



KPMG FORENSIC

# 2008 Anti-bribery and Anti-corruption Survey

ADVISORY

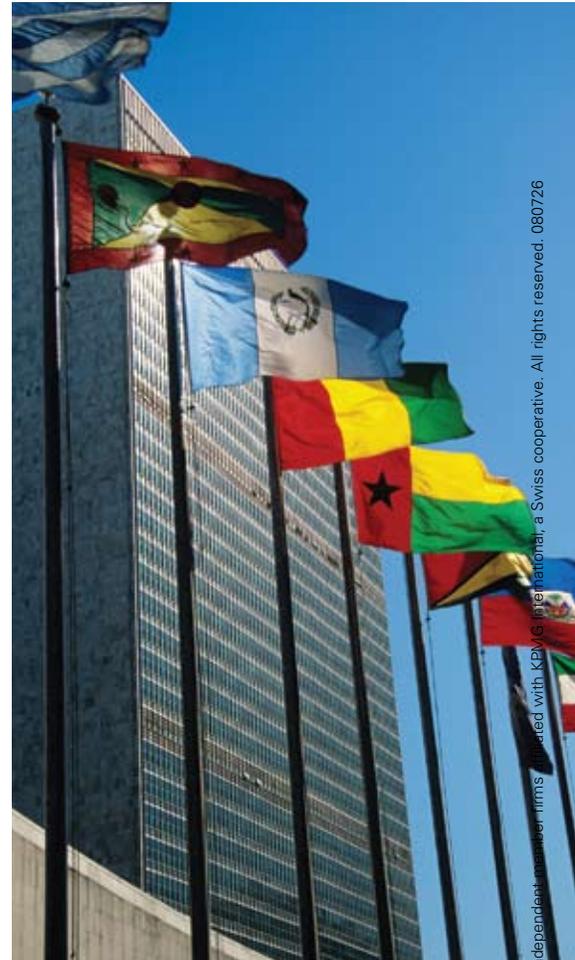


# Executive Summary

KPMG Forensic<sup>SM</sup> surveyed 103 U.S. executives from a variety of industries who identified themselves as having day-to-day responsibility for FCPA matters. The survey examined how companies deal with anti-corruption and anti-bribery organizational structures, reporting policies and processes, training, and identification of—and response to—potential violations. The responses suggest several areas for improvement, such as:

- Using technology as a means to prevent, detect, and respond to FCPA violations.
  - Fewer than 10 percent reported they are leveraging proactive forensic data analysis to monitor FCPA compliance.
  - Only 3 percent reported that over the next 12 to 24 months (July 2008–July 2010) the area of largest expenditure associated with FCPA would be technology.
- Identifying and assessing FCPA risk. Seventy-eight percent of respondents classified this as challenging.
- Creating effective procedures for FCPA due diligence. Only 36 percent of respondents said they felt their organization's level of FCPA due diligence in a merger, acquisition, or other transaction in the past five years was "adequate." Twenty-seven percent said it was "minimal."
- Developing effective mechanisms for FCPA communication and training (cited as challenging by 69 percent).
- Developing internal resources (for example, FCPA subject-matter professionals and technology) (56 percent cited lack of resources as challenging).
- Obtaining guidance or leading industry standards for effective FCPA programs (55 percent cited lack of such guidance as challenging).

KPMG Forensic presents this report not only to examine the survey responses in some detail but also to provide a basis for initiating discussion on the integration of FCPA and bribery and corruption risk management with remediation and sustainability. Such discussion, it is hoped, will help bring about improvements in the overall risk-management function—that is, how to prevent, detect, and respond to possible FCPA-, bribery-, and corruption-related activity.



## Globalization of Anti-bribery and Anti-corruption Regulations and Enforcement

The stakes are high. Businesses around the world that have run afoul of the FCPA and other anti-bribery and anti-corruption standards have had significant damage to their reputations and have been subject to large fines and other monetary sanctions—as much as US\$44 million in a recent case—and lengthy jail terms for certain executives.

