

**Anti-Corruption Workshop:
FCPA and Anti-Corruption Enforcement
Hot Topics and Compliance Best Practices**
Compliance and Ethics Institute
Society of Corporate Compliance and Ethics
Las Vegas, NV
October 21, 2018

PANELISTS

Natalie Lockwood, Counsel, General Motors Company
Thuy Tran, Regional Integrity Officer—USA, SNC- Lavalin
Shannon O. Young, US Employment and Ethics Counsel, WSP USA Inc.

MODERATOR

Iris Bennett, Member, Smith Pachter McWhorter PLC

Who We Are

Natalie Lockwood, Counsel, General Motors Company

Natalie J. Lockwood is Counsel in the Legal Department of General Motors Company in Detroit, Michigan. Ms. Lockwood practices in the Compliance & Special Investigations group, where she undertakes and manages internal investigations, develops proactive and remedial compliance measures including with respect to anti-corruption compliance, and liaises with GM's federal monitor team. Prior to joining General Motors, Ms. Lockwood practiced international investment and commercial arbitration, as well as complex commercial litigation, at Debevoise & Plimpton LLP in New York City. She clerked for the Honorable Judith W. Rogers of the United States Court of Appeals for the District of Columbia in 2013-2014. Ms. Lockwood received her law degree, *magna cum laude*, from Harvard Law School and her undergraduate degree, *magna cum laude*, from Princeton University. She is a member of the New York State Bar.

Thuy Tran, Regional Integrity Officer – USA, SNC-Lavalin

Thuy P. Tran is the Regional Integrity Officer – USA for SNC-Lavalin, a global fully integrated professional services and project management company, and a major player in the ownership of infrastructure with 50,000 employees worldwide. In her role, she supports and advises the senior leadership team across five sectors with identifying risks and executing the company's world-class Integrity Program. Thuy first came to know ABAC compliance as a legal intern for a company that was undergoing investigations by the DOJ and SEC. Since then, she has built upon that experience working abroad in the oil and gas sector in The Netherlands and Hungary, including serving as a subject matter expert on a pro bono basis for Transparency International in Budapest. Upon her return to the United States, she worked in Washington, D.C. where she managed global programs and partnerships for TRACE International. Thuy is currently based in Houston, Texas.

Who We Are

Shannon O. Young, US Ethics Counsel, WSP USA Inc.

Ms. Young is U.S. Employment & Ethics Counsel for WSP, a leading global construction management and engineering firm and previously served as WSP's U.S. Compliance & Ethics Officer. Ms. Young provides ethics counsel to WSP's U.S. compliance and ethics teams and business partners. Ms. Young provides WSP with legal advice covering a variety of ethics related matters, including conflicts of interest, outside employment, bribery, corruption, gifting, hiring government employees, and discrimination. She works closely with the global compliance and ethics team, human resources, and internal business partners. Ms. Young has been certified by the SCCE as both a CCEP and a CCEP-I. Prior to joining WSP, Ms. Young practiced for nearly a decade in private legal practice in the fields of construction and employer-side employment and labor law. Ms. Young received her law degree and undergraduate degree from Penn State. She is a member of the Pennsylvania State Bar and Illinois State Bar.

Iris E. Bennett (Moderator), Member, Smith Pachter McWhorter PLC

Ms. Bennett has deep experience counseling clients on the investigation, defense, and resolution of white collar matters, as well as the corporate compliance programs designed to avoid such liabilities. She has represented numerous Fortune 100 corporate and individual clients in matters relating to potential violations of criminal or civil fraud statutes, including the Foreign Corrupt Practices Act, the False Claims Act, the Anti-Kickback Act, and antitrust laws. She has conducted FCPA and other internal investigations across the globe, including many in Spanish, in which she is fluent. She has represented companies before the Criminal and Civil Divisions of the Department of Justice as well as the Securities and Exchange Commission. Ms. Bennett regularly advises corporate clients on their anti-corruption compliance programs, has designed and led corporate compliance reviews and audits, and is currently playing a leading role in a multi-year anti-corruption compliance monitorship on behalf of the World Bank. Ms. Bennett entered private practice after serving as a federal criminal defense lawyer in the District of Columbia Federal Public Defenders' office. She clerked for the Honorable Robert W. Sweet of the United States District Court for the Southern District of New York, and for the Honorable David S. Tatel of the United States Court of Appeals for the District of Columbia. She received her law degree, *magna cum laude*, from New York University School of Law, and her undergraduate degree, *summa cum laude*, from Harvard College.

