

**17TH ANNUAL
COMPLIANCE &
ETHICS INSTITUTE**

*Decades to Build, Seconds to Destroy:
Proactive Compliance On Your Own Terms to
Avoid or Mitigate An Enforcement Action*

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Eric R. Feldman, CFE, CIG, CCEP-I
Senior Vice President and Managing Director,
Corporate Ethics and Compliance Programs
Affiliated Monitors, Inc.

Thomas J. Topolski, CCEP-I, AICP
Senior Vice President
Parsons Corporation

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ERIC R. FELDMAN

- Senior Vice President and Managing Director, Corporate Ethics and Compliance Programs
- Retired from CIA in April 2011 with 32 years of federal service
- Government Accountability Office
- Department of Defense
- CIA/National Reconnaissance Office IG
- Senior Advisor for Procurement Integrity
- Different perspectives on business ethics:
 - ✓ Senior agency official
 - ✓ Law enforcement
 - ✓ Corporate consultant
 - ✓ Independent monitor

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THOMAS J. TOPOLSKI



- Senior Vice President, Parsons Corporation – Recognized as One of the World’s Most Ethical Companies® by the Ethisphere Institute for Ninth Year in a Row.
- More than 35 years of experience in the professional services industry, including 21 years of international
- Extensive experience leading the transformation, restructuring and strengthening of businesses, most notably internal controls and compliance related policies and procedures
- Unique perspectives on business ethics:
 - ✓ President of an international business
 - ✓ Responsible for managing a DPA mandated external monitoring



Agenda

AGENDA

- Introduction
- Cost of Compliance
- Enforcement Actions and Alternatives
- Strategies to Influence Outcomes
- Proactive and Post-Enforcement Monitoring
- How Effective Is Your Compliance Program?
- Conclusions and Considerations



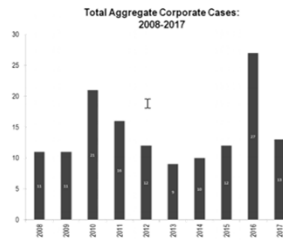
“ IF YOU THINK COMPLIANCE IS EXPENSIVE, TRY NON COMPLIANCE.”

PAUL MCNULTY,
FORMER DEPUTY U.S.
ATTORNEY GENERAL



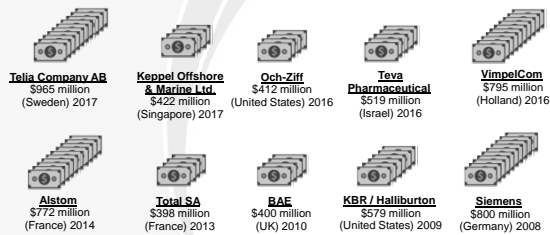
CORPORATE FCPA CASES 2008–2017

- Public DOJ declinations under FCPA Pilot Program
- Excludes Las Vegas Sands enforcement action, which mirrored the SEC enforcement action brought in 2016
- The cases of Contoguris, Finley, Kohler, Zuurhout, and Barnett are outgrowths of the corporate enforcement action against Rolls-Royce. For purposes of this note, in particular the geographic distribution of enforcement actions, these are treated together with Rolls-Royce.



Source: Shearman & Sterling <http://www.shearman.com/files/assets/2017/07/2017-FCPA-Report-04-16-17.pdf>

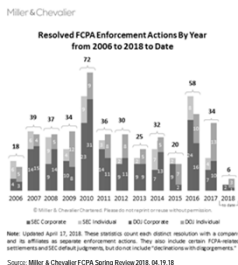
"COST" OF COMPLIANCE



Sources: FCPA Blog <http://www.fcpablog.com/blog/2017/02/24/keppel-offshore-marine-sec-enforcement-action-against-keppel-marine/>; Miller & Chevalier <http://www.millerchevalier.com/news-articles/2017/02/24/keppel-offshore-marine-sec-enforcement-action-against-keppel-marine/>

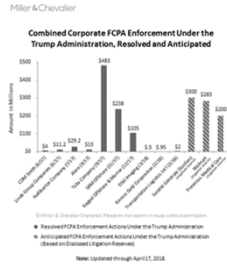
FCPA ENFORCEMENT TRENDS Q1 2018

- Enforcement of the FCPA was relatively slow during Q1 2018 with only two individual enforcement actions and three fairly low-value corporate enforcement actions.
- This relatively slow quarter continues the reduced pace of reported enforcement decisions under the Trump Administration.
- It remains an open question whether this decrease in enforcement announcements truly reflects a less aggressive posture by the DOJ and SEC with some statistics suggesting a more nuanced picture.