Investigations and prosecutions resulting from FCPA violations may be only one of several threats to businesses that operate in foreign jurisdictions. Hundreds of investigations have been launched and cases brought in recent years by law enforcement agencies and regulators around the world as a result of enforcement initiatives under the Organisation for Economic Co-operation and Development's (OECD's) Anti-Bribery Convention, which has been signed by 37 nations, and other global codes and statutes.

Data from Transparency International (TI), the global coalition against corruption, shows that in 2005 there were 51 reported investigations and 50 cases involving bribery and corruption in 13 OECD countries.<sup>1</sup> In 2007, TI reported 263 investigations and 254 cases in 16 countries, including Argentina, Australia, Belgium, Denmark, Finland, France, Germany, Hungary, Italy, South Korea, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United States. Also, sanctions outside the United States have been significant. German authorities, for example, imposed a EUR200 million fine for bribery of foreign public officials.<sup>2</sup>

Businesses are now operating in an environment of increasingly active cooperation between regulators and law enforcement from a variety of nations. The U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) report having enhanced their working relationship with each other and with law enforcement agencies and regulators around the world in an effort to curb corporate bribery and corruption.

At an FCPA conference in September 2008, Mark Mendelsohn, Deputy Chief of the DOJ Fraud Section, said his team of investigators and prosecutors has “been increasingly effective in gathering evidence overseas through treaties as well as through informal arrangements with our law enforcement counterparts in other countries. That has made our work easier by definition.... And the fact that foreign law enforcement authorities, at least in some jurisdictions, are beginning to investigate... and prosecute their own cases has had a positive effect on our efforts.”<sup>3</sup>

In addition to the OECD's Anti-Bribery Convention, other nations and regions have acted. For instance, several landmark anti-corruption conventions have been passed since 1996, including:

- Inter-American Convention Against Corruption (1996)
- Council of Europe Criminal Law Convention on Corruption (1999)
- Council of Europe Civil Law Convention on Corruption (1999)
- United Nations Convention Against Transnational Organised Crime (2000)
- African Union Convention on Preventing and Combating Corruption (2003)
- United Nations Convention Against Corruption (2003)

The United Nations Convention Against Corruption was signed by 140 countries and provides a framework for prevention, criminalization, cross-border cooperation in enforcement, and asset recovery. Under the convention, countries are bound to render specific forms of mutual legal assistance, including gathering and transferring legal evidence, extraditing offenders, and supporting the tracing, freezing, seizing, and confiscating of the proceeds of corruption.

In addition, the United States now regularly includes provisions in free-trade agreements requiring cooperation with anti-bribery efforts. These provisions cover cooperation in investigations and enforcement actions and technical assistance, and they provide a framework for the United States to provide technical, financial, and human resources assistance for anti-corruption efforts in target countries.

Comments made in 2006 by Alice Fisher, then assistant attorney general and head of the DOJ's criminal division, still ring true today. Fisher told the audience at an FCPA conference that enforcing the FCPA is critical to “root out global corruption and preserve the integrity of the world's markets.” She said that corruption “...is the linchpin of so many different global problems. It undercuts democracy and the rule of law. It stifles economic growth and sustainable development. It destabilizes markets. And it creates an uneven playing field for U.S. companies doing business overseas. By enforcing the FCPA, we are demonstrating our commitment to combating global corruption, maintaining the integrity of U.S. markets, and setting an example for other countries around the world.”<sup>4</sup>

That example has led to numerous investigations and prosecutions as well as a heightened awareness of the necessity of robust compliance programs.

<sup>1</sup> Cases included prosecutions, judicial investigations, and civil actions.

<sup>2</sup> Angel Gurría, OECD Secretary General, Opening Remarks at the 10th Anniversary of the OECD Anti-Bribery Convention, November 21, 2007

<sup>3</sup> American Bar Association conference: “The Foreign Corrupt Practices Act: Current SEC and DOJ Enforcement Initiatives,” September 11, 2008, Washington, D.C.

