

Morgan Lewis

Foreign Corrupt Practices Act (FCPA) Mid-Year Review



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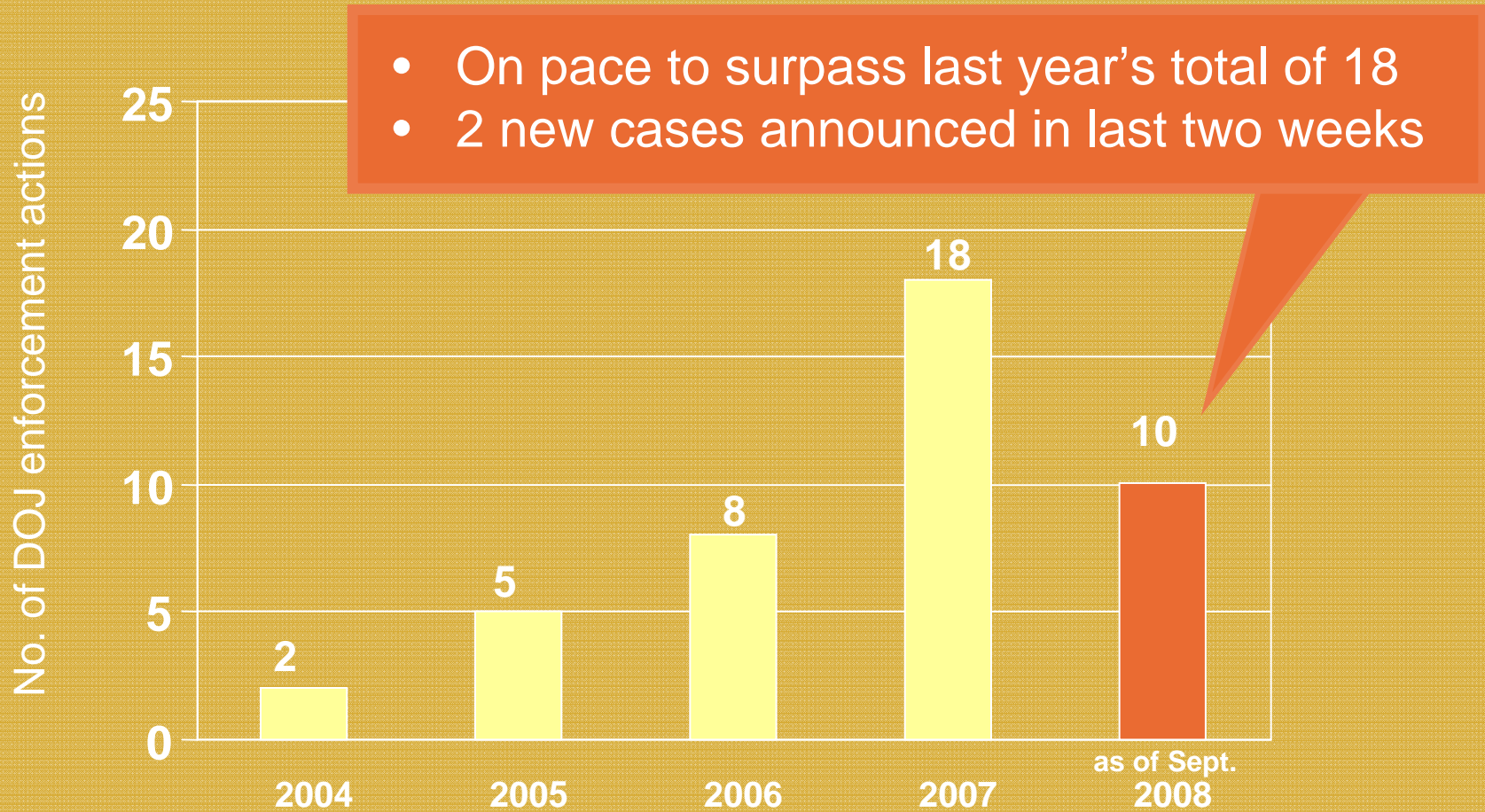
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Topics of Discussion

- Enforcement Trends
 - Enforcement Remains on the Rise
 - Industries Affected
 - Geographically Dispersed Enforcement
- The FCPA's Expanding Reach
- Considerations for International Deals
- “Red Flags” Due Diligence and Compliance Reviews

Enforcement Trends

Continued Robust Enforcement



Coming to a court near you...

