Global business today has a short list of focal points: 1) fast-moving competition; 2) pressure on growth and financial performance; and 3) the rigors of expansion into new markets worldwide. Along with these dynamics, the regulations that guide business have become far more numerous and complex. Regulatory authorities in various countries share information with each other more frequently than ever before, are increasingly aggressive about enforcement, and are adamant about their expectation of accountability for business conduct around the world. This is true not only in developed countries, but also in developing and emerging markets.

Lex Mundi member firms, in collaboration with their clients and in-house counsel members of the Lex Mundi Client Advisory Council, obtained information relating to the growing body of knowledge concerning anti-corruption jurisprudence that is developing worldwide to address and prevent fraud and corruption in international business. These resulting best practices are based on that information and on additional follow-up discussions and research materials provided by Lex Mundi member firm lawyers who agreed that the most important aspects of preventing and avoiding fraud and corruption involve:

- Understanding the regulatory enforcement environment
- Gaining management understanding to commit to and support anti-fraud and corruption initiatives
- Prioritizing the key risks to the business, the brand and the company’s reputation
- Maintaining compliance in light of the scope and complexity of global business growth
- Obtaining experienced advice when responding to compliance issues or threats
- Educating the workforce about the risks of wrongdoing
- Cultivating a company-wide culture of compliance

The objective of this best practices guide is to provide practical suggestions and steps to enable corporations and their law firm advisors to work together to develop effective compliance programs to avoid, detect and remedy wrongdoing, especially fraud and corruption. The guide first generally describes anti-corruption norms as articulated in codes of conduct, laws and conventions, and what they mean in terms of business practices. It then considers necessary oversight strategies such as controls, monitoring, reporting and audits. After recommending measures for investigating and resolving a compliance problem, the guide discusses how the compliance function could be structured in a company, followed by the internal communication and education required to promote compliance. It concludes by analyzing the difficult challenge of third-party fraud and corruption risk and provides advice on how to avoid successor liability for anti-corruption violations.
Anti-Corruption Norms

Definitions of Corruption and Fraud

Corruption and fraud are defined fairly consistently (and sometimes interchangeably) by key organizations:

“In broad terms, corruption is the abuse of public office for private gain. It encompasses unilateral abuses by government officials such as embezzlement and nepotism, as well as abuses linking public and private actors such as bribery, extortion, influence peddling and fraud. Though corruption often facilitates criminal activities such as drug trafficking, money laundering and prostitution, it is not restricted to these activities.”

Corruption is operationally defined as the misuse of entrusted power for private gain. Further differentiation exists between “according to rule” corruption and “against the rule” corruption. “According to rule” corruption is constituted by facilitation payments, where a bribe is paid to receive preferential treatment for something that the bribe receiver is required to do by law. “Against the rule” corruption, alternatively, is a bribe paid to obtain services the bribe receiver is prohibited from providing.

“...Active corruption or “active bribery” is defined as paying or promising to pay a bribe.”

“Fraud is generally defined in the law as an intentional misrepresentation of material existing fact made by one person to another with knowledge of its falsity and for the purpose of inducing the other person to act, and upon which the other person relies with resulting injury or damage. Fraud may also be made by an omission or purposeful failure to state material facts, which nondisclosure makes other statements misleading.”

Foreign Corrupt Practices Act (FCPA) and Other Standards

The main anti-corruption enforcement tool of the United States – the Foreign Corrupt Practices Act (FCPA) – has existed for over 30 years. The FCPA prohibits U.S. companies and individuals from bribing non-U.S. officials to obtain or retain business. For much of its history, enforcement of the FCPA was consistent but modest, averaging one or two cases per year; however, FCPA prosecutions have spiked dramatically in the last three years. Between 2006 and 2007 alone, the number of enforcement actions doubled.

There has been a striking increase in the size of penalties as well. In early 2008, for example, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) collectively levied a record $44 million (USD) in civil and criminal FCPA penalties, fines and disgorgement against Baker Hughes, Inc. In the two-month span from December 15, 2008, to February 15, 2009, companies agreed to pay over $1.3 billion (USD) to the U.S. government to settle FCPA charges. Siemens AG accounted for over half of this amount when it announced in December 2008 that it settled FCPA charges with the U.S. government for $800 million (USD).

For an account of the Siemens settlement see Appendix A. By January 2009, the Los Angeles Times reported that “Justice Department officials say enforcement of the FCPA is second only to fighting terrorism in terms of priority.”

Enforcement has been increasingly focused on individual prosecutions. In 2008, a number of individuals, including executives and other employees, faced prison sentences and multimillion-dollar penalties for FCPA violations. The DOJ and SEC are currently investigating companies and individuals in a wide variety of industries, including healthcare, pharmaceuticals, medical devices, transportation, entertainment, energy and manufacturing. The FCPA’s jurisdiction is far-reaching, and has enabled U.S. enforcers to aggressively pursue foreign entities and individuals that have comparatively limited contacts with the United States. U.S. enforcers have sent an unmistakable signal that companies and individuals that conduct business internationally must ensure that they comply with the FCPA.