<sup>4</sup> Alice Fisher, speech at the American Bar Association, National Institute on the Foreign Corrupt Practices Act, October 16, 2006



By the end of 2007, the DOJ and the SEC collectively investigated 29 FCPA-related matters, up from 9 in 2003.<sup>5</sup> In 2008, at least 80 companies reportedly were under investigation for possible violations of the Act's anti-bribery or financial-reporting provisions.<sup>6</sup> The increase in regulatory and law enforcement emphasis on FCPA has brought about a heightened awareness of its importance.

In discussing the recent increase in FCPA enforcement, the DOJ's Mendelsohn said, "As we bring cases in industries that were not previously a focus of FCPA enforcement actions, that does have the effect of causing a lot of players in that industry to wake up and pay attention."<sup>7</sup>

<sup>5</sup> Shearman & Sterling, "Shearman & Sterling Publishes Latest FCPA Trends and Patterns Report and Digest," February 21, 2008

<sup>6</sup> *Ibid.*

<sup>7</sup> Portfolio.com, "Peeking Under the Table," June 6, 2008



## KPMG Forensic Survey Results

The changing global corporate landscape requires organizations to contend with new and more-complex business models and supply chains, distribution channels that are more widely distributed and outsourced, and limited corporate-level visibility.

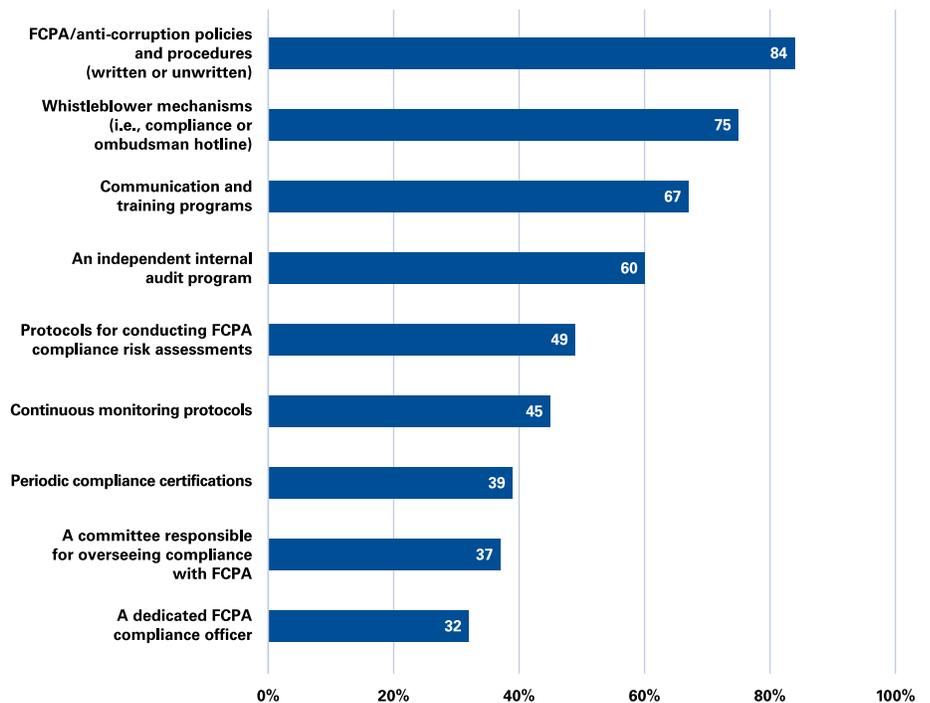
In an attempt to understand how U.S. businesses operating abroad deal with FCPA issues—such as organizational structure, reporting policies and processes, types of violations and their impact, facilitating payments, and third-party vendors and partners—KPMG Forensic conducted a survey of 103 U.S. executives in a variety of industries.

The results of the survey, which concluded in summer 2008, indicate that although resources are being expended to reduce FCPA risk, much work remains to further mitigate the risks.

