



EVERYTHING MATTERS

The Foreign Corrupt Practices Act:

Current United States
Enforcement Trends You Should
Know About

Brian S. Chilton

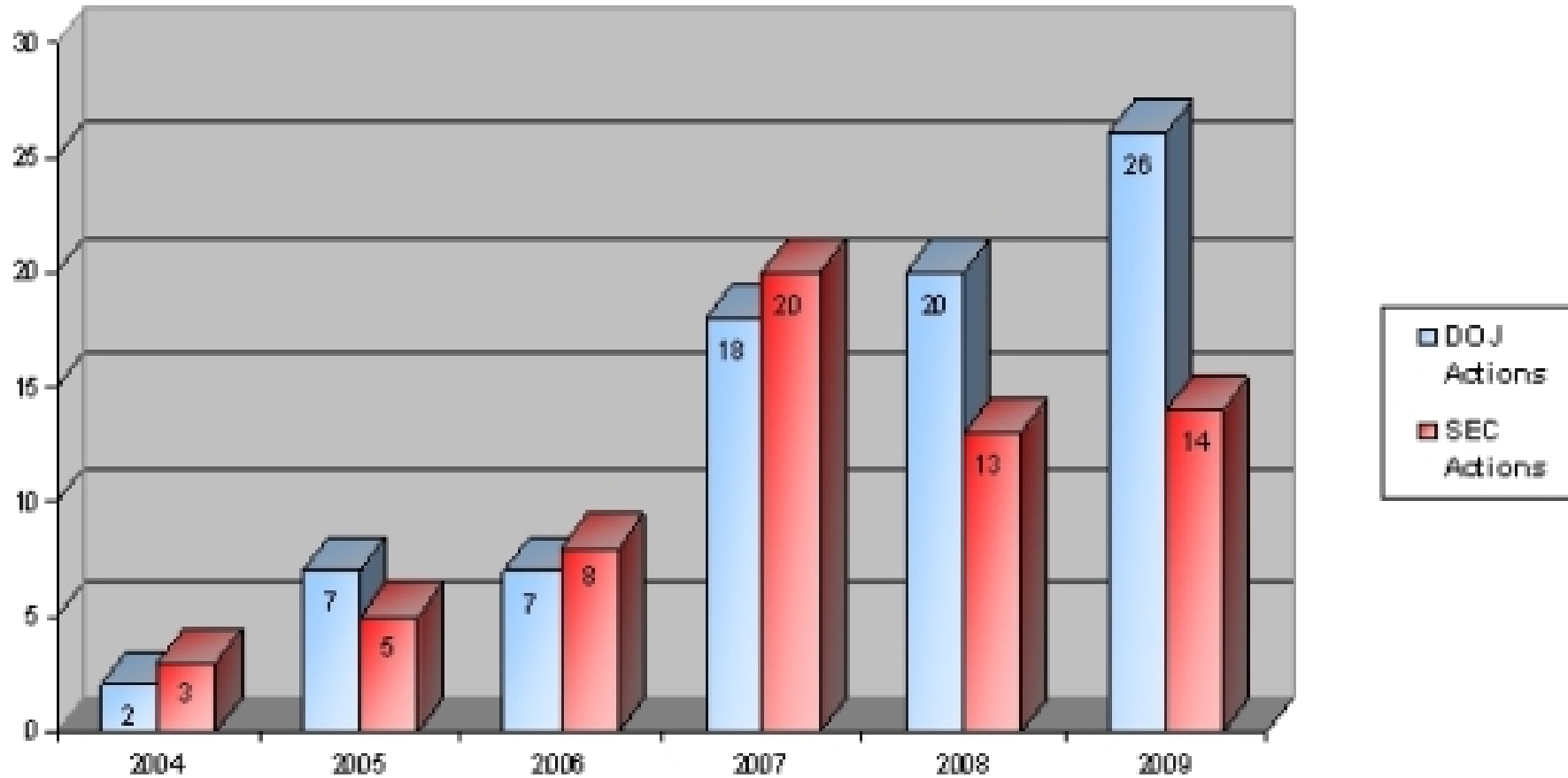
What is the FCPA?

