3. Anti-Corruption Compliance in Switzerland
and the Impact of the U.S. FCPA and the U.K. Bribery Act

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This report highlights recent developments of anti-corruption legislation applicable to companies doing business both in Switzerland and abroad, particularly in the United States (U.S.) and in the United Kingdom (U.K.), and the associated risks.

The reason for the increasing number of extraterritorial investigations is simple: it is lucrative. Recently, the Wall Street Journal noted that FCPA prosecutions turned into a cash cow for the Depatment of Justice (DoJ) and the Securities and Exchange Commission (SEC)[1].

"The 1977 FCPA was intended to prevent American companies from joining the Third World's payoff habits. Over the last five years, however, Justice has begun to stretch the law into a far more blunt instrument ... Houston federal judge Lynn Hughes was similarly skeptical last month about the bribery case against an official at Swiss company ABB, saying in a verbal order that the principal witness 'knows almost nothing' and gave answers that were 'abstract and vague, generally relating gossip.' Ouch. Justice may not mind these embarrassing failures, considering the cash its prosecutions are bringing in. The government saw a $1.8 billion windfall in FCPA-related fines and penalties from Justice and the Securities and Exchange Commission in 2010 and another $508.6 million in 2011."

The one-way trend towards global investigations, zero tolerance and the need of global compliance is striking and irreversible. Companies with international business activities are well advised to ensure compliance with anti-corruption regimes enacted in Switzerland, in the U.S. and in the U.K. by implementing the necessary organizational measures to avoid the risk of serious consequences.

Tightening Anti-Corruption Enforcement under Swiss Legislation

Recognizing the signs of time, Switzerland timely enacted legislation criminalizing bribery of foreign officials as well as private commercial bribery committed by companies in Switzerland and/or abroad[2]:

By enacting these new laws, Switzerland successfully forestalled a clash of legal systems as recently experienced in its tax disputes with the U.S. and Germany.

As evidenced by two recent cases, Switzerland's courts and authorities are not reluctant to apply the anti-corruption provisions beyond its boundaries. In the matter of *Sani Abacha*, the late Nigerian dictator, a Swiss court ordered the confiscation of bank accounts held outside Switzerland in the aggregate amount of CHF 350 million[3]. Abacha, who died in June 1998, is suspected of having taken some USD 2.2 billion from the Nigerian central bank between his taking of power in November 1993 and his death four years later.

Another landmark case became final and binding recently. In November 2011 the Federal Prosecutor imposed a fine of CHF 2.5 million plus compensatory claim of CHF 36.4 million on *Alstom* Network Schweiz AG for failing to take necessary and reasonable precautions to prevent bribery of foreign public officials[4]. The Federal Prosecutor had investigated potential briberies in 15 countries and came to the conclusion, that consultants retained by Alstom forwarded success fees to decision-makers in Latvia, Tunisia and Malaysia. Quite notably, the decision of the Federal Prosecutor contains statements that the compliance department was understaffed, not sufficiently experienced and not sufficiently trained.

Many *international sports associations* such as IOC, FIFA, IIHF and UEFA are headquartered in Switzerland. There is a notable trend in these organizations to tighten the rules and policies to prevent bribery of association officials and business partners. For example, FIFA recently mandated well-known professor Mark Pieth as chairman of its Independent Governance Committee[5].

Reach of the U.S. Foreign Corrupt Practices Act (FCPA)[6]

Under the FCPA, two types of behavior are identified as illegal: corrupt payments to non-U.S. government officials and the failure by stock-listed companies to accurately and fairly reflect transactions in their books. The FCPA enjoys a substantial extraterritorial effect. It targets both U.S. and foreign companies and individuals that use U.S. mails, U.S. bank accounts or other means of U.S. interstate commerce in connection with a corrupt act.

For almost 40 years, prosecutions under the FCPA, a law enacted in 1977, were rare. In the past few years, however, FCPA investigations underwent a veritable explosion. The prosecutions and penalties under FCPA have generated billions of U.S. Dollars (USD). Companies being prosecuted in Switzerland or elsewhere face an increasing risk of parallel prosecution by the U.S. Department of Justice (DoJ) or by the Securities and Exchange Commission (SEC) under the FCPA. There is a clear trend towards industry-wide and global nature of FCPA investigations.