While the FCPA is generally viewed as the international standard regarding bribery, international conventions such as the Organization for Economic Co-operation and Development’s (OECD) Convention on Combating Bribery of Foreign Officials, the Criminal Law Convention on Corruption, the Civil Law Convention on Corruption, and

3 Id.
5 http://definitions.uslegal.com
7 DOJ Press Release 08-1140, Don Lee, Avery Dennison Case,
the African Union Convention on Preventing and Combating Corruption have also been concluded. The United Nation's Convention Against Corruption, arguably the most important of the international conventions, was adopted by the United Nations General Assembly on October 31, 2003, and entered into force on December 14, 2005. Eighty-eight countries have ratified and are now parties to it. The UN Convention addresses corruption in both public and private sectors on a wide array of topics including bribery, illicit trading, money laundering and accounting standards.

The regulatory landscape has significantly changed, and the true impact for businesses is a shift in emphasis from detection of corruption to enforcement. This raises the pressure on companies to demonstrate compliance. An act of bribery in one jurisdiction may attract legal consequences halfway around the world. A practice viewed by one employee as normal may be corrupt according to the region’s laws and regulations. Employees must, therefore, know the regulations and follow them. The stakes for ignorance are high: company executives may face imprisonment; companies may face stiff penalties and fines for noncompliance or may be ruined entirely.

Organizations and Agencies Combating Corruption

Transparency International

Transparency International was founded in Germany in 1993 and is a non-governmental organization that was developed to fight global corruption. Transparency International has a presence in over 90 countries and is most widely known for its annual Corruption Perceptions Index (CPI), which has been published since 1995 to highlight awareness of countries that are perceived to have a serious problem with corruption. The organization also publishes the Bribe Payers Index (BPI), which evaluates leading exporting countries according to the country’s likelihood to bribe foreign officials.

World Bank

In 1996, the World Bank began an earnest effort to combat official corruption by launching over 600 programs designed to address global corruption. Between 1999 and 2007, the World Bank sanctioned 338 firms and individuals for fraud and corruption, and debarred consultants and contractors that it found to have engaged in corruption in connection with World Bank-funded projects. Subsequently, in 2006, the World Bank created a voluntary disclosure program that permits individuals and firms who have been guilty of misconduct to avoid public debarment through disclosing the misconduct, refraining from future misconduct and agreeing to participate in a compliance program.

Corporate Policies and Procedures

Law Firm and Client Partnering Best Practices

- Law firms can share with clients sample codes of conduct, ethics codes, and standard policies and procedures.
- Clients can ask their outside advisers to audit their processes and procedures to ensure that key risks to the company are covered.
- In each geographic market, clients can work with local law firms to adapt the codes of conduct and compliance processes to fit the local circumstances.

Corporate law departments spend a great deal of time and focus on reducing the risks of corruption and fraud in global business, and on other forms of corporate compliance. It is a demanding task in light of rapid global expansion and the very different cultures and business practices affected by regulation. The costs associated with ensuring compliance are high, and many corporate law functions are concerned that they do not have the resources or the management commitment they need.

Beyond the mammoth task of tracking and interpreting new regulations, in-house counsel have the challenge of educating the corporate workforce and its leadership about the issues and the very substantial risks. Law firms advising global companies are responding to this challenge by working alongside in-house counsel on training, auditing, reporting, investigations and other areas. All parties involved see continual room for improvement.

Most companies agree quickly on “doing the right thing,” but that is not enough. Companies need to take time to clarify

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Law Firm and Client Partnering
Best Practices

Clients can get support from their law firm advisors in reviewing existing controls to find elements to add or improve based on current regulations and the clients’ core businesses, and also to consider issues of attorney-client privilege.

Law firms often have examples of “whistleblowing” and hotline programs that they can share with clients.

Clients can seek advice from their outside law firms when reviewing their monitoring and reporting processes. Law firms working with clients on corruption and fraud issues can advise on key “hiding places” of wrongdoing and effective monitoring approaches.

what this means in a range of business situations, contexts and cultures. Emphasizing the “letter of the law” is not always helpful, as most employees do not understand it. Far more important is to emphasize the company’s core values and to consistently demonstrate how corporate culture and behavior support those values. Because the legal function cannot possibly ensure global compliance on its own, codes of conduct, standards, processes and procedures help to give managers and employees across the company a “script” to follow.

This means that companies need to have clearly articulated corporate standards. They also need policies, an ethics code, or business principles that give employees and the company’s business partners clear direction about:

- Basic rules, standards and behaviors expected regardless of geography or circumstance
- The company’s fundamental values and principles
- The company’s position on bribery, corruption and facilitation payments
- The company’s rules on competition and antitrust and how they affect commercial operations and transactions
- Policy and procedures for business entertainment and gifts
- Policy and procedures for political and other donations or grants
- Policy, process and procedures on conflicts of interest

Many companies find that once the core values and code of conduct are clear, it is helpful to select individual employees and partner with other organizations that share similar core values. The code of conduct should be distributed to every employee (in the local language). It should be easily accessible online on the company’s website.

Monitoring, Controls, Reporting and Audits

Law Firm and Client Partnering
Best Practices

Monitoring helps the company to understand how well controlled its compliance risks are and to make informed judgments about where it should spend its resources. It is a challenge to determine what to measure, how to evaluate effectively and efficiently, and how to report the results in a way that stimulates action.