EVERYTHING MATTERS

- Makes it illegal for any U.S. person, U.S. company, issuer, anyone acting on their behalf (whether a U.S. person or not), or anyone on U.S. soil to bribe a foreign official or foreign political party for the purpose of obtaining or retaining business.
- Imposes accounting and record-keeping requirements on companies registered on any U.S. stock exchange, including foreign companies, and on any companies who are required to file reports pursuant to the Securities Exchange Act.

Trend No. 1: Explosion of FCPA Prosecutions

EVERYTHING MATTERS



Explosion of FCPA Prosecutions

EVERYTHING MATTERS

- Long-term Trend: The Department of Justice (“DOJ”) has prosecuted more FCPA actions in the last two years than in the preceding 20 years
- Short-term Trend: Combined DOJ and SEC prosecution of FCPA actions is at least 5 times greater in the 2007-2009 timeframe than in any of the prior 3 years

Explosion of FCPA Prosecutions Will Continue

EVERYTHING MATTERS



“At least 120 companies are under investigation, according to Mark Mendelsohn, a deputy chief in the Justice Department division overseeing the prosecutions, up from 100 at the end of last year. . . . Today, companies across the U.S. are working to figure out if they are at risk. In some instances, companies have called the Justice Department to come clean, in hopes of obtaining leniency. ‘If we call them before they call us, it's not where they want to be,’ Mr. Mendelsohn said. . . . Mr. Mendelsohn currently has a team of eight Federal Bureau of Investigation agents working on overseas bribery cases, up from five last year.”



Source: “U.S. Cracks Down on Corporate Bribes” *The Wall Street Journal*, at page A1 (May 26, 2009)



Explosion of FCPA Prosecutions Will Continue

EVERYTHING MATTERS



Lanny A. Breuer, Assistant Attorney General, Criminal Division, Remarks to the National Forum on the FCPA (Nov. 17, 2009)

- “I want to be clear: the majority of our cases do not come from voluntary disclosures. They are the result of pro-active investigations, whistleblower tips, newspaper stories, referrals from our law enforcement counterparts in foreign countries, and our Embassy personnel abroad [W]e will continue to focus our attention on areas and on industries where we can have the biggest impact in reducing foreign corruption.

Trend No. 2: Big Corporate Penalties

EVERYTHING MATTERS

- **Total penalties imposed against companies in FCPA matters enforced by DOJ amounted to:**

- \$17,250,000 in 2005;
- \$28,000,000 in 2006;
- \$59,932,363 in 2007;
- \$497,600,000 in 2008; and
- \$817,300,000 in 2009.



- **The corresponding amounts for civil penalties, disgorgement and prejudgment interest in parallel SEC enforcement actions totaled:**

- \$32,817,000 in 2005;
- \$67,779,000 in 2006;
- \$95,971,000 in 2007;
- \$398,427,000 in 2008; and
- \$386,363,000 in 2009.



Trend No. 2: Big Corporate Penalties

EVERYTHING MATTERS

- Penalties Have Become Much More Severe Than In The Past for Similar Levels of Conduct

Compare May 2009

- Novo Nordisk – Danish pharmaceutical company paid \$1.4 million in bribes
 - \$9 million criminal penalty
 - \$3,025,066 in civil penalties and
 - \$6,005,079 in disgorgement

To May 2005

- DPC (Tianjin) Co. Ltd. – Chinese subsidiary of US medical device manufacturer paid \$1.6 million in bribes
 - \$2 million criminal penalty
 - \$2.8 million in disgorgement

Trend No. 3: Bringing the FCPA Into the Mainstream of Prosecutorial Techniques

EVERYTHING MATTERS



Increasingly FCPA crimes are being investigated and charged by DOJ using standard criminal investigative techniques and strategies previously reserved for drug conspiracies and organized crime



Use of Standard Federal White Collar Investigation and Charging Techniques Not Previously Used in FCPA Investigations

