

Anti-Corruption 2011 Mid-year Enforcement Update – Analyzing the Trends in Global Enforcement

July 25, 2011



*A Broader Perspective*SM

Today's Presenters



Mark Srere



Stan Marcuss



Anita Esslinger



Jana Fuchs



Joe Smallhoover



Evan Chuck

Topics for Discussion

- OECD Convention on Combating Bribery
- U.S. 2011 FCPA Enforcement Developments
- U.K. 2011 Anti-Bribery Enforcement Developments
- German Anti-corruption Law and Enforcement Developments
- French Anti-corruption Law and Enforcement Developments
- Anti-Corruption Developments in Asia: Indonesia, Vietnam, and China
- Q&A



OECD Convention on Combating Bribery

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

- Adopted 1997
- 38 Current Signatories
 - Notable absentees as of May of this year: Russia, China, India, Indonesia, Saudi Arabia
 - But Russia and China at least have anti-bribery laws pertaining to international business even if not meeting OECD standards
- Convention Patterned After U.S. Law
 - Was Largely at the Impetus of the U.S.
 - Goal Was to Level the Playing Field

OECD Convention – Key Features

- Calls for Bribery to be a Criminal Offense
- Calls for Proscribed Activities to be Violations if Committed “Directly or Through Intermediaries,” e.g., Foreign Subsidiaries
- Calls for Obtaining or Retaining an “Improper Advantage in the Conduct of International Business” to be an Offense
- Calls for Requiring Accurate Books and Records
- Calls for “Prompt and Effective” Mutual Legal Assistance in Investigations
- Deems Bribery within the Scope of the Convention to be an Extraditable Offense under Relevant Extradition Treaties
- Calls for an On-Going OECD Monitoring Program to Measure Implementation and Enforcement

Enforcement Scorecard According to Transparency International Progress Report 2011

- Active Enforcement – 7 countries
 - Denmark, Germany, Italy, Norway, Switzerland, UK and US
- Moderate Enforcement – 9 countries
 - Argentina, Belgium, Finland, France, Japan, South Korea, the Netherlands, Spain and Sweden
- Little or No Enforcement – 21 countries

Consequences from Lax Enforcement

- Increasing Pressure on Laggards by Countries with Vigorous Enforcement Programs
 - Laggards Undermine the Original Purpose of the Convention in the First Instance – Leveling the Playing Field
- Increasing Pressure on Laggards by Transparency International
- More Aggressive Extraterritorial Enforcement by the U.S.
 - Especially in the Pursuit of U.S. Nationals for Activities Committed Abroad
 - And the Pursuit of U.S. Entities for the Sins of Foreign Affiliates and Foreign Agents
- More Aggressive Use of Successor Liability Theories to Impose Liability on Acquiring Companies for Transgressions by Acquired Companies
- More Aggressive Insistence on Outside Monitors to Monitor Future Compliance If Violations Are Found



U.S. 2011 FCPA Enforcement Developments

Noteworthy DOJ and SEC Cases

- Bonny Island, Nigeria
 - JGC Corp. paid \$218.8 million
 - Jeffrey Tessler forfeited \$149 million
- Johnson & Johnson (\$77 million)
 - Bribery of doctors and hospital administrators employed by the government in several European countries; payment of kickbacks under U.N. Oil for Food program
- Magyar Telekom
 - \$62 million reserved for this sub of Deutsche Telekom that trades ADRs on the OTC pink sheets

Noteworthy DOJ and SEC Cases

- IBM, Tyson Foods, Rockwell Automation, Comverse Technology
- BAE fined \$79 million by the State Department
- Alcatel-Lucent settlement in 2010
 - Instituto Costarricense de Electricidad S.A. (ICE) attempted to recover money as a “victim” of the crime
 - Court said corruption was rampant at ICE and denied motion

FCPA Trials

- Lindsey Manufacturing, Keith Lindsey, Steve Lee and Angela Aguilar
 - Guilty verdicts
 - Post-trial motions
- 4 Shot-Show Defendants
 - Hung jury – mistrial
 - Sting operation

The Definition of “Foreign Official”

