

**The Latest Surge in Anti-Corruption Enforcement:
What Looms on the Horizon for Global Businesses and
Their Leadership**

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Aggressive Enforcement of the U.S. Foreign Corrupt Practices Act

Officials in charge of the U.S. government's anti-corruption enforcement program have made clear that the aggressive enforcement of the Foreign Corrupt Practices Act (FCPA) will continue in both size and sophistication, and that the government will pursue and punish companies and individuals that cross the line.

From the top down, U.S. government officials are talking about combating global corruption including President Barack Obama, U.S. Attorney General Eric Holder, Department of Justice (DOJ) Assistant Attorney General Lanny Breuer (Criminal Division), Deputy Chief of the Fraud Section (and lead DOJ FCPA enforcement attorney) Mark Mendelsohn, Securities and Exchange Commission (SEC) Director of Enforcement Robert Khuzami, and Associate Director of the SEC's Division of Enforcement Cheryl Scarborough. These top U.S. officials are speaking about the government's deliberate steps to raise awareness, to build coalitions and cooperation among nations, and to vigorously enforce anti-corruption laws, such as the FCPA.

Examples of recent speeches and formal remarks include the following:

- Formal address of DOJ Assistant Attorney General Lanny Breuer to the American Conference Institute's 22nd National Forum on the Foreign Corrupt Practices Act, delivered in National Harbor, Maryland on November 17, 2009. See <http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf>.
- Formal keynote address of Assistant Attorney General Lanny Breuer to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum, delivered in Washington, D.C. on November 12, 2009. See <http://www.justice.gov/criminal/pr/speeches/2009/11/11-12-09breuer-pharmaspeech.pdf>.
- Remarks of Attorney General Eric Holder at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity, delivered in Doha, Qatar on November 7, 2009. See <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>.
- Remarks of SEC Division of Enforcement Director Robert Khuzami to the New York City Bar Association, delivered in New York City on August 5, 2009. See <http://www.sec.gov/news/speech/2009/spch080509rk.htm>.

The most recent pronouncements from Assistant Attorney General Breuer, Deputy Chief Mendelsohn, and Associate Director Scarborough came the week before Thanksgiving, at the 22nd National Forum on the FCPA. In prepared remarks and panel discussions, each made clear that the FCPA enforcement program is a priority and that the U.S. government will use every tool at its disposal to aggressively enforce the FCPA.

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2009 Enforcement Achievements

Among the topics discussed were the government's achievements in 2009. Examples include:

- DOJ officials predicted a record level of prosecutions (including the landmark prosecutions of Siemens and KBR), which is expected to equal or exceed the number of 2008 prosecutions by the year's end.
- There also are a record number of open FCPA investigations, currently estimated at 130.
- The SEC is increasing its use of disgorgement, even where the DOJ declines to prosecute or has lower penalties. Examples include Halliburton, Siemens, and ITT.
- The government is focused on criminal prosecution of and civil enforcement actions against individuals as a means of deterrence. This was a reoccurring theme throughout the discussions. The government cited successful guilty verdicts in each of the criminal jury trials this year, namely the cases against Frederic Bourke, former Congressman William Jefferson, and Gerald and Patricia Green, and pointed to the large number of cases brought against other individuals this year.

What Looms Ahead: Future Enforcement Trends

Importantly, DOJ and SEC officials also provided significant insights regarding the future of the FCPA enforcement program:

- The government will become even more proactive in initiating investigations against companies and individuals. As a means of deterrence, the government will continue to bring criminal and/or civil enforcement cases against officers and senior managers such as those in KBR and Nature's Sunshine Products cases and investors such as Frederic Bourke. Where possible, it will also pursue third-party agents such as Paul Novak, who had a consulting arrangement with Willbros.
- The government will continue to use sectorwide corruption probes, similar to the ongoing probes in the medical device and pharmaceutical industries, as well as the "Oil for Food" prosecutions. Officials stated that other industrywide probes exist but have not yet been made public. One official predicted that we will see more activity in areas impacted by the global economic crisis, including, for example, not only the financial industry but industries that benefited from the infusion of government dollars, such as companies involved in infrastructure-related activities.
- FCPA investigators and prosecutors are more proactively partnering with other enforcement specialists to aggressively pursue corruption cases. For example, in the pharmaceutical and medical device industry probes, FCPA prosecutors are

working with the DOJ's Health Care Fraud Prevention and Enforcement Action Team lawyers. Where possible, FCPA prosecutors also are working closely with adjunct teams, such as antitrust prosecutors, Internal Revenue Service agents, and export control specialists, to name a few. The government is becoming more sophisticated in its approach, and is pursuing creative ways to "up the ante" in FCPA-related prosecutions, making these cases harder to defend.