EVERYTHING MATTERS

- February 2009. Jeffrey Tessler, a UK solicitor, and Wojciech Chodan, former sales VP and consultant for Halliburton, indicted for alleged roles in a Nigerian gas pipeline – indictments came shortly after KBR/Halliburton settled corporate charges
- April 2009. Antonio L. Perez, former controller for Miami-based Terra Telecommunications, and Juan Diaz, president of a shell company used to funnel bribes, pleaded guilty to conspiring to violate the FCPA with bribes to Haiti Teleco officials. Six months later, additional charges were filed by DOJ against Joel Esquenazi and Carlos Rodriguez, respectively Terra's president and executive vice president, and Marguerite Grandison, the president of another shell company allegedly used to funnel bribe payments from Terra to Haiti Teleco.
- Even more noteworthy from the Haiti Teleco investigation, DOJ has also, for the first time, charged Robert Antoine and Jean Rene Duperval, successive holders of the office of Haiti Teleco's Director of International Relations, with participating in a money laundering conspiracy and, in Duperval's case, substantive money laundering charges, arising from the movement of the bribe payments through U.S. financial institutions

Use of Standard Federal White Collar Investigation and Charging Techniques Not Previously Used in FCPA Investigations

EVERYTHING MATTERS

- July 30, 2009. Ousama M. Naaman, a dual citizen of Canada and Lebanon was arrested by German authorities at DOJ's request, and indictment unsealed charging him with paying \$150,000 in bribes to Iraqi Oil Ministry officials in 2006-2007
- November 17, 2009. Lanny Breuer, Assistant Attorney General of DOJ's Criminal Division, announced that he has directed all Criminal Division prosecutors to determine in every case whether it is appropriate to seek forfeiture, and that FCPA prosecutors in the Fraud Section will be working with DOJ's Asset Forfeiture and Money Laundering Section attorneys "to forfeit and recover the proceeds of foreign corruption offenses." Ten of DOJ's twenty-six FCPA prosecutions in 2009 have included a forfeiture count. For the first time in FCPA investigations, DOJ brought a freestanding forfeiture *in rem* action against nearly \$3 million in alleged bribes paid to Arafat Rahman, the son of former Bangladeshi Prime Minister Khaleda Zia, by Siemens Bangladesh and China Harbor Engineering Company.
- November 23, 2009. Fernando Maya Basurto, a Mexican citizen and agent for ABB Ltd. pleaded guilty to FCPA conspiracy charges. That same day, John Joseph O'Shea, GM for ABB's Texas subsidiary, was arrested and charged with FCPA and other felony violations

DOJ Is Trying and Winning Convictions

EVERYTHING MATTERS

- On July 10, 2009, Frederic Bourke was convicted by a jury in the Southern District of New York following a five-week trial stemming from his \$8 million investment in a business partnership that sought to gain control of the State Oil Company of Azerbaijan Republic. Bourke was not accused of paying any bribes himself, or directing others to pay. Instead, he was charged with conspiring to violate the FCPA by investing in a business partnership that he knew or strongly believed was engaged in a bribery scheme. On November 10, 2009, Bourke was sentenced to one year and one day in prison and ordered to pay a \$1 million fine.
- On August 5, 2009, after five days of deliberations, former Congressman William J. Jefferson was convicted by an Eastern District of Virginia jury on eleven of sixteen counts charged in the indictment. He was acquitted on the substantive FCPA charge, but convicted on a related conspiracy charge. On November 13, 2009, he was sentenced to five years imprisonment on the conspiracy count, to run concurrently with his thirteen year sentence on non-FCPA counts. The investigation included a wired cooperating witness and wire taps.

DOJ Is Trying and Winning Convictions

EVERYTHING MATTERS

- On September 11, 2009, after a trial lasting two-and-a-half weeks in the Central District of California, a jury found husband and wife film producers Gerald and Patricia Green guilty of one count of conspiracy to violate the FCPA, nine substantive FCPA counts, and seven counts of money laundering, all relating to bribing a Thai tourism official in exchange for Thai government contracts. Patricia Green was also convicted of two counts of filing false tax returns, which stemmed from her mischaracterization of the bribes as tax-deductible "commissions."
- FBI agents engaged the Greens' bookkeeper as a confidential informant and offered her immunity in exchange for surreptitiously recording conversations with the Greens. The government also obtained the Swiss bank financial records of the Thai official's daughter where the bribes were deposited, which were obtained through a Mutual Legal Assistance Treaty request issued to the Swiss government.