## FCPA, Anti-bribery, and Anti-corruption Compliance Program Elements

Most programs at respondents' organizations (see Chart 1) include FCPA or anti-corruption policies and procedures (84 percent), whistleblower mechanisms (75 percent), and communication and training programs (67 percent). But other significant elements of an FCPA compliance program—such as a dedicated FCPA compliance officer (32 percent) or a

**Chart 1: Policies and Procedures in Place**



Multiple responses accepted.

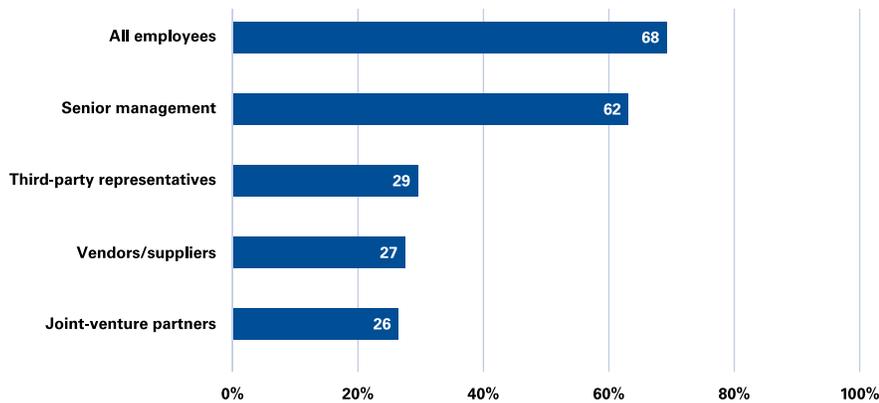
Source: KPMG LLP (U.S.), 2008

committee responsible for overseeing compliance (37 percent)—were not evident among a significant majority of the survey respondents' organizations. Also, fewer than half (49 percent) reported having protocols for conducting FCPA compliance risk assessments, and only 45 percent said their programs contained continuous monitoring protocols.

### *Written versus Unwritten Policies*

Among those with programs that include written FCPA/anti-corruption policies and procedures, 68 percent (see Chart 2) distributed the policies and procedures to all employees, 29 percent to third-party representatives, 27 percent to vendors and suppliers, and 26 percent to their joint-venture partners. Fewer than half (47 percent) of those with

**Chart 2: Policies and Procedures Documents Issued**



Multiple responses accepted.

Source: KPMG LLP (U.S.), 2008

written policies and procedures said they are translated into multiple languages. The importance of such translations may be underscored when one considers that the number of multinational companies has doubled from 35,000 to 70,000 in the past 18 years.<sup>8</sup>

Half who said their organizations have written policies and procedures reported that these are incorporated within the company's code of conduct as well as contained in a separate FCPA-compliance document.

### *Whistleblower Hotline*

Confidential, anonymous reporting by employees of suspected illegal activities can be an effective tool in the fight against bribery and corruption and other forms of fraud or misconduct. There have been numerous examples of recent SEC and DOJ enforcement actions launched after tips were received through a company's whistleblower hotline. Many organizations now emphasize the hotlines' use for matters involving possible FCPA violations.

<sup>8</sup> IBM Institute for Business Value, "Economic Development in a Rubik's Cube World: How to Turn Global Trends into Local Prosperity," 2008

However, the results of the survey suggest that not all companies with potential FCPA exposure have established hotlines. Only 75 percent reported having a compliance or ombudsman hotline, and only slightly more than one quarter (27 percent) of those with a hotline extended the hotline to parties outside their organizations with whom they have a business relationship, including contractors, third-party agents, customers, business partners, and vendors and suppliers.

### **Communication and Training Programs**

Only one quarter of organizations with communication and training programs said the training is mandatory for all employees. The remaining 75 percent said they use a risk-based approach.