Important to an effective program to prevent wrongdoing is an effective control framework. This should include internal controls such as:

- Clear written designation of authority and accountability for various issues
- Clear lines of reporting
- Effective accounting and financial reporting procedures that accurately reflect the company’s transactions, dealings and asset disposition

Written documentation of the company’s policies and procedures, formalized reporting responsibilities, descriptions of specific compliance controls, and testing methods for these procedures are extremely important. Without evidentiary proof, a company cannot demonstrate the existence or adequacy of its compliance program to the regulatory authorities.9

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Additionally, in large and complex businesses it is important to have structures in place so potential risks or compliance threats can be flagged and reported to those responsible, such as:

- A “whistle-blowing” policy that provides anonymity and protects the whistle-blower
- A hotline or helpline that provides employees with a safe way to raise concerns and have them investigated
- Special audit and investigative teams, closely supported by the legal and finance organizations as necessary

Those responsible for preventing fraud and corruption should work with business units to conduct audits and assessments to ensure that anti-corruption policies are being followed and the control framework is operating effectively. For example, there should be:

- Periodic audits or assessments to ensure that controls and policies are being complied with by employees and relevant third parties
- Monitoring that effectively evaluates whether compliance measures are cognizant of local practical issues and consistently adhere to regulations

### Investigations, Disciplinary Actions and Sanctions

#### Law Firm and Client Partnering Best Practices

- Clients should partner with experienced outside law firms on investigations and disciplinary actions as the compliance risk can be worsened (and new problems can arise) if the investigation or disciplinary action is not handled in compliance with complex laws and regulations.
- Law firms often have existing relationships with regulators and know the processes and procedures, enabling them to guide clients in developing and implementing a strategy to work most effectively with regulators when there is the possibility of an investigation.
- Coordination with Human Resources is very important in the investigation and disciplinary action process. It is thus wise for clients to work with the law firm advising them on labor and employment matters.

The control and reporting framework serves to identify and raise compliance risks or potential problems. Once these issues arise, the company must respond by investigating the facts, analyzing the legal exposure and resolving the issues.

Increasingly, corporations and the authorities that regulate them prefer that investigations be conducted by the company rather than the regulator, at least initially. Investigations require close coordination with other corporate functions, particularly Human Resources. Often the needs of the business are best met by retaining outside counsel to assist with, or lead, the investigation. Many outside counsel have broader experience and expertise in conducting internal corporate investigations than in-house lawyers or audit teams. In addition to this expertise they can bring objectivity, confidentiality, privilege and other benefits.

The following recommendations are suggested for internal investigations:

- Before you start, think through the objectives of the investigation and the actions that may be taken as a result...
of the findings, then plan the investigation in order to achieve the objectives.

- The findings and conduct of internal investigations should be made known to senior management and the Board, and leadership should have direct access to those conducting the investigation.
- The law department and internal audit should be involved in any internal investigation.
- For broader investigations that may involve more than one office or jurisdiction, it is wise to establish a centrally controlled cross-border investigative team.
- A system to effectively gather and analyze data (within the context of data protection regulations) is important in conducting investigations and to the overall control framework.
- External experts, such as forensic accountants or computer experts, should be utilized where necessary.
- If an investigation is being handled internally, it often is helpful to have reputable external lawyers, accountants and/or consultants provide quality control and present an external overview of the investigation to reassure various constituencies.
- Throughout the investigation it is important to review and discuss the specific areas of the investigation. Since investigations tend to involve enormous amounts of data passing among various companies in various countries, it is important to be collecting consistent information. This means agreeing on clear search terms with investigators.
- If the internal investigation is connected to a query from a regulatory authority, it is important to maintain a dialog with the authority throughout the investigation, sharing information, confirming the scope of the investigation and getting continuous input from the regulatory authority.

The response to risks or issues of noncompliance is essential to an effective anti-corruption and fraud program. This response involves disciplinary action or sanctions. Companies vary in their views on whether a “public hanging” is productive, but all agree that there must be a serious consequence for not following the rules of the company. Direct action must be taken, and the response should:

- Clearly demonstrate that noncompliance will not be tolerated and that breaches will be dealt with seriously
- Respond consistently to particular offenses to avoid the appearance of selective enforcement

- Have pre-established disciplinary measures and a process for breaches, such as dismissal, prosecution for fraud or bribery, recovery of assets, etc.
- Not permit exceptions
- Communicate breaches and their consequences to build trust in the process

Compliance Structure: Coordination With Other Business Functions and the Board of Directors

Law Firm and Client Partnering Best Practices

- Outside legal advisers can conduct workshops for the business units, highlighting the areas where similar industries have had fraud and corruption problems and suggesting measures to reduce the risk.
- It is critical for in-house lawyers to know the business strategy and operations in order to take part in key management meetings to prevent, detect and advise on potential risks.
- In-house lawyers must work closely with Human Resources on investigations and regulatory inquiries with advice from expert outside lawyers.

While compliance programs are typically guided by the legal and compliance functions, it is increasingly important that there be clear division of responsibility and accountability within the company for various aspects of compliance. Most global companies recognize that responsibility for compliance cannot rest with the legal function, but falls within the business function. Various corporate departments, such as Human Resources and Finance, play a critical role in the coordination between executive officers and the Board of Directors.

The functions in the company that must lead and coordinate efforts to reduce wrongdoing include:

- The C Suite (particularly Chief Executive Officer, Chief Financial Officer and Chief Operating Officer)
- Board of Directors
- Legal Function
- Compliance Function
Internal Audit
Risk Management Function
Accounting, Financial Controls, Treasury
Human Resources
Corporate Secretary
Tax
Corporate Communications, Government Relations
Corporate Strategy and Development

Lex Mundi member firms, their clients, and in-house counsel agreed that programs to reduce the risk of fraud and corruption cannot be mere overlays introduced exclusively by the legal or audit function, but must be incorporated fully into business functions. Business unit leaders must be trained in fraud and corruption compliance practices, with clarification of processes and accountability. Many business units assign individuals within the unit as compliance “champions” to assist in communication and detection.