Who You Are: Audience Poll

Role

- In-house, outside counsel, outside consultant.
- Compliance professional, lawyer, accountant/auditor, other.

Experience in ethics and compliance field

Experience in anti-corruption compliance

What We Will Cover Today

FCPA Enforcement: Background

Case Study: legal, compliance, governance, and strategic issues

- Legal Backdrop and Enforcement Developments: Anti-Bribery.
- Case Study Part 1.
- Legal Backdrop and Enforcement Developments: Books & Records.
- Case Study Part 2.

Best practices for anticorruption compliance

This is an interactive workshop and we encourage open discussion and sharing ideas from everyone's experience in the field!

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Case Study Part I Anti-Bribery Legal Backdrop

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U.S. FCPA Enforcement: Background

Focus today will be on U.S. law, though we will reference other jurisdictions or global principles at times.

U.S. authorities are the leading enforcer when it comes to anti-corruption prosecutions.

The DOJ and SEC have several advantages.

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U.S. FCPA Enforcement: Background (cont.)

U.S. authorities have become increasingly aggressive with respect to enforcement of the FCPA for conduct with little connection to the U.S.

U.S./Non-U.S. enforcement authorities are cooperating with each other more than ever.

A strong compliance program is key to preventing FCPA issues, and important to be able to demonstrate in the event of a problem.

- DOJ FCPA Corporate Enforcement Policy
- DOJ Policy on Coordination of Corporate Resolution Penalties

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U.S. Legal Backdrop: FCPA Anti-Bribery Provision

A payment or offer, promise, or authorization of a payment or other thing of value, directly or indirectly to a foreign government official.

To obtain or retain business.

Defenses and exceptions.

- facilitation payments
- reasonable product promotion or contract performance expenses
- legal under local law (very narrow)
- extortion (very narrow)

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U.S. Legal Backdrop: Covered Parties and Enforcement Authorities

Applies to:

- public companies and their employees, officers, directors, and agents.
- U.S. companies and their employees, officers, directors, and agents, and to all U.S. citizens.
- non-U.S. companies and non-U.S. nationals where act in furtherance of an improper payment in the U.S.

U.S. Department of Justice (DOJ): criminal enforcement against companies and individuals.

U.S. Securities and Exchange Commission (SEC): civil enforcement against public companies and individuals associated with such companies.

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U.S. Legal Backdrop: A Thing of Value

Cash

Gifts

Hospitality

A job offer

Anything else of value to the recipient

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U.S. Legal Backdrop: Knowledge

Culpable knowledge includes knowing that there is a “high probability” of an improper payment payment.

Moreover, under U.S. common law, “knowledge” = either actual knowledge or willful blindness.

Willful blindness is more than negligence or even recklessness, *but*: you cannot deliberately shield yourself from clear evidence of critical facts strongly suggested by the circumstances.

DOJ and SEC have pursued FCPA enforcement cases premised on willful blindness.

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U.S. Legal Backdrop: Liability for Third Party Conduct

Many if not most FCPA cases involve payments made through third parties.

Liability is triggered by:

- Funding payments through third parties with *knowledge*.
- *Authorizing* third party payments even if covering no part of the cost.

Third parties triggering risk come in all types.

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U.S. Legal Backdrop: Gifts and Hospitality

Permitted:

- Reasonable.
- Related to a legitimate business purpose.
- Not intended to influence a government official to use his or her authority improperly to direct business or otherwise provide an unfair business advantage.

