



FORENSIC

Overseas Bribery and Corruption Survey

ADVISORY

Contents

5

**Introduction and
Methodology**

7

The Regulatory Landscape
– **The US Foreign Corrupt
Practices Act 1977**



9

The Regulatory Landscape
– **The UK Anti-Terrorism,
Crime and Security
Act 2001**

10

The Regulatory Landscape
– **Non-Governmental
Organisations**

13

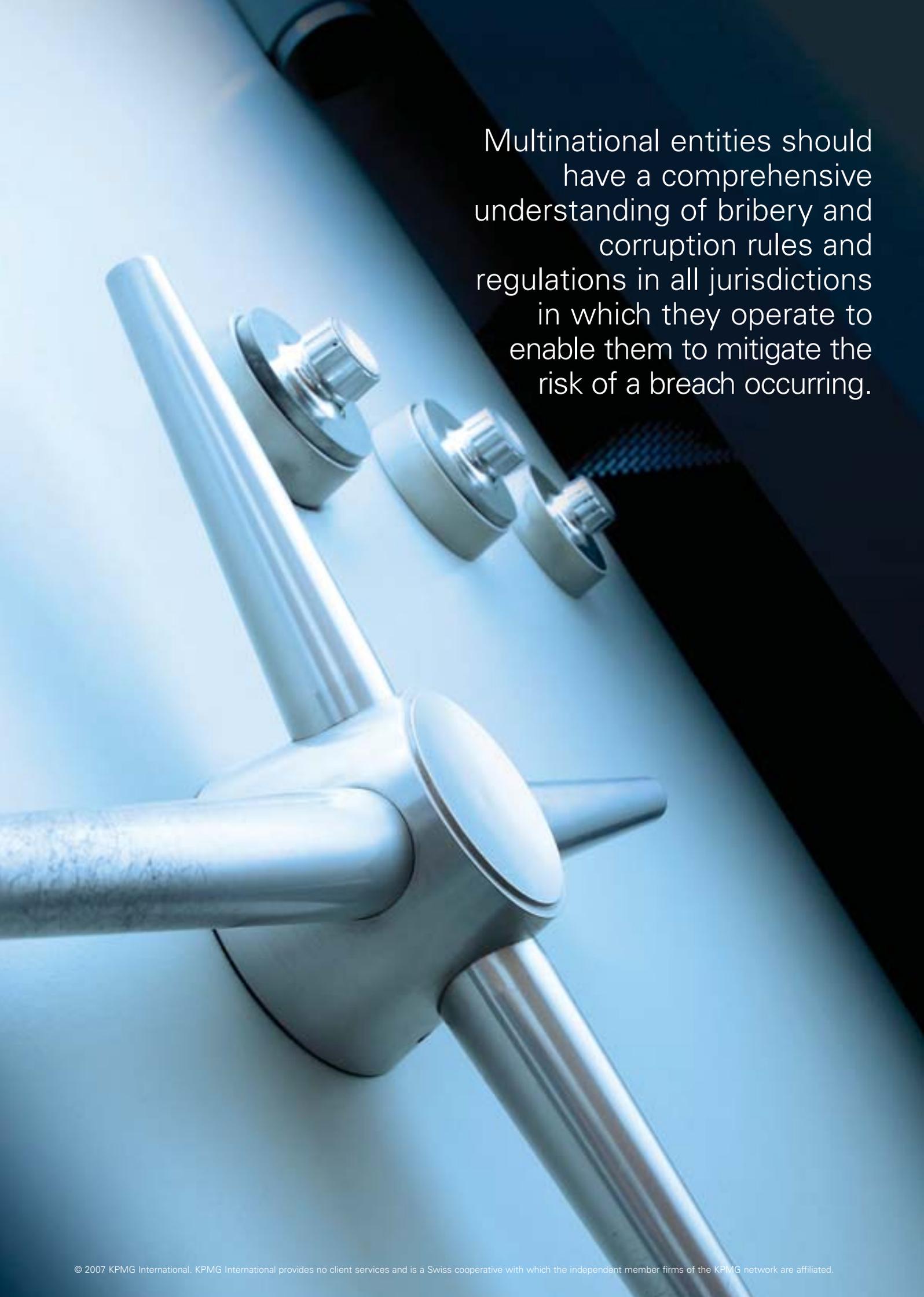
**Considerations for
Effective Compliance**

17

**The Potential Consequences
of Non-Compliance**

18

In Conclusion



Multinational entities should have a comprehensive understanding of bribery and corruption rules and regulations in all jurisdictions in which they operate to enable them to mitigate the risk of a breach occurring.

Introduction and Methodology

KPMG Forensic's Overseas Bribery and Corruption Survey examines the awareness of the UK Anti-Terrorism Crime and Security Act 2001 (UK 2001 Act) and US Foreign Corrupt Practices Act 1977 (US FCPA) and the impact of these regulations on companies operating in multiple jurisdictions.