- DOJ officials: there are approximately 80 cases under active investigation
- Companies continue to disclose investigations in 10Ks and annual reports
- The big fish: Siemens, BAE
 - More fallout from KBR, Oil-for-Food, etc.?

The Government's Heavy Hammer

- Large fines are the norm and only getting larger
 - DOJ looks to Sentencing Guidelines and Principles of Federal Prosecution of Business Organizations
 - SEC seeking disgorgement
 - DOJ and SEC are willing to be creative in finding remedies
- DOJ routinely seeking jail time
 - Mendelsohn: “That’s no accident.” Looking for deterrent effect

Affected Industries

Broad spectrum of industries under the microscope



Geographically Disperse



Evidence Abroad of Global Growing Pains?

- Treaties
 - OECD Convention on Combating Bribery (1997) – 37 signatories (including all G7 nations)
 - UN Convention Against Corruption (2003) – 140 signatories; approx. 40 countries have ratified and implemented anti-corruption laws
 - MLATs
- Cooperation and coordination among international enforcement agencies
- Statute of Limitations – *U.S. v. Kozeny* (2d Cir. 2008)

Growth of Foreign Enforcement: Countries With Enforcement

Source: TI Survey of OECD enforcement, 2008.

	Cases		Investigations	
	2008	2007	2008	2007
Germany	43+	+4	>88	>83 (63)
Hungary	23	18	1	27
France	19	9	6	u
Denmark	17 (17)	1	0	21 (21)
Switzerland	16 (14)	1	36	23 (17)
Netherlands	7 (7)	0	3	8 (7)
Italy	2	2	3	1
Belgium	4	4	s	s
Norway	4	2	u	u
Spain	2	2	0	1
Sweden	1	1	15(12)	14(12)
Finland	1	0	3	1
Total	139 (38)	44	154 (12)	179 (120)

Growth of Foreign Enforcement: Countries With Little or No Enforcement

Source: TI Survey of OECD enforcement, 2008.

	Cases		Investigations	
	2008	2007	2008	2007
Bulgaria	3	3	0	0
UK	0	0	20	15
Ireland	0	u	3 (3)	3 (3)
Austria	0	0	2	0
Czech Republic	0	0	1	0
Estonia	0	0	0	0
Greece	0	u	1 or u	u
Poland	0	0	0	0
Portugal	u	0	u	2
Slovakia	0	0	0	0
Slovenia	0	0	0	0
Total	3	3	26 (3)	20 (3)

The FCPA's Expanding Reach

FCPA's Two Prongs

ANTI-BRIBERY PROVISIONS:

Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage

BOOKS & RECORDS PROVISIONS:

Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls

Antibribery Prohibitions

- It is unlawful for:
 - an issuer, domestic concern, or anyone acting within the jurisdiction of the United States
 - with “corrupt intent”
 - to directly or indirectly
 - offer, pay, promise to pay, or authorize payment
 - of “anything of value”
 - to a “foreign official”
 - for the purpose of obtaining or retaining or securing any improper advantage

2008 Cases

<i>U.S. v Nexus Technologies, Inc.</i>	September 5
<i>SEC v. Albert J. Stanley</i>	September 3
<i>U.S. v. Kozeny</i>	August 28
<i>SEC v. Con-way, Inc.</i>	August 27
<i>Faro Technologies</i>	June 5
<i>AGA Medical Corp.</i>	June 3
<i>SEC v. Willbros Group, Inc.</i>	May 14
<i>Pacific Consolidated Industries (Self)</i>	May 8
<i>U.S. v. Ramedra Basu</i>	April 25
<i>SEC v. AB Volvo</i>	March 20
<i>SEC v. Flowserve Corporation</i>	February 21
<i>SEC v. Westinghouse Air Brake Tech. Corp.</i>	February 14

“Anything of Value”

- Small Payments – won’t fly under the radar
- Travel Benefits
- Customs Duties
- If it quacks like a duck...
 - Commissions
 - Service fees
 - Kickbacks

“Foreign Official”

- Traditional foreign officials
- World Bank, international programs
- State-owned enterprises
- Employees of State-owned enterprises

Vanishing Exceptions?