Typically a legitimate purpose would be an expense incurred in connection with:

- Promotion.
- Demonstration or explanation of products and services, or execution or performance of a contract.

Although real-life cases usually require judgement calls based on experience, DOJ Opinion Releases provide guidance.

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Non-U.S. Legal Backdrop

The anti-bribery laws of countries other than the U.S. tend to be similar to the FCPA, particularly for countries that are OECD signatories.

Local variations, however, can exist.

In addition, some companies, depending on the nature of their business, may be subject to other anti-corruption rules.

Best practices will enhance compliance across the board.

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Case Study Part I Anti-Bribery The Korean Bid

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Case Study: The Korean Bid

InfoTech, Inc. is a U.S.-based multinational company registered on the U.S. stock exchange.

Infotech has formed a joint venture with a Korean company named Superior Vigilance to bid a contract with Korea's Ministry of Interior to supply certain high tech surveillance equipment and associated technical support services for use by the National Police.

Before partnering with Superior Vigilance, Infotech ran them through its third party due diligence, and asked them to make anticorruption compliance representations.

Infotech is the majority partner in the JV, and has management control.

Superior Vigilance with experience with a similar technology, and has represented that it can help navigate the procurement process.

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Case Study: The Korean Bid (cont.)

The InfoTech bid team understands that Superior Vigilance is working informally with an individual named Wahn Cho on the bid effort.

Cho has a small tech company in Seoul and is a potential subcontractor for the program. Some members of the InfoTech bid team have heard of Cho's company.

Cho is a retired member of the National Police, though he has not worked there for a number of years.

Cho has not been put through InfoTech's third party due diligence process nor has InfoTech required Superior Vigilance to conduct due diligence.

The InfoTech bid team is not aware of whether Cho is being paid for his help during the bid process, or whether any promises of future compensation have been made.

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Case Study: The Korean Bid (cont.)

During the bid process, Superior Vigilance obtains information regarding the customer's needs and the qualifications of other competitors. InfoTech makes changes to the bid as a result.

Some of the information has redundant information published as part of the RFP and other MOI official communications. Some is not. In email correspondence, Superior Vigilance refers to all of the information, without distinction, as "highly confidential."

The InfoTech bid team is not clear as to how the information is being obtained, but understands that some of it has come through Cho.

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Case Study: The Korean Bid (cont.)

After winning, InfoTech learns that Superior Vigilance had promised Cho a success fee and a subcontract. This agreement was not in writing because Superior Vigilance has a "longstanding business relationship" with Cho.

Superior Vigilance also reports that Cho incurred 25K USD in travel and hospitality-related expenses in connection with the bid. Superior Vigilance has reimbursed Cho for these costs, and asks if Infotech will now cover half.

Superior Vigilance also wants to pay Cho his success fee and to engage him as a subcontractor.

The InfoTech bid team lead calls Cho. Cho assures the team lead that Cho is aware of U.S. anticorruption rules, and there is nothing to worry about, but that he cannot share details about his work over the phone. In particular, Cho says he cannot provide the names of anyone at the MOI from whom he obtained information helpful for the bid. However, Cho explains that they can meet in person in Seoul and he will be happy to talk in more detail.

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Case Study Group Discussion: What Decisions and Actions Are Needed

What are your next steps as InfoTech's Compliance Officer if you learn of these facts?

What are your next steps as InfoTech's General Counsel if you learn of these facts?

What if any compliance failures occurred with respect to:

- The bid process.
- Superior Vigilance.
- Wahn Cho.

Should InfoTech reimburse Cho's expenses

- Does it matter whether InfoTech reimburses them or not.

Can the JV use Cho as a subcontractor on the program

- If additional steps are needed, what are they.

Can the JV go forward with accepting the contract from the Korea MOI

- If additional steps are needed, what are they.

