **bribing a Thai official** in exchange for contracts to manage Thailand's film festival.



- The Greens paid approximately **\$1.8 million** in bribes to a tourism official through **numerous bank accounts** in Singapore, the UK, and the Isle of Jersey in the name of the former governor's daughter and a friend of the former governor.
- The Greens received contracts that **generated more than \$13.5 million in revenue** for their businesses.
- The Greens disguised the bribes as “sales commission” payments.
- Gerald and Patricia Green have not yet been sentenced.

# Paul Novak (Willbros)

Novak, a former consultant for a subsidiary of **Willbros Group**, pleaded guilty to paying **\$6 million** in bribes.

- Novak bribed **officials who worked for the Nigerian government, government-owned companies, and a political party.**
- The bribes were intended to help Willbros win and keep contracts for the Nigerian Eastern Gas Gathering System Project, worth approximately **\$387 million.**
- Three of Novak's co-conspirators also have been charged.
- In 2008, Willbros Group, Inc., and Willbros International, Inc., entered into a deferred prosecution agreement and agreed to pay a **\$22 million criminal penalty.**
- Novak has not yet been sentenced.



# Enforcement Actions Involving European Companies



- The following are some of the Europe-headquartered companies that have been subject to FCPA enforcement actions:
  - ABB/Vetco (Zurich, Switzerland)
  - Akzo Nobel (Amsterdam, Netherlands)
  - Alcatel (Paris, France)
  - Fiat (Turin, Italy)
  - Montedison (Milan, Italy)
  - Novo Nordisk (Bagsværd, Denmark)
  - Paradigm (Amsterdam, Netherlands)
  - Siemens (Munich, Germany)
  - Statoil (Stavanger, Norway)
  - Volvo (Göteborg, Sweden)

# Enforcement Actions Involving Middle East Business

- The following FCPA enforcement actions were based upon activities in the Middle East:
  - American Bank Note Holographics (Saudi Arabia)
  - Ashland Oil (Oman)
  - Control Components (Saudi Arabia and UAE)
  - Faheem Mousa Salam (Iraq)
  - Goodyear Tire & Rubber (Iraq)
  - Healthsouth (Saudi Arabia)
  - Holcar Oil (Qatar)
  - Lockheed (Egypt)
  - Metcalf & Eddy (Egypt)
  - Page Airways (Saudi Arabia)
  - Siemens (Israel)
  - Statoil (Iran)
  - United Industrial Corporation (Egypt)



# Penalties

## Anti-Bribery Provisions Violations:

- **Corporations**: criminal penalties include a \$2 million fine *or* twice the pecuniary gain or loss, disgorgement of profits, and possible suspension and debarment by the U.S. government; civil penalties include disgorgement of profits *and* a fine of up to \$500,000.
- **Individuals**: criminal penalties include up to 5 years imprisonment, *and* a \$250,000 fine *or* twice the pecuniary gain or loss; civil penalties include a fine of up to \$100,000.

## Accounting Provisions Violations:

- **Civil penalties** and **criminal penalties** for “knowingly circumventing” the accounting rules.
- **Corporations**: criminal penalties of up to \$25 million.
- **Individuals**: criminal penalties up to 20 years imprisonment and \$5 million fine.



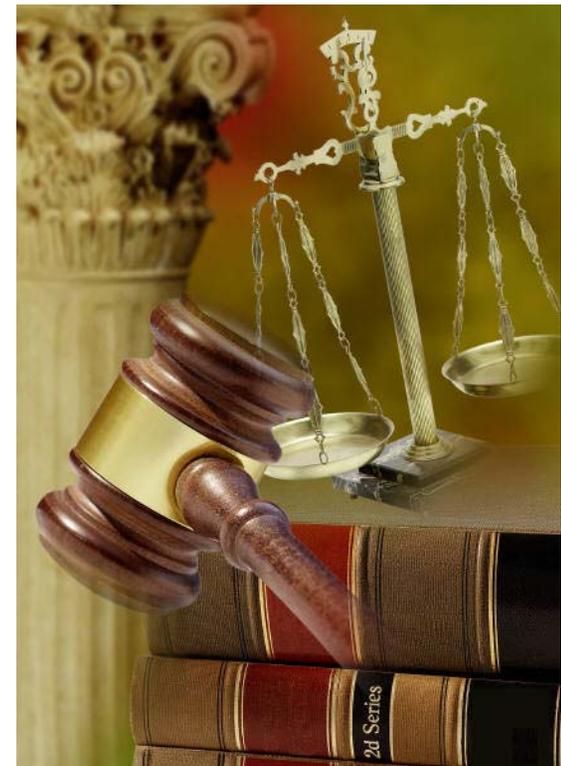
# Penalties and Adverse Collateral Consequences for Corporations