- Facilitating Payments
- Promotional Expenses
 - **Opinion Release 08-03:**
 - “Reasonable under the circumstances” and directly relates to “the promotion, demonstration, or explanation” of a company’s products or services
 - No weight given to prevalence in industry

DOJ Opinions on Due Diligence

- Opinion Release 08-01
 - Due diligence and paying premium for acquisition of foreign government-owned interests
- Opinion Release 08-02
 - Due diligence and amnesty for pre- and post-acquisition FCPA violations

Considerations for International Deals

Relationships of Special Concern for U.S. Companies

Joint Ventures

**Commercial
Agents**

**Foreign Business
Partners**

**Foreign
Subsidiaries**

Joint Ventures and Partnerships



FCPA Assurances and Due Diligence

No Longer an Option for U.S. Companies Doing Business Abroad

- Liability risks are too great
- Costs of investigations are significant
- Legal advisers will recommend assurances and due diligence because...
 - The presence of certifications and comprehensive due diligence will limit the risk of prosecution by the U.S. government
 - Identifying corruption risks will enable clients to evaluate the true value of the transaction
 - It is important for the parties to understand and to agree how business will be conducted

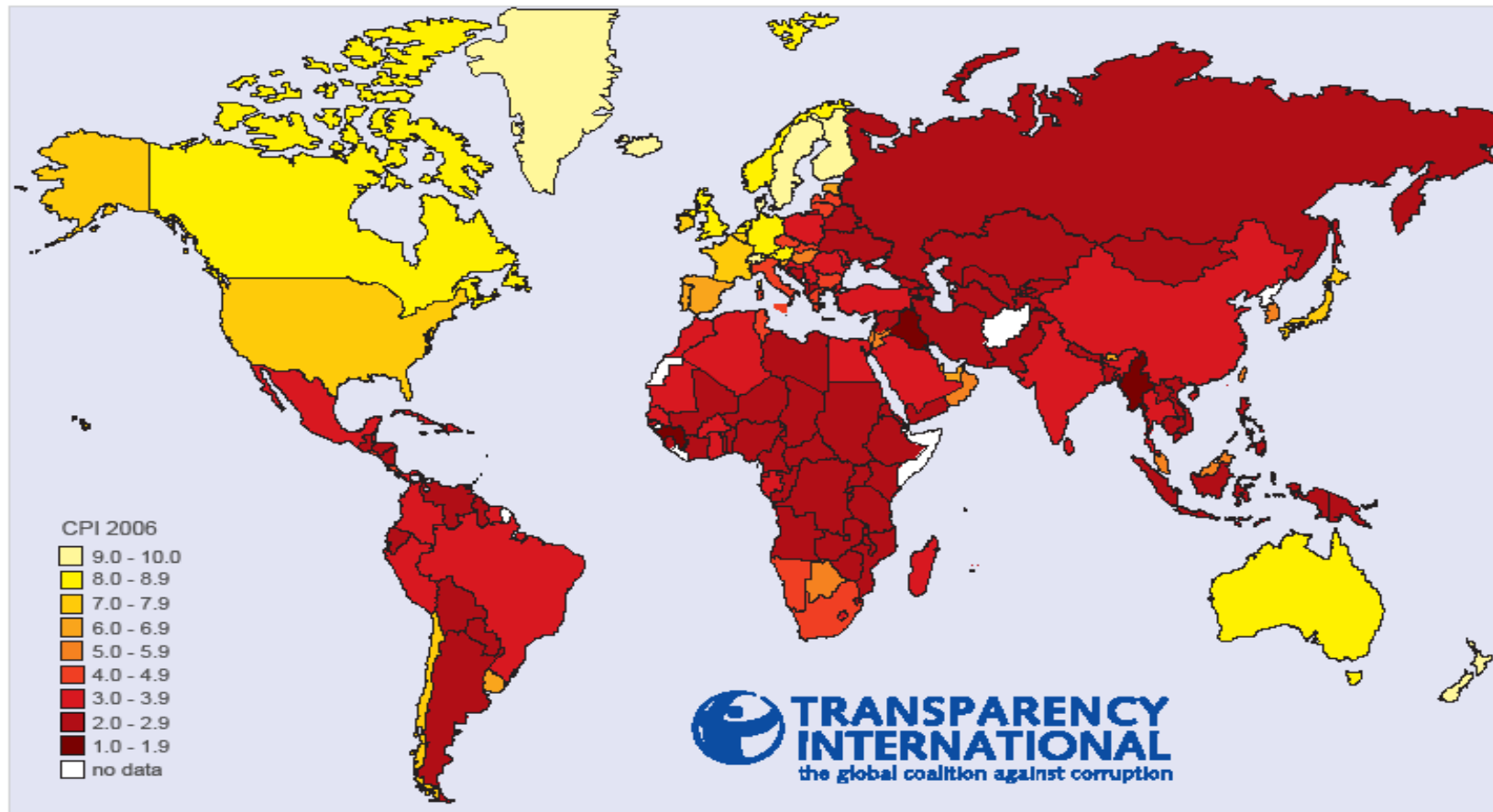
“Best Practices”