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Case Study Group Discussion: What Liability is There

Has the FCPA anti-bribery provision been violated

If it has been violated, by whom, and based on what facts

If the facts do not yet allow you to conclude whether there has been a violation, what else do you need to know to answer that question

Would it matter for purposes of potential liability if InfoTech was only a minority, non-controlling partner in the JV

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Case Study Part 2 Books and Records/Internal Controls Legal Backdrop

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Legal Backdrop: Books and Records and Internal Controls Provisions

Accurate books and records.

Adequate internal accounting controls.

These provisions also apply to any majority-owned entities, e.g., majority-owned subsidiaries or JV entities.

Strict liability.

No materiality requirement.

Often used in cases involving bribery, but are not limited to that scenario.

Powerful enforcement tool against public companies.

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Legal Backdrop: Books and Records and Internal Controls Provisions (cont.)

“Knowing” violations

- Corporate entities can be criminally prosecuted for “knowing” failure to devise and maintain an adequate system of internal accounting controls, “knowing” falsification of books and records, or “knowing” circumvention of internal accounting controls.
- Individuals can also be prosecuted, civilly or criminally, where their conduct is knowing.

“Knowing” = the conduct did not occur through ignorance, mistake, accident, negligence, or recklessness.

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Case Study Part 2 Books and Records/Internal Controls The Korean Bid

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Case Study: The Korean Bid Additional Facts

InfoTech does not want to turn down the contract, but the bid team leader wants to understand Cho's role better. He decides to meet with Cho.

Cho produces some receipts to support his travel and hospitality expenses. Some of the travel expenses appear to be only his own transportation and lodging expenses for traveling to contract-relevant sites. Other receipts are for restaurants and karaoke bars but do not list who attended or how many guests Cho hosted on these occasions.

Cho's expenses – and InfoTech's half thereof – are insignificant in comparison to the contract. The bid effort cost 200K USD. The contract is worth 25M USD.

The InfoTech bid team leader decides that, given the small amount of money involved, it makes sense to reimburse Superior Vigilance to ensure good relations with them. Also, he can't believe any officials would be influenced by merely hospitality and entertainment to award such a large contract.

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Case Study: The Korean Bid Additional Facts (cont.)

Under InfoTech's policies, the bid team's supervisor or Legal has to approve payment of any expenses for entertainment of a government official. The Infotech bid team leader prepares a request for payment that describes 12.5K USD as the full amount expended by Cho, because that is the only portion being paid by InfoTech, and because he thinks his supervisors might ask questions about Cho having spent double that amount.

The bid team leader then attaches receipts from Cho for the most palatable expenses to that request for payment. As much as possible, he includes only the receipts for Cho's own travel and meal expenses, but since this does not cover the full 12.5K USD he also has to include some receipts for hospitality that Cho says was provided to MOI officials.

On some receipts it is not clear who was at the meal, karaoke bar, or hotel. The Infotech bid team leader fills in gaps in Cho's invoices with names of MOI officials and a generic description of the purpose of each expense.

The Infotech bid team leader succeeds in getting the expenses reimbursed to Superior Vigilance.

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Case Study: The Korean Bid Additional Facts (cont.)

The InfoTech bid team leader also decides it would be a good idea to have Cho work on the program, so he initiates third party due diligence process.

The due diligence form asks for information about prior work performed by the third party for InfoTech. The bid team leader decides not to describe in the due diligence form what he knows about Cho's efforts to obtain information from the customer during the bid. He feels this information is not called for because this assistance was informal and unpaid.

Cho is hired as a subcontractor, at the compensation structure to which he had agreed orally with Superior Vigilance. He also receives a success fee. InfoTech does not bid out these services, and accepts that the compensation is reasonable based on its partner's representations.

InfoTech learns that that after Cho began receiving his subcontractor payments, he made payments to MOI officials based on a prior agreement with them to share percentage of his fees if InfoTech/Superior Vigilance won the bid.

Cho is still owed payment for services performed under his subcontract.

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Case Study Group Discussion: What Decisions and Actions Are Needed

What are your next steps as InfoTech's Compliance Officer if you learn of these facts?

