

What Every European Company Should Know About the FCPA and the UK Bribery Act

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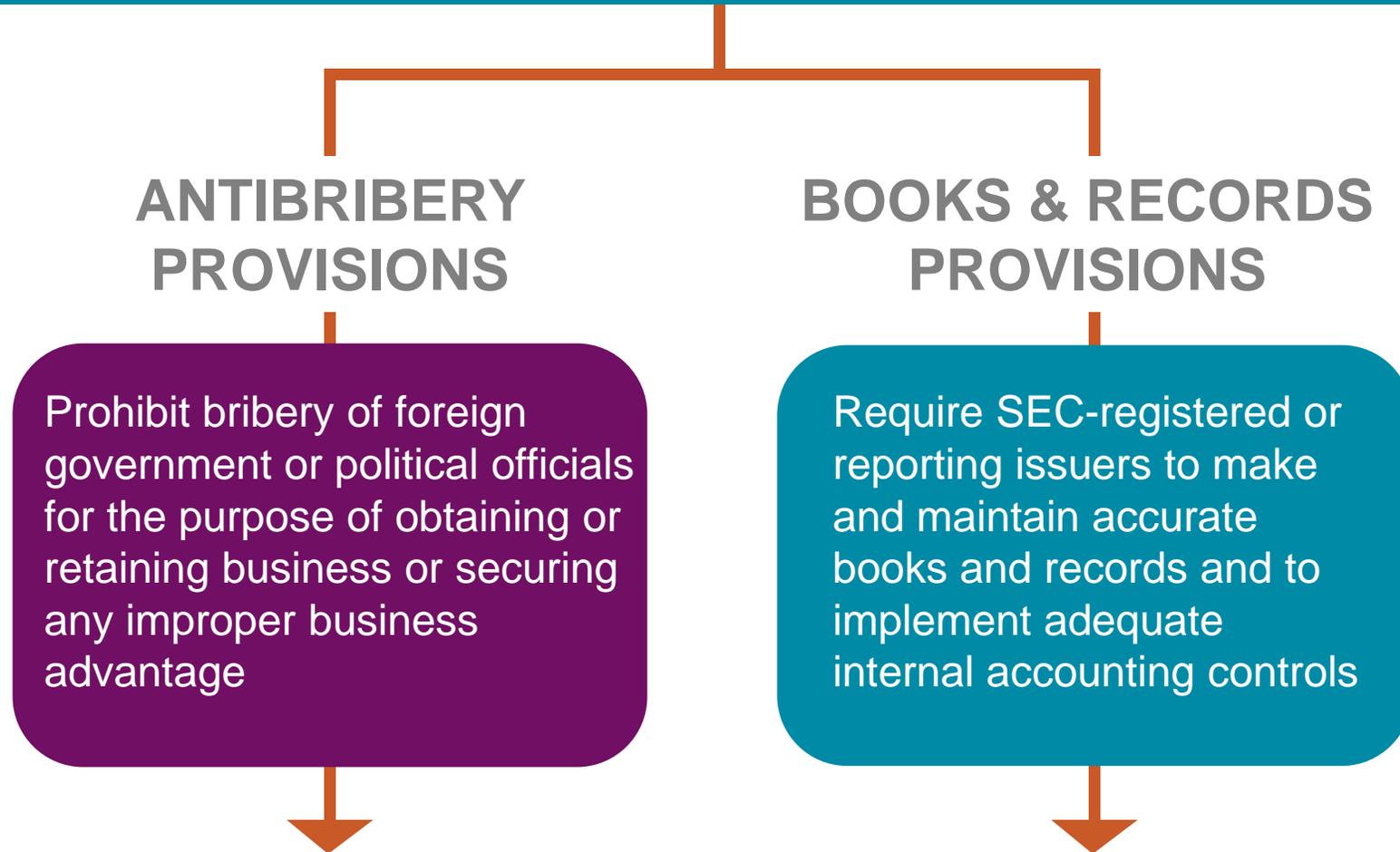
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Topics of Discussion

- The FCPA and its Jurisdiction
- The UK Bribery Act and its Jurisdiction
- The Rise of Global Anti-Corruption Laws
- Preparing for Enforcement:
Anti-Corruption Compliance Programs
- Questions and Answers