A 2008 survey on anti-corruption compliance found that most companies expect internal audit to play a critical role in detecting and investigating risks. However, in some regions and primarily throughout Europe, nearly half of survey respondents said that an internal audit is not very, or not at all, effective at detecting wrongdoing. The in-house legal team, with the help of outside advisers, can help ensure that effective measures to reduce the risks of wrongdoing are built into business elements and processes, including due diligence, corporate structure, contracts and agreements, and compensation and incentives. Lex Mundi’s member firm for Spain, Uría Menéndez, has provided a useful checklist (attached as Appendix B) as a resource for analyzing compliance issues.

Areas where risk of fraud or corruption is typically greater, requiring special coordination between the legal and compliance structure and the business or corporate function, are:

- Agent and intermediary relationships, particularly related to sales
- Commissions on sales (particularly those contingent on awarding of contracts)
- Documentation of consulting services

- Operations or subsidiaries in emerging markets or countries that are rated low on Transparency International’s Corruption Perception Index (CPI)
- Public-sector contracts or business requiring government approvals and authorizations
- Travel, entertainment, gifts and charitable contributions

Communication: Promoting Compliance and Maintaining Vigilance

Law Firm and Client Partnering
Best Practices

- Clients should share their compliance communication plan with outside lawyers so that the lawyers understand the client’s priorities and are able to clarify and provide advice on ambiguous areas.
- Law firms often have examples of compliance communications distributed by other companies that can be helpful for clients looking for effective approaches.
- Outside lawyers can often effectively present the compliance risks to specific audiences in certain geographical areas.

Corporate counsel and Lex Mundi law firms work in information-heavy environments, and it can be challenging to find novel and effective ways to reinforce principles and fundamental values. However, communication consistently emerges as a central factor to achieving compliance and reducing the risks of wrongdoing. In-house lawyers, together with colleagues at all levels, must know how to spot compliance issues and know how to address them.

The following are recommendations for effective communications to reduce the risk of wrongdoing:

- Make sure that the communications and the overall messages about compliance are clear and concise, and are understood by their intended audience. Use examples and situations to de-mystify compliance and encourage an open dialog.

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11 Id.
Use multiple channels to distribute the message: print and electronic, presentations and conversations with leadership, published articles, teleconferences, multimedia, etc.

Repeat the messages in various ways, and keep it interesting. Avoid legal jargon and make sure to clarify what you are talking about and why it is important.

Make sure that the topic of compliance communication is adapted to local markets and cultures, and that the examples and situations used are practical and realistic in the local setting. This is time-consuming and necessary.

Use multiple persons to distribute the message: business leaders, middle managers, in-house lawyers, outside lawyers, trainers, operational employees, etc.

To foster continuous improvement, many companies use a combination of external and internal resources for education and training, including communication programs, hands on/in person training sessions, webinars, online issue specific and targeted training, e-mail blasts, individual certifications, and annual top down compliance reviews when compliance threats or breaches arise.

Responding to Third-Party Fraud and Corruption Risk

Law Firm and Client Partnering Best Practices

- A number of law firms have developed reporting formats and processes to help clients that need to gather more information about their third-party relationships in order to control risks. Clients can partner with their law firms to follow best-practices in this developing area.

- Managing third-party corruption risk has only recently become a major compliance concern. Clients’ outside law firms can present a review of the typical issues and problems and effective ways to address them to corporate counsel and business management.

As provided by Lucinda Low of Steptoe and Johnson, LLP, Lex Mundi member firm for Washington, D.C.,

“Under the U.S. Foreign Corrupt Practices Act (FCPA), the corrupt practices of a third party can lead to criminal responsibility on the part of a principal. ‘Third parties’ include individuals or companies in almost any type of relationship with the principal, including an agent, representative, consultant, distributor, joint venture partner, contractor, broker, finder or a professional service provider.

The principal can be legally responsible for corrupt practices committed by the third party in the course of the business relationship not only if the principal has actual knowledge of the third party’s practices, but if the principal is willfully ignorant of those practices. Such ‘head in the sand’ behavior can include the failure to address any ‘red flag’ that may arise during the course of the relationship.”
Under the FCPA, principals are expected to conduct pre-engagement due diligence on a prospective third party. The due diligence can be tailored to the level of risk presented by the third party, and customized to eliminate or adequately mitigate any red flags that may arise. Such red flags may be addressed in a variety of ways, including further due diligence, contractual safeguards against improper practices or other means that are responsive to the particular factual issues presented.

But the responsibilities of principals do not stop with engagement. Principals are expected to maintain oversight of the activities of a third party, and to respond to any red flags that are presented during the course of performance or during termination of the relationship. To that end, not only are companies well-advised to develop systems and procedures to help manage these risks (and to document the prophylactic steps taken), but relevant personnel should be trained to recognize red flags, how to respond to them, and where to go for assistance in dealing with them.

For a useful resource in identifying anti-corruption risks related to third parties, see Appendix D.

Experts agree that managing third-party corruption risk is one of the most difficult challenges for businesses today. Depending on the third party and the nature of its involvement, it is important to conduct due diligence, negotiate written agreements that include specific representations and warranties, and implement other means of financial controls.

Communications, training and other actions are important to change what may be the attitude of employees in certain cultures and geographies that assume third parties can be used to do what the company or its employees would never consider doing themselves.