Currently, the top ten list of FCPA fines includes nine non-U.S. companies, amongst others a Swiss company[7].

Current Top Ten List of FCPA Fines

Rank	Company	Country	Year	Fine
1	Siemens	Germany	2008	USD 800 million
2	KBR/Halliburton	U.S.	2009	USD 579 million
3	BAE	U.K.	2010	USD 400 million
4	Snamprogetti	Netherlands/Italy	2010	USD 365 million
5	Technip	France	2010	USD 338 million
6	JGC Corporation	Japan	2011	USD 219 million
7	Daimler	Germany	2010	USD 185 million
8	Alcatel-Lucent	France	2010	USD 137 million
9	Magyar Telekom	Hungary	2011	USD 95 million
10	Panalpina	Switzerland	2010	USD 82 million

Quite notably, the top ten list of 2009 included another Swiss company, *ABB*. The company paid USD 58.3 million in disgorgement, prejudgment interest and penalties to the DoJ and the SEC to resolve charges arising from payments related to projects in Mexico. ABB fully cooperated with the DoJ and the SEC and put in place a global comprehensive compliance and integrity program which, according to the DoJ "may become a benchmark for the industry"[8].

Unlike complicated accounting transactions, bribes are easy for juries to understand and there is nothing U.S. prosecutors like more than efficient convictions. As per January 2012, the FCPA *corporate investigations* list included seventy-eight names[9], inter alia: Alstom, AstraZeneca plc., GlaxoSmith-Kline plc., Schlumberger NV, Smith & Nephew plc., Goldman Sachs Group Inc., Total SA, Transocean Ltd and Zimmer Holdings Inc.

Also *individuals* face a significant risk of FCPA prosecution. In December 2011, Preet Bharara, the U.S. Attorney for the Southern District of New York, announced that eight former executives and agents of Siemens, coming from Germany, Switzerland, Argentina and Israel, were charged for allegedly engaging in a decade-long scheme to bribe Argentine government officials to secure a USD 1 billion contract with the Argentine government[10]. Shortly before, in October 2011, Judge Jose E. Martinez sentenced Joel Esquenazi, the former president of Terra Telecommunications Corp., who authorized the payment of USD 890,000 in bribes to Haiti Telecom, to 15 years imprisonment (5 years for eight counts of violating the FCPA and 10 years for 13 counts of money laundering). It is to date the longest sentence ever imposed under the FCPA. The sentence demonstrates the DoJ's commitment to impose substantial sentences on individuals who violate the FCPA.

The *U.S. Chamber of Commerce*[11], the largest business lobbying institution in the U.S., argues that the FCPA is ambiguous and that the U.S. law enforcement authorities (DoJ, SEC) have taken extreme positions. The U.S. Chamber of Commerce, in its paper "Restoring Balance Proposed Amendments to the Foreign Corrupt Practices Act", recommends to reform various aspects[12], including (i) adding a compliance defense, (ii) limiting a company's liability for the prior actions of a company it has acquired; (iii) adding a "willfulness" requirement for corporate criminal liability; (iv) limiting a company's liability for acts of a subsidiary; and (v) defining a "foreign official" under the statute.

Long-Arm of the U.K. Bribery Act

The U.K. Bribery Act, effective as of July 1, 2011, requires companies to reexamine their compliance program. The U.K. Bribery Act imposes criminal liability on acts and omissions that are not prohibited under the FCPA, such as:

- private commercial bribery;
- facilitation payments; and
- failure to prevent bribery by "associated persons" performing services for or on behalf of the company.

With its far reaching extraterritorial effect, the U.K Bribery Act represents a hidden threat to numerous internationally active companies. The Bribery Act empowers the Serious Fraud Office (SFO) to prosecute offenses of companies carrying on part of their business in the U.K. for offenses under the Bribery Act irrespective of whether the offences take place in the U.K. or elsewhere. The director of the SFO commented on the long-arm of the Bribery Act as follows[13]:

"The UK's Bribery Act is going to apply to foreign corporates that satisfy a simple test. This test will be satisfied if the foreign corporate carries on business or any part of its business in the UK. If it does, then it will be within the jurisdiction of the Serious Fraud Office when the Bribery Act comes into force. We shall have jurisdiction in respect of any act of bribery committed in any other country even if there is no connection to your UK business presence."