The FCPA and its Jurisdiction

U.S. Foreign Corrupt Practices Act



Antibribery Provisions

- 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

The FCPA's Third-Party Payment Provisions

- The FCPA's broad definition of knowledge means that a company can be liable for the actions of its agents and third-party representatives
 - Anti-bribery provisions cover improper payments made to “any person, while **knowing** that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly to any foreign official”
 - Knowledge is established “if a person is aware of a **high probability** of the existence of such circumstance, unless the person **actually believes that such circumstance does not exist**”
- More than 50% of FCPA prosecutions involve liability based on the use of agents and representatives
- Due diligence and monitoring agents and third-party representatives is increasingly important

Books & Records Provisions

- Books and records
 - Must be in reasonable detail that accurately and fully reflect transactions
 - Payments, gifts, and entertainment
- Effective internal accounting controls
 - company policies and procedures
 - documentation (e.g., expense forms)
 - reporting
 - certifications
 - corrective actions

Potential FCPA Fines and Penalties

Business Organizations

- \$25 million criminal fine per violation (books & records and internal control violations)
- Up to \$2 million criminal fine per violation (antibribery violations)
- \$10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d) (twice the gain or loss)

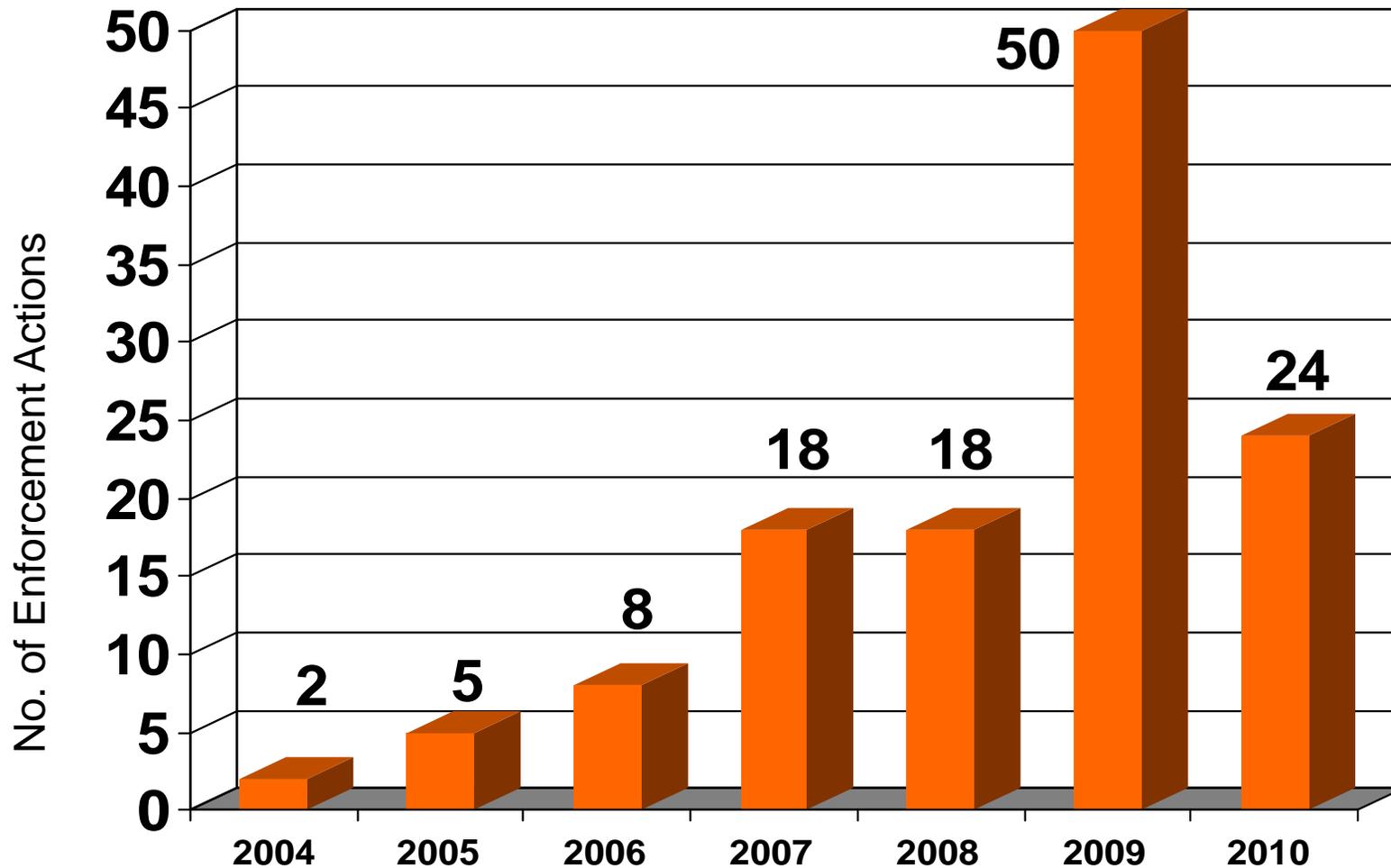
Individuals

- 20 years in prison and/or \$5 million per violation (books & records and internal control violations)
- 5 years in prison and/or \$250,000 fine per violation (antibribery violations)
- \$10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d) (twice the gain or loss)

Enforcement Trends

- Expansion of investigative resources
- Increased SEC enforcement
- Collaboration with foreign authorities
- Focus on individual prosecutions
- More FCPA trials
- Use of traditional law enforcement techniques
- Industry-wide focus