Avoiding Successor Liability for Anti-Corruption Violations

Many anti-corruption problems arise during mergers and acquisitions. Because an acquirer may be liable for violations committed by its target under anti-corruption laws such as the FCPA, corporate counsel are increasingly insisting on anti-corruption due diligence. While discovering unexpected FCPA violations during due diligence can cause major headaches for the acquirer, it is far superior to facing FCPA exposure. In one of the most significant FCPA cases arising out of an M&A transaction, Titan Corporation entered into merger discussions with Lockheed Martin.\(^{12}\) As part of the merger agreement, Titan represented that it had not taken any action that would cause the company to be in violation of the FCPA. During due diligence, lawyers discovered that one of Titan’s agents had made improper payments in violation of the FCPA. In the wake of this discovery, and the subsequent disclosure to the government, Titan offered to reduce the purchase price by over $179 million.\(^{13}\) Despite Titan’s concession, Lockheed walked away from the deal, leaving Titan to settle charges with the U.S. government for a then-record $28.5 million.\(^{13}\) Bass, Berry & Sims, Lex Mundi’s member firm for Tennessee, has provided recommended steps for conducting anti-corruption due diligence. See Appendix E.

An effective anti-corruption program serves to deter the risk of wrongdoing, positively affects company culture, increases the company’s ability to interact with regulatory authorities and provides the company with remedial measures should they need to be undertaken quickly.\(^{14}\)

“By taking a strong stance on promoting transparency and fighting corruption, companies not only mitigate reputational risk, but they also live up to their responsibility as corporate citizens and can take an active part in the emerging solutions to some of the greatest issues facing the world today.”

Cobus de Swardt, Managing Director, Transparency International

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For more information please contact Sandra Jacobson, Senior Manager, Professional Development (713.335.0129, sjacobson@lexmundi.com).

Jan Karel van der Staay  
General Counsel  
Akzo Nobel NV

Eduardo Arbizu  
Director of Legal Affairs  
Banco Bilbao Vizcaya Argentaria, S.A.

Sebastian Biedenkopf  
General Counsel and  
Chief Compliance Officer  
Conenergy AG

Henri-Michel Siraga  
General Counsel  
Dassault Aviation

Marco Bollini  
General Counsel  
Exploration and Production  
Eni SpA

Iñigo Cisneros  
General Counsel  
Gamesa Corporación Tecnológica, S.A.

Philippe Sumeire  
General Counsel  
Groupe SEB

Alfonso González-Espejo  
Secretary of Board of Directors  
and General Counsel  
Grupo Lar

Denis Musson  
Group General Counsel and  
Company Secretary  
IMERYS

François Dugast  
Vice President and General Counsel  
JT International S.A.

Stephen Jones  
Deputy General Counsel  
SABMiller

Luzia Gomes Ferreira  
Director of Legal Department  
Sonae, SGPS, S.A.

Uzi Karniel  
General Counsel  
Teva Pharmaceutical Industries Ltd.

Christian Rau  
Chief Legal Officer  
The Linde Group

John Loughrey  
Head of Corporate Law  
Vodafone Group Services Ltd.

Teri Lynn McMahon  
Blake, Cassels & Graydon LLP, U.S., Georgia

Ross Booher  
Bass, Berry & Sims PLC, U.S., Tennessee

Bruno Arnould  
Bowman Gilfillan, South Africa

Carl Stein  
Chiomenti Studio Legale, Italy

Stefania Bariatti  
Chiomenti Studio Legale, Italy

Vittorio Tadei  
Cichitti & Partners, Italy

Bruno Quentin  
Cichitti & Partners, Italy

Philippe Xavier-Bender  
Cichitti & Partners, Italy

Gide Loyrette Nouel A.A.R.P.I., France

Eddie Meijer  
Gerard G. van der Wal  
Michiel Wesseling  
Houthoff Buruma N.V., Netherlands

Filipa Arantes Pedroso  
Joaquim Vieira Peres  
Morais Leitão, Galvão Teles, Soares da Silva  
& Associados, Portugal

Michael Molitoris  
Christian Pelz  
Dieter Schenk  
Nörr Stiefenhofer Lutz, Germany

Guy-Philippe Rubeli  
Christophe Rapeli  
Pestalozzi Lachenal Patry, Switzerland

Samuel A. Nolen  
Richards, Layton & Finger, P.A., U.S., Delaware

Tal Band  
Alex Hertman  
S. Horowitz & Co., Israel

Lucinda A. Low  
Steptoe & Johnson LLP, U.S., Washington, D.C.

Charles C. Coward  
Uri Ménendez, Spain
Siemens Settles U.S. Foreign Corrupt Practices Act Charges for $800 Million:
Largest FCPA Settlement Action in History; Highlights DOJ and SEC Determination to Aggressively Enforce FCPA

Key Points
- Siemens AG (“Siemens”) pled guilty to violating the Foreign Corrupt Practices Act (“FCPA”). Fines and disgorgement are expected to total approximately $800 million. Siemens must also submit to oversight by an independent compliance monitor.
- Siemens admitted that it violated the FCPA by failing to keep accurate books and records or to establish internal compliance programs to prevent FCPA violations. Though the FCPA also prohibits actual bribery, Siemens was not required to admit bribery violations.
- This case capped a banner year in enforcement of the FCPA, with significant prison sentences and fines for executives and companies in multiple industries. Companies and executives that do business internationally are on notice that the FCPA will be aggressively enforced in 2009.

