

Morgan Lewis

Foreign Corrupt Practices Act (FCPA)
Year in Review

Mark A. Sreere
Nathan J. Andrisani
Eric Kraeutler
William H. Kimball
Kelly A. Moore
Robert A. Goldspink
Brian M. Privor

www.morganlewis.com

February 2009

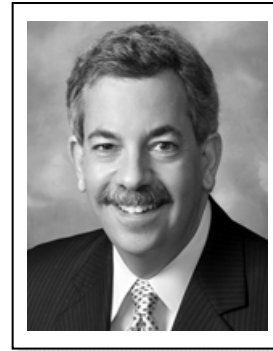
Presenters



Mark A. Srere
Washington, D.C.



Nathan J. Andrisani
Philadelphia



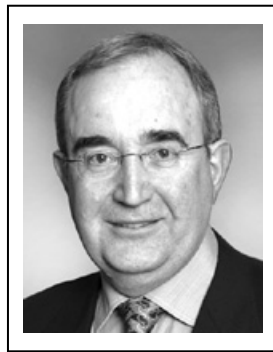
Eric Kraeutler
Philadelphia



William H. Kimball
San Francisco



Kelly A. Moore
New York



Robert A. Goldspink
London



Brian M. Privor
Washington, D.C.

Topics of Discussion

- Overview of the FCPA
- Enforcement Trends
 - Large Fines
 - Corporate Settlements and DPAs
 - Individual Prosecutions
- Overseas Enforcement
- Rise of Private Litigation
- 2009 Predictions
- Due Diligence and Compliance Best Practices

year in review

Overview of the FCPA

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 business or securing any improper advantage

FCPA Jurisdiction for Anti-Bribery Provisions

- Any “**issuer**” that files reports to the SEC or trades equity or debt on a U.S. exchange and any officer, director, stockholder, employee, or agent acting on behalf of such issuer. This includes any foreign company that trades, for example, American Depositary Receipts (ADRs) on a U.S. exchange.
- Any “**domestic concern**,” which includes U.S. citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the United States or a U.S. territory or that has its principal place of business in the United States.
- Any “**person**,” including an organization, wherever located, that, while in the territory of the United States, does any act in furtherance of the prohibited conduct, including, for example, the transmission of wires or emails through the United States.

Potential Penalties for FCPA Violations

Corporation:

- \$25 million criminal fine per violation or twice the gain
- Debarment
- \$10,000 civil penalty or gross gain to the company
- Disgorgement

Individual:

- 20 years in prison
- \$5 million criminal fine
- \$10,000 civil penalty or gross gain
- The fine shall not be paid, directly or indirectly, by the company