Only a very small fraction (6 percent) of those with mandatory training reported that they require all of their third-party representatives (brokers, agents, distributors, lobbyists) to take the FCPA training.

A number of recent high-profile enforcement actions resulted from a company's agent or other outside representative in a foreign country making a bribe or engaging in other corrupt actions. The SEC, for example, recently fined a technology company US\$1.1 million when the company's outside agent made improper payments to foreign officials in Asia. According to the SEC, the company had not devised sufficient internal controls with respect to the actions of its agents, including the lack of proper due diligence, training, and oversight of agents working on its behalf. The Department of Justice, in defining the elements of an effective FCPA compliance program, explained in its Opinion Procedure Release 04-02 almost five years ago that a "clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws [should be] followed by all directors, officers, employees, and all business partners, including, but not limited to, agents, consultants, representatives, and joint venture partners and teaming partners, involved in business transactions, representation, or business development or retention in a foreign jurisdiction...."<sup>9</sup>

### **FCPA Compliance Risk Assessments**

Roughly half (49 percent) of the respondents reported that their program includes protocols for conducting FCPA risk assessments. In response to a question about how often the assessments were undertaken, two thirds (66 percent) said annually, 20 percent said "as necessary," 10 percent said "more than once a year," and 4 percent said "once every few years." The scope of the assessments was most often enterprise-wide (43 percent), while the remainder said the scope was by line of business, geography, or a mix of the three.

### **Continuous-Monitoring Protocols**

Forty-five percent of respondents reported that their compliance program has continuous-monitoring protocols. The most common protocol is an internal audit-led FCPA compliance audit (61 percent) and the least common is proactive forensic data analysis (22 percent).

### **Compliance Certification**

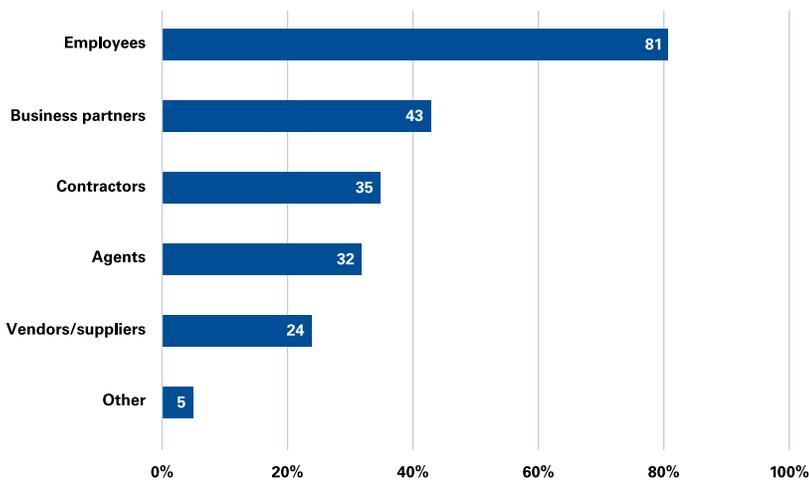
The reliance on external business relationships—acquisitions, strategic alliances, joint ventures—suggests that businesses must have comfort around whether or not these new partners understand the requirements of the FCPA and agree to comply with them. But the results of our survey indicate that in this respect much work needs to be done.

<sup>9</sup> Department of Justice, "Foreign Corrupt Practices Act Review Opinion Procedure Release," July 12, 2004

Of those respondents with periodic anti-bribery and anti-corruption compliance certifications (about 40 percent), most do not extend that requirement beyond their employees. Only 32 percent of the small segment reported requiring FCPA compliance certifications from their agents, and 24 percent of the population required them from their vendors and suppliers (see Chart 3).

Having so few respondents requiring certifications may—at least in part—explain why so many in the survey (82 percent) said they believe they face a challenge in performing effective due diligence on their agents and third parties. Only 36 percent of the total respondent population said they felt their level of FCPA due diligence in a merger, acquisition, or other transaction in the past five years was “adequate,” and 27 percent described it as “minimal.”