More Trials to Come in 2010

EVERYTHING MATTERS

- December 2008 & February 2009. Control Components, Inc.'s former Director of Worldwide Factory Sales, Mario Covino, and Finance Director, Richard Morlok, pleaded guilty to FCPA conspiracy charges. Both await sentencing until February 2011 because they are cooperating with the government.
- The cooperation is working. On April 8, 2009, four CCI executives -- Stuart Carson, Hong "Rose" Carson, Paul Cosgrove, and David Edmonds -- were indicted on FCPA charges, and are scheduled for trial on November 2, 2010, in the Central District of California. Two other non-US defendants -- Flavio Ricotti and Han Yong Kim -- apparently not subject to detention in the US also indicted in the case have yet to make an appearance.
- On July 31, 2009, CCI pleaded guilty to FCPA violations.

More to Come in 2010: The Las Vegas Gun Show “Sting”

EVERYTHING MATTERS

- January 18, 2010. The FBI used the annual firearms industry trade show as an opportunity to sweep up 21 of the 22 defendants targeted by a large-scale undercover sting operation. The defendants were charged in 16 indictments unsealed on January 19 with violations of the Foreign Corrupt Practices Act (FCPA), and conspiracy to violate the FCPA and to commit money laundering.
- 22 executives and employees from military and law enforcement equipment suppliers and sales agents, from three countries and five states.
- One fictitious minister of defense of a foreign country, to whom bribes of 20 percent commissions were offered through an undercover FBI agent posing as a sales agent. The bribes were meant to obtain part of \$15 million in contracts to outfit the country’s presidential guard.
- Two years of investigation.
- 150 FBI agents executing 14 search warrants in several cities in Florida, Virginia and California.
- One coordinated sting at a 60,000-person trade show that included all but one of the defendants.