Collateral Costs

 **Multiple Investigation Costs**

 **Deferred Prosecution Agreements**

 **Diversion of Management**

 **Compliance Monitors**

 **Civil Litigation**

 **Back Taxes**

 **Prejudgment Interest**

 **Reputational Harm**

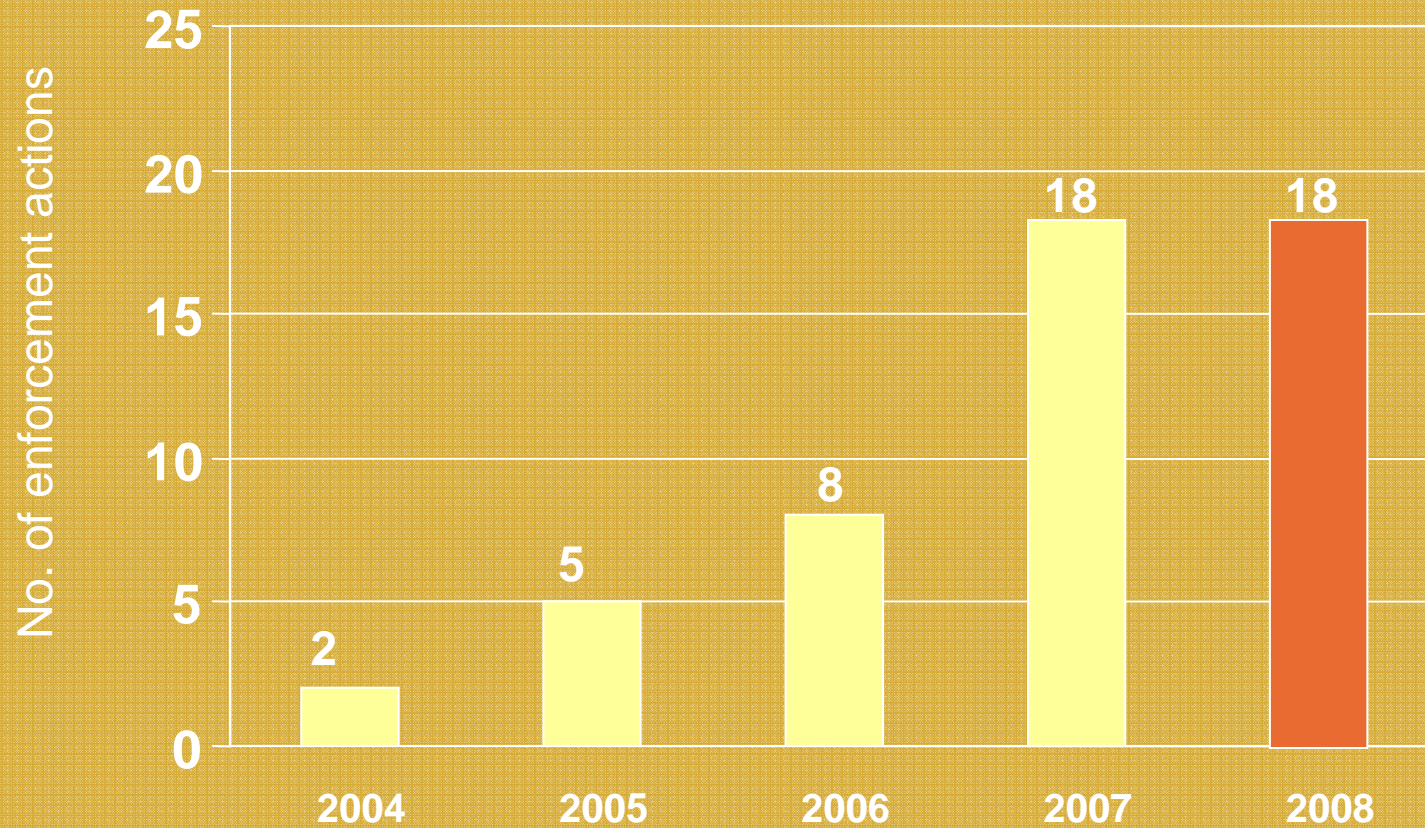
 **Share Price**

 **Rescission of Contracts, Permits**

year in review

Enforcement Trends

Continued Robust Enforcement



Large Fines Are the Norm

- DOJ looks to Sentencing Guidelines and Principles of Federal Prosecution of Business Organizations
 - *KBR/Halliburton* – \$402 million criminal fine and \$177 million disgorgement
 - *Siemens* – \$450 million fine and \$350 million disgorgement
 - *Fiat* – \$17.8 million in fines, penalties, and disgorgement
 - *Willbros* – \$32 million in fines, penalties, and disgorgement
 - *AB Volvo* – \$19.6 million in fines, penalties, and disgorgement

Other Monetary Sanctions

- Disgorgement – *Fiat*
 - \$7.2 million disgorgement and interest
 - \$7 million criminal fine imposed by DOJ and \$3.6 million penalty paid to SEC
- Penalties in Multiple Jurisdictions – *Siemens*
 - DOJ and SEC imposed an \$800 million fine and disgorgement while Siemens paid an additional \$569 million in Germany

Corporate Settlements and DPAs

- Public companies have incentive to settle –
10 settled in 2008
 - *Nexus (privately held) going to trial*
- DOJ takes DPAs seriously
 - *Aibel (ABB) recidivists face stiff punishment*
- Parent corps. paying price for foreign subsidiaries
- Government willing to be creative
 - *Siemens criminal internal controls*
 - *Fiat not charged, but paid fines and signed DPA with subsidiaries*

