

Compliance Risks for Global Energy Investors

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A close-up photograph of a hand holding a thick stack of US dollar bills. The bills are fanned out, showing various denominations. The hand is positioned in the lower right, with fingers gripping the stack. The background is a soft, out-of-focus grey. Overlaid on the center of the image is the title text in a large, dark serif font.

An Overview of the Foreign Corrupt Practices Act ("FCPA")

A Brief Overview of the FCPA

The Foreign Corrupt Practices Act was enacted in 1977 in the wake of reports that numerous U.S. businesses were making large payments to foreign officials to secure business.



- Anti-Bribery Provisions: The FCPA prohibits giving or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.
- Accounting Provisions: The FCPA also requires publicly traded U.S. companies to maintain accurate “books and records” and reasonably effective internal controls.

Definition of “Foreign Official”

The FCPA prohibits corrupt payments to “foreign officials,” which is expansively defined to include:



- Any officer or employee (including low-level employees and officials) of a foreign government or any department, agency, or instrumentality of the government, which U.S. regulators have construed to include employees of government-owned or government-controlled businesses and enterprises.
- Officers and employees of public international organizations, such as the United Nations, World Bank or other international financial institutions, the Red Cross, and others.
- Party officials and political candidates.
- Members of royal families.

Criminal Penalties and Enforcement Under the FCPA

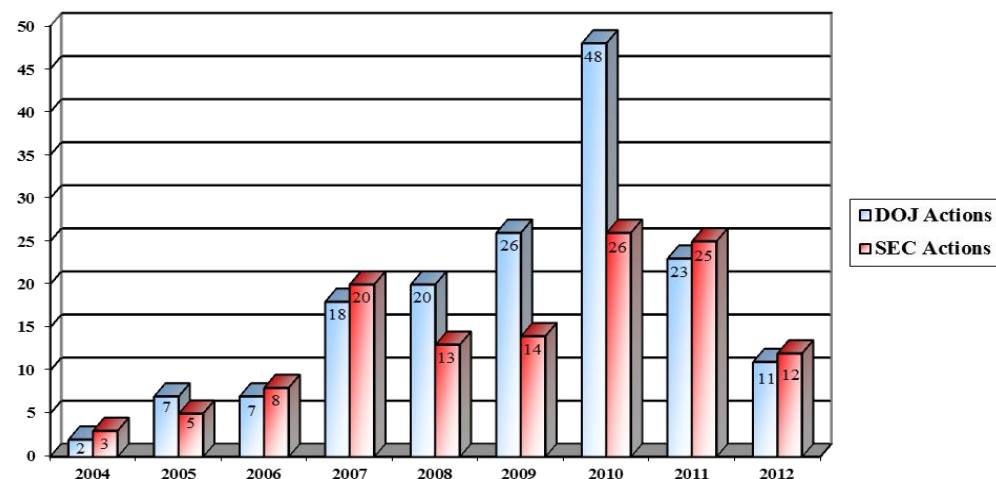
Anti-Bribery Provisions

- **Corporations:** Criminal penalties include a \$2m fine *or* twice the pecuniary gain or loss, and possible suspension and debarment by the U.S. government.
- **Individuals:** Criminal penalties include up to five years' imprisonment, *and* a \$250,000 fine *or* twice the pecuniary gain or loss.

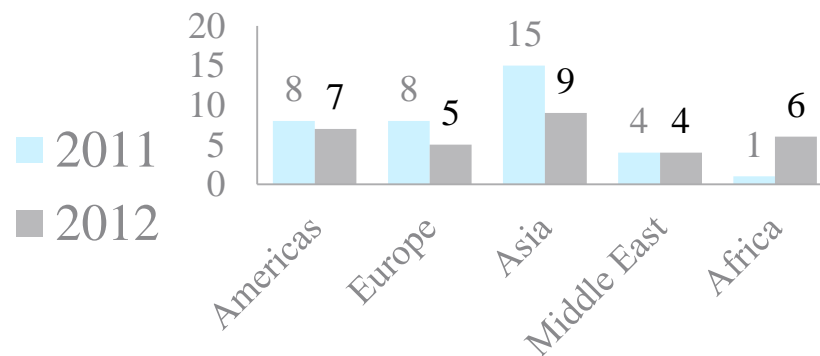
Books-and-Records Provisions

- **Corporations:** Criminal penalties up to a \$25m fine.
- **Individuals:** Criminal penalties include up to 20 years' imprisonment, *and* a \$5m fine.

