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# Foreign Corrupt Practices Act in Latin America Implementing FCPA Compliance Programs and Mitigating Legal Risks

## A Live 90-Minute Audio Conference with Interactive Q&A

### Today's panel features:

Kimberly A. Parker, Partner, **WilmerHale**, Washington, D.C.

James G. Tillen, Member, **Miller Chevalier**, Washington, D.C.

Thomas J. McCarthy, Partner, **Akin Gump Strauss Hauer & Feld**, Washington, D.C.

**Thursday, July 9, 2009**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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**Foreign Corrupt Practices Act in  
Latin America:  
Lessons from Recent  
Enforcement Activity**

**Strafford Publications Teleconference  
July 9, 2009**

Kimberly A. Parker

Wilmer Cutler Pickering Hale and Dorr

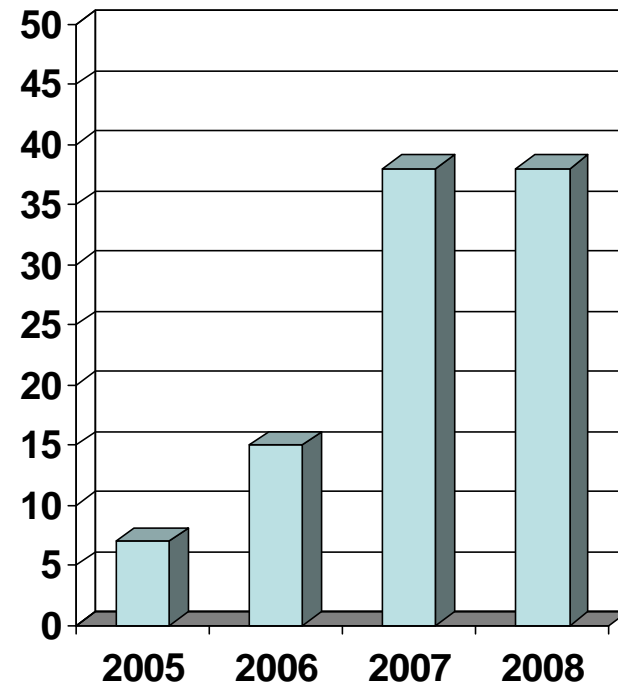




# OVERALL FCPA ENFORCEMENT TRENDS

- In recent years, companies have been subject to increasing risk exposure to the FCPA and other anti-bribery laws, sparked by aggressive US (DOJ/SEC) enforcement and increased vigor of enforcement in other countries.
- U.S. prosecutions have been increasing year after year.
- Unusual coordination between DOJ and SEC.

**Reported FCPA Proceedings: 2005-2008**





## OVERALL ENFORCEMENT TRENDS

***“U.S. Cracks Down on Corporate Bribes,”*** *Wall Street Journal*, May 26, 2009:

- Currently, at least 120 matters in the U.S. enforcement pipeline, up from 100 at the end of last year.
- “The crackdown under the Foreign Corrupt Practices Act, or FCPA -- a post-Watergate law largely dormant for decades -- now extends across five continents and penetrates entire industries, including energy and medical devices.”
- DOJ currently has a team of eight Federal Bureau of Investigation agents working on overseas bribery cases, up from five last year.



## OVERALL ENFORCEMENT TRENDS

- Increased prosecution of individuals.
- Heightened focus on the due diligence (or lack thereof) on third party business partners, including agents, JV partners, and acquisition targets.
- Increase in multi-jurisdiction investigations and cooperation among government authorities in different countries.
- Major increase in penalties.
- Companies also subject to internal compliance enforcement through the use of independent monitors at the company's expense.
- New U.S. Administration unlikely to change course.



## RECENT FCPA CASES INVOLVING LATIN AMERICA

### Enforcement Actions:

- Latin Node (April 2009): Honduras
- Siemens (Dec. 2008): Argentina and Venezuela
- Former Bridgestone manager (Dec. 2008): Argentina, Brazil, Ecuador, Mexico, Venezuela
- Alcatel execs (Sept. 2008 sentencing): Costa Rica
- Willbros (2008): Ecuador
- CCI execs (2008-2009): Brazil
- Paradigm (Sept. 2007): Mexico

### Announced Investigations:

- Pride (disclosed 2006): Mexico and Venezuela
- Swiss investigation of Alstom (Aug. 2008): Venezuela and Brazil