THREE SETTLEMENTS LOOM ON THE HORIZON

- Despite this quiet Q1, a handful of potentially large FCPA-related settlements loom on the horizon.
- Several of these cases have dragged on for years, likely due to their size and complexity.
- Notably, over the past six months, at least three companies have publicly announced sizable reserves to settle long-running investigations:
 - ✓ Fresenius Medical Care
 - ✓ SocGen
 - ✓ Walmart
- Assuming these companies have correctly predicted the timing and amount of any upcoming settlements, we should see at least some sizeable settlements this year on par with last year's Telia, SBM Offshore, and Keppel Offshore resolutions.



PANASONIC PAYS \$280 MILLION TO RESOLVE FCPA OFFENSES

- April 30, 2018—Panasonic Avionics agreed to pay \$280 million to resolve FCPA offenses for payments to consultants of its U.S. in-flight-entertainment unit in the Middle East and Asia.
- Osaka, Japan-based Panasonic Corporation will pay \$143 million in disgorgement to the SEC.
- Its U.S. unit—Panasonic Avionics Corporation—will pay \$137 million in criminal penalties to the DOJ.



"Those bemoaning the lack of FCPA enforcement activity can cease. With the Dun & Bradstreet Inc. declination and this enforcement action involving Panasonic Avionics Corporation (PAC) and its parent Panasonic Corporation (Panasonic), US regulators at the DOJ and SEC have roared back with not only significant enforcement actions but more importantly for the compliance practitioner, important information about how the DOJ will consider enforcement actions under the new FCPA Corporate Enforcement Policy, announced last November"

Tom Fox, The FCPA Evangelist



DOJ CORPORATE ENFORCEMENT POLICY

- If a company voluntarily discloses wrongdoing, the DOJ will not require appointment of a monitor if the company has implemented an effective compliance program.
- The DOJ evaluates an appropriate compliance program and notes that hallmarks of an effective compliance and ethics program include:
 - ✓ Fostering a culture of compliance,
 - ✓ Dedicating sufficient resources to compliance activities, and
 - ✓ Ensuring that experienced compliance personnel have appropriate access to management and to the board.



DOJ CORPORATE ENFORCEMENT POLICY

DOJ TO APPLY THE PRINCIPLES OF ITS FCPA CORPORATE ENFORCEMENT POLICY TO ALL OF ITS CORPORATE CRIMINAL INVESTIGATIONS

- March 1, 2018: Acting Assistant Attorney General John Cronan announces that DOJ's FCPA Corporate Enforcement Policy will now be applied in corporate cases beyond FCPA violations
- March 2, 2018: DAG Rod J. Rosenstein announces that rather than insisting on parent-level criminal resolutions, DOJ will reward companies with strong compliance programs
- This extension of the policy, which lays out the expectations for an effective compliance program, rapid investigation, and remediation, should be welcome news for all companies.
- Companies with effective compliance programs will have added confidence of a favorable outcome and thus be in a better position to make decisions about voluntary disclosure to and cooperation with DOJ.

Source: Kathleen McGovern, EY: <https://americas.ey.com/2018/11/standing-pages/fcpa-dod-client-alert-alert-kathleen.mcgovern.042118.pdf>



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WHAT LEADS TO AN ENFORCEMENT ACTION?