The SFO expressed its determination to test the extraterritorial reach (long-arm) of the Bribery Act.

Most notably, companies will be held strictly liable for bribes paid by "associated persons" anywhere in the world under the Bribery Act. There is, however, a compliance defense available. The company can demonstrate that it has adequate procedures available designed to prevent bribery not only by its employees, but also by its agents and business partners performing services for or on behalf of the company. In March 2011, the U.K. Ministry of Justice published a "Guidance" with six criteria in an effort to clarify the important compliance defense[14]. The criteria are briefly summarized by way of questions (Q) and answers (A):

- *Proportionate procedures:* Q: Do you have a code of conduct and effective procedures in place? A: Companies must certainly focus on and prevent high risks, but they must also deal with facility payments and donations.
- *Top level commitment:* Q: Do you have top level commitment? A: The CEO, CFO, General Counsel and Senior Managers are responsible to communicate a crystal clear "tone from the top" that bribery is illegal and that the company pursues a strategy of zero tolerance.
- *Risk assessment:* Q: Have you thoroughly assessed your risk? A: Companies must periodically assess the risks inherent to the business, the business partners and the place of business.
- *Due diligence:* Q: Having completed our due diligence on your agents and others who provide services to your business, how will you reinforce your corporate values and culture? A: The company must implement adequate procedures assessing and managing the risks inherent to its agents and service providers.
- *Communication:* Q: Have you launched an internal communications program and ensured all your staff have had the correct level of education and training? A: The tone from the top and principles of bribery prevention must be understood throughout the company. Training, including whistle-blowing, must be proportionate to the exposure of the employees.
- *Monitor and review:* Q: Do you have an ongoing mechanism to monitor and review your performance? A: Risks are changing and companies should periodically align their policies and procedures to prevent bribery.

The Guidance of the Ministry of Justice contains 11 case studies dealing with the aforementioned six principles and copes with facilitation payments, hospitality, joint ventures and due diligence of agents. However, the case studies bring only limited clarity how prosecutors and courts will apply the Bribery Act.

Implementation of Effective Anti-Corruption Programs[15]

In view of the newly enacted legislations in Switzerland, in the U.S. and in the U.K., the increased readiness of local prosecutors to enforce anti-corruption legislation and the trend towards global investigations, companies are well-advised to observe the following principles:

1) *Code of conduct:* Companies exposed to corruption and bribery must establish a code of conduct, an integrity program. It is no longer sufficient to promulgate a paper tiger. The code of conduct must be implemented throughout the company and all subsidiaries. It is an important element

to the tone from the top. The CEO, CFO, General Counsel and other senior staff must demonstrate leadership.