## LESSONS FROM RECENT CASES: SIEMENS

- Separate investigations and prosecutions by U.S. and German authorities working together to review Siemens operations in virtually all areas of its international business. U.S. criminal fine of \$450 million and civil disgorgement of \$350 million in profits. German criminal fine of an additional \$800 million for total pay-out of \$1.6 billion.
- Siemens AG and various subsidiaries pleaded guilty to violations of the anti-bribery, books and records, and internal controls provisions of the FCPA.
- Criminal information alleged systematic efforts to falsify books and records and knowing failure to implement internal controls allowed for over \$800 million in corrupt payments (and a total of \$1.4 billion in fraudulently recorded transactions) to foreign officials through various payment mechanisms including “cash desks” and “slush funds.”
- Siemens Argentina and Siemens Venezuela separately pleaded guilty to corrupt payments to government officials in connection with large government projects and licenses. Siemens Mexico was named in the SEC complaint for making payments to a highly politically connected business consultant knowing that some portion of the payment would be passed on to employees of a government-owned natural gas corporation.
- Individual prosecutions of officers and executives may follow.



## LESSONS FROM RECENT CASES: SIEMENS

- First time the DOJ has ever charged a company with a criminal failure to maintain adequate internal controls:
  - Merely adopted a “paper program;” critically absent was a sufficient “tone at the top.”
  - Failed to establish a “sufficiently empowered and competent” compliance department with sufficient staffing and resources.
  - Failed to appropriately investigate and respond to corruption issues in multiple markets.
  - Failed to discipline culpable employees
  - Lacked a mandatory FCPA training program until 2007.
  - Failed to implement sufficient accounting and finance controls.
  - Maintained extremely limited internal audit resources to support compliance efforts, which undermined improvements in policies and the periodic evaluation of the effectiveness of the company’s FCPA program.



## LESSONS FROM RECENT CASES: WILLBROS

### Continued Exposure from Use of Consultants:

- Criminal Information alleged that Willbros conspired with a hired consultant to make approximately \$300,000 in corrupt payments through that consultant to officials of state-owned PetroEcuador and its subsidiary, PetroCommercial, to assist in obtaining a gas pipe-line project.
- Willbros was also charged with tax fraud in Bolivia.
- As part of the settlement, Willbros paid \$32 million in penalties.
- Guilty plea by one individual; SEC settlements with others.
- Former executive charged and former consultant arrested in Houston airport in December 2008.



## MORE LESSONS FROM RECENT CASES

Cases highlight recurring risk areas in Latin America:

- Interactions with employees of state-owned entities in certain industries:
  - Petro-chemical (Willbros, Pride, Bridgestone, Paradigm)
  - Infrastructure/power/mass transit (Siemens, CCI, Alstom)
  - Telecom (Latin Node, Alcatel, BellSouth)
- Use of customs brokers
- Currency conversion
- Use of consultants and agents



# CONCLUSION

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# Doing Business in Latin America: FCPA Compliance Risk Factors

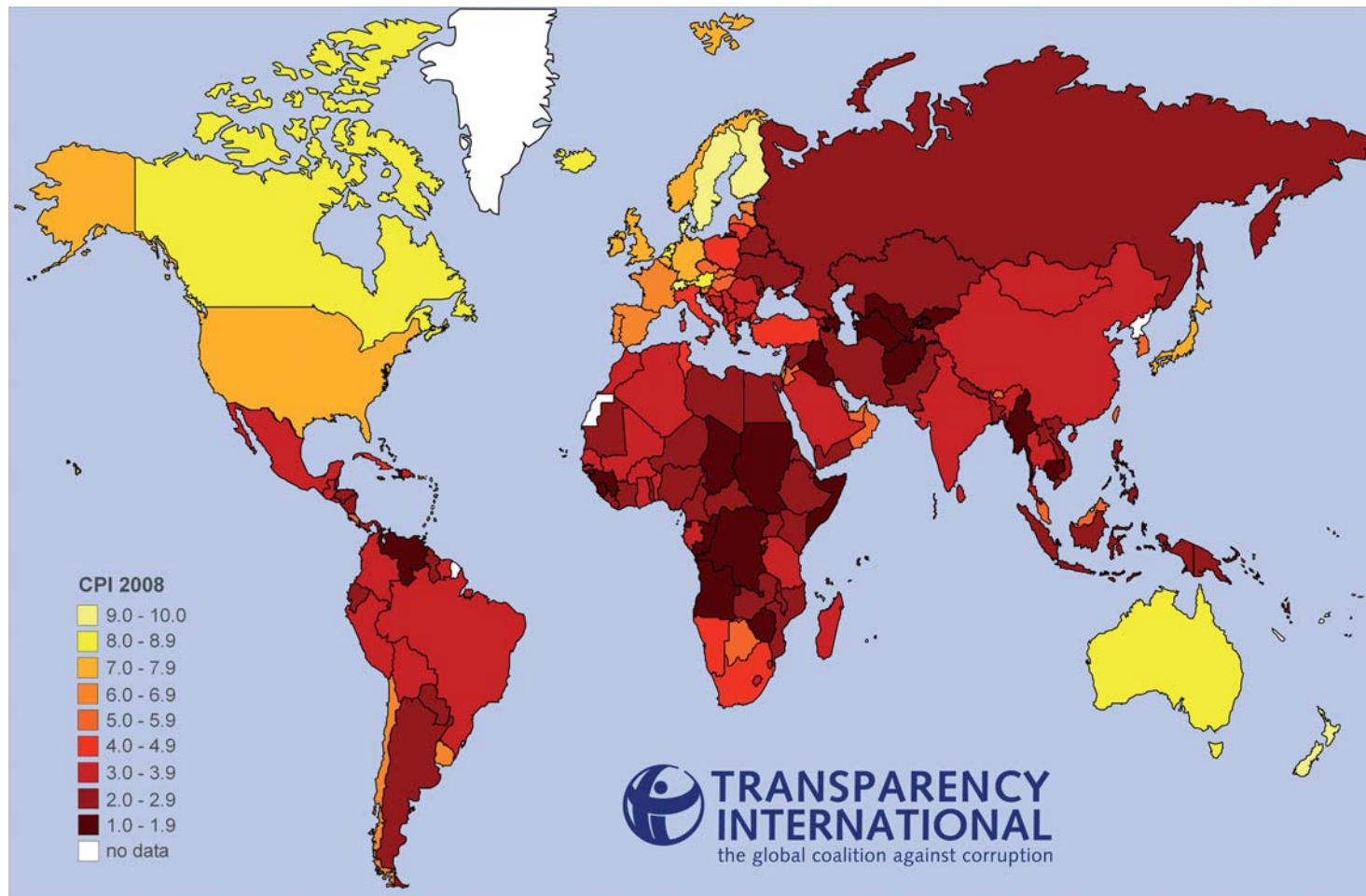
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# FCPA Risk Factors: Background