What are your next steps as InfoTech's General Counsel if you learn of these facts?

What if any compliance failures occurred with respect to:

- The third party due diligence process.
- The subcontractor hiring and compensation process.
- The expense reimbursement process.

Should InfoTech pay Cho for the remaining monies owed under his subcontract for services performed to date? Should they pay but subtract the % now believed to be for kickbacks to government officials?

What type of remediation should be put in place from a books and records or internal controls perspective?

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Case Study Group Discussion: What Liability is There

Have either the books and records or internal controls provisions of the FCPA been violated?

If so, in connection with which books & records, internal controls, and/or payments?

If so, are those violations “knowing?”

If so, were these violations committed by InfoTech, or were they committed by an individual, or both?

Would it matter for purposes of the books and records or internal controls provisions if InfoTech was only a minority, non-controlling partner in the JV?

If the facts do not yet allow you to conclude whether there has been a violation, what else do you need to know to answer that question?

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Best Practices
Core Principles and
Lessons from Our Collective Experiences

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Anti-Corruption Compliance Programs: What U.S. Authorities Expect and Global Best Practices Require

Eleven Elements Discussed in DOJ Guidance	
Analysis and remediation of misconduct	Confidential reporting and investigation
Senior and middle management	Incentives and disciplinary measures
Autonomy and resources	Continuous improvement, periodic testing, and review
Policies and procedures	Third party management
Risk assessment	Mergers & acquisitions
Training and communications	

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What U.S. Authorities Expect and Global Best Practices Require (cont.)

Prevent

- Senior and Middle Management.
 - Tone at the Top.
 - Oversight.
- Autonomy and Resources for the Compliance Function.
 - Experience.
 - Stature.
 - Independence.
 - Funding.
- Policies and Procedures.
 - Relevant policies and procedures for the company's risks and legal requirements.
 - Design.
 - Implementation.
 - Training for gatekeepers (finance, procurement, legal).

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What U.S. Authorities Expect and Global Best Practices Require (cont.)

- **Prevent (cont.)**

- Training and Communications.
 - Content and audience tailored to risks.
 - Form and accessibility.
 - Availability of guidance.
- Third Party Management.
 - Assessment of risks associated with third party partners, suppliers, etc..
 - Due diligence, contractual provisions, controls over payments, monitoring.
 - Integration with company systems (procurement, vendor management, finance).

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Questions for Group Discussion re “Prevent”

What experience can you share relating to the effective design, implementation, or improvement to one of the elements of an anti-corruption compliance program relevant to *preventing* violations?

How did the company in your experience go about figuring out the best approach?

What were lessons learned that might be of value to others in this area?

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What U.S. Authorities Expect and Global Best Practices Require (cont.)

Detect

- Risk Assessment.
 - Ethics and compliance risk management process.
 - Information gathering and analysis.
 - Accounting for manifested risks.
- Continuous Improvement, Periodic Testing and Review.
 - Internal Audit.
 - Compliance program auditing.
 - Periodic updating of policies and procedures.

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What U.S. Authorities Expect and Global Best Practices Require (cont.)

Detect (cont.)

- Confidential Reporting and Investigation.
 - Effective reporting mechanisms.
 - Properly scoped investigation by qualified personnel.
 - Root cause analysis, attention within the company, and remediation.
- Mergers and Acquisitions.
 - Due diligence.
 - Integration.

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Questions for Group Discussion re “Detect”

What experience can you share relating to the effective design, implementation, or improvement to one of the elements of an anti-corruption compliance program relevant to *detecting* violations?

How did the company in your experience go about figuring out the best approach?

What were lessons learned that might be of value to others in this area?

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What U.S. Authorities Expect and Global Best Practices Require (cont.)

Respond

- Analysis and Remediation of Misconduct.
 - Root cause analysis.
 - Prior indications.
 - Remediation.
- Incentives and Disciplinary Measures.
 - Accountability.
 - Human Resources process.
 - Consistent application.
 - Approach to incentivizing ethical behavior.