The Siemens Charges
On December 15, 2008, one of Europe’s largest and most sophisticated conglomerates settled FCPA charges with the U.S. Department of Justice (“DOJ”) and U.S. Securities & Exchange Commission (“SEC”). This enforcement action is the latest indication that the U.S. government intends to aggressively apply the once little-used FCPA against businesses that operate internationally. The U.S. Siemens enforcement action was announced on the same date that the company announced that it had also reached a 395 million settlement with the German government to settle corruption charges. The U.S. Siemens action arose from the company’s alleged failure to prevent or adequately account for improper payments made to foreign government officials. The SEC alleged that Siemens paid bribes to secure contracts for medical equipment in China and Southeast Asia, telecommunications networks in Africa and transit equipment in South America, among others.

According to documents filed by the U.S. government, Siemens made over 4,200 improper payments totaling $1.4 billion. The charging documents alleged that Siemens employees mischaracterized bribes and used improper accounts to conceal the illegal payments from auditors. These actions, along with the chronic underfunding of the company’s anti-corruption compliance efforts, led to massive FCPA violations.

The DOJ stated that Siemens could have been required to pay up to $2.7 billion in U.S. penalties, and that only exemplary cooperation during the investigation reduced the penalties and disgorgement to $800 million. In addition to the monetary settlement, Siemens will be required to submit to extensive anti-corruption compliance monitoring by an independent firm.

The December settlement with the SEC and DOJ concluded a two-year U.S. investigation of the German conglomerate; however, the company remains under investigation for related charges in nearly a dozen other foreign countries in which it operates. In addition to the U.S. and German penalties, Siemens’ CEO Klaus Kleinfeld was forced to resign in the wake of the scandal, and German courts have issued prison sentences to other executives. In addition, Siemens has spent over 850 million during its own investigation of the charges, including paying more than 200 million to its U.S. attorneys.

What Is the FCPA and to Whom Does It Apply?
Though the FCPA has been around for decades, it was rarely enforced until recently, and therefore has garnered relatively little attention from many executives, general counsel and compliance officers. If you or your company is engaged in international business, whether directly or through agents, JVs or subsidiaries, you need to be aware of the FCPA.

The FCPA can be summed up in two general sets of provisions:
(i) Anti-bribery – these provisions prohibit directly or indirectly offering anything of value to any foreign official for the purpose of influencing the decision of that official to do anything that assists the offeror in the obtaining or retaining of business. The interpretation of the statutory language is exceptionally broad. For example, a “foreign official” can include physicians and other healthcare workers in countries with government-sponsored healthcare. “Anything of value” can include travel, meals, entertainment and offers of employment to relatives. Local custom is no defense.
(ii) Books and Records – these provisions require companies to “make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions...
and dispositions of the assets of the issuer. There is no materiality threshold. Additionally, companies must maintain a system of internal compliance controls that “provides reasonable assurances that transactions are executed in accordance” with GAAP.

The approximately 800 million in fines that Siemens has agreed to pay to the U.S. government stemmed from Siemens’ failure to maintain proper books, records and compliance controls. Siemens did not plead guilty to violations of the anti-bribery provisions of the FCPA.

The penalties that can be imposed for FCPA violations are severe, and can include:

(i) For companies – felony convictions, fines of up to $2,000,000 per violation, disgorgement, denial of export licenses, and debarment from doing business with the U.S. government. As in the Siemens case, companies will often be required to submit to an independent compliance monitor.

(ii) For individuals and executives – felony convictions, imprisonment up to five years and fines up to $100,000 per violation, along with disgorgement and debarment.

Companies and individuals also face substantial defense costs and the loss of reputation associated with being criminally charged under an anti-bribery statute.

Why Is the FCPA Relevant Now?

FCPA prosecutions have spiked dramatically in the last three years. Fines and prison sentences are also increasing. The record for fines has been broken each of the last three years, culminating in the record-setting Siemens settlement. The U.S. government has decided to aggressively enforce the FCPA and significant resources have been devoted to this end. The DOJ FCPA team that previously had the equivalent of only two full-time prosecutors now has as many as a dozen prosecutors dedicated to FCPA enforcement, supported by a special FBI FCPA unit.

Government investigators are using wiretaps, undercover agents and corporate “moles” to uncover anti-corruption violations. As public awareness of the FCPA grows, enforcers are receiving many more reports of alleged FCPA violations from whistle-blowers and competitors.

Recently, when enforcers have targeted one company in an industry, they have heavily scrutinized other actors in that industry. For example, nearly a dozen investigations have occurred or are ongoing in the medical devices industry.

Maintaining an FCPA Compliance Program that Adheres to Current DOJ Guidelines

The DOJ’s chief FCPA enforcer has remarked that “we have yet to bring a case where we’ve had a company come before us with a meaningful compliance program.” Companies that conduct business internationally should institute an FCPA compliance program consistent with DOJ guidelines.

An effective anti-corruption compliance program can significantly reduce FCPA exposure, both by avoiding or catching potential problems before they develop and by convincing prosecutors that a company is serious about its anti-corruption efforts. Moreover, as demonstrated by the $850 million spent by Siemens on its internal investigation, even simply defending an FCPA allegation can be enormously expensive. When dealing with the FCPA, the proverbial ounce of prevention can be worth several million pounds of cure.