We surveyed more than 100 FTSE 350 companies, asking individuals responsible for compliance with anti-bribery and corruption legislation at their organisation a series of questions. These questions centred on their knowledge of both the US FCPA and UK 2001 Act, and what steps their organisation is taking to ensure compliance with these regulations.

The findings of the research are interspersed with KPMG Forensic's commentary on the implications of the results, and the wider subject of how companies can address the issue of overseas bribery and corruption.

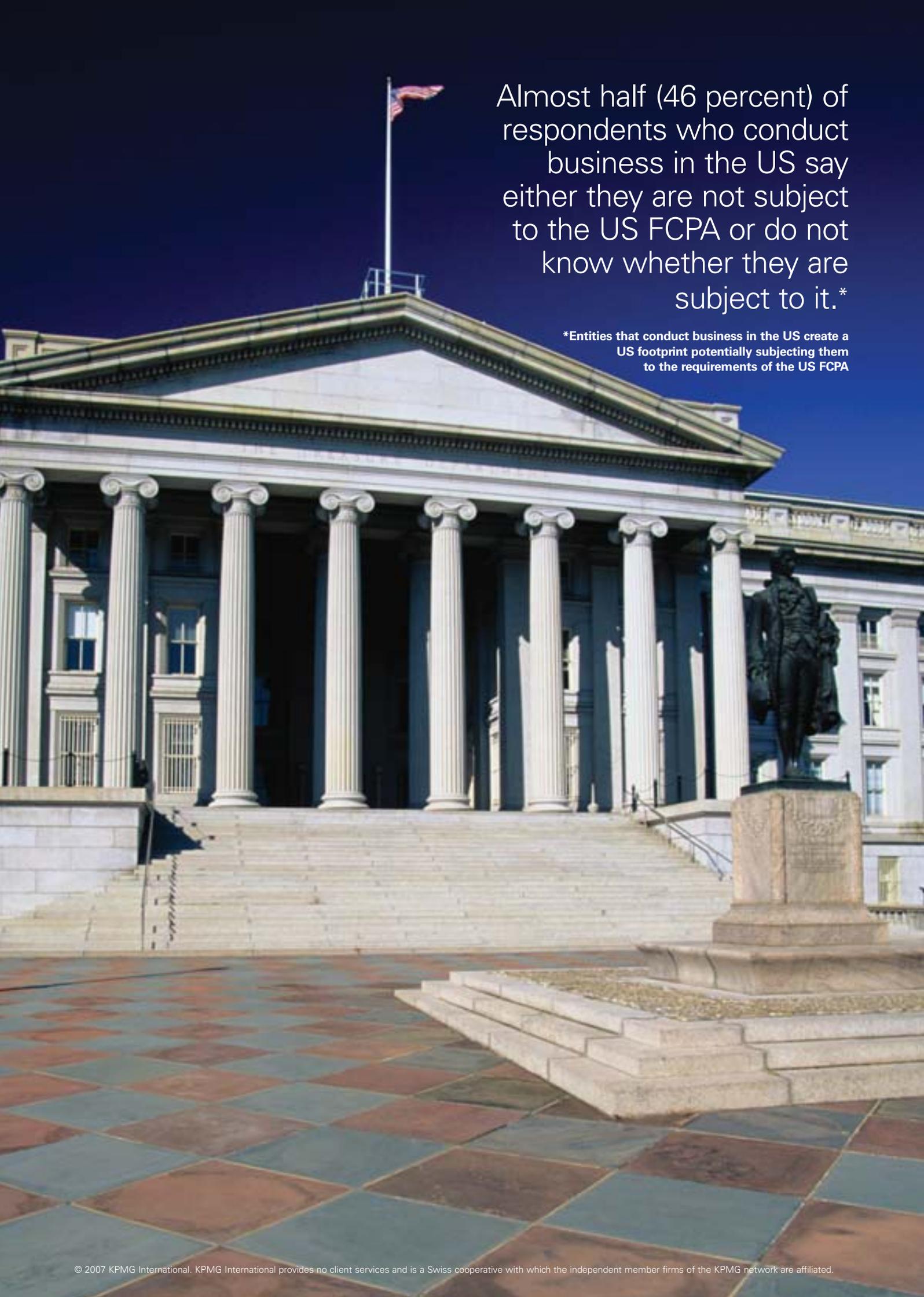
Summary Findings

UK 2001 Act

- Three quarters of respondents agree that the UK authorities should have the power to prosecute corrupt practices abroad.
- The majority of respondents are aware that UK citizens can be prosecuted in the UK for acts of bribery committed abroad.
- The majority of respondents think the UK 2001 Act is a laudable attempt to put an end to unfair practices.