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- 2007-2009 enforcement actions included 9 countries;
- Multiple cases in Mexico, Venezuela, Brazil, Ecuador
- Wide range of industries:
  - Telecom
  - Infrastructure
  - Energy
  - Agriculture
  - Services

# FCPA Risk Factors: Background



# FCPA Risk Factors: TI Backgrounder

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- 32 Countries in Americas included in 2008 TI Index
  - 22 scored under 5 points (“serious corruption”)
  - 11 scored under 3 points (“rampant corruption”)
- Anti-corruption efforts have “stalled”
  - Progress made in conventions and legal instruments
  - Enforcement remains lacking
  - Corruption pervasive problem for low-income residents in particular

# FCPA Risk Factors: M&C 2008 Survey

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- 200 respondents in 7 countries, representing a mix of multinationals and region-based companies
  - 48% say corruption is a significant obstacle to doing business in the region
  - More than 80% believe local anti-corruption laws are NOT effective
  - 55% rank addressing corruption risk as a top priority
  - 77% have taken steps to address corruption risk
    - ❖ 55% of region-based companies, 82% of multinationals
  - 30% of respondents whose companies are clearly subject to the FCPA said they were not aware of it

# FCPA Risk Factors: Culture and Practice

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- Studies suggest particular corruption risk from:
  - Interactions with local police and municipal government officials (violations, permitting processes)
  - Interactions with judiciary
  - Interactions with customs officials
  - Mixed picture for legislative and executive branches, country-by-country
- “Facilitating payments” a perennial issue

# FCPA Risk Factors: Culture and Practice

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- Hosting and Entertainment Expectations
  - Carnival
  - Soccer “luxury” boxes
  - Formula One races
  - Midday meal
- Charitable donations
  - Risk varies by location, both across and within countries
- Political contributions
  - Parties continue to be #1 ranked source of corruption

# FCPA Risk Factors: Definition of Official

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- State ownership of key infrastructure and major industries varies across countries
- Partial privatization common, creating uncertainty as to “official” status – e.g., Petrobras
- Exercise of government role in companies ebbs and flows, further complicating picture – e.g., PDVSA

# FCPA Risk Factors: Third Parties

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- Many third parties have prior exposure to compliance due diligence requirements
- Generally favorable response to process, within usual limits
- Local culture and in some countries local law may restrict questions related to family members/political affiliations
- Transparency challenges in joint ventures and with some third parties; family-owned conglomerates

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**Foreign Corrupt Practices  
Act in Latin America:  
Best Practices for Mitigating Risk**

**Thomas J. McCarthy**

**July 9, 2009**



## Agenda

- Overview of Considerations in Latin America for Developing a Compliance Program
- Management Commitment
- Written Procedures
- Due Diligence of Third Parties
- Education and Training
- Monitoring
- Responding to Suspected Misconduct