- Lindsey case
 - Comisión Federal de Electricidad (CFE)
 - “the legislative history of the FCPA is inconclusive”
- Carson case
 - Included Korea Hydro and Nuclear Power, PetroChina, China National Offshore Oil Corporation, Guohua Electric Power, Petronas
 - “state-owned companies may be considered 'instrumentalities' under the FCPA, but whether such companies qualify as 'instrumentalities' is a question of fact”

SEC Enforcement Initiative

- “Flattened” Organizational Structure and “Specialized” Units
- Cooperation Tools
 - Proffer agreements
 - Cooperation agreements
 - Deferred prosecution agreements
 - Nonprosecution agreements
 - Immunity requests
- First DPA – Tenaris S.A.
- Dodd-Frank Whistleblower provisions

Hearing before House Committee

- June 14, 2011
- Advocates for change want:
 - Add a compliance defense
 - Clarify the meaning of “foreign official”
 - Limit a company’s successor criminal liability for an acquisition
- Is this an issue that will survive elections?



U.K. 2011 Anti-Bribery Enforcement Developments

Bribery Act 2010

- Robust new legislation came into force 1 July 2011
 - Affects not only UK companies but also US and other non-UK companies and their non-UK affiliates that do business in the UK

UK Bribery Act – Key Issues

- Goes beyond the FCPA and the OECD Bribery Convention
 - UK domestic as well as foreign bribery
 - Acceptance of a bribe
 - “Private to private” bribery as well as bribery of public officials, including foreign officials
 - No “improper performance” element required for bribery of a foreign official – just intent to obtain business or a business advantage
 - No statutory carve-out for facilitation payments
 - No statutory carve-out for reasonable and bona fide promotional expenses – but some guidance

New Failure to Prevent Bribery Offence

Key Issues

- New strict liability offence for failure by commercial organisations to prevent bribery by associated persons intending to obtain business advantage for the organisation
- UK companies carrying on business anywhere or non-UK companies that carry on a business or part of a business in any part of the UK
- Associated person: a person anywhere who performs services anywhere for or on behalf of a relevant commercial organisation
 - Can include not only employees, but also agents, sales representatives, distributors, subsidiaries, other contractors, joint ventures/joint venture partners (depending on the circumstances)

Adequate Procedures Defence

- Ministry of Justice Guidance – 6 guiding principles for adequate procedures defence
 1. Proportionate to the bribery risks faced by and size and complexity of the business
 2. Top level commitment
 3. Risk assessment
 4. Due diligence
 5. Communication and Training
 6. Monitoring and review