How We Got Here: The FCPA's Perfect Storm

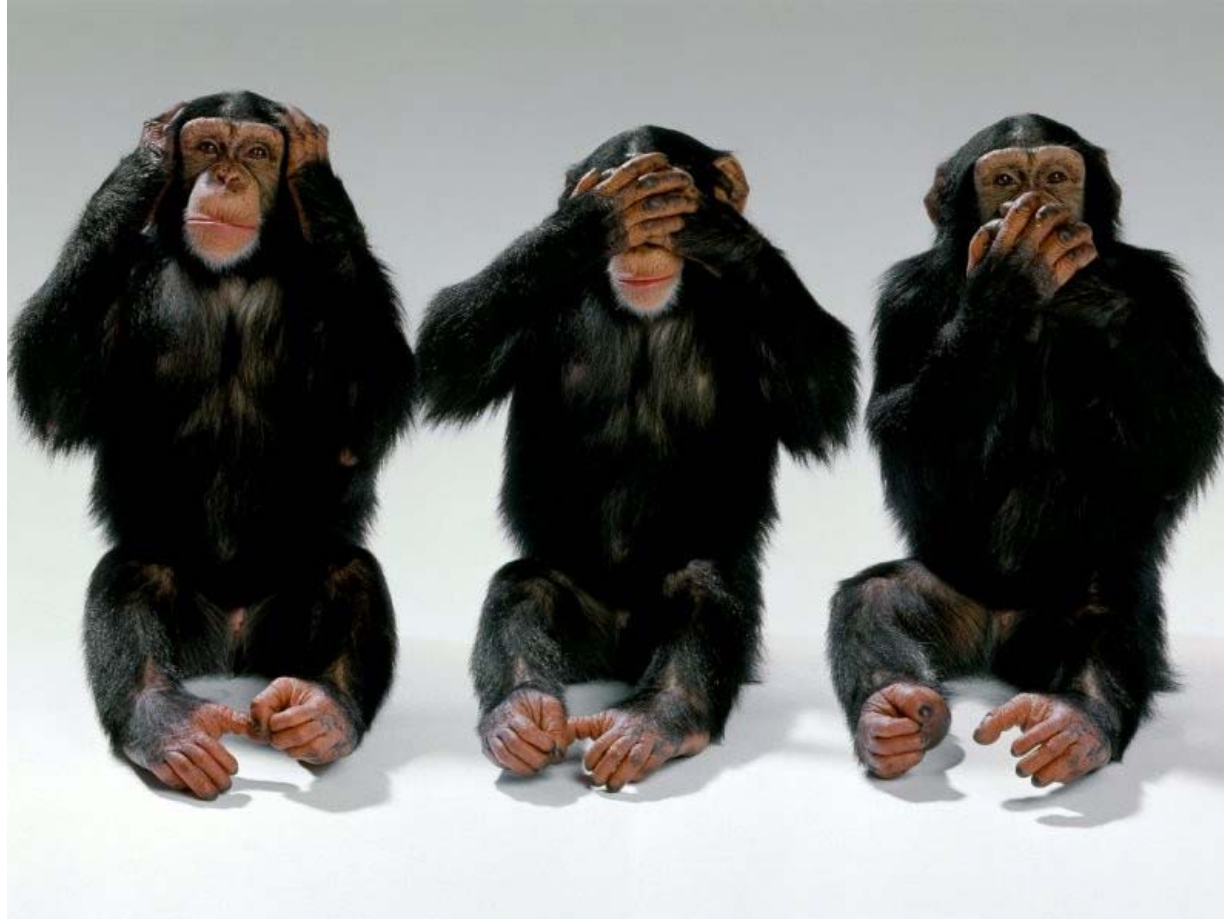
EVERYTHING MATTERS

- Increased globalization with emphasis on U.S. companies expanding to developing world
- Increased enforcement standards and environment with political emphasis on “corporate greed” and “board room crime”
- Legal unpredictability based on thin jurisprudence giving enforcement personnel broad discretion in defining what is illegal



Legal Indeterminacy and Complexity Knowledge = "Willful Blindness"

EVERYTHING MATTERS



Knowledge = “Willful Blindness” (cont.)

EVERYTHING MATTERS

- The FCPA’s knowledge standard is very broad, and liability can be based on conscious disregard, willful blindness or deliberate ignorance of facts
- Company knew of facts (often referred to as “red flags”) indicating a likelihood that the intermediary would engage in prohibited behavior, and then consciously or deliberately took steps to avoid learning whether the intermediary was engaging, or had engaged in, prohibited conduct

Nature's Sunshine Products, Inc. First Use of "Control Person" Liability Theory

EVERYTHING MATTERS

- On July 31, 2009, Utah-based nutritional product manufacturer *Nature's Sunshine Products, Inc.* ("NSP") and two of its former officers, CEO *Douglas Faggioli* and CFO *Craig D. Huff*, settled civil FCPA charges with the SEC arising from the alleged payment of bribes to customs officials in Brazil
- NSP's Brazilian subsidiary used third-party brokers to funnel approximately \$1 million to customs officials to circumvent registration requirements
- NSP's Brazilian subsidiary's operations manager notified U.S.-based controllers of his concerns that products were being illegally imported and that NSP was paying exorbitant fees to its customs brokers, but the US controllers failed to investigate these "red flags"

Nature's Sunshine Products, Inc. (cont.)

EVERYTHING MATTERS

- Section 20(a) of the Securities Exchange Act of 1934 provides that anyone "who, directly or indirectly, controls any person liable" for violating the Act is liable to the same extent as the violator
- SEC charged Faggioli and Huff solely because of their alleged supervisory responsibilities over the people and processes implicated in the alleged payments
- SEC did not allege that Faggioli or Huff had any involvement in or any knowledge of the corrupt activity
- Without admitting or denying the charges, Faggioli and Huff each agreed to pay \$25,000 in civil penalties
- SEC Assistant Director Kara N. Brockmeyer publicly opined that when the SEC invokes this theory of liability, it is "signaling that it believes there were red flags" to which the alleged control person "should have been paying more attention."