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ENFORCEMENT AND MONITORING: NOT JUST DOJ

- Federal regulatory agencies (FCC, FTC)
- SEC
- World Bank
- Federal suspension and debarment officials
- United Nations
- State attorneys general
- Professional licensing boards
- State regulatory agencies and commissions

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**ALTERNATIVE SETTLEMENT
PROLIFERATING
WORLDWIDE**

WHAT:

- Deferred/non-prosecution Agreements
- Administrative agreements
- Settlement agreements

WHERE:

- DOJ, USG agencies, states
- United Kingdom
- Singapore
- France
- Germany
- Australia
- Brazil

Common element:
Effective Compliance Programs



**EVALUATION OF
CORPORATE COMPLIANCE
PROGRAMS**

- Analysis and remediation of underlying misconduct
- Senior and middle Management
- Autonomy and resources
- Policies and procedures
- Risk assessment

- Training and communications
- Confidential reporting and investigation
- Incentives and disciplinary measures
- Continuous improvement, periodic testing, and review
- Third-party management

Source: <http://www.justice.gov/criminal-division/7/17/13/whistlebl>



**PROACTIVE MONITORING
VS POST ENFORCEMENT
MONITORING**



HOW GOOD IS YOUR PROGRAM?

- Beware of the "unknown unknowns"
- Don't assume there are no problems – even if there are no issues, independent oversight is a good thing!
- Is there a culture of compliance similar to health and safety?
- Ensure the culture is consistent at all levels of the organization
- Consistent and fair accountability
- Are the policies and procedures fit for purpose?
- Communication!



INDEPENDENT MONITOR ACTIVITIES

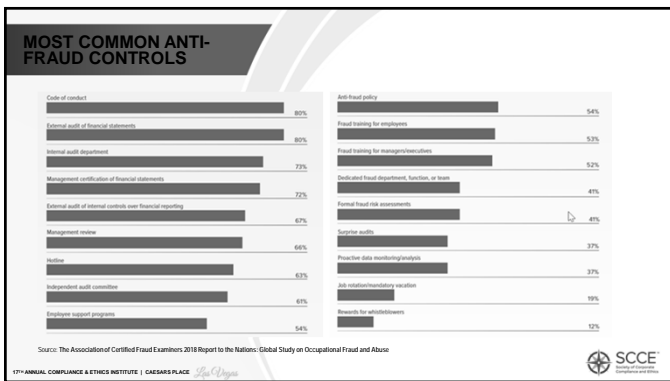
- Develop a work plan
- Evaluate existing programs
- Assessment of corporate ethical culture
- Benchmark program
- Regularly update regulator
- Support development of best practices program
- Strength of internal controls
- Prevent recidivism through gaining trust and passion for ethical behavior



KEY PROGRAM ASSESSMENT ELEMENTS

- **ANTI-CORRUPTION CONTROLS**
- **CORPORATE ETHICS AND COMPLIANCE PROGRAM:**
 - High-level commitment
 - Policies and procedures
 - Periodic risk-based review
 - Proper oversight and independence
 - Training and guidance
 - Internal reporting and investigations
 - Enforcement and discipline
 - Third-party relationships
 - Mergers and acquisitions
 - Monitoring and testing





“IF YOU WANT US TO TREAT A CORPORATE ENTITY AS A VICTIM, YOU SHOULD ACT LIKE A VICTIM WHO WANTS TO SEE THE PERPETRATORS HELD ACCOUNTABLE.”

ROD J. ROSENSTEIN,
DEPUTY ATTORNEY GENERAL

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SCCE

ASSESSMENT METHODOLOGY

EMPLOYEE FOCUS GROUPS:

- Culture
- Training and messaging
- Reporting
- Trust and credibility

INDIVIDUAL INTERVIEWS:

- Process
- Controls
- Authority and independence

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ASSESSMENT METHODOLOGY

SURVEYS:

- Culture
- Awareness
- Involve board and other stakeholders
- Secret shopper


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SOME KEY METRICS OF EFFECTIVENESS

- Focus on corporate culture
- Alignment of performance management with integrity objectives
- Tone at the top, mood in the middle, and buzz at the bottom
- Comfort level in raising concerns
- Employee concerns over retaliation


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SOME KEY METRICS OF EFFECTIVENESS

- Beyond ERM: Fraud Risk Assessment
- Consistency and fairness of disciplinary actions
- Effectiveness of training approaches
- Hiring and onboarding
- Independence, authority, and reporting
- Board engagement
- Financial and control transaction testing

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**QUESTIONS TO ASK
WHEN EVALUATING
YOUR E&C PROGRAM**

**1. WHAT IS THE RELATIONSHIP BETWEEN ETHICS AND OTHER
PERFORMANCE METRICS IN THE COMPANY?**

- The leading factor in unethical behavior is pressure from management or the board to meet unrealistic business objectives.
- Alignment of ethics and performance objectives is critical in compensation, bonus, and promotion decisions.