DOJ's Upward FCPA Enforcement Trend

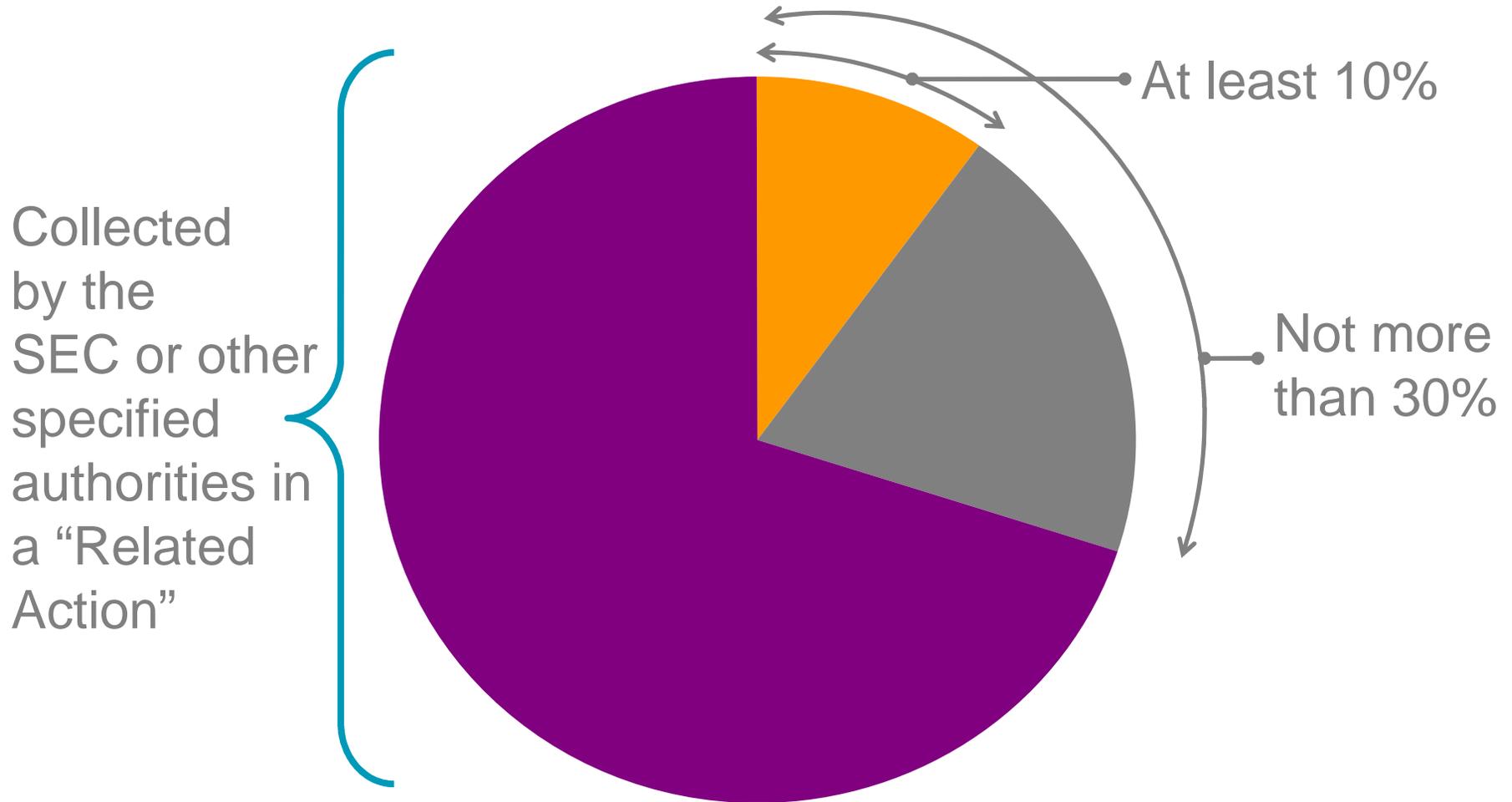


The Rise of SEC Enforcement



- Fundamental reorganization of the SEC Enforcement Division & expansion of investigative tools
- Dodd-Frank Act Whistleblower Bounty Provisions
 - The SEC will pay an award to one or more whistleblowers who:
 - *Voluntarily provide the SEC*
 - *With original information*
 - *About any possible (reasonable belief) violation of federal securities laws that occurred, is ongoing, or is about to occur*
 - *That leads to a successful federal court or administrative enforcement action by the SEC*
 - *In which the SEC obtains monetary sanctions totaling more than \$1 million*

Dodd-Frank Act Whistleblower Provisions Amount of Award



Jurisdictional Reach

Antibribery Provisions

- U.S. persons
- FCPA issuers
- Domestic concerns
- Any officer, director, employee, or agent of an FCPA issuer or domestic concern, or any stockholder “acting on behalf of” an FCPA issuer or domestic concern that does any act outside of the United States
- Any persons, including organizations, wherever located, that, while in U.S. territory, performs any act in furtherance of the prohibited conduct

Books & Records Provisions

- FCPA issuers (direct liability)
- Aiders and abettors
- Control persons (civil liability only)
- Any person who willfully makes or causes to be made false statements in a required filing

Expansive Anti-Bribery Jurisdiction

Extraterritorial Jurisdiction

- U.S. persons
- FCPA issuers
- Domestic concerns
- Officer, director, etc.
(can be a non-U.S. person)

Any act outside of the United States in furtherance of a prohibited act

Territorial Jurisdiction

- Non-U.S. persons
- Non-FCPA issuers
- Non-domestic concerns

Use of any means or instrumentality of interstate commerce while in the United States

The UK Bribery Act and its Jurisdiction

Rationale

- Replace old, ineffectual UK ABC laws with pace-setting regime
- Actively encourage businesses to develop and enforce robust ABC procedures