- Criminal Fine (e.g., Titan)
- Appointment of Compliance Monitor (e.g., Statoil)
- Prejudgment Interest (e.g., Helmerich & Payne)
- Disgorgement of Profits (e.g., AGCO)
- Lawsuit by Parties Harmed by Bribery (e.g., Alcoa)
- Derivative Lawsuit by Shareholders (e.g., BAE)
- Class Action Lawsuits by Investors or Others (e.g., Immucor)
- Ineligibility for Necessary Licenses or Permits
- Ban From Doing Business with Governmental Entities
- Suspension or Debarment from Agency/World Bank/UN/IMF Activities (e.g., Siemens Russia)
- Tax Law Implications Regarding Improper Payments
- Loss of Reputation or Goodwill
- Negative Effect on Stock Price
- Burden on the Company (defense costs, executive time, lost resources, terminated employees, etc.)



# Penalties and Adverse Collateral Consequences for Corporations

- Criminal Fine (e.g., Misao Hioki)
- Prison Sentence (e.g., Frederic Bourke)
- Asset Forfeiture (e.g., Christian Sapsizian)
- Prejudgment Interest
- Loss of Reputation or Goodwill
- Lawsuit by Parties Harmed by Bribery



# Substantial Penalties: Other Examples

## Corporations:

- **Baker Hughes:** \$11 million criminal penalty; \$10 million in civil penalties; more than \$23 million in disgorgement and prejudgment interest.
- **AB Volvo:** \$7 million criminal penalty; \$4 million civil penalty; \$8.6 million in disgorgement and prejudgment interest.
- **Fiat:** \$7 million criminal penalty; \$3.6 million civil penalty; \$7.2 million in disgorgement and prejudgment interest.
- **Vetco Gray:** \$26 million criminal penalty.
- **Willbros:** \$22 million criminal penalty; \$10.3 million in disgorgement and prejudgment interest; independent monitor for three years.

## Individuals:

- **Douglas Murphy:** 63 months imprisonment.
- **David Kay:** 37 months imprisonment.
- **Faheem Mousa Salam:** 36 months imprisonment.
- **Christian Sapsizian:** 30 months imprisonment.

# Emphasis on Individual Culpability

- Charges have been brought against executives, financial officers, and mid-level employees. Since 1990, the government has prosecuted **twice as many individuals as corporations**.
- **Stiff prison terms** have been imposed.
- **Asset Forfeiture**: “Whether we’re talking about kleptocracy or those who benefit from bribery, we’re going to pursue it and pursue it aggressively. When we can prove the case **we’re absolutely going to seize their profits and their land and their fancy cars and boats**. We’re committed to doing it.” (Lanny Breuer, Assistance Attorney General, DOJ, Nov. 17, 2009)

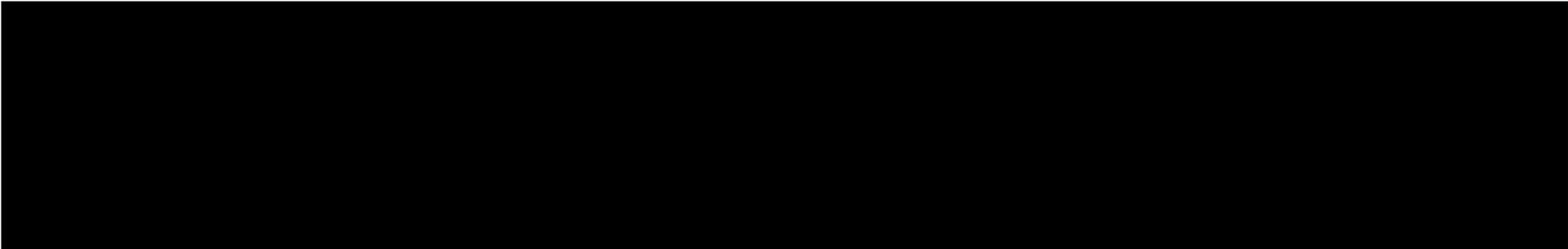


# Dual Prosecution

## And it's not just the Americans...

Numerous companies investigated for FCPA violations have also faced prosecution in Europe:

- **AGCO:** Paid \$630,000 to the Danish State Prosecutor for Serious Economic Crime to resolve criminal charges against its Danish subsidiary. (AGCO paid nearly \$20 million to U.S. authorities to resolve charges related to Oil-for-Food Program kickbacks.)
- **Aon:** Fined £5.25 million by the UK's Financial Services Authority (FSA) for failing to establish and maintain reasonably effective systems and controls to counter the risks of bribery and corruption overseas. (Aon has not yet reached a settlement with U.S. authorities.)
- **Novo Nordisk:** Settled an Oil-for-Food program probe with the Danish State Prosecutor for Serious Economic Crime by disgorging DKK 30 million in profits. (Novo Nordisk paid \$18 million to U.S. authorities in separate settlement.)
- **Siemens:** Paid €96 in fines and disgorgement of profits to settle with the Munich Prosecutor's Office. (Siemens paid \$800 million to settle with U.S. authorities.)
- **Statoil:** Settled with Økokrim by paying fine of NOK 20 million. (Statoil paid \$21 million to U.S. enforcement authorities.)
- **Volvo Construction Equipment:** Being investigated by Swedish Prosecution Authority for Oil-for-Food program activities. (Volvo settled with U.S. authorities for \$19.6 million.)



# **Voluntary Disclosure**

# Benefits of Voluntary Disclosure

- “[A] *voluntary disclosure may result in no action being taken against a company*, or the company may secure other preferred dispositions . . . . In this, as in so many other areas, doing the right thing . . . also makes good business sense.”
  - Lanny A. Breuer, Assistant Attorney General, DOJ (Nov. 12, 2009)
- The U.S. Sentencing Guidelines provide for **reduced penalties** for companies that self-report violations and cooperate with government investigations. Self-reporting may help companies and individuals **avoid maximum penalties**.
- Once the DOJ begins an investigation, a company that made a voluntary disclosure will be in a **better bargaining position** than a company that did not.

# Disadvantages of Voluntary Disclosure

- **There is substantial debate about how meaningful the benefits from voluntary disclosure really are.** For instance, Omega Advisors, which did not make a self-disclosure, paid \$500,000. Schnitzer Steel, which did voluntarily disclose its improper conduct, paid a total of \$15.2 million. And Vetco, which also voluntarily disclosed its conduct to the government, paid fines totaling \$26 million, at the time the largest criminal fine in the thirty-year history of the FCPA. **The level of potential cooperation discounts is impossible to foresee.**
- Voluntary disclosure **makes the government aware of improper conduct** that it otherwise may have never discovered on its own.
- The **SEC** often takes the position that **disgorgement of ill-gotten profits is non-negotiable** regardless of disclosure.
- This is in contrast to the UK, where the Serious Fraud Office (SFO) offers “**a civil rather than a criminal outcome**” “in appropriate cases” as a benefit of self-reporting.

# Voluntary Disclosure Regime

The DOJ and SEC rely upon voluntary disclosure and internal investigations to carry out their mandates.



- Combined, the DOJ and SEC employ **fewer than 50** full-time FCPA investigators and prosecutors.
- DOJ is pursuing approximately **130 open FCPA investigations**.
- Siemens AG's internal investigation cost the company approximately **\$1 billion and lasted two years**.
- **Limited resources** prevent the DOJ and SEC from publicly investigating all allegations.
- **Voluntary disclosure fuels FCPA enforcement**.
  - Although U.S. regulators claim that less than half of FCPA investigations arise from voluntary disclosures.

# Voluntary Disclosure Checklist

1. **Clarity of a Violation**: Is there a clear FCPA violation, or is there some question about the conduct?
2. **Nature and Scope of the Violation**: Did the conduct involve only a single transaction or limited number of transactions, or was there a history of numerous improper transactions over an extended period of time?
3. **Dollar Volume**: How large were the improper payments, and how significant was the business obtained or retained by the payments?
4. **Pervasiveness of the Conduct Within the Company**: Was the conduct perpetrated by one or two low or mid-level employees, or was the conduct pervasive, involving high-level officers?
5. **Likelihood of an Involuntary Disclosure**: How likely is it that the government will learn of the conduct through a required securities filing, disgruntled employee, whistleblower, competitor, or otherwise?

# Voluntary Disclosure Checklist

6. **Concerns of Discovery of Additional Improper Conduct:** If a voluntary disclosure is made, are there concerns that a government investigation will uncover additional improper conduct unrelated to the disclosed FCPA violation?
7. **Risk of Foreign Government Action and/or Civil Litigation:** What is the likelihood that a voluntary disclosure will result in an action being instituted by a foreign government and/or private litigant, and what are the potential financial and other implications of such actions?
8. **Willingness to Commit Company Resources to Government Cooperation:** Is the company prepared to commit the personnel and financial resources necessary to produce numerous documents, make witnesses available, potentially hire independent counsel for individual witnesses, and otherwise fully cooperate with the enforcement authorities?
9. **Statute of Limitations:** Is the statute of limitations close to expiring, or is there sufficient time for the government to investigate and bring charges if it were to learn of the offense?

