



JONES DAY  
**COMMENTARY**

## FCPA AND INTERNATIONAL ANTICORRUPTION ENFORCEMENT

For the last several years, the Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) have taken an aggressive stance in the enforcement of the Foreign Corrupt Practices Act (“FCPA”), and this trend continued through 2011. By the end of 2011, the SEC and DOJ had brought 16 enforcement actions against corporations and 18 actions against individual defendants, collecting approximately \$508.6 million in corporate fines, penalties, and disgorgement. By comparison, 2010 was marked by 20 corporate enforcement actions, 16 individual enforcement actions, and a record-topping \$1.8 billion collected from fines, penalties, and disgorgement. Thus, although the number of FCPA enforcement actions against corporations and the amount of collections in 2011 was not as high as in the prior year, the increased number of actions against individuals made 2011 the second most active year for individual enforcement since the statute’s enactment in 1977.

The year 2011 was also an important year for anticorruption enforcement activity across the globe. Notably, the United Kingdom Bribery Act (“U.K. Bribery Act”) went into force on July 1, 2011, and several other countries are enacting or considering similar anti-bribery legislation.<sup>1</sup>

While 2011 did not have as many record-breaking statistics as 2010, the message is clear: Many countries around the world are taking a hard line on enforcing anticorruption measures at home and abroad. In this heightened regulatory climate, companies must identify high-risk activities while concentrating compliance efforts on mitigating potential violations of law. This *Commentary* identifies recent trends and developments in anticorruption enforcement and considers their impact on companies, focusing on:

- **Enforcement actions against non-U.S. companies.** The DOJ and SEC brought more cases against foreign companies than against U.S. companies in 2011.

- **Enforcement actions against individuals.** The DOJ and SEC continue to investigate and charge individual decision-makers, not just corporations, with violations of the FCPA. Individual investigations and charges have reached unprecedented levels.
- **Global anticorruption efforts undertaken by other countries.** The U.K. Bribery Act is in effect and has already been the basis for one successful prosecution. Further, many other countries are updating their criminal laws to reflect the developing global standards in anticorruption enforcement.

## ENFORCEMENT ACTIONS AGAINST NON-U.S. COMPANIES

In recent years, the DOJ and SEC have been targeting non-U.S. companies in addition to U.S. companies. Although the percentage of corporate actions against non-U.S. companies was lower than in 2010, the focus on anticorruption enforcement outside U.S. borders continued in 2011. Specifically:

- Five of the 16 corporate cases in 2011 involved non-U.S. companies, compared to the 11 of 20 in 2010. As of

December, nine of the top 10 monetary settlements in FCPA history involved non-U.S. companies.

- About 90 percent of DOJ FCPA-related collections in 2011 came from foreign companies or nationals, as did about 36 percent of SEC collections.

In addition to SEC and DOJ action, overseas enforcement activity has been driven, in part, by the Organisation for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Anti-Bribery Convention,” or “Convention”). The OECD Anti-Bribery Convention has established standards for anticorruption legislation and enforcement and has been signed by 39 countries. Enforcement of the Convention’s aims is monitored by Transparency International (“TI”), and TI’s findings are published in a yearly Progress Report. The 2011 Progress Report shows that for the first time in seven years, there was no increase in the number of signatory nations<sup>2</sup> or in the number of such nations considered to have active enforcement activities under the Convention. Indeed, the 2011 Progress Report indicates that only seven of the 38 signatory countries were judged to have active enforcement activities, as opposed to 16 countries in 2008.

### 2011 OECD Anticorruption Convention Progress Report Key Results

Category	Percentage of World Trade	Countries
Active Enforcement (7)	30 percent	Denmark, Germany, Italy, Norway, Switzerland, United Kingdom, United States
Moderate Enforcement (9)	20 percent	Argentina, Belgium, Finland, France, Japan, South Korea, Netherlands, Spain, Sweden
Little or No Enforcement (21)	15 percent	Australia, Austria, Brazil, Bulgaria, Canada, Chile, Czech Republic, Estonia, Greece, Hungary, Ireland, Israel, Luxembourg, New Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Turkey

Source: [http://www.transparency.org/news\\_room/in\\_focus/2011/oecd\\_progress\\_2011](http://www.transparency.org/news_room/in_focus/2011/oecd_progress_2011)

Given the decrease in active enforcement activities in other nations, the FCPA has become all the more important as a tool the U.S. has at its disposal to seek enforcement outside its borders. As long as other nations are perceived by U.S. authorities as not effectively combating corruption at home and abroad, chances are the FCPA will continue to be utilized against non-U.S. companies.