Individual Prosecutions



DOJ Routinely Seeking Jail Time

 Mendelsohn: “That’s no accident.” Looking for deterrent effect

- DOJ seeking jail time
 - Misao Hioki (Bridgestone) – two years and \$80,000 fine for conspiracy to rig bids and violate the FCPA
 - Jack Stanley (KBR) – plea agreement for seven years and \$10.8 million in restitution
 - Ramedra Basu (World Bank) – 15 months in prison
- Upcoming Trials
 - William Jefferson (U.S. Congressman) – allegedly bribed Nigerian officials to secure telecommunications contracts
 - Nexus Technologies – four individuals indicted in September 2008 for allegedly bribing Vietnamese officials in connection with sales of defense- and security-related equipment
 - Gerald & Patricia Green – arrested in December 2007 for allegedly bribing Tourism Authority of Thailand to land film festival contracts
 - Frederic Bourke – indicted for allegedly paying bribes in connection with privatization of Azerbaijan’s state-owned oil company

year in review

Overseas Enforcement

The FCPA's Global Reach



Foreign Companies Subject to U.S. Laws

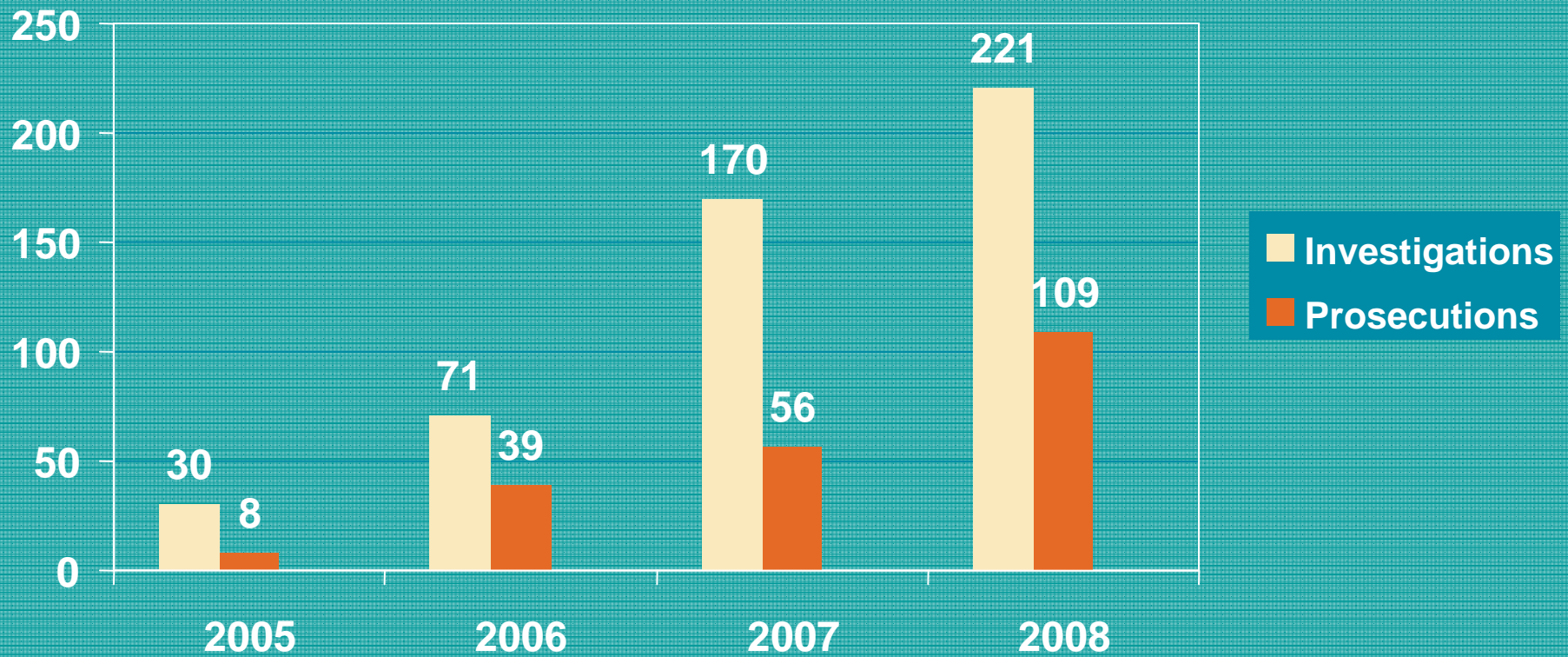
- U.S. issuers (including ADRs)
- Conduct in the United States (territorial jurisdiction)
- Acts of foreign subsidiaries acting as agent of U.S. company via *respondeat superior*