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Questions for Group Discussion re “Respond”

What experience can you share relating to the effective design, implementation, or improvement to one of the elements of an anti-corruption compliance program relevant to *responding* to violations?

How did the company in your experience go about figuring out the best approach?

What were lessons learned that might be of value to others in this area?

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Best Practices Lessons from Two DOJ Matters Group Exercise

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Lessons from DOJ Settlements

In recent years, DOJ settlements have provided increasing levels of detail regarding remedial actions put in place by companies involved in FCPA matters.

Many details, of course, remain out of public view.

Examination of two 2017 settlements, however, provides some useful information into DOJ's thinking regarding best practices in anti-corruption compliance.

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What U.S. Authorities Expect: Case #1 Sociedad Química y Minera de Chile (2017)

Sociedad Química y Minera de Chile (SQM), a Chilean chemicals and mining company, was required to settle with both the DOJ and the SEC in connection with payments to politically-connected individuals in Chile from a fund under the control of one of the Company's officers.

Payments were made:

- In the form of donations to dozens of foundations controlled by or closely tied to Chilean politicians who were important to SQM's business, such as an official with influence over the government's mining plans in Chile.
- To vendors associated with politicians, including family members.

SQM ultimately paid \$30.5M into U.S. authorities in connection with the settlements and had to agree to other onerous requirements, including imposition of a monitor.

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What U.S. Authorities Expect: Case #1 Sociedad Quimica y Minera de Chile (2017) (cont.)

Compliance Failures

Donations made to charities controlled by or associated with government officials relevant for SQM's without due diligence or anti-bribery controls.

Fictitious invoices and contracts to justify third party payments with no services rendered, including to vendors who were relatives of government officials.

Internal Audit identified high-risk vendors, recommended their contracts be terminated; contracts continued or new fictitious vendors hired, payments continued.

High-level executives, including one responsible for internal controls, involved. Lower-level employees cooperated.

Remediation*

Implementation of new accounting and payment process controls.

Implementation of new accounting and payment process controls.

Reconstitution and staffing of new internal audit and compliance functions.

Termination of one executive; discipline of another.

Revised Code of Ethics and conducted company-wide training.

In-depth training for employee who failed to respond to red flags.

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What U.S. Authorities Expect: Case #2 Rolls Royce (2017)

Rolls-Royce settled with the U.S. DOJ and SEC as well as with Brazilian and U.K. authorities in connection with improper payments to officials in Brazil and a number of other countries.

In Brazil, a U.S. subsidiary of Rolls Royce paid commissions to a Brazil-based oil and gas services "commercial advisor" while knowing that portions of those payments would be paid to a officials at Petrobras to obtain contracts for equipment and long term service agreements.

Rolls Royce was fined \$809M in its global settlement with Brazilian, U.K. and U.S. authorities.

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What U.S. Authorities Expect: Case #2 Rolls Royce (2017) (cont.)

Compliance Failures

Paid commissions to a third party intermediary under the guise of “technical advisory” services knowing payments would be shared with Petrobras officials.

High-level executive and a number of lower-level employees involved.

Obtained competitor technical and pricing information through the technical advisor in order to win Petrobras bid after having been technically disqualified.

Structured agreement with “technical advisor” to pay commissions on accelerated schedule to induce contract award.

Remediation*

Termination of business relationships with all third-party intermediaries involved in the corruption schemes.

Enhanced procedures for reviewing and approving third-party intermediaries.

Material reduction in use of third-party intermediaries.

Engaged outside compliance advisor to review compliance program, reporting to the Board of Directors.

Termination of six employees and resignation of eleven employees implicated in the corruption schemes.

Enhanced procedures for reviewing and approving third-party intermediaries.

Material reduction in use of third-party intermediaries.

Enhanced internal controls.

Material reduction in use of third-party intermediaries.

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Additional Questions or Comments?

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