US FCPA

- Three quarters of respondents replied that their company conducts business in the US, thereby creating a US footprint, potentially subjecting them to the requirements of the US FCPA.
- However, almost half of respondents who conduct business in the US say either that they are not subject to the US FCPA or do not know whether they are subject to the US FCPA.
- Two thirds of respondents who conduct business in the US stated that they do not have a US FCPA compliance program or do not know if they have such a program.



Almost half (46 percent) of respondents who conduct business in the US say either they are not subject to the US FCPA or do not know whether they are subject to it.*

***Entities that conduct business in the US create a US footprint potentially subjecting them to the requirements of the US FCPA**

Overseas Bribery and Corruption: The Regulatory Landscape

1. The US Foreign Corrupt Practices Act 1977

The US FCPA was enacted in 1977 in response to a number of scandals and was designed to restore public confidence in the integrity of the US business system. The US FCPA was amended in 1988 and 1998, and has extra-territorial reach. The Act is broad in its application and extends well beyond companies listed on US stock exchanges.

The number of cases being brought by the US government is increasing and the penalties are rising steadily into the tens of millions of US dollars.

The US FCPA contains a series of provisions, falling under two key categories:

1. Anti-bribery prohibition:

The US FCPA makes it a criminal offence for a director, employee, agent or any third party acting on behalf of a US domestic concern or SEC registrant to make payments to a foreign official for the purpose of obtaining or retaining a business advantage.

2. Books and records provision:

The US FCPA requires publicly held US companies, and foreign companies

listed on US stock exchanges, to maintain accurate books and records and to devise and maintain an adequate system of internal accounting controls so that bribes cannot be concealed or disguised.

Although the US FCPA has been in effect for 30 years, the US Department of Justice and Securities and Exchange Commission have become significantly more active since 2001. They are often working together to bring charges against individuals and entities for conduct occurring within and outside the US. The use of plea agreements such as deferred prosecution agreements or non-prosecution agreements, in order to avoid going to trial, is becoming more common. Prosecutions of individuals, including foreign nationals, can include jail sentences.

Extra-territorial reach

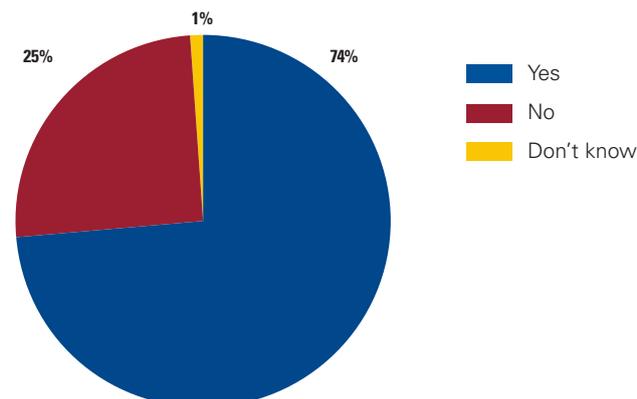
Foreign nationals can be held liable for their improper conduct if they are employees or agents of US companies, or for conduct they undertake within the US that furthered a corrupt payment.

Foreign businesses with a US footprint can also be held liable for violations of the anti-bribery provision. A US footprint can be created in many ways, for example, conducting business or having operations in-country, using financial institutions and banking systems or utilising commerce systems.

The fact that foreign businesses with a US footprint can be held liable for violations is of particular relevance to our respondents, three quarters of whom conduct business in the US. However, almost half (46 percent) of respondents who conduct business in the US say either they are not subject to the US FCPA or do not know whether they are subject to it.

This significant knowledge gap highlights the fact that UK multinationals may be exposed to prosecution from US regulators under legislation that they previously had not considered relevant to their business. This is of particular importance given the severe criminal sanctions – including imprisonment, and civil penalties – for failure to comply with the US FCPA.

Figure 1
Organisations that conduct business in the US



Base: All (107)

The majority of respondents are aware that UK citizens and companies can be prosecuted in the UK for acts of bribery committed abroad.



2. The UK Anti-Terrorism, Crime and Security Act 2001

The UK 2001 Act extends existing UK bribery offences including:

- Common Law Offence of Bribery;
- Public Bodies Corrupt Practices Act 1889;
- Prevention of Corruption Act 1906; and
- Prevention of Corruption Act 1916.

Under the UK 2001 Act, bribery and corruption is a criminal offence. The UK 2001 Act came into force after the UK signed the OECD Anti-Bribery Convention¹, and is meant to deter UK companies and nationals from committing acts of bribery overseas. UK companies and nationals can now be prosecuted in the UK for an act of bribery committed wholly overseas.

Interestingly, private bribery, for example between a UK national and an employee of a foreign company, is also a criminal offence, something not addressed by the US FCPA.

The majority of respondents (80 percent) agreed that the UK 2001 Act was a laudable attempt to put an end to unfair practices. However, over half the respondents (58 percent) agreed that the Act ignores the fact that, in many countries, bribery is “simply the way business is done.”