**Chart 3: Compliance Certification Required**

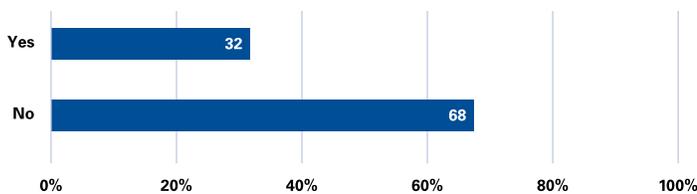


“Don’t Know” responses are not shown. Multiple responses accepted.

Source: KPMG LLP (U.S.), 2008

While 63 percent of those respondents that require periodic compliance certifications said they incorporate a right-to-audit clause in their third-party contracts, a significant majority of these (68 percent) has never exercised the right (see Chart 4). A right-to-audit clause appears to be the kind of oversight expected by regulators and prosecutors, and has been included as an essential element of FCPA compliance in several recent deferred or nonprosecution agreements that companies have reached with the SEC and the DOJ. Recent agreements entered into in 2008 included, for example, stipulations that the parties agree to adopt new or to modify existing procedures to include “rights to conduct audits of the books and records of” agents or business partners “to ensure compliance” with anti-bribery laws and regulations.

**Chart 4: Exercise of Right-to-Audit Clause**



Source: KPMG LLP (U.S.), 2008



Of those respondents who reported their organization has a committee responsible for overseeing compliance with FCPA, 19 percent said it is a specific FCPA committee; the remaining 81 percent said FCPA compliance is the responsibility of—or is overseen by—another committee, such as an audit committee.

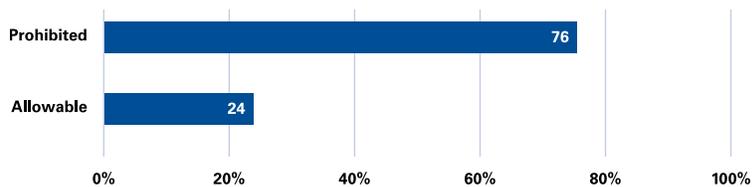
In organizations with an FCPA compliance officer, he or she most often reports to general counsel or the chief legal officer (48 percent). Other FCPA compliance officers report to the chief risk officer (6 percent), the chief compliance officer (3 percent), the chief internal audit executive (3 percent), or operations (3 percent).

**Facilitating Payments**

When the topic of facilitating payments is raised in the context of FCPA compliance, the fine line between a bribe and a nominal payment to “facilitate” a bureaucratic action is often difficult to find. For that reason, many organizations have developed policies prohibiting all facilitating payments by their employees or agents operating in overseas markets.

The survey found that only one quarter of respondents said their organizations allowed facilitating payments (see Chart 5).

**Chart 5: Facilitating Payments**



“Don’t Know” responses are not shown.

Source: KPMG LLP (U.S.), 2008

The Department of Justice has published the following guidance with respect to facilitating payments: “The FCPA contains an explicit exception to the bribery prohibition for ‘facilitating payments’ for ‘routine governmental action’ and provides affirmative defenses which can be used to defend against alleged violations of the FCPA...The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country. While still legally permitted under U.S. law, [such]...payments can be potentially damaging to a company, as they walk the fine line between a bribe and facilitating payment—companies who rely on the exception to the rule should be prepared to shoulder the burden of proof in defending their actions.”<sup>10</sup>