# Voluntary Disclosure

**AON**



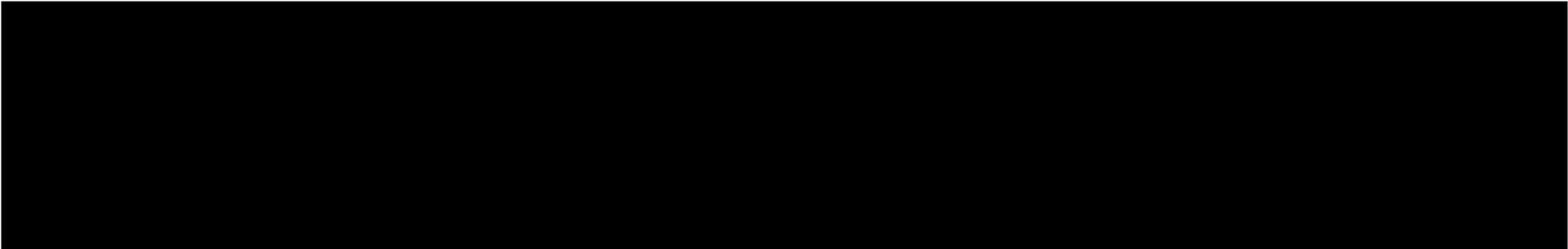
**DynCorp**  
INTERNATIONAL

Morgan Stanley



 **AVERY  
DENNISON**

 **Sun**  
microsystems



# **FCPA's Effect on Business Practices**

# Counterparties and Due Diligence

- **Relationships with third parties**, including local sales agents, consultants, attorneys, subsidiaries, and other counterparties, may pose **serious corruption risks**.
- **Statoil**, for example, settled FCPA allegations arising out of a bribery scandal in which it made approximately \$5 million in prohibited payments through a “consulting contract” with an offshore intermediary.



# Indirect Third-Party Payments Prohibited

The FCPA prohibits **indirect** corrupt payments and imposes liability if the **company authorizes a payment to a third party while “knowing” that the third party will make a corrupt payment.**

- **“Knowledge” means either**
  1. being aware of such conduct or substantially certain that such conduct will occur, or
  2. consciously disregarding a “high probability” that a corrupt payment or offer will be made.
- **“Head in the sand” or “ostrich” defense will not work.**
- **Bourke jury instruction:** “When knowledge of the existence of a particular fact is an element of the offense, such knowledge may be established if a person is aware of a **high probability of its existence and consciously and intentionally avoided confirming that fact.** Knowledge may be proven in this manner if, but only if, **the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.”**



# Due Diligence

The FCPA has spurred companies to engage in **significant risk-based integrity due diligence**.

- Companies must scrutinize **prospective high-risk third-party agents**.
- Companies must ensure that **potential acquisition targets and investments conduct clean business**.
  - DOJ Opinion Procedure Release 08-02 sets forth plan for Halliburton to avoid successor liability for potential acquisition.
- Companies must **screen potential employees** for corruption risk.
- These efforts can require companies to devote **significant resources and personnel**.



# Third-Party Risks

- **Joint Ventures:** Must be fully vetted, because the actions of the joint venture may be attributed to each partner and because interaction with state-owned partners presents FCPA risks.
- **Distributors:** Watch for sales agents, distributors acting as agents, dealers acting as agents, sales representatives, and sales consultants or other representatives; distributors do not need to be agents for there to be liability. (At least 7 FCPA enforcement actions have involved third-party distributors.)
- **Agents:** Require centralization of approval, substantial scrutiny, and meaningful oversight.
- **Mergers & Acquisitions:** Extensive pre-acquisition due diligence is necessary to avoid successor liability.

# Third-Party Red Flags



## Potential Red Flags:

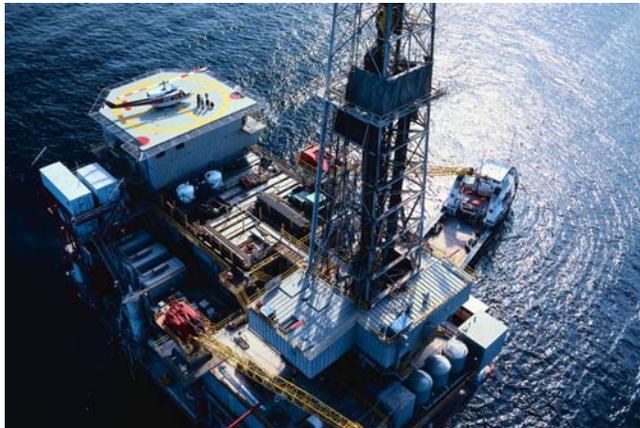
- Unorthodox payment methods (cash, offshore accounts, payment to third parties, etc.)
- Disproportionately large or unusual compensation
- Success fees
- Little or no relevant business experience
- Refusal to agree to audit rights
- Recommended by government officials
- Familial relationships to government officials
- Owned by government officials
- Poor reputation/rumors