The UK 2001 Act applies to UK businesses, UK citizens and residents for conduct that occurred within or entirely outside the UK. Although 81 percent of respondents stated that they are aware that UK citizens and companies abroad can be prosecuted under the UK 2001 Act, the majority of respondents (73 percent) stated that apart from this they know little or nothing about the Act itself.

Extra-territorial reach

The UK 2001 Act also has extra-territorial reach and applies to foreign nationals and foreign businesses for conduct undertaken within the UK.

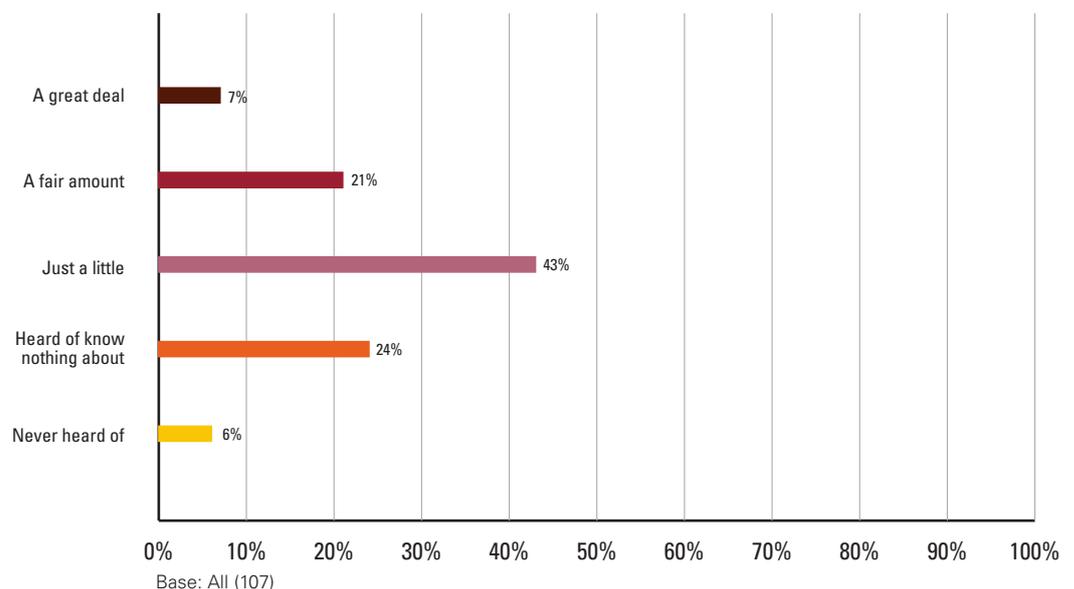
The survey results highlight the fact that UK businesses are failing to recognise the importance of the UK 2001 Act and its extensive application.

Of the respondents who were aware that UK citizens and UK companies abroad can be prosecuted, a third (31 percent) said that they had taken no action to communicate the UK 2001 Act to their employees. Half of these respondents cited the fact that they “did not think it was relevant to their business” as the reason they had not communicated the UK 2001 Act to their employees.

Significantly, half of respondents agreed that difficulties in collecting evidence relating to bribery and corruption mean the UK 2001 Act is unlikely to be effective. However, UK government authorities state that a number of cases are currently being investigated.

Figure 2

Respondents knowledge about the UK's 2001 Anti-Terrorism, Crime and Security Act



¹ OECD Convention on Combating Bribery of Public Officials in International Business Transactions, signed 17 December 1997.

3. Non-Governmental Organisations

In response to the widespread global corruption phenomenon, a number of international agreements have been ratified which require signatories to set common standards with regards to the definition and prosecution for the bribery of public officials.

Two of the most prominent and rigorous of these agreements are the:

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which has 37 country signatories and sets out measures dealing with corruption with respect to prevention, criminalisation, international cooperation and asset recovery.
2. United Nations Convention against Corruption 2003 which has over 100 signatories and highlights the importance of addressing corruption with a comprehensive framework, setting common standards.

The existence of these international agreements serves to highlight the heightened awareness of bribery and corruption by many countries around the world. As a result, many countries are enacting their own legislation to comply with the conventions.

Multinational entities need to have a comprehensive understanding of the bribery and corruption rules and regulations in all jurisdictions in which they operate, to enable them to mitigate the risk of a breach occurring. This is particularly important to companies who operate in countries with perceived high rates of corruption, as identified by Transparency International and other non-governmental organisations.

As companies expand their operations into 'high risk' countries, the importance of an effective compliance program that extends to all business operations is paramount. An increasing number of US FCPA prosecutions have resulted from violations that occurred in Asia Pacific and African regions². However, over 40 percent of respondents who conduct business in the US and Asia Pacific and/or Africa do not have a US FCPA compliance program.

Transparency International's 2007 Corruption perception index ranks countries by their perceived levels of corruption. Transparency International is an international non-governmental organisation devoted to combating corruption by raising awareness about the damaging effects of corruption and working towards the implementation of multilateral conventions.