- Use the Act as a mechanism to encourage the tackling of bribery and corruption cultures in other jurisdictions around the world

Overview of the UK Bribery Act 2010

- Four basic offences
 - Two “general” offences: bribery (s.1) and taking a bribe (s.2)
 - Bribery of foreign public official (s.6)
 - Corporate offence: failure to prevent bribery (s.7)
- Offences broadly defined
- De facto requirement to develop ABC policies and procedures
- Potentially broad jurisdictional reach, particularly s.7
- Implications for entities not falling within its scope

General Offences: 3 Key Concepts

- **A relevant function**
 - Covers both public and commercial (e.g. B2B) spheres
 - Expected to perform in good faith/impartially
- **Improper performance** of that function
 - Not in manner expected (e.g. impartially)
 - Reasonable person in UK
 - Local custom/practice irrelevant (except written law)
- Offer, acceptance, solicitation, etc. of an **advantage**
 - Broad definition and scope, e.g. covers indirect bribery, recipient need not benefit or be person performing function, etc.

Bribery of Foreign Public Official

- Bribing a foreign public official if intending to influence the official in his or her official capacity, intending to obtain/retain business or business advantage
- Broadly overlaps with § 1 offence
- But unlike § 1, does not require proof of improper performance or an intention to induce it

Points to Note

- No exception for facilitating payments
- Potentially wide application, e.g. hospitality/promotional expenses
- Reliance on prosecutorial discretion,
 - Public statements/guidance by MoJ and SFO
- Corporates can commit the offences
 - Consent/connivance of senior officer
 - Relevant senior officer may also commit offence

Jurisdictional Reach (s.1, 2, and 6 offences)

- Any act forming part of offence occurs in UK (Test 1)
- Person with “close connection” with UK commits relevant act
 - Citizens, residents, UK corporations, etc.
- Corporates: consenting senior officer also guilty if Test 1 applies or officer has close connection with UK