Number of FCPA Enforcement Actions Per Year

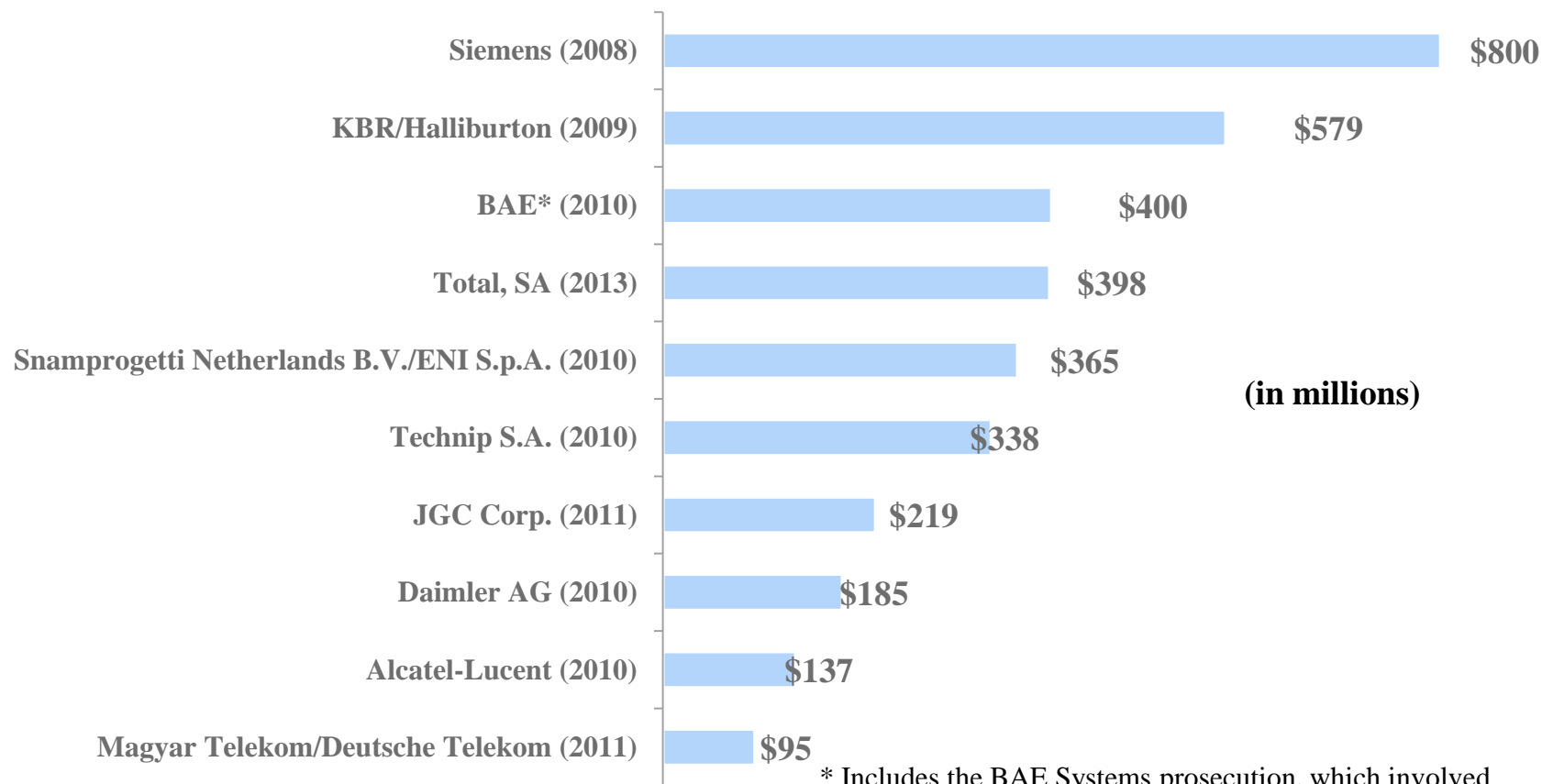


FCPA Enforcement Actions by Region (2011-2012)



Recent Blockbuster US Enforcement Actions

Eight of the top 10 monetary settlements in FCPA history were reached in 2010 to 2013.



* Includes the BAE Systems prosecution, which involved international bribery but did not include any FCPA charges.

Increasing Overlap by Regulators in Multiple Jurisdictions

Enforcement actions are often brought in more than one country.

- Examples of parallel enforcement actions resulting in penalties, fines, and settlements in multiple jurisdictions:
 - **Snamprogetti/ENI** (USD 365 million to DOJ and SEC; USD 32.5 million to Nigerian government).
 - **JGC Corporation** (USD 218.8 million to DOJ; USD 28.5 million to Nigerian government).
 - **Siemens** (USD 800 million to DOJ and SEC; USD 569 million to Munich Prosecutor; USD 46.5 million to Nigerian government; USD 336 million to Greek government; USD 100 million to World Bank Group).

The Energy Industry: An Enforcement Target?

The energy industry's global activities are highly visible to the U.S. regulators.

- Energy companies do business in markets considered to be at the highest risk for bribery and corruption.
- Local governments often control the energy sector.
- Energy companies often utilize foreign agents or consultants who handle a number of “on-the-ground” transactions, increasing the risk of illegal activity.
- Energy companies routinely move products, equipment and employees across country borders.