² See recent press releases on the US Department of Justice website: <http://www.usdoj.gov/criminal/fraud/fcpa/>



Sixty-five percent of companies who conduct business in the US either do not know whether they have a US FCPA compliance program or say they do not have such a program.

Overseas Bribery and Corruption: Considerations for Effective Compliance

A comprehensive understanding of the provisions of the US FCPA, the UK 2001 Act and other anti-bribery and corruption rules and regulations is critical to any multinational enterprise. In order to prevent, detect and respond to bribery and corruption issues, an effective, global compliance program should be implemented.

Sixty-five percent of companies who conduct business in the US either do not know whether they have a US FCPA compliance program or say they do not have such a program.

The implications of this are severe, as US regulators will take into account the efforts a company has made to comply with the US FCPA should a violation occur.

Each company needs to consider their specific risk factors and relevant business processes in order to implement an effective program. There is no single answer as to what an effective compliance program should look like, however it may include:

a) Tone at the top

Setting the tone at the top, including the assignment of one or more independent senior individuals charged with responsibility for compliance, is central to an effective compliance program. These individuals are

responsible for the implementation and oversight of compliance with anti-bribery and corruption policies and procedures established in accordance with a company's overall compliance program. They should have a clear reporting line to the senior executives of the company to facilitate effective communication and to keep anti-bribery and corruption compliance on the agenda.

Our survey results show that the job title of the individual with responsibility for compliance with anti-bribery and corruption legislation can vary greatly, from Company Secretary to Security Director (see figure 4 below). The job title *per se* is not important, however it is important that the individual assigned to the role is qualified, knowledgeable and capable of performing the duties required of them.

It is unlikely to be sufficient to simply add anti-bribery and corruption compliance

to an individual's existing responsibilities if they do not have the requisite time and resources to fulfil the requirements of the role.

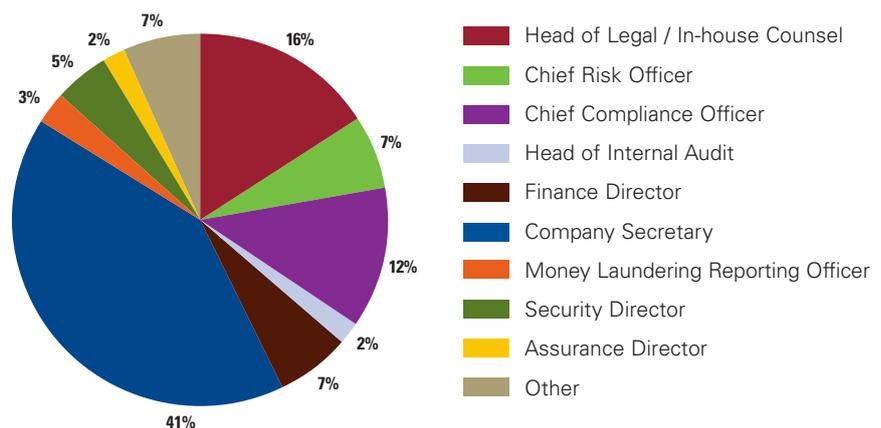
Those charged with responsibility for anti-bribery and corruption compliance should be supported by a team of adequately trained, qualified and capable people who have the time and resources to assist them with their anti-bribery and corruption responsibilities.

b) A global anti-bribery and compliance policy

A company should have a clearly articulated global compliance program which sets out the requirements of the UK, US and other anti-bribery and corruption legislation relevant to its business, along with the policies and procedures the company has adopted to comply with the legislation.

Figure 4

Job title of individual with responsibility for compliance with anti-bribery and corruption legislation



Base: All (107)

Almost half (46 percent) of respondents who stated that bribery and corrupt practices were used occasionally or frequently to gain commercial advantages abroad also stated that the frequency of corrupt practices in their sector is below average.

This global program should be adopted and implemented by the local business units and departments of the company.

c) Training and certification

Regular training for employees, agents and third parties should be given to ensure they are aware of their responsibilities under the relevant anti-bribery and corruption legislation, and the activities for which they may be found liable. Employees, agents and third parties should also be required to sign an annual certification to demonstrate their understanding.

The importance of training and annual certifications is underpinned by the fact that almost half of respondents (46 percent) perceived that bribery and or corrupt practices were used occasionally or frequently by organisations to gain contracts or commercial advantages abroad (see figure 5 below). However, when asked about the frequency of corrupt practices in their particular sector, almost half of these respondents stated that it was below average. This suggests that

respondents are either operating effective compliance programs to ensure that violations do not occur or they are unaware of the true scale of bribery and corruption within their industry.