UK Bribery Act Enforcement Issues

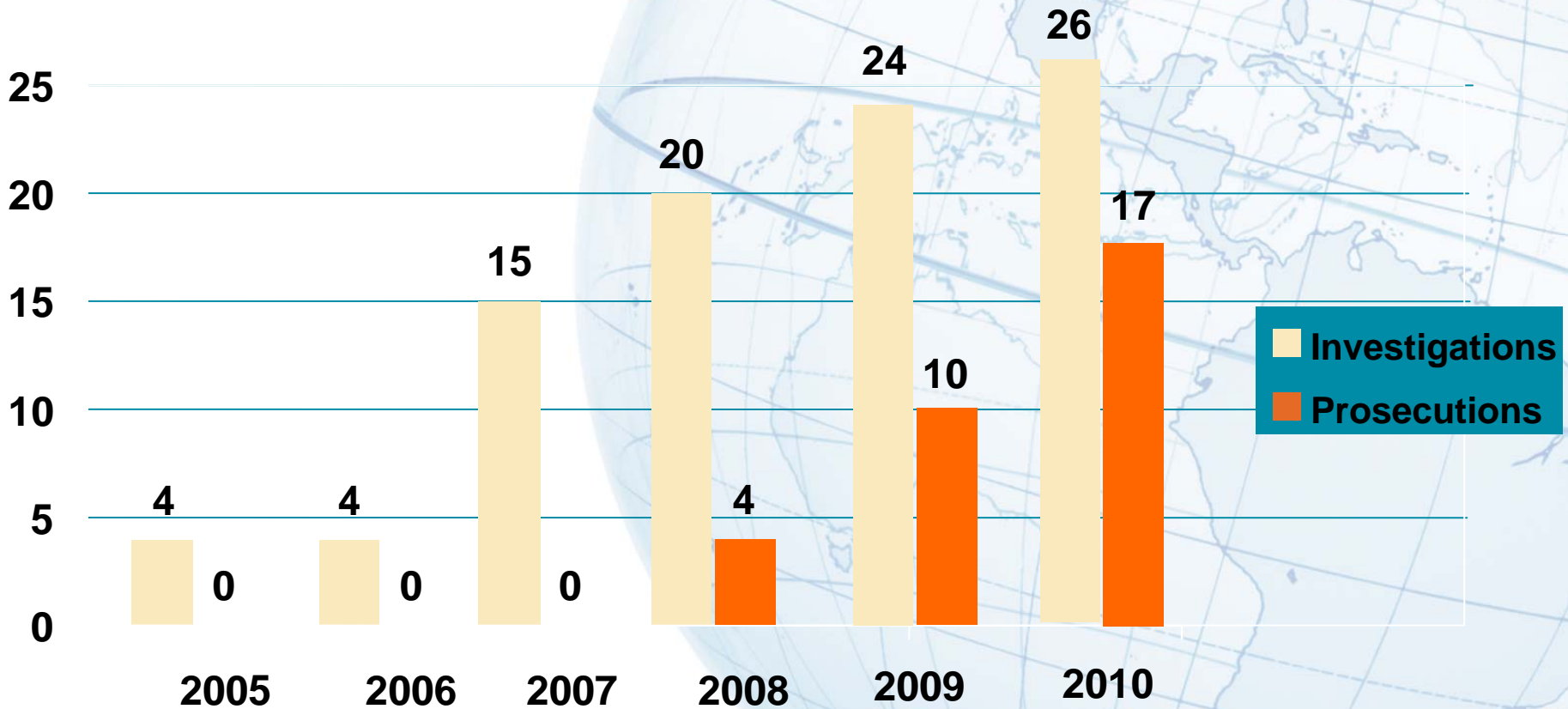
- The principal prosecutorial authority for the new Act (the SFO) has stated that it takes a wide view of its powers to prosecute companies
- Conviction on indictment risks unlimited fines and up to 10 years imprisonment
- No discretion on imposition of public procurement ban, except in connection with the offence of failure by a commercial organisation to prevent bribery

UK Bribery Act Enforcement Issues

- Violations of UK anti-corruption laws prior to 1 July would be prosecuted under prior anti-corruption laws
- The UK has been criticised by the OECD for lack of enforcement in the past, but is now considered an “active” enforcer
- Most prosecutions have not been brought under the old anti-corruption laws, but under other statutes including particularly anti-money laundering laws, including civil monetary recovery orders under the Proceeds of Crime Act
- FSA fine in 2009 of £5.25 million against Aon Ltd (subsidiary of US insurer) and in July 2011 of £6.9 million against the UK arm of Willis, the number 3 global insurer, for failure to have effective systems and controls in place to counter bribery and corruption

Developments in the UK

Source: Transparency International



Developments in the UK

- July 2009, first successful UK prosecution of a corporation (Mabey and Johnson) for overseas bribery. M&J admitted paying kickbacks in connection with UN Oil for Food Program -- £6.6 million fine
- Two M&J executives and a sales manager were sentenced in a later proceeding in connection with the kickbacks
 - Former managing director - 21 months imprisonment, disqualified from acting as a company director for five years and was ordered to pay prosecution costs of £75,000
 - Former sales director - 8 months imprisonment, disqualified from acting as a company director for two years and was ordered to pay prosecution costs of £125,000
 - Former sales manager - 8 months imprisonment, suspended for two years

Developments in the UK

Other highlights

- Innospec – Global settlement with the SEC of \$12.7 million; plea bargain in the UK reluctantly approved by the court but criticized
- DePuy (Johnson & Johnson) -- £4.829 civil recovery order
 - Deferred Prosecution Agreement with the US DOJ (\$21.4 million) and SEC Civil Sanctions (\$24.2 million); Greek restraint of assets (€5.8 million)
 - SFO takes the position that prosecution would be prevented under double jeopardy principles
- Robert Dougall – DePuy Marketing Director
 - Cooperating witness, but initially sentenced to one-year in prison in spite of SFO recommendation of suspension; Court of Appeal suspends