Wallace W. Dietz
Bass, Berry & Sims PLC
315 Deaderick St.
Nashville, TN 37238
615.742.6276
wdietz@bassberry.com

Ross Booher
Bass, Berry & Sims PLC
315 Deaderick St.
Nashville, TN 37238
615.742.7764
rbooher@bassberry.com

This case summary is adapted from an article that first appeared on December 15, 2008, by Lex Mundi member firm Bass, Berry & Sims PLC.
Corporate Structure and Compliance: 10 Questions to Ask that May Have Implications for Groups of Companies With Compliance Issues

**Conduct standards**

1. Must the standards of conduct regarding corruption, bribery, fraud, etc., be the same across an international group of companies or should they vary depending on the legal requirements and accepted practices in the different jurisdictions where the group companies are present? Frequently, conduct standards in an international environment may need to be tailored to address different cultural and religious backgrounds and diverse legal frameworks.

**Codes of conduct, compliance programs and expenses associated with them**

2. Who should approve them at the level of the parent (senior management, chief executive officer, board of directors, etc.) and how should approval be documented?

3. Should the subsidiaries adhere to the codes of conduct and compliance programs approved by the parent, and how should adherence be documented?

4. Should minority shareholders in subsidiary companies have a say regarding the codes of conduct and compliance programs adhered to and implemented by the subsidiary and the expenses associated with them?

**Compliance structure and reporting**

5. Should a chief compliance officer be appointed or can other officers take on compliance responsibility?

6. To whom should the chief compliance officer (if any) report (audit committee, chief executive officer, chief legal counsel)?

7. To whom should the chief compliance officer in group companies report (board of directors of the subsidiary and/or chief executive officer, chief compliance officer, or audit committee of the parent)?

8. Is it acceptable for compliance functions to be performed at the level of subsidiaries with minority shareholders by officers employed by the parent company rather than by employees of the subsidiary, or does it trigger any concerns (independence, conflicts of interest, etc.)?

9. How does the compliance function relate to the control and internal audit functions, and is any interaction required?

**Intra-group circulation of compliance information**

10. Are there legal restrictions affecting the reporting of compliance-related information by group companies in an international environment (personal data protection legislation, etc.)?

Charles C. Coward
_Uría Menéndez_
Diagonal, 514
08006 Barcelona
Tel: +34934165185
Fax: +34934165160
E-mail: ccc@uria.com

Daniel Ripley
_Uría Menéndez_
Diagonal, 514
08006 Barcelona
Tel: +34934165586
Fax: +34934165511
E-mail: drs@uria.com

Javier Redonet
_Uría Menéndez_
Príncipe de Vergara 187
28002 Madrid
Tel: +34 91 586 01 54
Fax: +34 91 586 03 68
E-mail: jre@uria.com
10 Tips for Training Your Workforce on Competition Compliance

An antitrust compliance program will be successful if it prevents antitrust infringement, both at the EU level and in other jurisdictions where the company does business, and if it facilitates the early detection of violations that do occur with the possibility of reducing any fines and minimizing claims for damages in private lawsuits. This can only be achieved by educating the company’s representatives at all levels by making everyone aware of areas where sensitivity to antitrust issues are needed and by advising them to seek advice from counsel where appropriate.

The following guidelines may help to educate your workforce to comply with antitrust laws:

(i) **Develop a general antitrust compliance policy for the company** by clearly explaining what constitutes an antitrust violation and what specific types of behavior are prohibited. Remember, however, that the compliance program must not only avoid actual violations of antitrust laws, but also avoid creating or permitting the creation of files, records, documents, statements or conversations that might create the appearance of an antitrust violation.

(ii) **Tailor the compliance program to the company’s business, organization, personnel and culture.** A tailored program takes into account factors such as the particular issues likely to be faced by the company, the various jurisdictions in which the company operates, its market positions in its industry sector, the antitrust risk levels associated with their industry sector, and the internal structure of a group or company.

(iii) **Establish compliance standards and procedures to be followed.** If necessary, this may include adopting a code of conduct.

(iv) **Include in the program a clear statement of the company’s commitment to comply with the antitrust laws.** Establish a set of practical do’s and don’ts written in a simple, readily available language that every employee can understand.

The following is an example of a “do’s and don’ts” list:

- Don’t make an agreement with your competitors to stay out of each other’s markets.
- Don’t discuss prices with your competitors.
- Don’t exchange information that affects prices.
- Don’t participate in any meetings with competitors that might result in discussions of business practices and tactics, customers, costs, and prices, and be especially on guard at all times at trade association meetings.
- Don’t join forces with some of your competitors to the disadvantage of a select few competitors or customers.

If you have particular market power, add:

- Don’t purposely set prices below a measurable amount with the intention of bankrolling a mission to drive out a competitor or discourage a new entrant.
- Do not tie the sale of one product to another.
- Use exclusive dealing arrangements only if they are justified and necessary for your business.
- Charge all customers the same price, unless the cost of serving them is different.
- Consult with lawyers who specialize in antitrust law when specific problems or questionable activities occur.

(v) **Make sure that your employees understand the importance to consult counsel.** Even if they have been given a general overview of the antitrust law and the issues, employees must understand that antitrust law is very fact-specific and that there is no substitute for a lawyer who knows antitrust law and works based on the detailed facts unique to the company’s situation. To ensure compliance with antitrust laws, a company must have a proactive law department that is dedicated to practicing preventive measures.