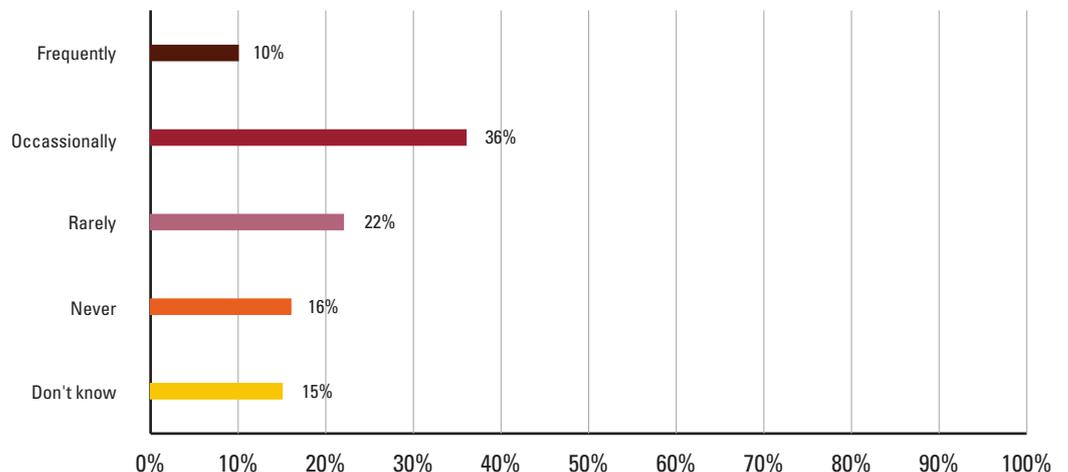
d) Integrity due diligence

In-depth, accurate and timely information allows companies to make informed decisions regarding who they are doing business with and enables them to take necessary precautions for monitoring high risk areas of their operations. Integrity due diligence involves the search, collection and analysis of information – from both public and confidential sources – on the background, ownership, business track record, reputation and integrity of entities or individuals.

Our respondents stated that they most commonly use lawyers, accountancy firms and British embassies to understand business practices in foreign countries. These sources can be useful in providing knowledge of local practices, laws and regulations and public information on entities or individuals (see figure 6).

Figure 5

Perceived frequency with which bribery and corruption practices are used to gain contracts or commercial advantages abroad



Base: All (107)

However, there may also be other hard to find or non-public information that can be obtained by utilising other sources provided by third party specialists. This additional information should allow a genuinely well informed business decision to be made.

Over half of respondents (55 percent) who use British embassies and consulates as a source of information in order to understand business practices in foreign countries stated that they found this support to be good.

e) ‘Whistleblower’ hotlines

A reporting system for employees, agents and third parties to report suspected anti-bribery and corruption violations and other criminal conduct can be an important element of an effective compliance program. A hotline enables anonymous reporting and can often be the first indication of a problem that needs to be addressed.

Previous KPMG research has found that 50 percent of fraudulent or corrupt activity is discovered through whistleblowing by employees³, and that employees are twice as likely to report

such activity through hotlines compared to five years previously⁴.

f) Monitoring for compliance and continuous feedback

A risk-based approach to monitoring for compliance should be adopted. This should target activity towards those areas that are considered most at risk, for example high risk jurisdictions or business areas in which controls are considered to be weak, or where a previous violation has occurred.

An annual risk assessment should be completed to ensure changes in the nature and size of business operations are taken into account. Monitoring for compliance in conjunction with a risk-based approach, may include in-country visits to conduct on-site audits and to review systems and controls.

A comprehensive compliance program should be constantly updated with findings from the monitoring process and changes in local legislation, to ensure it is up-to-date and relevant to the business.

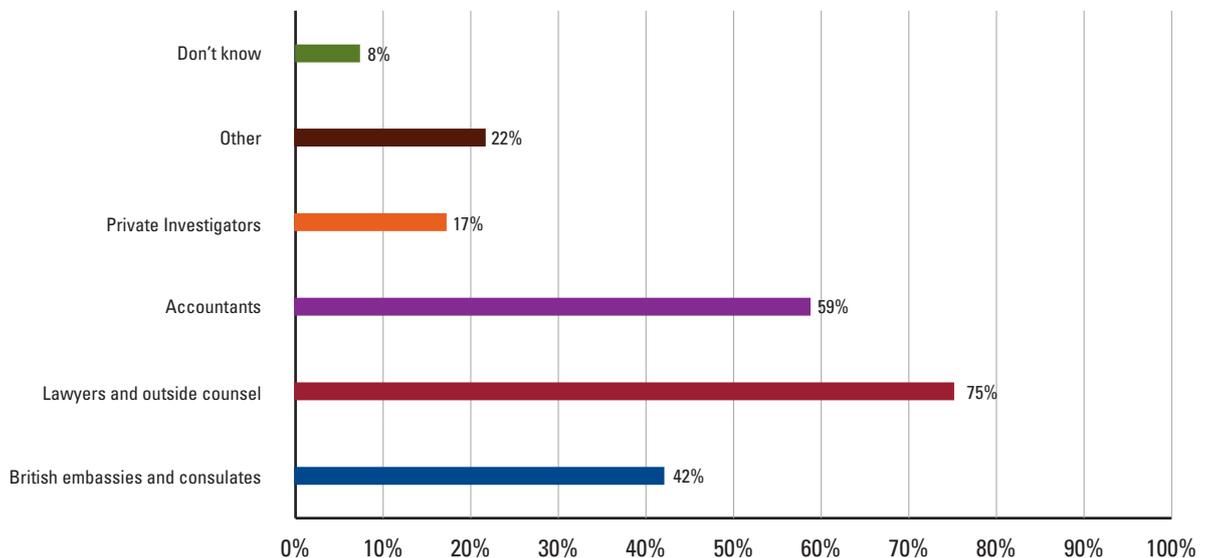
The compliance program should also be adapted to incorporate recommendations from investigations into alleged violations, taking into account lessons learnt to improve the framework for the future.

