

In this newsletter, we briefly touch on three recent developments shaping corporate exposures.

First, we look at a recent decision governing whether whistleblower protections should extend to individuals who disclose information to the media (versus the company itself or relevant investigative agency). We then consider data on internal reporting of potential fraud events, looking for lessons learned. Finally, we look to what may be the top 10 list of industries with exposure under the coming U.K. Bribery Act, based on experience with the U.S. Foreign Corrupt Practices Act, and the relevance of a robust internal reporting procedure.

## DO WHISTLEBLOWER PROTECTIONS COVER LEAKS TO THE MEDIA?

In a WikiLeaks, OpenLeaks world, with 24-hour news cycles that need to be filled, the answer to whether or not whistleblower protections extend to media leaks can be very important. The Ninth Circuit Court of Appeals addressed just this question and held that the whistleblower provisions of the Sarbanes-Oxley Act of 2002 (SOX) do not protect employee leaks to the media.<sup>1</sup> Looking to the plain language of the statute, the court held that SOX protects only those disclosures to federal regulatory and law enforcement agencies, Congress and employee supervisors.

Looking beyond the language of the law, the Ninth Circuit also considered the legislative history to SOX's whistleblower protections, finding that Congress only intended to protect disclosures to individuals and entities with the capacity or authority to act effectively on the disclosure – i.e., those supervisors and federal officials empowered to remedy any wrongdoing.

In agreeing with the district court in rejecting the plaintiffs' arguments, the appeals court also considered the plaintiffs' assertion that disclosures to the media should be protected because they may



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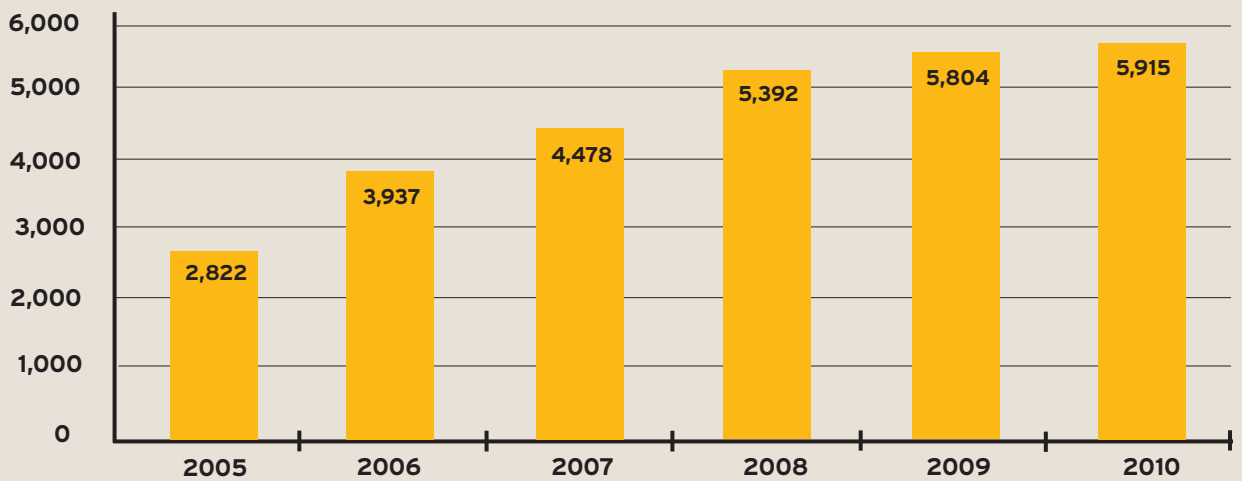
eventually cause information to be provided to Congress or federal law enforcement or regulatory agencies. It concluded that to accept this view of SOX's whistleblower protections would make the application of the statute "boundless" and therefore unsupportable.

For those looking ahead to the additional whistleblower protections recently set out under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), this may prove to be a useful analysis as Dodd-Frank specifically speaks to disclosures to the Securities and Exchange Commission (and not the media).