# Industry-Wide Investigations

- The DOJ and SEC have undertaken several industry-wide investigations.
  - **U.N. Oil-for-Food Program**
  - **Global Freight Forwarder Panalpina**
  - Sale of **Healthcare Products** to non-U.S. Hospitals and Healthcare Professionals
- At a conference in 2008, Mark Mendelsohn suggested that the financial sector may become the subject of increased DOJ attention.



# U.N. Oil-for-Food Program



- The Oil-for-Food Program was intended to allow Iraq to sell oil on the world market in exchange for food, medicine, and other humanitarian goods.
- Companies were accused of **making kickback payments in connection with sales of goods** to Iraq.
- **12 companies** have settled Oil-for-Food related enforcement actions, including AGCO, Akzo Nobel, Fiat, Flowserve, Ingersoll-Rand, Novo Nordisk, and Volvo.
- The DOJ also indicted **1 individual**, Ousama Naaman, for charges arising from the Oil-for-Food Program.

# Panalpina Investigation

- On July 2, 2007, the DOJ sent letters to **11 oil and oil-service companies** asking them to **detail their relationship with Panalpina**.
- The firms were asked to **list the countries where Panalpina provided them with services** in the past five years and specify **what they paid for those services**.
- Each firm was asked to **meet separately with federal prosecutors** in Washington, D.C.



# Sale of Healthcare Products



*“[A] typical U.S. 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 short-cuts. It must resist the temptation and the invitation to pay off foreign officials for the sake of profit.”*

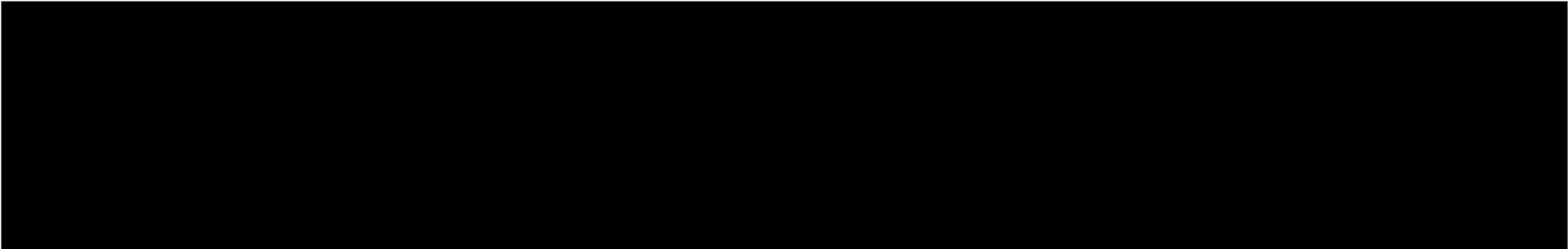
- Lanny A. Breuer, Assistant Attorney General, DOJ (Nov. 12, 2009)

*“Pharmaceutical companies must ensure that they are dealing honestly and fairly with patients, health care providers, private insurers and government programs. And if they don’t, the [DOJ] will be vigilant in holding companies and individuals who break the law accountable, not only through civil actions . . . but also by bringing criminal indictments if the facts and law warrant.”*

- Lanny A. Breuer, Assistant Attorney General, DOJ (Nov. 12, 2009)

# Sale of Healthcare Products

- **Many customers and business partners employed by public health systems in foreign countries qualify as government officials under the FCPA.**
- **Recent enforcement actions and investigations:**
  - AGA Medical – Privately held medical device manufacturer settled criminal FCPA charges for payments made by its local Chinese distributors to doctors at state-owned hospitals.
  - Micrus Corp. – Privately held medical device company resolved criminal FCPA charges in connection with unlawful payments to doctors at state-owned hospitals in several countries.
  - Diagnostic Products Corp. and DPC Co. Ltd. – U.S. parent and Chinese subsidiary of medical diagnostic test systems manufacturer resolved civil and criminal charges related to improper payments to Chinese physicians and lab workers
  - Johnson & Johnson and Bausch & Lomb – Voluntarily disclosed to the government potential FCPA issues in 2007.
  - At least five orthopedic implant manufacturers received information requests from the DOJ and SEC in 2007 in connection with alleged payments to government-employed physicians in foreign countries.