**Transparency International's Corruption Perceptions Index.**

When doing business abroad, U.S. and foreign companies

alike should always be aware of the degree of risk attributed to particular locations. Transparency International's annual Corruption Perceptions Index ("CPI") ranks countries by their perceived levels of corruption, based on expert assessments and opinion surveys. The following table shows the CPI ranking for selected countries in which some act of bribery has led to an FCPA prosecution, with a ranking of "1" reflecting the least perceived corruption and a ranking of "183" reflecting the most.

	2007 Ranking (out of 179 countries)	2008 Ranking (out of 180 countries)	2009 Ranking (out of 180 countries)	2010 Ranking (out of 179 countries)	2011 Ranking (out of 183 countries)
China	72	72	79	78	75
India	72	85	84	87	95
Indonesia	143	126	111	110	100
Italy	41	55	63	67	69
Mexico	72	72	89	98	100
Nigeria	147	121	130	134	143
Russia	143	147	146	154	143
Saudi Arabia	79	80	63	50	57
Taiwan	34	39	37	33	32
Turkey	64	58	61	56	61
Venezuela	162	158	162	164	172
Vietnam	123	121	120	116	112

**ENFORCEMENT ACTIONS AGAINST INDIVIDUALS**

In 2011, the government indicted a near record number of individuals under the FCPA, second only to 2009. Unlike corporations, individuals face the prospect of potentially long prison sentences. In addition, because the FCPA bars companies from paying for the criminal and civil fines imposed on their individual officers, directors, employees, agents, or stockholders (see 15 U.S.C. § 78ff(c)(3)), individuals may face ruinous penalties. Furthermore, the government can use the ability to prosecute individuals as leverage because individuals facing imprisonment may be more likely to assist the government in further investigation of their former employer and business partners in exchange for reduced punishment. By focusing resources on cases against individuals, the government may attract more cooperating witnesses and

generate even more FCPA investigations. In short, enforcement actions against individuals (including not only company employees who paid bribes but also executives who authorize or are willfully ignorant of the conduct) are a powerful tool to fight corruption.

In 2011, 18 cases were against individuals, up from 16 cases against individuals in 2010. Of those 18, 12 were against non-U.S. individuals, and three others held dual U.S. and foreign citizenship. The focus on foreign nationals does not necessarily indicate a trend, however, since all 12 of the non-U.S. individuals are from the same two cases, *Siemens*<sup>3</sup> and *Magyar Telekom*.<sup>4</sup> Nevertheless, the number of actions against individuals will continue to rise, especially given the growing public sentiment that individuals should be held accountable for their corporate acts.

Interestingly, the actions against individuals associated with the *Siemens* case were brought almost three years to the day after the Siemens Corporation settled its FCPA action. Thus, the implication for individuals whose companies are being investigated is clear: Just because a case against a corporation is over does not mean the individuals involved may not later be the subject of an investigation or, ultimately, an indictment.

This trend could have significant practical consequences, particularly in potential business deals or transactions. Threatened with personal exposure, corporate executives are more likely to show caution when choosing foreign business partners or agents. This will likely lead to heightened scrutiny of the risks of FCPA issues in the due diligence process preceding mergers and acquisitions. Furthermore, company leaders and counsel should be prepared to answer questions regarding the extent to which individual employees may be liable for corporate actions.

**2011 Punishments for Individuals.** The penalties imposed on individuals for FCPA violations can be severe:

- Joel Esquenazi was sentenced in October 2011 to 15 years in prison for his part in a scheme to bribe officials of Haiti's state-owned national telecommunications company. This is the longest sentence ever imposed in an FCPA case, almost doubling the previous record of 7.25 years handed down in 2010.
- Geoffrey Tesler was ordered to forfeit \$148,964,569 for distributing massive bribe payments on behalf of TSKJ consortium in Nigeria, the highest financial sanction ever assessed against an individual in an FCPA action.

## GLOBAL ANTICORRUPTION EFFORTS UNDERTAKEN BY FOREIGN COUNTRIES

The U.S. leads the global anticorruption fight, having filed more than 70 percent of the world's foreign anti-bribery prosecutions through July 2011; the United Kingdom's 5.1 percent comes in at a distant second.<sup>5</sup> Even so, the implementation of the U.K. Bribery Act provides a powerful new

enforcement tool for prosecutors, and the number of U.K.-led anti-bribery charges is expected to increase.<sup>6</sup> Other countries such as China, Russia, and India also are enacting or updating legislation designed to join the global fight against corruption.<sup>7</sup>

The U.K. Bribery Act came into force on July 1, 2011, and is designed to simplify and modernize the U.K.'s preexisting patchwork of common law and statutory offenses to prevent bribery. The Act increases penalties for "corrupt payments," a term that covers not only bribes to foreign public officials, but also offering, promising, requesting, accepting, or agreeing to receive a bribe. A commercial organization can be held guilty of failure to prevent bribery if an individual associated with the organization bribes another person, intending to retain business or obtain some kind of business advantage for the commercial organization. The Act's jurisdictional reach is similar to that of the FCPA, applying both to bribes made on U.K. soil by foreign companies and to those made overseas by U.K. citizens (including businesses, passport holders, and residents). Unlike the FCPA, however, the U.K. Bribery Act includes a safe harbor provision for companies that maintain an effective compliance program.