## Overview

- General reasons for a compliance program
  - Prevent, detect, and address violations
  - Accounting provision internal control requirements
  - Mitigating factor in sentencing guidelines
  - Internal control requirements of Sarbanes-Oxley
- Obstacles faced by U.S. subsidiaries and foreign issuers in implementing U.S. standards in Latin America
  - Customary practice of accepting bribes
  - Skepticism regarding the efficacy of local law enforcement
  - Low opinion of the effectiveness of anti-corruption laws
  - Uncertainty whether FCPA applies and the risks of their activities under U.S. law
  - Variable political, cultural, and legal systems among Latin American countries



## Overview

- Considerations in developing a program
  - Identifying at-risk activities in your business
    - Business sector (telecomm, infrastructure, energy)
    - Government (including state-owned) contracts / customers
    - Regulatory intersection (tax, customs)
    - Use of third party intermediaries
  - Undertaking a self-assessment to identify risks if confidence is not high
  - Tailoring the program
    - Building/borrowing from existing global programs
    - Integrating with existing operating procedures to heighten the likelihood that they will be observed
    - Consistency with the IACAC and local law



## Overview

- Elements of a compliance program
  - Management Commitment
  - Written Procedures
  - Due Diligence
  - Education and Training
  - Monitoring
  - Responding to Suspected Misconduct



## Management Commitment

- Published policy
- Identification of responsible personnel
- Dedication of appropriate resources
- Communication
  - Updates and procedures to employees
  - Issues from employees
- Ensuring that the other elements of the program are in place



## Written Procedures

- Tailored to each business unit appropriately
- Easily available and understandable (Spanish and Portuguese versions)
- Fit within the current operations
- Identify responsible personnel for particular tasks
- Cover at-risk activities
  - Government customers
  - Facilitating payments
  - Travel, entertainment, gifts, samples
  - Use of third parties
  - Political / charitable contributions
  - Hiring of government & former government officials
- Repercussions for violations



## Due Diligence of Third Parties

- Appropriate due diligence of each business partner
- Verification of suppliers
- Maintain records
- Update due diligence during the course of a relationship, as appropriate
- Understanding of, and procedures for, red flags
- Combine with screening for compliance with other U.S. laws (OFAC specially designated narcotics traffickers)



## Due Diligence – Contractual Provisions

- Business partners should be bound to comply with the same standards as the business compliance program
- Violations should have serious consequences, including termination of contracts
- Indemnification and warranties/representation provisions are a must
- Audit provisions, training commitments, and certifications are also preferred



## Due Diligence – Red Flags

- Business setting
  - Transactions in a country with a corrupt reputation
  - High risk industry
  - Weak corporate governance
  - No code of conduct
  - Lack of cooperation
  - Poor controls over disbursements
  - Lack of documentation / transparency
  
- Business relationships
  - High-level of interaction with foreign government
  - Employees lack requisite skills
  - Favorable treatment of one supplier over another
  - Political contributions, donations or other lobbying activities
  - Family or business ties to relevant foreign public officials
  - Excessive or cash-only payment terms
  - Use of JVs without control



## Education and Training

- Attendance and participation by management
- All applicable employees, such as those who deal with foreign government officials and business partners
- Significant or at-risk foreign business partners
- Company circulates updates to the law and compliance procedures
- Maintain records



## Monitoring

- Review transactions
- Update procedures
- Maintain records
- Audit accounts
- Annual certification to be completed by each employee
- Formal and informal communication channels among internal audit, security, and compliance personnel
- Accounting controls
- Quarterly reports by departments and compliance officials



## Responding to Misconduct – Internal Reporting

- Reporting policy for employees aware of a possible violation
- Investigation procedures following reports of possible violation
- Tailor program to Latin American country
  - Determine local complaint procedures
  - Identify whether local laws exist that protect whistleblowers in both the public and private sectors
  - Assess efficacy of hotlines given the local history of repression or abuse



## Responding to Misconduct – Internal Investigations

- Analyze red flags or reported violations
- Ensure adequate resources dedicated to resolution
- Create record of issue/resolution
- Undertake remedial action to enhance safeguards
- Engage outside assistance (consultants or counsel) as warranted
- Consider whether voluntary self-disclosure is appropriate



## Responding to Misconduct – Voluntary Self-Disclosures

- Voluntarily reporting potential violations to the U.S. government can result in significant mitigation of penalties
- A company must disclose before the government begins an investigation
- The company should seek legal counsel to help assess potential risk exposure and the agencies (U.S. and foreign) to which it would disclose