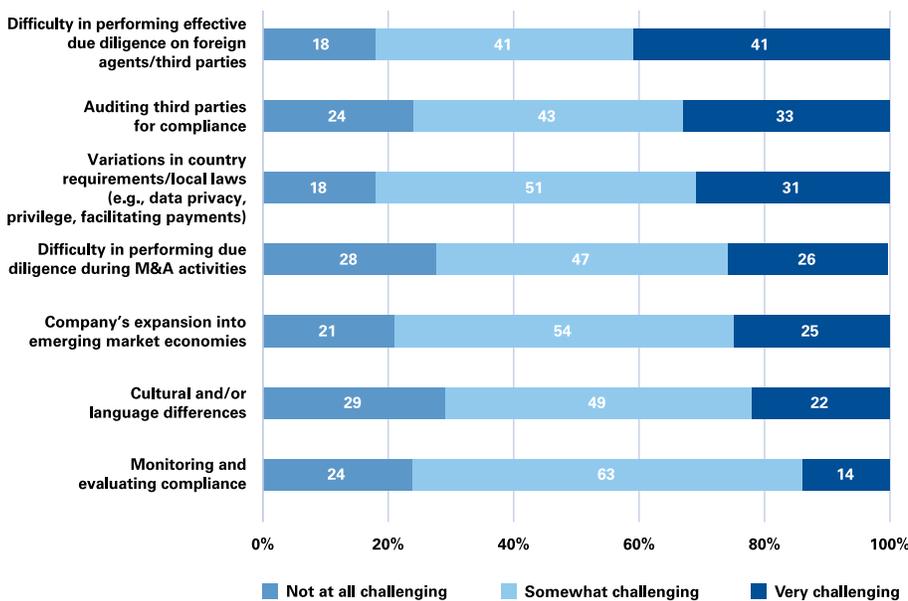
<sup>10</sup> Department of Justice, “The Lay-Person’s Guide to the FCPA,” [www.usdoj.gov/criminal/fraud/docs/dojdocb.html](http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html)

## FCPA Challenges

One of the primary motivations in conducting the survey was to understand the areas of FCPA, anti-bribery, and anti-corruption compliance that multinational companies find most challenging.

The results (see Chart 6) show that performing effective due diligence on foreign agents and third parties is either “very” challenging or “somewhat” challenging to most (82 percent) of the respondent population. The same number found that dealing with the variations in country requirements and local laws (data privacy, privilege, facilitating payments) is “very” or “somewhat” challenging. Auditing third parties for FCPA compliance also is a significant challenge (76 percent) for the respondents.

**Chart 6: Challenge of Performing Due Diligence**



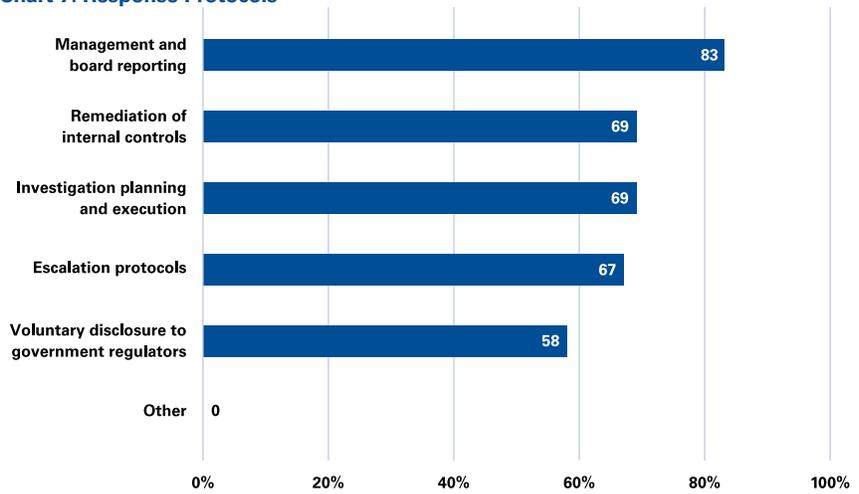
“Don’t Know” responses are not shown.  
May not total 100% due to rounding.

Source: KPMG LLP (U.S.), 2008

## Response Protocols

In the aftermath of discovering a potential or actual FCPA violation, organizations have learned that not being prepared can lead to a number of serious problems. Having appropriate protocols in place may help mitigate those problems. The most common response protocol identified by the population (see Chart 7) was reporting to management and the board (83 percent), followed by remediation of internal controls (69 percent) and investigation planning and execution (69 percent). Fifty-eight percent reported protocols for voluntary disclosure to the government or regulators.