The Year of “Foreign Coordination”

- Increased evidence sharing
 - United States issued at least 45 Letters Rogatory in 2008
 - “Spontaneous disclosures”
 - Swiss authorities are sharing banking records (e.g., *BAE* and other cases)
 - Greater formal and informal cooperation among law enforcement agencies
- Parallel investigations (Siemens; KBR/Stanley; Flowserve; BAE)
- Pressure to disclose U.S. investigations to foreign authorities

More European Investigations/Prosecutions

Source: Transparency International 2008 Review



Foreign Enforcement

- Rise in enforcement in Europe
 - Denmark, France, Germany, Hungary, Netherlands, Sweden, Switzerland, UK
 - *Germany – more investigations than the U.S.*
 - *France, Germany, Hungary – more prosecutions than the U.S.*
 - UK off the mark
 - *CBRN*
 - *Heath, Gangar, and White*
 - *Balfour Beatty*
 - *20+ investigations*
- And in the Far East:
 - India, China, Korea, Thailand, Japan

year in review

Rise of Private Litigation

Creative Plaintiffs – Direct Injuries

- RICO, Fraud
 - Aluminum Bahrain BSC (Alba) sued Alcoa for allegedly overcharging for raw materials during a 15-year period, and using some of that money for kickbacks to Alba executives to obtain more contracts
 - Iraqi government sued two individuals and approximately 50 companies under Oil-for-Food Program for RICO violations
- Breach of Fiduciary Duty
 - Siemens suing former executives for causing losses
- Unfair Competition
 - Supreme Fuels Trading FZE sued International Oil Trading Co. (IOTC) for allegedly bribing Jordanian officials to award IOTC authorization to transport fuel through Jordan to Iraq, effectively blocking Supreme Fuels from competing for authorization

Disgruntled Investors

- Joint Venturer
 - Jack Grynberg of Grynberg Productions sued BP and Statoil under RICO for allegedly using Grynberg's money, without his knowledge, to bribe officials to obtain oil rights for ventures in which Grynberg invested.
 - *Grynberg reportedly sued to show that he was not complicit*
- Shareholder lawsuits
 - Willbros settled class action after restating earnings
 - InVision – securities fraud class action dismissed under PSLRA
 - BAE and Alcoa face derivative actions

year in review

2009 Predictions

1. The New Administration: A New Sheriff in Town?

- Expect same or greater level of enforcement activity
- Pressure to self report and have robust programs given how much press there has been (especially Siemens)
- Prosecution of both *big* (Siemens) and *small* (Nexus) companies and payments will continue
- Forfeiture actions to recover proceeds and bribes paid to foreign officials (Siemens)
- Legislation for limited private right of action under FCPA?

2. Industries to Watch: Sovereign Wealth Funds and Financial Institutions

The recent boom of sovereign wealth funds is an area at the top of DOJ's hit list.

~Steve Tyrrell, Chief of the Fraud Section, DOJ Criminal Division

- Money is a scarce resource
 - Sovereign wealth funds are source of capital in tight credit markets
 - Nationalized banks and state-owned entities (Iceland, UK)
- Factors
 - Passive investors without control rights?
 - Special access or quid pro quo?
 - Regulation vs. control