# SPEAKING TO THE MAN (IN A MEASUREABLE WAY)

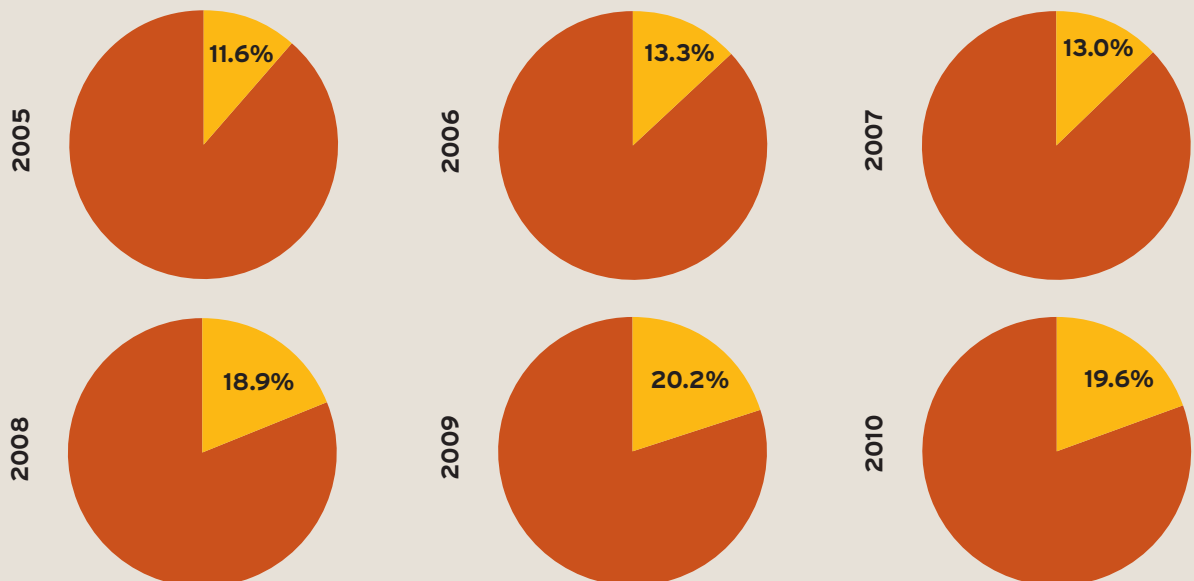
Looking for a measurement of those employees reporting potential concerns in-house, in the most recent Quarterly Corporate Fraud Index™ from the fourth quarter 2010 by The Network, Inc. and BDO Consulting,<sup>2</sup> we see that in comparison to the same time period in 2009, the total number of reported fraud-related incidents rose 1.9%. This figure has steadily increased since the Index was first introduced in 2005. Fraud-related incidents include reports on corruption and fraud, misuse of assets, conflicts of interest and Foreign Corrupt Practices Act (FCPA) violations.

**Comparison of Fourth Quarter Fraud-Related Incidents:**



When looking to the bigger picture and comparing fraud reporting to **all** compliance reporting, Q4 2010's fraud reporting percentage was 19.6%. This is slightly down from the same quarter of 2009, but still shows fraud reports as roughly one-fourth of all employee in-house reports.

**Comparison of Fourth Quarter Fraud-Related Percentage:**





## TOP 10 INDUSTRIES MOST VULNERABLE TO THE U.K. BRIBERY ACT (AND U.S. FCPA)

With little known about the likely enforcement strategy of the U.K.'s Serious Frauds Office, many believe that data on enforcement of the U.S. Foreign Corrupt Practices Act (FCPA) may be a useful guide as to how the U.K. Bribery Act may play out, starting July 1, 2011. The Bribery Act creates a new offense which can be committed by commercial organizations that fail to prevent persons associated with them from committing bribery on their behalf. A review by Ernst & Young of industries most vulnerable under the coming U.K. Bribery Act, using enforcement of the U.S. FCPA as a guide, from the most to the least exposed, found, in order of vulnerability:<sup>3</sup>

1. Oil & Gas
2. Life Sciences
3. Consumer Products
4. Technology
5. Real Estate
6. Automotive
7. Telecoms
8. Asset Management
9. Banking & Capital Markets
10. Government and Mining & Metals

Of the top three: oil and gas firms accounted for 18% of all prosecutions, life sciences 13% and consumer products 12%. Looking to outcomes for these three sectors: criminal fines topped the list, followed by civil injunctions for oil and gas companies, compliance monitors for life sciences organizations and civil penalties in the consumer products sector.

In its study, E&Y reviewed 118 FCPA cases involving 242 companies (including subsidiaries) and around 167 prosecutions (of which 30 are still pending). Based on this review, it concluded that the most likely outcome of prosecution for the top 10 are civil penalties (30), followed by criminal fines (29) and plea agreements (28). Shockingly, only 3% of all investigations resulted in no action being taken.

The good news is that under the U.K. Bribery Act, it is a complete defense for an organization to prove that, despite a particular case of bribery, it nevertheless had adequate procedures in place that ought to have prevented persons associated with it from bribing.<sup>4</sup> Strategically, therefore, company directors across all industry sectors have been reviewing their bribery, corruption and fraud risks with the goal of protecting their firms. According to the government's appropriately named "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing," an essential part of an effective anti-bribery policy is likely to include internal procedures for the "reporting of bribery including 'speak up' or 'whistle blowing' procedures."<sup>5</sup>

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<sup>1</sup> *Tides v. The Boeing Co.*, Case No. 10-cv-35238. The 9<sup>th</sup> Circuit includes the states of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon and Washington.

<sup>2</sup> <http://atlanta.citybizlist.com/3/2011/3/1/The-Network-and-BDO-Consulting-Release-Fourth-Quarter-2010-Data-in-the-Quarterly-Corporate-Fraud-Index%E2%84%A2.aspx>. The Quarterly Corporate Fraud Index is compiled from actual incidents reported by 12 million employees at 1,000 worldwide clients of The Network and BDO Consulting.

<sup>3</sup> “Oil and gas sector most at risk from investigation under the U.K. Bribery Act, warns Ernst & Young,” May 9, 2011, <http://www.ey.com/U.K./en/Newsroom/News-releases/Assur---11-5-9---Oil-and-gas-sector-most-at-risk-from-investigation-under-the-U.K.-Bribery-Act>.

<sup>4</sup> <http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf>, page 6.

<sup>5</sup> Found in 1.7, page 22.