- **Know** your business partners, agents, and consultants
 - Are they state-owned?
 - Are any employees government officials?
- **Know** your exposure to or contacts with foreign government officials (including employees of state-owned businesses)
- **Understand** the services to be provided and how the payments will be made
- **Conduct** a “red flag” analysis

This Is What Your Business Sees



This Is What Prosecutor Sees



Business Partner Due Diligence Analysis

Factors to consider in evaluating FCPA risk:

- Territory's **reputation** for corruption
- Industry's reputation for **corruption**
- **Competence** of business partner
- **Integrity** of business partner
- Business partner's **relationship** to foreign government officials
- Certification of **compliance**
- Reasonableness and method of **payment**
- Ensure compliance with **local law**
- Integrate FCPA **safeguards** into the contracts
- Continuing **oversight** of business partner's activities
- **Maintenance** of accurate books and records
- Consistent **standards**

“Red Flags” Due Diligence and Compliance Reviews

Business Partner, Customer, Supplier Red Flags

“Red flags” that may indicate an improper payment



Large and numerous end-of-year adjustments



Foreign operations managers received unusual bonuses



New customers granted unusual credits



Inconsistent invoicing or over-invoicing



Transactions recorded as “cash” or checks drawn to cash



Agent refuses to confirm that he/she understands the FCPA and will comply



Request that the payment be paid in a third country or to a third party

Business Partner, Customer, Supplier Red Flags

“Red flags” that may indicate an improper payment (cont’d)



Large commission, retainer, or fee requests



Premiums added to contract



Unusually high service-related fees



Requests for cash



Customer or agent is owned or controlled by government official



Customer or agent is owned or controlled by relative of government official



Requests for extravagant gifts

FCPA Assurances

- Certifications
 - Both pre-agreement and periodic post-agreement
- Contract language
 - Representations and warranties
 - In some instances, right to audit or review financial records
 - Breach and remedies provisions
- Can you negotiate language?
 - Yes, but U.S. legal advisers will try to get the most protection possible for their clients

Compliance Tips

What You Did Five Years Ago Is Not Enough Today

- Review FCPA policies and procedures
- Review FCPA training program
- Review current agents/consultants and due diligence files for each
- Review last FCPA audit results
- Conduct yearly audits and compliance reviews

Continuous Monitoring

Testing

- Workable, comprehensible policies
- Employee ownership
- Follow up with individual employees and answer questions
- Web-based surveys are efficient way to “test waters”

Auditing

- Internal audit to review compliance documents, including:
 - Due diligence files
 - Contracts with third parties
 - Training records
 - Annual certifications

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