- The DOJ is looking at other means to ensure that businesses and individuals do not benefit from corruption, and will more aggressively pursue asset forfeiture proceedings in connection with these cases. In particular, Assistant Attorney General Breuer has directed FCPA prosecutors "to speak with their supervisors and determine *in every case whether forfeiture is appropriate.*" (Emphasis added). Thus, we can expect ongoing collaboration in all future cases among FCPA prosecutors and their Asset Forfeiture and Money Laundering Section counterparts. Companies will need to be prepared for such actions, as they may involve the freezing of bank accounts.
- The DOJ will continue to define the term "foreign official" very broadly, to include not only ministry and customs officials but employees of state-owned facilities. In fact, in his November speech to the pharmaceutical industry, Assistant Attorney General Breuer stated that "it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a 'foreign official' within the meaning of the FCPA."
- As appropriate, FCPA prosecutions will continue to include more traditional charges of federal criminal violations to achieve convictions, including allegations of money laundering, tax, antitrust, export control, conspiracy, and Travel Act violations that are brought in cases where the government alleges commercial bribery in addition to bribery of foreign officials.
- The U.S. government will continue to encourage cooperation and collaboration with foreign enforcement authorities, including requests for formal and informal international assistance. Government officials stated that the most common requests for formal and informal assistance are made to Azerbaijan, Canada, Dubai, France, Germany, Guernsey, Haiti, Hungary, Ireland, Lithuania, Macedonia, Mexico, Panama, Singapore, Switzerland, Thailand, and the United Kingdom, as well as other unnamed countries in Africa, Asia, and Europe. Two new bilateral extradition and mutual legal assistance agreements between the United States and European Union (EU) member countries will soon take effect in 2010 and are expected to greatly facilitate the sharing of information and extradition of individuals subject to criminal proceedings in specified cases.
- The DOJ will continue to use corporate monitors in appropriate cases. DOJ officials stated that corporate monitors can be a very effective tool and that they are here to stay. However, the officials also say that the government has become more sophisticated in its approach and that it will consider other alternatives, as appropriate in individual cases, such as self-monitoring and reporting, deferred prosecution agreements, etc.
- The government is seeing a trend away from "unnecessary" third-party relationships because of the inherent risks that third parties bring. However, the government sees problems increasing in the context of acquisitions and joint-venture relationships.
- The government emphasized its view that companies will receive substantial

credit for voluntary disclosure and cooperation. On several occasions, government officials pointed out that Siemens, although it paid an extraordinary price to resolve its corruption probe, was actually subject to much higher fines and penalties under the United States Sentencing Guidelines. In particular, its \$450 million penalty to the DOJ alone was a significant “discount” from the \$1.35 billion to \$2.7 billion Guidelines range. According to the government, this discount was due to Siemens’s extraordinary cooperation. The government also cited the nonprosecution agreement with Helmerich & Payne and the approximately 30% discount off of the Guidelines range as an example of the benefits of voluntary disclosure and cooperation.

- Assistant Attorney General Breuer acknowledged that Deputy Chief Mark Mendelsohn will soon be leaving the Justice Department. Given the surge of the FCPA enforcement program under Mendelsohn’s leadership, his successor will no doubt have big shoes to fill. However, there will be every incentive for the next Deputy Chief to make his or her own mark on the FCPA enforcement program. Thus, one can expect to see an up-tick in activity once the reigns are passed.

Managing Risk and Preparing for the “Next Wave” of FCPA Enforcement

Vigorously enforced, well-documented, effective FCPA compliance programs are now more important than ever. In this environment, a company must be able to demonstrate its processes and how its compliance program works in practice. Thus, a company must document not only policies and procedures but how it handles “red flags,” how it monitors deals or relationships, and whether deals or relationships are rejected.