Industrywide Investigations Continue

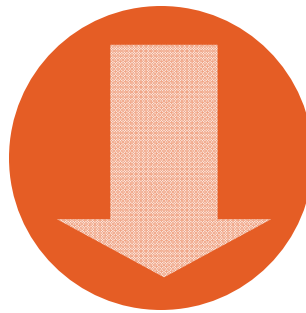
- U.N. Iraqi Oil-for-Food Program
 - Multiple industries (humanitarian goods, oil, etc.), but same pattern of kickbacks mischaracterized as “after sales service fees”
 - Ten U.S. prosecutions to date
 - Foreign authorities getting in on the act
- Medical Devices
 - Biomet, Medtronic, Stryker, Smith & Nephew plc, Zimmer Holding – under investigation for payments to government-employed physicians
 - Despite compliance monitors and DPA related to settlement of charges for domestic kickbacks, all (plus DePuy Orthopedics of Johnson & Johnson) are under investigation for foreign bribery
- Oil Services Companies
 - At least 11 oil services companies have received inquiries from DOJ about their dealings with Panalpina Welttransport Holding AG, a Swiss freight forwarder, implicated in *Vetco* case (believed to be the intermediary implicated in making payments to Nigerian customs officials)

3. Coordinated Enforcement

- Agency coordination will continue to rise
 - **Antitrust**
 - *Bridgestone* = first-ever joint FCPA/antitrust prosecution
 - *ABB Ltd.* and *Halliburton* also under investigation
 - **Export Control**
 - *Nexus* (Department of Commerce, Office of Export Enforcement)
 - *Shu Quan-Sheng* (Arms Export Control Act)
 - **IRS**
 - *Willbros*
 - *PCI/Martin Self*

4. Enforcement Focus: Unfair Business Advantage

To “obtain or retain business”



Secure any “improper advantage”

Unfair Business Advantage (cont.)

- Focus is on gaining a competitive advantage rather than directly securing a particular contract
 - Con-way = paying for slotting on planes and faster customs clearance
 - *United States v. Kay* = customs duties
 - Aibel = favorable customs treatment
 - Delta Pine = government reports and certifications to sell seed
 - Vetco = bribes paid for preferential treatment in customs clearance
 - Covino = payments to influence technical specifications to favor Covino's company in bidding

year in review

Due Diligence and Compliance Best Practices

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

Policing Conduct – What Is Expected?



- Increased Compliance Efforts
 - Better policies and procedures
 - Better monitoring efforts
 - Better training
- Due Diligence
 - M&A and joint venture transactions
 - Hiring of consultants, agents, and other third parties

“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

Relationships of Special Concern for U.S. Companies

Joint Ventures

**Commercial
Agents**

**Foreign Business
Partners**

**Foreign
Subsidiaries**

Managing Business Risk

- Financial Risk – Due Diligence Now, or Expensive Investigation Later
 - *Siemens, Baker Hughes*
- Opinion Procedures
 - Vetco sought, but ignored, direction
 - Halliburton sought expedited opinion re preacquisition due diligence
- Consider voluntary disclosures
 - Beware of whistleblowers, parallel investigations abroad
 - Cooperation buys leniency?

Recent Cases

- **Enforcement Actions:**

<http://morganlewis.com/documents/fcpa/FCPA-EnforcementActions.pdf>

- **Opinion Releases:**

<http://morganlewis.com/documents/fcpa/FCPAOpinionProcedureReleases.pdf>

Morgan Lewis FCPA Contacts – U.S.

Washington, D.C.