g) Response program

To be effective against the threat of fraud, corruption and misconduct, organisations should have a robust cross-border investigations methodology which will enable them to respond efficiently and effectively to violations.

An effective response program should clearly set out the response to an alleged violation including who is responsible for leading the investigation, how the alleged wrongdoer is dealt with, and the process for investigating the alleged violation including procedures for maintaining the integrity of data. The response program should also set clear guidelines for the use of outside counsel to establish legal privilege if applicable, and make decisions regarding disclosure to the regulators. It should also address when professional services firms are to be used to conduct an independent investigation.

Figure 6
Sources of information used for understanding foreign business practices



³ Profile of a Fraudster July 2004, KPMG in the UK
⁴ Integrity Survey 2005-2006, KPMG in the US

A close-up photograph of a hand holding a wooden gavel. The gavel has a dark, polished wooden head with several rounded, stacked sections. The hand is positioned on the left side of the frame, with the thumb and index finger gripping the handle. The background is a dark, out-of-focus blue-grey color. The lighting is dramatic, highlighting the texture of the wood and the skin of the hand.

The cost of implementing an effective compliance program to mitigate the risk of a breach is likely to be significantly less than the cost of an internal investigation, not to mention the fines and penalties imposed, should a breach actually occur.

Overseas Bribery and Corruption: The Potential Consequences of Non-Compliance

Penalties for non-compliance with the US FCPA are severe and tend to rise steadily, with fines in the tens of millions of dollars including potential disgorgement of profits from illicitly gained contracts.

Criminal liability⁵

- US \$2,000,000 per violation for a company
- US \$100,000 per violation for an individual including officers, directors, stockholders, employees or agents
- Up to 5 years imprisonment for an individual including officers, directors, stockholders, employees or agents
- US federal sentencing guideline factors will be considered when imposing criminal fines and penalties⁶

Civil liability for an SEC enforcement action

- Fines of US \$50,000 to US \$500,000 for a company

- Fines from US \$5,000 to US \$100,000 for an individual including officers, directors, stockholders, employees and agents
- Disgorgement of profits

US federal sentencing guideline factors

In addition to the criminal and civil liabilities prescribed under the US FCPA, the US regulators also consider federal sentencing guideline factors when handing out fines and penalties. In recent cases, the co-operation of the entities involved and the proactive and reactive measures in place to prevent further violations, have been taken into account when the regulator is considering the total penalty.

Other expenses

The internal investigation is likely to be costly and may lead to in-depth scrutiny of other transactions, as well as creating a significant diversion of management time and attention in order to respond to regulatory requests.

The fines handed down are often compounded by negative press coverage, the loss of investor confidence, criminal convictions, deferred and non-prosecution agreements, and the possible risk of debarment from contracting with government and other entities.