Recent Energy Industry FCPA Enforcement Actions

- **Parker Drilling (2013)**
- **Keyuan Petrochemicals (2013)**
- **Tyco Int'l Ltd. (2012)**
- **Bridgestone (2011)**
- **Maxwell Technologies (2011)**
- **JGC Corp. (2011)**
- **Panalpina (2010)**
- **ABB Ltd. (2010)**
- **Pride International Inc. (2010)**
- **Innospec, Inc. (2010)**
- **Mercator Corporation (2010)**
- **GlobalSantaFe Corp. (2010)**
- **KBR/Halliburton (2009)**
- **Control Components Inc. (2009)**
- **Helmerich & Payne Inc. (2009)**
- **Willbros Group, Inc. (2008)**
- **Siemens (2008)**
- **Misao Hioki (2008)**
- **Paradigm B.V. (2007)**
- **Baker Hughes Inc. (2007)**
- **Statoil ASA (2006)**

Recent Energy Industry FCPA Enforcement Actions

Total, S.A. (2013): In fourth-largest FCPA settlement ever, French oil giant Total S.A. agreed in May 2013 to pay \$398 million in penalties and disgorgement to settle charges of paying at least \$60 million in bribes to an Iranian official to gain access to oil and gas fields in Iran. Total also charged by the French enforcement authorities for violations of French laws.

Parker Drilling (2013): Worldwide drilling services and project management firm agreed to pay approximately \$15.9 million in fines and penalties to settle charges of authorizing improper payments to a third-party intermediary in order to entertain Nigerian officials involved in resolving the company's customs disputes. Stemmed from the DOJ's Panalpina action.

Keyuan Petrochemicals (2013): A China-based petrochemical company and its former CFO agreed to pay more than \$1 million to settle charges of accounting and disclosure violations involving the use of off-book accounts to provide gifts and cash payments to Chinese government officials. Keyuan is a China-based company that became a US issuer through a reverse merger with a US-based shell company.

Maxwell Technologies (2011): SEC charged the energy-related products manufacturer for making repeated bribes to Chinese government officials to obtain business from several state-owned entities. San Diego-based Maxwell agreed to an SEC settlement of more than \$6.3 million as well as an \$8 million criminal penalty.

Panalpina (2010): Global freight forwarding company and five oil and gas service companies and subsidiaries agreed to pay \$156,565,000 in criminal penalties, plus civil disgorgement, interest and penalties totaling approximately \$80 million, in relations to allegations of bribery in the oil field services industry in order to circumvent local rules and regulations relating to the import of goods and materials.

Cannot “Just Look the Other Way”

In 2009, Dooney & Bourke founder Frederick Bourke was convicted for conspiring to violate the FCPA

Bourke’s *business partner, Viktor Kozeny, allegedly paid millions of dollars in bribes* to induce the government of Azerbaijan to privatize its state-owned oil company.

- Bourke was *aware of Kozeny’s reputation*
- Bourke was *aware of the pervasive corruption* in Azerbaijan
- Kozeny’s attorney testified that *he told Bourke about the nature of the bribery scheme*
- Bourke contacted his attorneys to *discuss ways to limit his potential FCPA liability* and to *voice concerns that Kozeny was paying bribes*
- Bourke *created American advisory companies to shield himself and other American investors from potential liability* for payments made by Kozeny in violation of the FCPA
- Bourke’s attorney *advised Bourke not to “just look the other way”*

Cannot “Just Look the Other Way”

In December 2011, the Second Circuit affirmed Bourke’s conviction under the FCPA because he consciously avoided the truth

Even if Bourke had *no actual knowledge* that Kozeny was bribing Azerbaijan officials, ***“a rational juror could conclude that Bourke deliberately avoided confirming his suspicions”*** of bribery

- It was sufficient that the finding of conscious avoidance was **“supported primarily by circumstantial evidence.”**
- Moreover, **“this same evidence may also be used to infer that Bourke actually knew about the crimes.”**

There was “ample evidence that Bourke had serious concerns about the legality of Kozeny’s business practices and worked to avoid learning exactly what Kozeny was doing.”

— Second Circuit, *United States v. Kozeny* (2011)

Effective Due Diligence & Compliance Controls

In November 2012, the DOJ and the SEC released a 120-page FCPA “Resource Guide,” which makes clear that rigorous and extensive pre-acquisition due diligence and implementation of a robust compliance program are critical. The Resource Guide considers "extensive due diligence" to include the following steps:

- Having the acquiring company's legal, accounting, and compliance departments review the target company's sales and financial data, its customer contracts, and its third-party and distributor agreements;
- Performing a risk-based analysis of the target company's customer base;
- Performing an audit of selected transactions engaged in by the target company; and
- Engaging in discussions with the target company's general counsel, vice president of sales, and head of internal audit regarding all corruption risks, compliance efforts, and any other major corruption-related issues that have surfaced at the target company over the past ten years.

Effective Due Diligence & Compliance Controls

The Resource Guide provides that companies may receive “meaningful credit”—including a possible declination—when they undertake five actions in connection with merger and acquisition transactions:

1. Conduct thorough risk-based FCPA and anti-corruption due diligence on potential targets;
2. Ensure that the acquiring company's code of conduct and anti-corruption compliance policies and procedures apply as quickly as is practicable;
3. Train the directors, officers, and employees of newly acquired businesses or merged entities, as well as agents and business partners (where proper), on relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures;
4. Conduct FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and
5. Disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities.

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