Failure to Prevent Bribery (s.7): Relevant commercial organisations

- UK body corporate or partnership
- Non-UK body corporate or partnership carrying on a business, or part of a business, in the UK
- Carrying on a business in the UK
 - To be determined by courts
 - Relevant factors? - assets, employees, (target) customers, where business conducted, continuity/repetition, etc.
 - MoJ guidance: subsidiaries, listed companies
 - SFO declared approach

s.7 Offence: Bribery by “associated persons”

- Person associated with RCO bribes intending to obtain/retain business/business advantage for the RCO
- “Associated person”
 - Performs services for or on behalf of RCO
 - Substantive test: may possibly include employees, agents, subsidiaries, JVs, distributors, sub-contractors, etc.
 - MoJ guidance (control, direct benefit, etc.)

s.7 Offence: Bribery by “associated persons”

- Bribery by associate
 - s.1 or s.6 offence if done in UK
 - No prosecution/conviction of associate required
- No UK nexus required, e.g. for associate, bribe, or recipient

Key issues

- Strict liability offence for RCO
- Only defence: RCO had in place adequate procedures designed to prevent associated persons from bribing
- Implications for RCO counterparties (particularly agents, sub-contractors, etc.)
 - ABC policies as pre-condition for doing business
 - Contractual obligations to protect RCO

Penalties

General Offences and § 6

- individuals: 10 years imprisonment or unlimited fine
- other persons: unlimited fine

§ 7 Corporate Offence

- unlimited fine

Offences May Trigger

- ban on tendering for public procurement contracts (ss.1 and 6: automatic; s.7: discretionary)
- recovery/confiscation order: all proceeds of crime

Adequate Procedures: MoJ Guidance

1. Proportionate Procedures

2. Top-Level Commitment

3. Risk Assessment

4. Due Diligence

5. Communication (including training)

6. Monitoring and Review

The Rise of Global Anti-Corruption Laws

Enhanced Global Anti-Bribery Laws

- China
 - Recent amendments strengthening criminal anti-bribery laws
- Brazil
 - Proposed legislation extending anti-bribery liability to business organizations
- Mexico
 - 2011: Mexican Senate passes Federal Anti-Corruption Law
- Russia
 - 2011: Landmark Anti-Corruption Bill
- India
 - Pending Anti-Corruption Bill

Germany – Recent Developments

- Germany ranks as No. 4 on Transparency International's Bribe Payers Index 2011 beaten only by the Netherlands, Switzerland and Belgium but followed by the UK (No. 8) and the U.S. (No. 9).
- The latest available statistical information (2009) shows a total number of 1,904 investigations in corruption matters representing an increase of more than 5% compared to 2008.
- A PWC study on corruption in the public sector (2010) showed that 21% of the interviewed government officials claimed to have been a target of improper influence.

Germany – International Reach

- Germany's anti-corruption laws catch behavior targeted at both German and foreign companies
- However, Germany continues to reject the concept of criminal liability of companies
- Further, German commentators have criticized Section 7 of UK Bribery Act as vague and overreaching.

Germany – Insufficient Protection of Whistleblowers ?

- The European Court of Human Rights (ECHR) held that Germany violated a whistle-blower's right to free speech after German labor Courts upheld the employer's termination of a whistle-blower for having filed an unjustified criminal complaint.
- The German Courts justified their decision by arguing that the whistle-blower had failed to produce in court the specific allegations on which the criminal complaint was based.
- The ECHR held that the German Courts were not allowed to require the whistle-blower to produce the allegations because the employer was a state-owned company and because the public prosecutors' office should have investigated the allegations more thoroughly.
- Because the ECHR awarded damages only in the amount of EUR 15,000, the effects of the decision appear to be limited.

Germany – Scope of Criminal Liability in the Healthcare Sector

- In the past, German criminal law considered doctors in private practice not to be agents of Germany's statutory health insurance schemes when issuing prescriptions for drugs or medical devices.
- Germany's Highest Criminal Court is expected to reverse this long-standing case law shortly.
- In such case representatives of pharmaceutical company can be found guilty of bribery if they grant benefits to physicians in return for the physician favoring a particular drug or medical device.
- A retro-active application of this expected change in the law cannot be excluded.