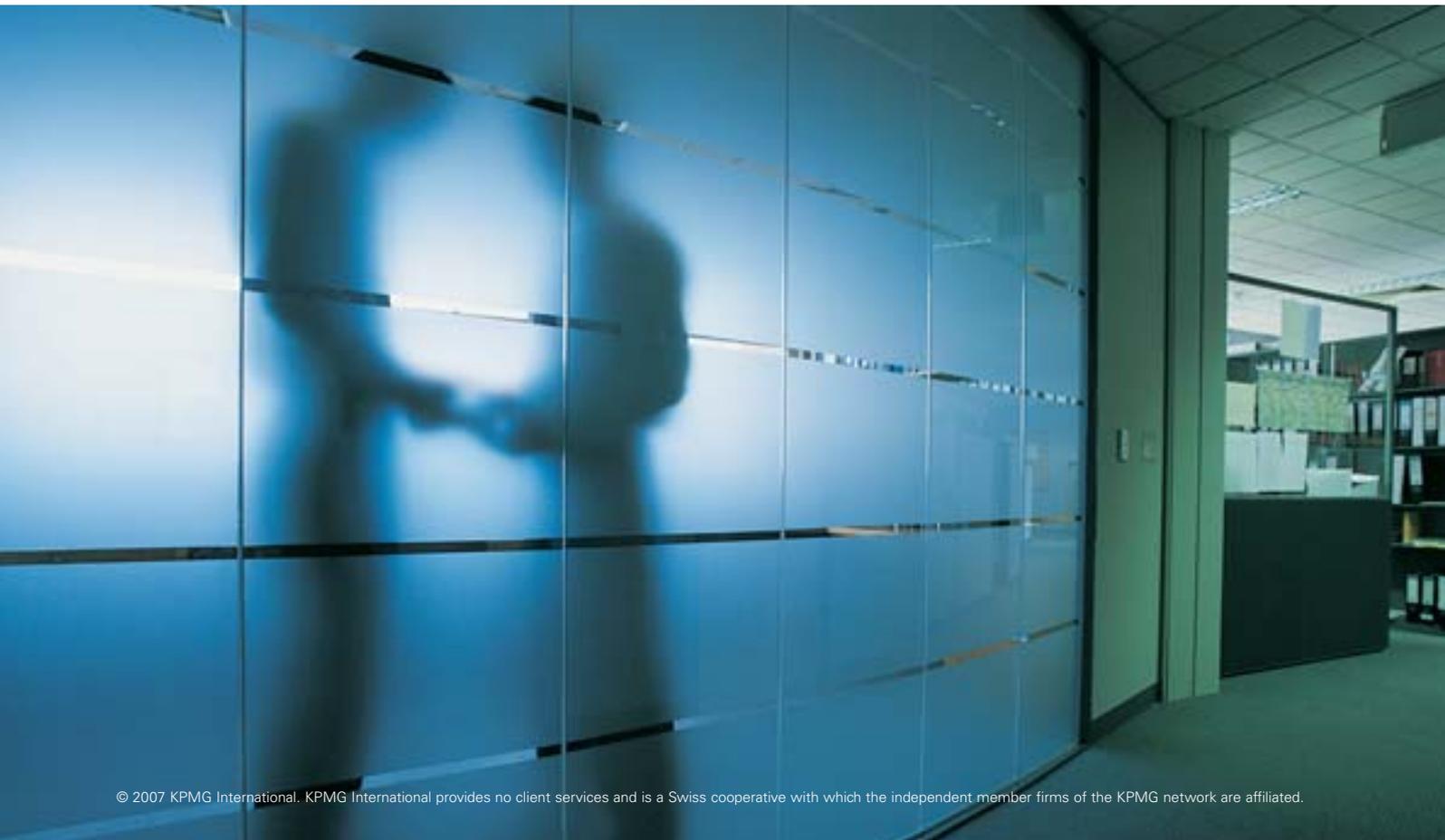
A number of investigations under the UK 2001 Act and in other jurisdictions around the world are currently ongoing, and could result in criminal prosecutions.

⁵ For more information on the specific fines and penalties please refer to the DOJ website <http://www.usdoj.gov/criminal/fraud/fcpa/>
⁶ United States Sentencing Commission Guidelines Manual Chapter 8: Sentencing of Organizations

Overseas Bribery and Corruption: In Conclusion

Our survey highlights a lack of awareness of UK and US anti-bribery and corruption laws amongst companies who operate within these jurisdictions. Many companies have not yet communicated the significance of the UK Act to their employees and have not put in place effective compliance programs to help reduce the risk of a breach of the US FCPA occurring. These failures may be exposing UK companies to unnecessary risk.

With increased activity by both the US and UK regulators, failure to take action now could result in companies being caught up in expensive investigations resulting in heavy fines and penalties, and having to handle the associated negative publicity and a loss of investor confidence. The costs associated with an investigation in the future are likely to far outweigh the cost of implementing an effective anti-bribery and compliance program today.



If you have any questions about this document or would like assistance on any of the issues covered in this survey please contact us.

Key Contacts

Jennifer Hammond
+44 (0) 20 7311 3755
jennifer.hammond@kpmg.co.uk

Alex Plavsic
+44 (0) 20 7311 3862
alex.plavsic@kpmg.co.uk

Global Contacts

Europe, Middle East and Africa
Richard Powell
+44 (0) 161 838 4044
richard.powell@kpmg.co.uk

Asia Pacific
Mark Leishman
+82 (2) 2 112 0882
mleishman1@kr.kpmg.com

Americas
Phil Ostwalt
+1 404 222 3327
postwalt@kpmg.com

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2007 KPMG International. KPMG International is a Swiss cooperative. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved. Printed in the United Kingdom.

KPMG and the KPMG logo are registered trademarks of KPMG International, a Swiss cooperative.

Designed and produced by KPMG LLP (UK)'s Design Services.

Publication name: Bribery and Corruption Survey 2007

Publication number: 310-563

Publication date: December 2007

Printed on recycled material.