Trend No. 4: The Long Arm of United States Law Acknowledges Few Boundaries

EVERYTHING MATTERS



2005-2007: DOJ & SEC launched FCPA investigations of 23 foreign companies

The Worldwide Reach of United States Law

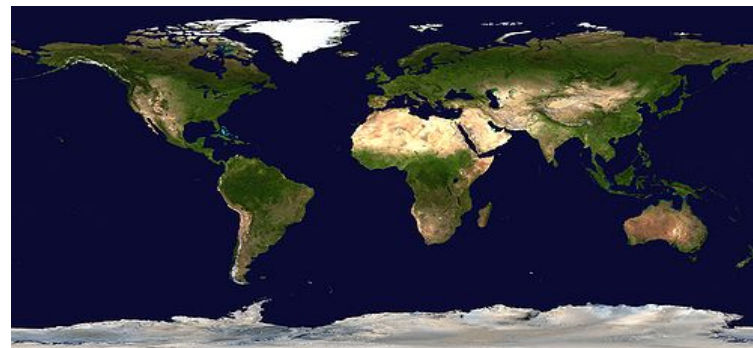
EVERYTHING MATTERS



- The FCPA's antibribery provisions apply to "any person" who commits any act in furtherance of a bribe "**while in the United States or its territories.**"

- "Any person" includes non-U.S. persons and corporations.

- Electronic Communications Based Jurisdiction – Do You Know Where the Routers/Switches and Satellites Your Email and Mobile Calls Go Through Are Located?



US Prosecution of Foreign Companies

EVERYTHING MATTERS

Prior to 1998, foreign companies, with the exception of those who qualified as "issuers," and most foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it takes any act in furtherance of the corrupt payment while within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce. See § 78dd-3(a), (f)(1). Although this section has not yet been interpreted by any court, the Department interprets it as conferring jurisdiction whenever a foreign company or national **causes an act to be done within the territory of the United States** by any person acting as that company's or national's agent.

- US Dep't of Justice, Criminal Resource Manual, Sec'n 1018 (Nov. 2000) (emphasis)

Deputy V.P. of Alcatel

EVERYTHING MATTERS

Alcatel-Lucent 



Christian Sapsizian

Deputy VP for Latin America

Connection to the United States?

- Corporation: France
- Citizenship: French
- Residence: French
- Alleged Misconduct: Costa Rica

Jurisdictional Hook

- Alcatel's American depository receipts were traded on the NYSE

Result

- Arrested shortly after touching down in Miami International Airport
- Indicted by federal Grand Jury in Miami
- Sept. 23, 2008: sentenced to 30 months in prison, 3 years supervised release, and financial penalties by federal judge in Miami

US Prosecution of BAE Systems

EVERYTHING MATTERS

BAE SYSTEMS

- Monetary and non-monetary “payments” to Saudi officials in order to secure \$85 billion arms deal with Saudi Arabia
- BAE Systems is a non-US company; all individuals involved are non-US citizens; conduct occurred outside the US; *not* listed on NYSE; ***jurisdiction would be based on company’s US operations and use of a US bank to make payments.***
- On February 5, 2010 BAE entered into agreements with the DOJ and the UK’s Serious Fraud Office. The DOJ agreement requires BAE to plead guilty to one charge of conspiring to make false statements to the U.S. Government in connection with certain regulatory filings and undertakings, and pay a fine of \$400 million. The SFO agreement requires BAE to plead guilty to one charge of breach of duty to keep accounting records in relation to payments made to a former marketing adviser in Tanzania and pay a fine of £30 million.
- The SFO dropped its investigation in December 2006 when Saudi Arabia threatened to end cooperation with the UK in terrorism matters. The US opened its own investigation in 2007, and in May 2008, federal agents detained and searched BAE’s CEO and a director as they travelled separately through the Houston and Newark airports.

Trend No. 5: International Cooperation

EVERYTHING MATTERS

- The United States Department of Justice and FBI have “been increasingly effective in gathering evidence overseas through treaties as well as through informal arrangements with our law enforcement counterparts in other countries.”
 - Mark Mendelsohn, Deputy Chief – DOJ Fraud Section, ABA Conference, Sept. 11, 2008
- Treaty Cooperation
 - Inter-American Convention Against Corruption (1996)
 - OECD Convention on Combating Bribery of Foreign Public Officials (1997)
 - Council of Europe Criminal Law Convention on Corruption (1999)
 - Council of Europe Civil Law Convention on Corruption (1999)
 - United Nations Convention Against Transnational Organized Crime (2000)
 - African Union Convention on Preventing and Combating Corruption (2003)
 - United Nations Convention Against Corruption (2003)



EVERYTHING MATTERS

Brian S. Chilton
DLA Piper LLP (US)