Developments in the UK

- BAE Systems plc -- Failure to keep adequate accounting records (Tanzania)
 - £500,000 fine plus costs and ex gratia payment of £30 million (less the fine) to the people of Tanzania; global settlement with the DOJ (\$400 million) to settle allegations in other countries
 - Reluctantly agreed to but criticized by the UK court
 - Prior Saudi matter dropped for national security reasons

Developments in the UK

- Voluntary Disclosures and Plea Bargaining
 - SFO “Approach” paper encourages self referrals and with the prospect of a civil rather than criminal outcome
 - No formal advisory opinion program – but encouragement to seek advice from the SFO
 - Would favour the possibility of plea bargains
 - Effectiveness of plea bargains and the desirability of self referrals in question after *Innospec* and *Dougall*
 - Deferred prosecution agreements not clearly authorised
 - Global cooperation and settlements
 - Voluntary disclosure and double jeopardy issues



German Anti-corruption Law and Enforcement Developments

Concept of Legal Sanctions

- Corruption is a criminal offence
 - Public sector
 - Covers foreign public official bribery
 - Civil sector (Commercial Bribery)
 - Covers commercial bribery acts committed abroad
- Corruptive behavior can also be prosecuted as administrative offence for “lack of supervision” (including by negligence)
- Legal sanction for corruptive behavior
 - Fines
 - Imprisonment
- German civil service law imposes further sanctions on German public officials

Concept of Responsibility

- Natural Person
 - Personal liability
 - Prosecution has burden of proof for all elements of the crime (objective / subjective)
- Legal Person
 - General Concept: A legal person cannot commit a crime
 - Germany establishes the liability of legal persons, including bribery offence, under the Administrative Offences Act.
 - Liability of legal persons is triggered where any “responsible person” , acting for the management of the entity commits **(i)** a criminal offence including bribery; or **(ii)** an administrative offence including a violation of supervisory duties.

Definition of Corruption

Public Sector

The main provision in section 334 CC provides that:

“Whoever **offers, promises or grants a benefit to a public official**, (...), for that person or a third person, **in return for the fact that he performed or would in the future perform an official act** and **thereby violates** or would violate **his official duties**, shall be punished with imprisonment from three months to five years. In less serious cases the punishment shall be imprisonment for not more than two years or a fine.”

Sec. 331, 332 constitute vice versa provisions.

Definition of Corruption

Civil Sector

- (1) Whosoever as an employee or agent of a business, demands, allows himself to be promised or accepts a benefit for himself or another in a business transaction as consideration for according an unfair preference to another in the competitive purchase of goods or commercial services shall be liable to imprisonment of not more than three years or a fine.
- (2) Whosoever for competitive purposes offers, promises or grants an employee or agent of a business a benefit for himself or for a third person in a business transaction as consideration for such employees or agents according him or another an unfair preference in the purchase of goods or commercial services shall incur the same penalty.
- (3) Subsections (1) and (2) above shall also apply to acts in competition abroad.
Restricting competition through agreements in the context of public bids is in addition sanctioned by separate regulation.

Concept of Enforcement

- Natural Persons
 - Fines
 - Criminal fines in Germany are defined by the criminal judges in their free discretion within the statutory limitations.
 - Fines are calculated in daily units, e.g. 30 daily units in the amount of EUR 100 (result in a total fine of EUR 3,000).
 - The general maximum amount of daily units is 360.
 - The amount of a daily unit can be between EUR 1 and EUR 30,000.
 - The judge determines the fine in consideration of the delinquent's personal and economic circumstances.
 - Confiscation of the bribe is possible.

Concept of Enforcement

- Natural Persons
 - Imprisonment
 - Public Sector
 - 3 months to 5 years
 - 2 years or a fine, in minor cases
 - 1 to 10 years in especially serious cases
 - Civil Sector
 - up to 3 years or a fine
 - 3 months to 5 years, in especially serious cases

Concept of Enforcement

- Legal Persons
 - Fines
 - As a reminder:
 - The conditions for such liability are that **(i) a person in a leadership position commits a crime** (e.g. bribery) **or (ii) commits the administrative offence of breach of supervisory duties**, by failing to take the measures necessary to prevent the commission of a crime by a lower level employee.
 - Maximum amount is EUR 1,000,000 if the crime (i) was committed with intent; EUR 500,000 if it was committed negligently.
 - In addition, the fine ordered against a legal person must exceed the financial benefit gained from the underlying offence. For this purpose the applicable fine may be increased (maximum by 100%), if the financial benefit is higher than the statutory maximum fine.
 - No further punitive sanctions; confiscation is possible.