# **Best Practices**

# Sources of Guidance

- Under the **DOJ's *Principles of Federal Prosecution of Business Organizations*** and **§ 8B2.1 of the U.S. Sentencing Guidelines**, implementation of an effective ethics and compliance program can help corporations avoid prosecution or obtain reduced sentences.
- Specific guidance on the implementation of an FCPA compliance program can be gleaned from **DOJ Opinion Procedure Releases** and **FCPA settlements**.
- Additional recommendations regarding implementation and maintenance of an effective internal control system have been promulgated by the **Committee of Sponsoring Organizations of the Treadway Commission (“COSO”)**.
- **Ethics and compliance practitioners** have also provided guidance, sometimes based on analyses, surveys, or studies, on the general principles that should guide companies in establishing effective ethics and compliance programs.

# Elements of a Compliance Program

The U.S. Sentencing Guidelines offer companies direction by laying out the elements of a successful ethics and compliance program, which include

- Written policies and procedures designed to detect and prevent unlawful actions;
- Oversight by the company's governing body;
- Designation of a high-ranking manager responsible for overseeing the program;
- Designation of at least one additional employee responsible for administering the program on a daily basis and reporting to the governing body and high-ranking manager;
- A mechanism for excluding individuals who have broken laws or acted unethically from management;
- Mechanisms, such as training, for communicating the company's policies and procedures to employees;
- Ongoing monitoring and periodic evaluations to evaluate the effectiveness of the program;
- A mechanism for employees anonymously to report misconduct or seek guidance without fear of retaliation;
- Consistent enforcement of the program;
- Mechanisms for responding to potential violations; and
- Periodic risk assessments to assist the company in modifying its compliance and ethics program to increase its effectiveness.

# Risk Assessment

- Companies should conduct **periodic (if possible, annual) risk assessments** to enable them to understand its ethics- and compliance-related risks, prioritize ethics- and compliance-related spending, and tailor ethics and compliance programs. The compliance program should evolve as the company's risk picture changes.
- Risk assessments should be conducted with **input from audit, legal, ethics and compliance, and business personnel.**
- Recent studies recognize the **increasing role of internal audit** in risk assessment and mitigation.
- Information about ethics and compliance risks may be collected through **opinion surveys, focus groups, and interviews.**
- Risk assessments should result in **action plans** to mitigate the identified risks.
- The results of periodic risk assessments and the implementation of any recommended risk-mitigation measures should be **documented.**
- Potential FCPA risk areas include supply chain and procurement, sales, government contracts, business relationships with agents and other third parties, joint ventures, customs and tax, government approvals and permits, lobbying, political contributions, charitable donations, and corporate social responsibility projects.

# Compliance Function

- Overall responsibility for the compliance program should be assigned to **one dedicated senior employee with sufficient visibility, authority, and resources to implement the compliance program effectively**. The head of the ethics and compliance function should be a member of the senior management team.
- Those responsible for day-to-day administration of the compliance program should have **clearly defined roles**, as well as sufficient authority and resources to implement the program effectively.
- A company may consider creating a **compliance committee or council** to assist the head of the ethics and compliance function in the implementation of the company's ethics and compliance program.
- A company should consider establishing a **network of “adjunct” compliance employees** in its business units and divisions to help with local training, monitor local compliance, and channel ethics- and compliance-related information to the head of the ethics and compliance function.

# Compliance Function

- The compliance function should **operate independently of the business lines**, which typically requires that the head of the ethics and compliance function have access and provide periodic (at least annual) reports to the board or one of its committees and that the “adjunct” compliance employees in the company’s business units and divisions have a direct or functional reporting line to the head of the ethics and compliance function.
- The ethics and compliance function should have **sufficient ties to the legal department** to ensure that issues that implicate a company’s compliance with laws are addressed by those with relevant legal expertise.
- Some government agencies have voiced opposition to having the head of the ethics and compliance function report to the general counsel, chief financial officer, or other key management employees.

# High-Level Oversight

- The **head of the ethics and compliance program** should have regular **access** and should **provide regular reports** about past and upcoming ethics and compliance activities to the board or one of its committees and to senior management.
- There should be a **process for escalating the most serious allegations of misconduct to the board.**
- Members of the board (or the relevant committee that oversees the activities of the compliance function) and **senior management should support and be knowledgeable about the compliance program and oversee its effective implementation.**
- Both the **board and senior management should regularly emphasize the company's commitment to ethics and compliance** and should personally adhere to the company's standards of ethical behavior.
- Senior management should encourage and motivate **middle management** to behave ethically and send appropriate compliance messages to employees to ensure that the “tone from the middle” is consistent with the “tone from the top.”