Germany – Bank Official Prosecuted for Improper Payments from B. Ecclestone

- A former member of the executive board of BayernLB (Gribkowsky) is currently being tried for having received EUR 33 million from Bernie Ecclestone (“Mr. Formula 1”).
- Gribkowsky was responsible for selling a minority stake in SLEC owning Formula 1 to CVC Capital Partners.
- According to the public prosecutor's office, Gribkowsky authorized payments to Ecclestone in the amount of USD 67 million. In what prosecutor’s consider a quid pro quo, Gribkowsky received USD 50 million for consultancy services from companies associated with Ecclestone.
- Ecclestone admitted having made the payments hinting that he was concerned that Gribkowsky shared information compromising Ecclestone with UK tax authorities.

Preparing for Enforcement: Anti-Corruption Compliance Programs

Components of an Effective Antibribery Compliance Program

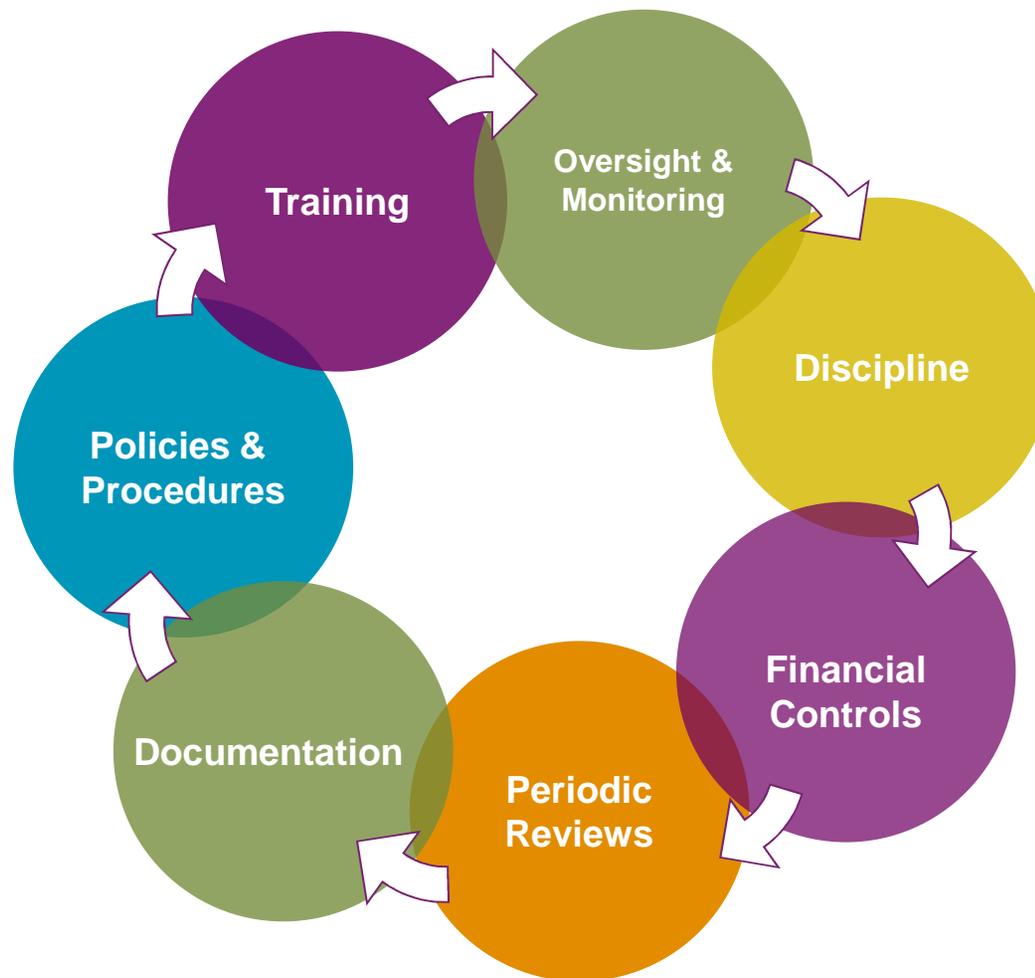
U.S. Sentencing Guidelines

- Code of Ethics
 - Reporting without fear of retaliation
 - Consistent enforcement through appropriate disciplinary mechanisms and incentives
 - Remediation and corrective action
- Senior management responsibility and oversight
 - Compliance officer
 - Reports to the board
- Communication and training
- Monitoring, auditing, and periodic evaluation
 - Risk assessment

UK Bribery Act Principles

- Proportionate procedures
- Top-level commitment
- Communication and training
- Due diligence
 - Risk assessment

Components of an “Effective” Compliance Program



Q&A



international presence

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