Enforcement Statistics

- **Number of registered Corruption offences**
 - 1,477 (761 civil sector, 716 public sector) according to BKA (Federal Crime Authority) statistic 2010. Civil sector 5,8 % increase, public sector 5,7 % decrease.
 - This number does not correspond with convictions, which is significantly lower. E.g. OECD 2011 report refers to 70 individuals having been convicted since 2005.
- **Number of unregistered cases is expected to be much higher**
- There is **no central register** of data on criminal convictions as this falls into the responsibility of the German Federal States, which also do not keep such a register.
- According to the OECD report there **were only two cases in Germany where a company was held liable** for the administrative offence of failure of the management to carry out supervisory duties, both are well known (Siemens and MAN)
- **Foreign Bribery**
 - OECD report refers to only 6 legal persons ever being convicted for foreign bribery compared to 69 individuals.

Thank You!

Germany fully accepts the following forms of bribery:





French Anti-corruption Law and Enforcement Developments

French Law

- Law no. 2000-595 of June 30, 2000
- Law no. 2007-1598 of November 13, 2007

French Offenses

- Active or passive bribery of a foreign public official or judicial staff (Art. 432-11 and 433-1 and Articles 435-1 to 435-4 of the French Criminal Code)
- Active or passive trading in influence with a foreign public official or judicial staff (Art. 432-11 and 433-1 and Articles 435-1 to 435-4 of the French Criminal Code)
- Bribery of a witness in a foreign judicial procedure (Art. 435-12 of the French Criminal Code)
- Threats or intimidation of a foreign judicial staff member (Art. 435-13 of the French Criminal Code)

French Law

- Applies to offenses committed
 - in France
 - outside of France by a French national
 - by a foreigner against a French victim (Article 113-7 of the French Criminal Code)
- Proceedings initiated by the Public Prosecutor
 - complaint is filed by the victim or an official denunciation by the government in the country where the offense was committed

Penalties

- Individuals
 - up to 10 years imprisonment
 - up to €150,000 in fines
 - additional penalties such as professional restrictions, deprivation of rights, banishment for foreigners, confiscation and publication of the court's decision in appropriate press organizations
- Legal Entities
 - up to 5x the maximum amount of fines for individuals
 - additional penalties include those of individuals as well as those listed in Art. 433-25 of the French Criminal Code

Relevant French Authorities

- Central Anti-Bribery Brigade
(Brigade Centrale de Lutte Contre la Corruption)
- Central Department for Corruption Prevention
(Service Centrale de la Prévention de la Corruption)
- Tracfin - the French Financial Intelligence Unit for fighting money laundering and terrorist financing
(Traitement du Renseignement et Action contre les Circuits Financiers clandestins)

Developments

- Whistleblowing
 - Article L. 1161-1 of the French Labor Code
 - Hotline
 - Revised French procedures – scope restricted to financial misdoings
- Expanded investigation powers
 - Art. 706-1-3 of the Code of Criminal Procedure
 - Surveillance
 - telephone tapping
 - audio and video recordings
 - undercover operations

Enforcement

- French Blocking Statute
 - Law no. 68-678 of July 26, 1968 as modified by Law no. 80-538 of July 16, 1980
 - Gives companies the right to refuse to provide foreign investigative authorities with information
- Monopoly of the Public Prosecutor
 - In 2010 France condemned by the European Court of Human Rights in the Medvedyev and Moulin decisions over the lack of independence
- Jurisdictional Limitations
 - French law applies if the offense is punishable in the country where it was committed or if the victim is French
 - Tribunal de Grande Instance in Paris for international corruption and trading in influence

Enforcement

Recent Statistics Transparency International France Progress Report June 2011

- Total cases as of 2010 of OECD foreign bribery enforcement starting from the entry into force of the Convention in France = 24
- Investigations of OECD foreign bribery enforcement underway in France:
 - in 2010 = 5
 - in 2009 = 10