2) *Risk analysis:* Risks may be assumed but adequate measures have to be taken. Industries such as military equipment, construction, oil and gas are deemed particularly exposed sectors. Equally, geographical factors are relevant: Emerging markets, where intermediaries are necessary, indicate increased risks and require corresponding measures.
3) *Compliance organization:* The Alstom decision of the Swiss Federal Prosecutor teaches us that the compliance department must have adequate and sufficient staffing. The chief compliance officer (CCO) must be a senior officer who is in a position to report directly to the board of directors. Subsidiaries may have their own compliance program, but the parent company must support the local compliance officers. Joint ventures must meet the compliance standard of subsidiaries.
4) *Zero tolerance:* The code of conduct should explicitly deal with gray areas such as facilitation payments, hospitality, personal gifts, or charitable donations. Payments, hospitality, and gifts shall not be made in an effort to influence the decision-making process. They must be entered in the company's records and must not be concealed.
5) *Intermediaries:* Agents, intermediaries, consultants, representatives, distributors, contractors, suppliers, consortia, joint ventures must be carefully selected and supervised. Red flags are, e.g.: high risk countries, high remunerations, close government relations, dubious reputation, unwillingness to adopt compliance rules similar to those of the company (and respective audit rights), intransparent invoicing, request for payment via offshore accounts.
6) *Implementation:* The time when compliance programs were sold and purchased "off the shelf" is long gone. The work begins with the adoption of the code of conduct. The compliance program must be implemented throughout the company and its subsidiaries. In doing so, the compliance staff must closely cooperate with the management.
7) *Communication and schooling:* The most efficient way of communication, internally and externally, is the publication of the code of conduct on the internet, i.e. on the company's website. In case of enforcement proceedings it is important that the company can document the schooling of its employees, e.g. by way of e-learning. Online schooling with respect of FCPA and the U.K. Bribery Act is offered by professionals such as SAI Global[16]. The company may also offer its employees a helpline.
8) *Whistle blowing:* In an ideal world whistleblowers should report suspected corruption or bribery to their immediate superior. This, however, entails inherent risks for the whistleblower. The company should therefore arrange for different reporting channels, including reporting to the CCO and anonymous reporting, typically to an external service provider such as Integrity Line[17]. Importantly, follow-up system should be transparent for the whistleblower and there should be measures to protect whistleblowers.
9) *Controls and sanctions:* Routine controls must be carried out to ensure the implementation of the code of conduct at all relevant levels. Concrete suspicions must be investigated. In this context, the company may need to conduct internal investigations. The employees have a duty to collaborate. Violations of the code of conduct should be sanctioned in an appropriate manner (ultima ratio: dismissal of the employee).
10) *Cooperation with authorities:* voluntary disclosure, industry wide investigations, cooperation during enforcement. Very significantly, Ronald Weich, Assistant Attorney General, recently identified eight factors and circumstances in which the DoJ declined to prosecute companies, including voluntary disclosure, production of truthful and complete information or one single employee being involved in improper payments[18]:

1) http://online.wsj.com/article/SB10001424052970203711104577199412696071528.html
2) Enacted in 2003, Article 102 of the Swiss Criminal Code ("SCC") foresees criminal liability of companies; since 2011, Article 22a of the Federal Personnel Act obliges federal employees to report crimes or other irregularities; see also http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=en&msg-id=42981
3) http://www.expatica.com/be/news/belgian-news/Swiss-seize-millions-from-late-dictator_s-son_58292.html
4) http://www.nzz.ch/nachrichten/wirtschaft/aktuell/alstom_muss_millionenbusse_und_ent-schaedigung_zahlen_1.13386862.html; see Article 322septies SCC; Article 102 Sec. 2 SCC allows to impose criminal liability if a company fails to take reasonable organizational measures to prevent bribery.
5) http://www.fifa.com/aboutfifa/organisation/news/news-id=1549900/
6) Further reading and background information regarding the extraterritorial reach of the FCPA may be found under http://www.arnoldporter.com/resources/documents/Advisory%20Extraterritorial_Reach_FCPA_and_UK_Bribery%20Act_Implications_International_Business.pdf http://www.arnoldporter.com/resources/documents/FCPA%20Newsletter%202_14.pdf http://www.arnoldporter.com/resources/documents/FCPA%20Newsletter_FINAL144.pdf
7) http://www.justice.gov/criminal/fraud/fcpa/cases/2011.html; http://www.justice.gov/criminal/fraud/fcpa/cases/2010.html http://www.justice.gov/criminal/fraud/fcpa/cases/2009.html
8) http://www.abb.com/cawp/seitp202/b7aa479846d0fe19c12577ae0017bfa0.aspx
9) http://www.fcpablog.com/blog/2012/1/4/the-corporate-investigations-list-january-2012.html
10) http://www.justice.gov/usao/nys/pressreleases/December11/sharefetalsiemensfcpaindict¬mentpr.pdf
11) http://www.uschamber.com
12) http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf
13) http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2011/3rd-russia--cis-summit-on-anti-corruption-conference,-moscow.aspx
14) Further reading and background information regarding anti-corruption compliance may be found in the pertaining publication of professor Mark Pieth http://www.pieth.ch/nc/publications/
15) http://www.dike.ch/buchshop/product_info.php?products_id=941
16) http://www.saiglobal.com/compliance
17) http://www.integrityline.org
18) http://www.mainjustice.com/wp-admin/documents-databases/160-2-DOJ-response-to-6.22.11-FCPA-letter.pdf

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