**2. IS OUR REQUIRED ETHICS TRAINING MORE THAN A
CHECK-THE-BOX EXERCISE?**

- Cascading training
- Scenario-based

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**QUESTIONS TO ASK
WHEN EVALUATING**

**3. HAVE WE EXERCISED DUE DILIGENCE IN OUR HIRING,
PROMOTIONS, AND MERGERS AND ACQUISITIONS?**

- Due diligence in hiring
- Promotion screening
- Performance assessment elements, are we rewarding ethical behavior?

**4. HAVE WE CONDUCTED A RISK ASSESSMENT TO IDENTIFY
WEAKNESSES? WHAT IS OUR POTENTIAL ENRON, WELLS
FARGO, OR VW?**

- Perverse incentives
- Unintended consequences of goals and expectations
- Do WE have a "paper program"?

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**10 QUESTIONS TO ASK
WHEN EVALUATING**

5. WHAT IS THE TONE AT THE TOP?

- Communicating the ethics message.
- Proactive and consistent engagement.
- CEO independence, authority, and resources.
- Taking visible and decisive actions against violations of the code of conduct.
- Don't forget about the Board!

**6. WHAT IS THE MOOD IN THE MIDDLE AND THE BUZZ AT THE
BOTTOM?**

- Immediate supervisors have greatest impact.
- Leadership skill represents a key asset/vulnerability.
- Leadership accountability or "executive protection program"?

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**QUESTIONS TO ASK
WHEN EVALUATING**

7. WHAT IS THE TONE AT THE TOP?

- Senior leadership intentions don't always reflect reality.
- How are ethics incorporated into day-to-day business decisions?
- Active ethics messaging is a must.

8. WHAT IS THE MOOD IN THE MIDDLE AND THE BUZZ AT THE BOTTOM?

- Is it referenced beyond new-employee orientation?
- Is it customized to our business?
- Has it been updated?

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**QUESTIONS TO ASK
WHEN EVALUATING**

9. ARE OUR EMPLOYEES FAMILIAR WITH AND COMFORTABLE USING REPORTING MECHANISMS?

- Is there a fear of retaliation?
- Is the Hotline or Helpline used regularly?
- Are reporting trends analyzed and used to strengthen the program?

10. ARE WE PAYING ADEQUATE ATTENTION TO THE ETHICAL POSTURE OF THIRD-PARTIES?

- Third-party risks are high; due diligence is necessary.
- This is often the weakest area in ethics assessments.

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WHY PROACTIVE THIRD-PARTY ASSESSMENT MAKES SENSE

- Prevention is better than the cure
- Required by U.S. Federal Sentencing Guidelines, Spanish Criminal Code, and encouraged by OECD and other guidance
- Demonstrate and document company's commitment to ethics and compliance:
 - ✓ Government regulators
 - ✓ Employees
 - ✓ Stakeholders
- Prevent FRAUD and mitigate compliance RISK
- Competitive advantage with third parties in regulated industries

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**LESSONS LEARNED BY
"GRADUATES"**

- A rapidly increasing number of countries are implementing and enforcing strong compliance laws and regulations.
- Ethical behavior is GOOD business.
- The vast majority of people take pride in their work and are focused on winning and delivering work on merit.
- The vast majority of clients desire to work in an ethical manner.
- Reputational damage is exceedingly difficult to overcome.
- Independent monitoring or examination can make better companies.
- Ethical culture is a foundational internal control without which all other controls are bound to fail.



QUESTIONS?



ERIC R. FELDMAN
SENIOR VICE PRESIDENT AND MANAGING DIRECTOR
CORPORATE ETHICS AND COMPLIANCE PROGRAMS

AFFILIATED MONITORS, INC.
EFELDMAN@AFFILIATEDMONITORS.COM
PHONE: (866) 201-0903



THANK YOU