Amy J. Conway-Hatcher

Mark E. Matthews

Christian J. Mixer

Brian M. Privor

Mark A. Srere

Barbara “Biz” Van Gelder

Philadelphia

Nathan J. Andrisani

Colm Connolly

Eric Kraeutler

Zane Memeger

Eric W. Sitarchuk

R. Stephen Stigall

New York

Leslie R. Caldwell

Anne Flannery

Kelly A. Moore

Robert Romano

San Francisco

John H. Hemann

William H. Kimball

Lisa Tenorio-Kutzkey

Los Angeles

John F. Hartigan

Alicia Villarreal

Houston

Hugh E. Tanner

Morgan Lewis FCPA Contacts – Europe and Asia

London

Robert A. Goldspink

Paris

Thierry Dalmasso

Anne Tolila

Brussels

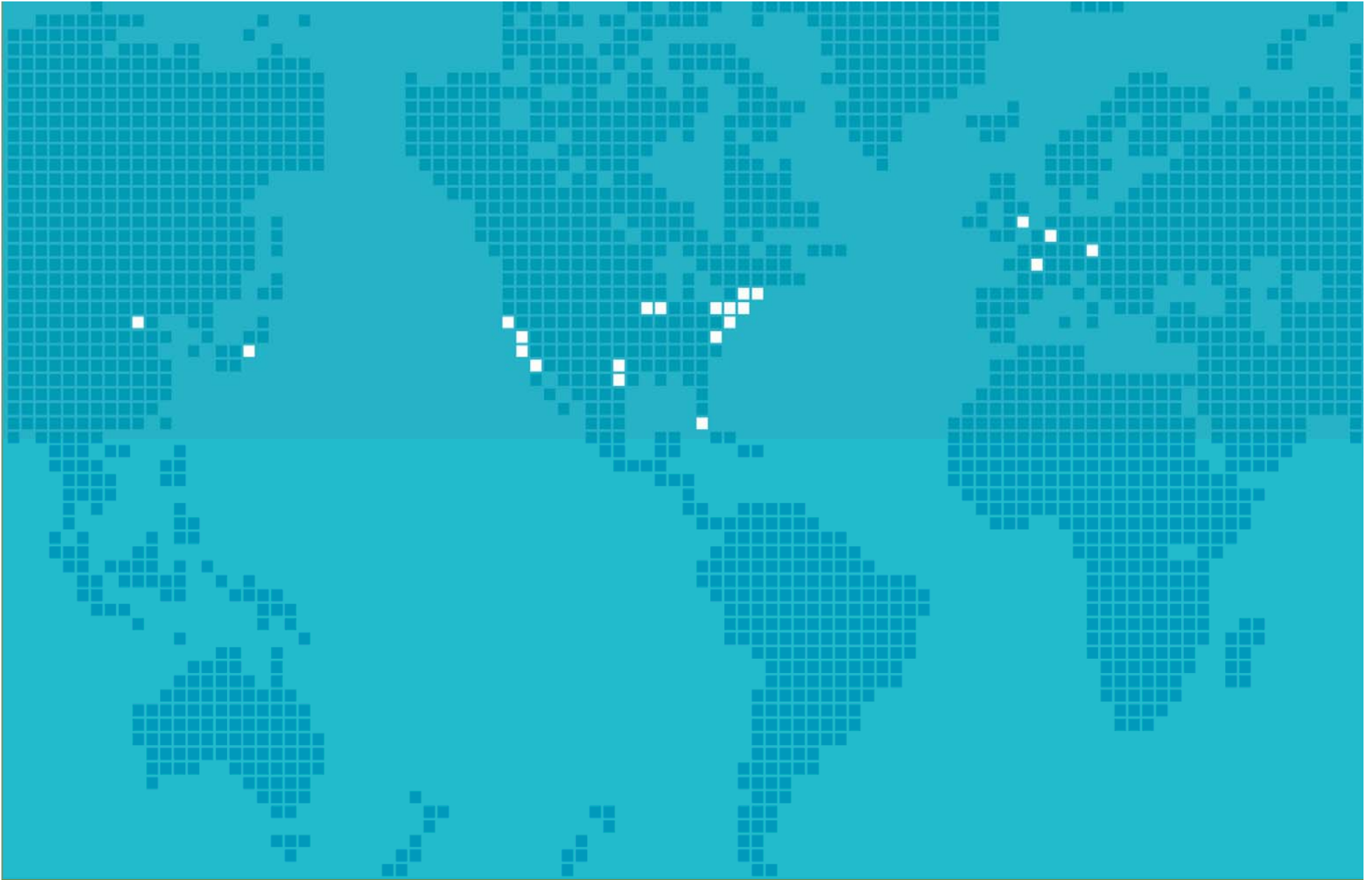
Izzet M. Sinan

Frankfurt

Jürgen Beninca

Tokyo

Lisa Yano



worldwide

Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston
Irvine London Los Angeles Miami Minneapolis New York Palo Alto Paris
Philadelphia Pittsburgh Princeton San Francisco Tokyo Washington