In this enforcement environment, companies should consider taking such steps as:

- **Review domestic and foreign anti-corruption-related policies, procedures, and training.** Will they stand up to government scrutiny? Do they sufficiently control risk in your organization? Do they require adequate due diligence for M&A transactions, investments, and other third-party relationships? Do they require monitoring of ongoing third-party relationships? Are senior management and board members sufficiently attuned to anti-corruption risks? If policies and procedures require approvals, are approvals in fact being sought? How are your compliance efforts being documented? Do you have “buy in” from the business? Do you have a strong “top down” message? Are you building compliance partnerships within your organization?
- **Understand your risks.** Review your company’s “touch points” with foreign officials overseas. Where is your company regulated? To what extent and in what contexts do your employees come into contact with employees of state-owned or state-controlled entities? What third-party relationships exist and which ones require more oversight?
- **Evaluate and monitor existing third-party relationships.** Once you identify your company’s third-party relationships, categorize these relationships by risk and evaluate them. Are you satisfied with the due diligence? Are the third-party relationships, their business purpose, and anti-corruption controls sufficiently documented? Is the relationship being monitored? By whom? Is there a business “owner” for the relationship, i.e., who from the business is responsible for managing the relationship and monitoring compliance? Have you carefully

reviewed third-party relationships that have been “inherited” through acquisitions?

- **Conduct periodic compliance assessments.** Risks change as company operations expand, contract, and shift in a global economy. Assessments conducted two years ago may not necessarily flag the actual risks of today’s business—particularly for operations that have been acquired or outsourced (but where certain control/oversight remains).
- **Avoid successor liability.** Does the company seek to identify problematic conduct in due diligence pre-acquisition, or does it simply implement appropriate policies and procedures after the fact? If the latter, has the company conducted an audit to ensure that no troubling conduct is ongoing? Companies that fail to discover risks in pre-deal due diligence are at increased risk for prosecution. Companies that fail to stop problematic conduct post-acquisition are almost certain to face higher penalties if the government investigates.
- **If troubling sales or marketing activities are disclosed by competitors or by joint venture partners, distributors, or other third parties with whom you conduct business, monitor the disclosures and review whether you may face similar problems or legal exposure.** The government is looking to leverage off of other investigations to build corruption cases. As a requirement of cooperation, your competitors and their employees (including possible former employees of yours) will be asked to provide information about other companies and business practices. Similarly, cooperating third-party intermediaries will be required to disclose each of their business relationships and related business practices. These investigative tactics inevitably lead to broader investigations that could impact your business.
- **Take potential whistleblower claims seriously.** If an employee raises concerns regarding overseas bribery, pay close attention to him or her—because the government will. Such concerns should touch off at least some review that will either corroborate or discredit the allegation and, if problems are noted, should at the very least result in swift remedial measures.
- **Develop a crisis-management plan for handling cross-border investigations.** It is no secret that the costs of cross-border investigations can reach astronomical heights. However, with some planning, companies can minimize certain costs upfront that will protect them if problems arise. For example:
 - **Understand where and how to preserve and access your overseas records.** Time and resources will be saved if your internal legal department and information technology specialists know where to look, and heed any legal restrictions for accessing or transferring electronic data. At a minimum, the government (and even your outside auditors) will expect that relevant information be preserved expeditiously once a problem is discovered.
 - **Learn the applicability of privilege and work-product protection rules in the jurisdictions where you operate,** or at the very least, identify local counsel who can help you navigate local rules and restrictions covering such issues if a problem arises. Local counsel may also be very helpful in identifying potential issues if interviews need to be conducted in the foreign territory. Make sure, however, that you conduct due diligence on your outside law firms.

- **Understand how the government can gain access to your company’s documents and employees, and understand your rights.** Companies operating in the EU should understand the new mutual legal assistance treaty that will take effect in early 2010, and how the U.S. government will be able to access information about such companies in the future.
- **Develop a “scoping” plan.** When a problem comes to your attention, do you need to “open the flood gates” or is there a more targeted and surgical way to get at the problem so that you address it without spending unnecessary resources? If the latter is the case, how do you go about determining that the problem does not exist in other jurisdictions? If you end up before the government, prosecutors will expect companies to explain where lines were drawn and why.

The continuing expansion of business operations overseas is crucial to building successful businesses in the future. However, it is also fraught with risk. The key will be how companies manage that risk and prepare themselves for addressing problems when they arise. In addition, companies that wind up in the cross-hairs of a government investigation will find it increasingly harder to resist the government’s settlement demands, due not only to the stiff penalties available under each of these statutes, but the government’s increasing willingness to use the threat of debarment and exclusion. Thus, companies must be prepared to respond appropriately to government demands while balancing the increased threat of parallel civil, state, and international enforcement actions, and likely follow-on shareholder and class action litigation.

Morgan Lewis is well positioned to assist your company prepare to meet the challenges ahead. Drawing on our team of nationally recognized fraud and abuse and corporate investigations lawyers, we have the experience, depth, and knowledge to guide your company in assessing compliance risks, reviewing and strengthening compliance programs, evaluating due diligence in third-party transactions, and responding to global anti-corruption investigations.

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