# Policies and Procedures

- Code of Conduct and Compliance Policies
  - A **strong, unified, and easy-to-use set of compliance policies**, including a code of conduct, is the foundation of a successful compliance program.
  - The code of conduct should be preceded by an **introductory letter from the chief executive officer** to set the proper ethical tone and stress to employees and the outside world the importance of ethics and compliance.
  - The code of conduct and compliance policies should **clearly articulate standards of conduct** for employees and third parties, describe mechanisms for obtaining help or advice, and provide methods for reporting potential violations.
  - The code of conduct should provide **practical guidance** to employees on what is expected from them by using real-life scenarios.
  - The code of conduct and compliance policies should be **updated as necessary** to reflect the company's experiences, current risk picture, culture, operations, and evolving business climate.

# Policies and Procedures

- Code of Conduct and Compliance Policies (cont.)
  - The code of conduct and key compliance policies should be **written in the working languages of the company** and **translated** into the major languages spoken by employees worldwide. **Local policies** that address the distinct risks faced in specific locations should supplement the code of conduct.
  - The code of conduct and other compliance policies should be **readily available to employees and other parties to whom these documents apply**. Employees and relevant third parties should be asked to certify that they have familiarized themselves with the code of conduct.
  - A company should **seek feedback** from personnel on the code of conduct and key compliance policies to gain employee acceptance of these documents.
  - A company may **apply its compliance policies to third parties** by creating separate third-party codes of conduct, directly applying the company's code of conduct to third parties, or incorporating the code of conduct into contracts with third parties.

# Policies and Procedures

- Internal Controls

- A **comprehensive, detailed, systematic, and effective internal control environment** helps detect and prevent fraud and unlawful expenditures.
- Employees charged with administering internal controls must have **sufficient authority, resources, and independence to implement the controls effectively**.
- Companies should institute **strict approval procedures** for all expenditures.
- Certain financial controls over the following have particular relevance for FCPA compliance: **(1)** petty cash; **(2)** accounts payable, especially payments to government officials; **(3)** gifts, travel, and entertainment; **(4)** charitable donations, sponsorships, and corporate social responsibility expenditures; and **(5)** political contributions.
- Certain procurement processes and controls have particular relevance for FCPA compliance, including the following: **(1)** competitive tendering; **(2)** segregation of duties; **(3)** centralized control over procurement activities; **(4)** counterparty due diligence; and **(5)** inclusion of anti-corruption compliance clauses in contracts. Issuance of payments without clear reference to specific transactions must be prohibited.
- A company may consider extending its **procurement controls** to charitable donations, corporate social responsibility programs, and sponsorships.

# Communication and Training

- To ensure that directors, employees, and, as appropriate, third parties understand the company's ethical standards and compliance policies and procedures, a company **should provide compliance training and require regular participation.**
- A company's **compliance training program should address all of the company's compliance risks and should be tailored to the risks faced by the recipients.** Training materials should be updated, as necessary, to reflect the company's experiences, current risk picture, culture, operations, and evolving business climate.
- Compliance training can be provided through **in-person sessions, during regular meetings, and/or via online or video courses.** Compliance training should help employees and third parties apply the legal and company policy requirements in their everyday work activities.

# Communication and Training

- Compliance training should be **provided to new employees soon after their employment commences.**
- Detailed **records of training sessions** and attendees should be maintained.
- Beyond formal training programs, a company should emphasize the importance of compliance, help employees identify risks, and educate all stakeholders about corporate policies, tools, and initiatives through **ongoing messaging efforts using various media, including company-wide e-mails, audio and video broadcasts, newsletters, posters, signs, speeches, meetings, the Internet, and the corporate intranet.**
- A company should have a **communications and training plan.** The implementation of this plan may be monitored by senior management and audited by the internal or external auditors.

# Reporting and Advising

- To foster an ethical culture and ensure consistent treatment, a company should **provide easy-to-use mechanisms for employees (and, as appropriate, third parties) to seek advice about compliance issues and report potential misconduct.**
- **Alternative channels for seeking advice** and reporting concerns should be available so that employees can select the channel with which they are the most comfortable (chain-of-command, anonymous helpline, e-mail address, dedicated fax number, etc.).
- Mechanisms for seeking advice and reporting concerns should be **publicized** and designed in such a way that employees view them as unbiased, confidential, and trustworthy.
- Employees should be able to seek advice and report concerns **anonymously**.
- Reporting mechanisms should be designed so that employees may seek advice and report potential issues **without fear of retaliation** and with confidence that allegations will be addressed fairly and promptly.