**Chart 7: Response Protocols**



“Don’t Know” responses are not shown.  
Multiple responses accepted.

Source: KPMG LLP (U.S.), 2008

## Looking Ahead

### *Objective Review of an FCPA Compliance Program*

Fifteen percent of respondents reported having their FCPA compliance program audited by an objective third party. Among those who did not have an objective review, 25 percent said they would consider such a review sometime within the next 18 months.

### *Future Focus*

One quarter of the respondents said that over the next 12 months their organization would increase its focus on FCPA compliance, and the remainder said the focus would remain the same. The area of largest expenditure associated with FCPA compliance in the next 12 to 24 months, according to respondents, will be training (69 percent), followed by personnel (28 percent) and technology (3 percent).

## Next Steps



In mid-September 2008, a noted oil-industry executive admitted in an agreement filed in federal court that he intended that a portion of US\$182 million in payments to consultants be used to pay bribes and kickbacks in order to land lucrative business contracts. And, while such illegal activity is hardly uncommon these days, it is worth noting that the investigation was conducted not only by U.S. authorities but also by law enforcement officials in a number of countries in Europe.

On September 11, 2008, at an FCPA conference in Washington, D.C., the DOJ's Mendelsohn said he expected anti-bribery and anti-corruption enforcement activity to continue to increase: "I think that trend is certainly going to continue, given the significant number of matters that we have under investigation. The number of individual prosecutions has risen, and that is not an accident. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. It is not fun and games."<sup>11</sup>

Mendelsohn noted that multinational businesses should expect "more multijurisdictional cases—cases where the conduct of one company impacts more than one jurisdiction. It is not just the United States that may be in play. In the United States, if you are a private company you are only dealing with [the DOJ]. If you are an issuer, you are dealing with the Department and SEC.

If you are a foreign issuer or a U.S. issuer doing business around the world, you may be subjecting yourself to investigation and potential prosecution everywhere you are doing business, everywhere you bank."<sup>12</sup>

These developments serve as a vivid reminder of the need for frank discussions and quick actions within organizations around the necessity of appropriate compliance programs and activities to lower the risk of violating the FCPA and other anti-bribery and anti-corruption laws.

<sup>11</sup> American Bar Association conference: "The Foreign Corrupt Practices Act: Current SEC and DOJ Enforcement Initiatives," September 11, 2008, Washington, D.C.

<sup>12</sup> Ibid.

## About KPMG Forensic

KPMG Forensic is a global practice comprising multidisciplinary professionals from KPMG member firms who can assist clients in their efforts to achieve the highest levels of business integrity through the prevention, detection, and investigation of fraud and misconduct. This practice not only helps clients discover the facts underlying concerns about fraud and misconduct but also assists clients in assessing their vulnerabilities to such activities, and in developing controls and programs to address these risks.

KPMG Forensic uses computer forensic and data analysis techniques to help clients detect fraudulent activity and other forms of misconduct. In addition, KPMG LLP, the U.S. member firm, operates the Cypress Technology Center (CTEC), which offers sophisticated technology tools and skilled professionals to help clients reduce litigation costs and risks in the areas of evidence and discovery management and the acquisition, management, and analysis of large data sets.

Professionals in the KPMG Forensic practice draw on extensive experience in forensic accounting, law and regulatory enforcement, fraud and misconduct risk assessment, anti-fraud risk controls, program design and implementation, asset tracing, computer forensics, and forensic data analysis.

With professionals from the Americas, Asia Pacific, and Europe to the Middle East and Africa, KPMG Forensic is well positioned to provide a high level of consistent service to global clients. It can readily assemble multinational teams comprising members who have shared methodologies, demonstrated technical skills, and deep industry knowledge.

Service offerings are subject to legal and regulatory restrictions. Some services may not be available to KPMG's financial statement audit or other attest service clients.

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