Recent Developments

- Total – Iraq Oil-for-Food Program
- “Angolagate”
- DCN, Amaris - submarines in Malaysia
- Alstom
- Halliburton



Anti-Corruption Developments in Asia: Indonesia, Vietnam, and China

Perceived Corruption Index - Asia

Country	Rank	Regional Rank
Singapore	1	1
Australia	8	3
Japan	17	5
South Korea	39	9
China	78	14
Thailand	78	14
India	87	16
Indonesia	110	20
Vietnam	116	22

Source: Transparency International

ADB OECD Anti-Corruption Initiative

- In September 2010, 28 Asia-Pacific jurisdictions adopted anti-bribery recommendations, including:
 - Criminalize bribing foreign public officials
 - Maintaining detailed statistics on corruption investigations
 - Creating regime for sanctioning business enterprises for bribery
- Initiative aims to better implement international standards, including UN Convention against Corruption and OECD Anti-Bribery Convention.
- Includes Australia, China, India, Indonesia, Japan, Republic of Korea, Singapore, Thailand, and Vietnam.



Recent Developments - Indonesia

- February, South Jakarta District Court charged former tax director to 10 years in prison.
 - Precedent for reverse burden of proof?
 - Anti-corruption laws vs. criminal laws
- March, legislation drafted to criminalize foreign and commercial bribery.
 - Bill presented to House of Representatives for deliberation.



Recent Developments - Vietnam

- 2011 Vietnam Anti-Corruption Initiative Program (VACI)
 - Organized by Government Inspectorate, World Bank and other donors.
 - Innovation competition and knowledge exchange.
- June, Committee for Corruption Prevention and Control (CSCCPC) 15th Session, 2011 Review
 - 4,447 violating cases
 - Legal agencies prosecuted 184 persons in 100 corruption cases.
 - Prolonged investigation, prosecution and trials still hampering progress.



China Anti-Bribery Laws

- Commercial Bribery
 - Article 8 of Anti-Unfair Competition Law
 - Prohibits both offering and accepting bribery in the form of “money, valuables, and other means to buy or sell goods.”
- Public Official Bribery
 - Articles 385 and 389 of the PRC Criminal Law
 - Prohibits state officials from accepting “money or property” to secure benefits.
 - Prohibits giving state officials “money or property” to secure benefits.

China Developments

- 8th Amendment to China Criminal Law
 - First China law to criminalize bribery of foreign officials.
 - Prohibits “giving money or property” to “foreign government functionaries or officials of international public organizations” seeking “improper commercial interests and benefits.”
 - Relatively large bribe: <3 years imprisonment or penal servitude.
 - Large bribe: 3<years<10 imprisonment and fine
- Premier Wen Jiabao Highlighted Corruption in Key Speech Delivered at 4th NPC
 - Government efforts in 2011 will target corruption in construction, state-owned property rights trading, mining development, land use rights trading and government procurement.

Recent Cases

- Liu Zhijun, Minister of Railways
 - Removed from his post in February for “severe violation of discipline.”
 - Currently under investigation for taking bribes from domestic companies for Chinese high-speed railway construction.
- Wang Xianmin, Party Secretary of Yuan County, Gansu
 - Found guilty of accepting RMB 10 million in bribes.
 - Sentenced to death in April with a two-year reprieve.

Similar Facts, Different Enforcement

- Germany:
 - April 2010, criminal court in Germany convicted two senior managers at Siemens, central actors in company's global corruption scandal, for breach of trust and abetting bribery.
 - Received probation and fines totaling €200,000.
- China:
 - June 2011, people's court in Henan Province sentenced former senior executive at China Mobile to death with two-year reprieve for accepting bribes from Siemens.
 - The middleman running bribes between China Mobile and Siemens sentenced to 15 years in prison.

Upcoming Webinars

- Specific Issues in Anti-Corruption Investigations – When to Conduct, How to Conduct, Remediation and Possible Disclosure
- Anti-Corruption Investigations in Asia
- The U.K. Bribery Act – How to Comply with the Latest Anti-Corruption Law



Questions & Answers