# Reporting and Advising

- The company's advising and reporting policies should **establish clear report escalation routines**. The board of directors and senior management should receive regular reports about allegations of unethical or illegal conduct.
- Oversight of the advising and reporting system should be **assigned to the ethics and compliance function to ensure consistent and competent responses to inquiries**.
- All issues raised and advice given should be **documented**. A case management system may be helpful for tracking allegations of misconduct and ensuring prompt resolution of these allegations.
- The company should **test the operation of its advising and reporting mechanisms on a regular basis**.

# Responding to Potential Violations

- **Prompt, efficient, and independent investigations** of alleged wrongdoing are necessary to identify misconduct, stop or prevent unethical or illegal behavior, and remedy control failures.
- A company should implement **formal, written investigatory procedures**, including detailed guidance concerning intake, investigation, escalation, resolution, and remediation. The results of investigations and any recommended remedial measures should be documented.
- **Allegations of misconduct by directors, senior management, and employees** should be addressed consistently and promptly.
- The results of investigations should remain **confidential** to the greatest extent possible.

# Enforcement and Incentives

- **Appropriate incentives and disincentives**, including the possibility of discipline, should be deployed so that employees act in accordance with the compliance program and report actual and potential issues.
- A company's code of conduct and compliance policies must **clearly define the potential disciplinary consequences** of violations of laws and company policies.
- Ethical behavior and compliance may be **integrated into existing performance reviews**.
- **Consistently applied and proportional discipline** for employees who violate legal and/or ethical requirements, regardless of the employees' positions or prominence, contributes to all employees' awareness of the consequences of failing to comply with applicable laws and policies.
- A company may consider **publishing periodic, sanitized (to prevent disclosure of confidential information) internal summaries of disciplinary measures** applied for violations of applicable laws and/or company policies.

# Counterparty Due Diligence and Employee Screening

- To guard against identified risks, a company should **establish pre-retention due diligence and post-retention oversight requirements for all counterparties**. The due diligence and oversight requirements may be conducted by local employees (who may be more familiar with the business environment and risks), corporate-level employees (who may be more impartial), and/or third-party due diligence providers.
- To ensure ongoing compliance by counterparties, a company should **periodically communicate company compliance policies to counterparties**; require compliance with the FCPA and other applicable anti-corruption laws in **contracts** with counterparties; consider providing compliance **training** to counterparties; periodically review **payments to counterparties**; seek and exercise **audit rights**; **require that counterparties report** suspected misconduct and provide periodic certifications; require that counterparties **not retain any sub-agent, sub-contractor, or representative without the company's prior written consent**; and ensure that contracts with counterparties provide for **termination of relationships** with the counterparties if they violate compliance requirements.

# Counterparty Due Diligence and Employee Screening

- A company should **avoid establishing compliance requirements for counterparties that are not commensurate with the company's control over these counterparties** and, thus, are difficult to monitor or enforce.
- **Rigorous due diligence is particularly important in the M&A context** to mitigate the risk of successor liability. Following a transaction, an acquiring company should provide compliance training to its new employees and, if necessary, conduct ongoing monitoring of target company activities. An acquiring company should also **swiftly integrate the target company** into its own compliance and internal control regime.
- A company should have in place **mechanisms to screen potential employees for ethics concerns** and exclude individuals who have historically engaged in conduct inconsistent with the company's ethics and compliance program from positions of "substantial authority."

# Assessment and Evaluation

- A company should conduct **ongoing and discrete evaluations** to monitor and assess the effectiveness of its ethics and compliance program and to identify any deficiencies so that they can be remedied.
- **Employee surveys** are valuable sources of evaluative information.
- A company should consider **determining the countries or regions in which it faces the highest risk of corruption and periodically conducting rigorous anti-corruption audits of its operations in those countries or regions**, including detailed audits of its business units that operate in those countries or regions, and audits of selected agents, consultants, and other counterparties in those countries.
- A company should have procedures in place for **escalating deficiencies** as necessary and tracking remedial actions.

# Assessment and Evaluation

- The **board and senior management should be updated regularly** regarding the results of ethics and compliance program assessments.
- **Internal audit** often has adequate competence to perform an assessment of a company's ethics and compliance program to determine whether its policies and procedures are being followed and to evaluate the effectiveness of the program. Any such audits should be conducted pursuant to a written work plan that is based on the company's risk picture.
- **Internal audit should be independent and objective** and should have the authority and resources to follow up on findings and recommendations.
- A company should consider whether it wishes to take steps to **protect the evaluation of the ethics and compliance program as privileged.**

# Questions?



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