(vi) **Put in place an active risk management.** A compliance program needs to be dynamic because an agreement or conduct might, on analysis, be considered compatible with competition law, but over time it may become critical or illegitimate. Active risk management for the company’s compliance program will allow for monitoring of all agreements and conduct necessary for assessment of compatibility with competition law. Moreover, risk management will also permit checking the company’s market position in its areas of activities so every time a triggering market share threshold is met the company will be in a position to adopt all the necessary measures to avoid abusing its dominant position.
(vii) **Implement the program by putting in place an active training process for employees.** The training process should include in-person training sessions by knowledgeable counsel and can be supplemented by video and internet training tools. The training should be as practical as possible, including case studies drawn from the company’s experiences. The instructions should also address the consequences of antitrust violations, both for the company and its managers and employees.

The following tools may be very useful:
- Role-playing interactive simulations
- Compliance handbooks
- Online training programs
- Antitrust news updates
- Quizzes and certificates of completion
- Databases to track compliance training

(viii) **Ensure senior management commitment and leadership of the program.** Participation by top management shows that compliance with the antitrust policy is fundamental for the company. A culture of competition must begin at the very top of the company. Senior management must value competition and must be clear in making that commitment known to employees.

(ix) **Monitor the effectiveness of the policy.** Take reasonable steps to ensure that the compliance policy is followed, including auditing to evaluate the effectiveness of the program and possibly detect violations at an early stage. Audits are an invaluable tool for identifying competition law violations (external lawyers conducting periodic audits can generally protect findings under attorney-client privilege). Audits should be conducted regularly and unannounced.

(x) **Provide incentives for compliance and impose disciplinary measures for violations.** Encourage reporting of possible misconduct and have a system in place to facilitate reporting of possible wrongdoing. For example, have a means for employees – anonymously and confidentially – to report suspected conduct and seek guidance about the legal implications of their own conduct.

If despite your efforts to ensure that the firm is complying with antitrust laws the company is nevertheless the object of an antitrust investigation or complaint, make sure you have a policy for dealing with antitrust procedure and to handle dawn raids.

Stefania Bariatti  
*Chiomenti*  
Via XXIV Maggio, 43  
00187 Rome, Italy  
Tel: 39.06.4662.2311  
Fax: 39.06.4662.2600  
stefania.bariatti@chiomenti.net
APPENDIX D

Set out below are some of the most common issues that arise in third-party relationships that involve dealings with government. These issues do not necessarily preclude a relationship, but are party- or transaction-specific issues that are ignored at the principal’s peril. Unless otherwise indicated, these issues pertain to the full range of third-party relationships described above.

Common Corruption Risks in Third-Party Relationships

The third party…

1. …is related to a key government official with discretionary authority over the company’s business in the host country (it’s all in the family) or is a close business associate of a key government official (the consiglieri).

2. …has a non-transparent ownership structure, often involving multiple layers or companies and offshore entities, so you can’t determine who ultimately owns it or benefits financially from it, or is reputed to have “silent partners” or “straw men” (prestanombres) holding an interest on behalf of a key government official.

3. …salts most or all of its money away in offshore jurisdictions known to maintain bank secrecy or that are tax or money-laundering havens (and there are still lots of them out there).

4. …prefers cash (a non-traceable instrument).

5. …likes to deal in lump sums and resists detailed accounting, either of time/activities or expenditures or other reasonable oversight measures.

6. …requests or produces inaccurate documentation, including overinvoicing, underinvoicing, misdescribed supporting documents or anything similar.

7. …insists on a success fee or requires extra funding (agents/partners) or a higher discount (distributors) to “overcome obstacles,” “get the business done,” make the third party whole for “unanticipated extra expenses” or something similar.

8. …relies primarily on influence to get things done or regularly offers inside information.

9. …supports the favorite charities of the spouse of the head of state (or it could be the political party), or habitually provides lavish gifts or entertainment.

10. …is not permitted by local law to engage in the relationship, or requires secrecy regarding the relationship, without any legitimate business reason for such secrecy.

Lucinda A. Low, Partner
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
Tel: 202.429.8051
Fax: 202.429.3902
llow@steptoe.com
www.steptoe.com
Tips to Avoid Successor Liability Under the FCPA

Companies considering acquiring or merging with other firms should consider taking at least the following steps during due diligence to decrease the risk of acquiring FCPA or other corruption-related liability:

■ Determine the jurisdictions in which the target has operated during at least the previous 5 years and understand the anti-corruption laws that apply in such jurisdictions;

■ Interview the target’s executives, as well as its compliance, accounting and sales personnel regarding the company’s anti-corruption compliance efforts and their awareness of the FCPA and the anti-corruption laws applicable to each jurisdiction in which the company has conducted business;

■ Review the target’s anti-corruption policies, internal controls, compliance program (including anti-corruption training program and certifications), and any past reports, allegations or investigations related to corruption;

■ Review the target’s third-party agreements, due diligence files, if any, for third-party agents and course of dealings with third-party agents to ensure they are consistent with the FCPA and the anti-corruption laws that apply in the jurisdictions in which the target has conducted business;

■ Conduct a forensic review of data room financials and the last 5 years’ auditors’ reports; and

■ Include representations and warranties in the merger agreement relating to FCPA and anti-corruption compliance.

Wallace W. Dietz
Bass, Berry & Sims PLC
315 Deaderick St.
Nashville, TN 37238
615.742.6276
wdietz@bassberry.com

Ross Booher
Bass, Berry & Sims PLC
315 Deaderick St.
Nashville, TN 37238
615.742.7764
rbooher@bassberry.com