Prior to the U.K. Bribery Act's implementation, the Directors of Public Prosecutions and the Serious Fraud Office issued joint guidance setting out their approach to prosecutorial decision-making with respect to the new law. The law's implementation was delayed until after the publication of the guidance, which has provided prosecutors with valuable insight into how the British government believes certain provisions of the Act should be interpreted. For now, it is too early to tell whether courts will adopt the government's interpretations.

With the U.K. Bribery Act currently in force, Britain likely will join the U.S. in aggressively prosecuting corrupt extraterritorial acts by companies doing business within its borders. Such enforcement may develop slowly since the U.K. Bribery Act applies only to acts that took place after July 1, 2011. Even in its infancy, however, the U.K. Bribery Act has already resulted in one prosecution and sentencing: In November 2011, a London law clerk was found guilty of receiving bribes and sentenced to three years in prison.<sup>8</sup>

Furthermore, several of the world's fastest growing emerging markets—Russia, India, and China—have updated or are attempting to update their laws to reflect the developing global standards in anticorruption enforcement. In China, the government approved an amendment to the criminal law prohibiting bribery of foreign officials, thus broadening its anticorruption efforts beyond its own borders. The amendment, which took effect in May 2011, was modeled after United Nations, U.S., and U.K. anti-bribery laws. Similarly, Russia recently amended its criminal and administrative codes to increase monetary fines for commercial bribery and bribery of foreign government officials, resulting in a set of laws that may have even broader reach than the FCPA. In another showing of its commitment in the area, Russia became a signatory to the OECD Anti-Bribery Convention as of February 1, 2012. Finally, in India, a bill to create an independent anticorruption agency passed one house of Parliament and is awaiting reconsideration in the second house after 13 hours of debate in December 2011. In light of these developments, companies should expect a growing number of countries to pursue corruption charges based on conduct occurring within their borders. This trend could lead to conflicting standards and parallel proceedings, although that has yet to become a significant problem for international companies in this area of the law.

## FCPA COMPLIANCE

Companies operating internationally should expect 2012 to bring increasing scrutiny from enforcement authorities in the U.S. and abroad. Unfortunately, companies attempting to comply with the FCPA struggle with a lack of interpretive guidance. Therefore, companies must continue to rely primarily on the following for guidance:

- Deferred prosecution agreements;
- Nonprosecution agreements; and
- DOJ Opinion Procedure Releases.

Notably, the DOJ's Deputy Assistant Attorney General of the Criminal Division recently described Opinion Procedure Releases as the best source for companies with doubts about the propriety of specific transactions or business opportunities.<sup>9</sup> Moreover, the DOJ announced that it will be updating its "Lay-Person's Guide to the FCPA" sometime in 2012.

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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## ENDNOTES

- 1 U.K. Ministry of Justice, “The Bribery Act 2010—Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing” (section 9 of the Bribery Act 2010) (March 2011).
- 2 Russia became the 39th party on April 17, 2012.
- 3 *U.S. v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367-RJL (D.D.C. 2008); *SEC v. Siemens Aktiengesellschaft*, No. 08-cv-02167 (D.D.C. 2008).
- 4 *SEC v. Magyar Telekom, Plc. and Deutsche Telekom, AG*, No. 11-cv-9646 (S.D.N.Y. 2011).
- 5 See Trace International, Global Enforcement Report 2011, at 3, available at [https://secure.traceinternational.org/data/public/documents/Global\\_\\_Enforcement\\_\\_Report\\_\\_2011-67720-1.pdf](https://secure.traceinternational.org/data/public/documents/Global__Enforcement__Report__2011-67720-1.pdf).
- 6 See U.K. Ministry of Justice, “The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing” (section 9 of the Bribery Act 2010) (March 2011).
- 7 See Andrea Bonime-Blanc, “The Fight Against Corruption Goes Global,” *Foreign Affairs*, Feb. 14, 2012.
- 8 *R v Munir Patel* (Unreported, Southwark Crown Court, HHJ, McCreath, A, 18 November 2011).
- 9 R. Christopher Cook, Stephanie L. Connor, and Kevin M. Comeau, *Trends in FCPA and International Anti-Corruption Enforcement*, Jones Day In Print (March 2011), available at [www.jonesday.com](http://www.jonesday.com). The DOJ Opinion Procedure Releases are available at <http://www.justice.gov/criminal/fraud/fcpa/opinion>.

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