

From FCPA Prosecutor to Company Protector

LESSONS LEARNED ON THE ANTI-CORRUPTION FRONT LINES
OF AN INCREASINGLY MULTI-JURISDICTIONAL WORLD

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Agenda

1. Lessons learned from global anti-corruption enforcement
2. DOJ's FCPA policies and your anti-corruption compliance program
3. Arguments for an increased anti-corruption compliance budget
4. Questions?

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Lessons Learned from Global Anti-Corruption Enforcement

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Compliance lessons from FCPA enforcement actions so far in 2019

Due diligence of third parties continues to be an issue

- SEC resolution with Fresenius Medical Care in March 2019 stated that FMC “failed to take basic steps” such as providing anti-corruption training or performing due diligence on its agents / third-party intermediaries
- Walmart resolution in June 2019 involved allegation that Walmart subsidiaries in Brazil, China, India and Mexico did not sufficiently investigate or mitigate corruption risks from third-party intermediaries, who made payments to foreign officials

Lessons to be learned about using third parties from the Walmart case:

- Conduct sufficient anti-corruption third party due diligence on all third parties who interact with foreign officials
- Put in sufficient internal accounting controls for third party intermediaries, including that proof of performance is provided before paying them and use written contracts with anti-corruption clauses
- Watch for payments recorded with vague descriptions like “misc fees,” “miscellaneous,” “professional fees,” “incidental,” and “government fee.”

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More compliance lessons from 2019

Pay attention to product discounts and how the money is used

- Microsoft settled FCPA charges with the SEC in July 2019
- Allegations included that Microsoft's subsidiary in Hungary provided discounts on software licenses to resellers – the discounts were not passed on to customers, instead they funded bribes for foreign officials

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Compliance lessons 2019 continued

Travel and gifts continue to be a focus for enforcement

- SEC claimed that Microsoft subsidiaries in Saudi Arabia and Thailand provided improper travel and gifts to foreign officials; the bribes were funded by slush funds maintained by Microsoft's vendors and resellers
- Walmart FCPA resolution referred to the lack of implementation of policies concerning gifts, meals, travel and entertainment for foreign officials
- In Telefonica Brasil resolution in May 2019, the SEC claimed that Telefonica Brasil provided World Cup and Confederations Cup tickets and hospitality to government officials who were involved with, or in a position to influence, legislative actions and business dealings involving the company

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Still more 2019 compliance lessons

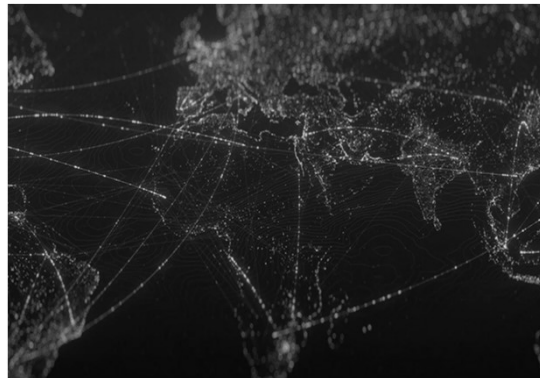
Construction of new facilities in high-risk countries deserves scrutiny

- In the Feb. 2019 resolution with Cognizant, the SEC stated that a government official in India demanded a \$2 million bribe from the construction firm responsible for building Cognizant's campus there
- Cognizant paid that bribe and two other bribes, and concealed them by doctoring the contractor's change orders and using sham change order requests
- DOJ stated that Walmart used third party intermediaries to make improper payments to government officials to obtain store permits and licenses so that Walmart could open new stores faster in Mexico, Brazil, India and China

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U.S. authorities increasingly cooperate with foreign authorities in FCPA matters

- The Walmart case included cooperation from Mexico, Brazil and India
- A DOJ and SEC resolution with a mobile telecom company in Russia in March 2019 referred to cooperation from multiple foreign authorities, including in the UK, Austria, France, Switzerland, Latvia, Isle of Man, Cayman Islands, Bermuda, Ireland, and others
- The SEC received cooperation from Thailand in the Microsoft matter



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DOJ takes into account penalties imposed by other countries investigating the same matter



- Deputy Attorney General Rod Rosenstein issued a policy in May 2018 known as the “piling on” policy but officially called the “policy on coordination of corporate resolution penalties”
- It states that DOJ attorneys should consider fines, penalties, or forfeiture paid to other federal, state, local, or foreign law enforcement in a case with a company for the same misconduct
- Cautions DOJ attorneys to “remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract... additional civil or administrative monetary payments.”

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DOJ FCPA Policies and Your Anti-Corruption Compliance Program

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Assume that DOJ and SEC mean what they say

<p>Agencies' basic message has remained constant for years: Anti-bribery and corruption (ABC) compliance program must be effective</p> <ul style="list-style-type: none">• "In a global marketplace, an effective compliance program is a critical component of a company's internal controls and is essential to detecting and preventing FCPA violations."	<p>Follow DOJ and SEC guidance about how companies need to build and maintain an ABC compliance program</p> <ul style="list-style-type: none">• Both agencies have broad authority to investigate FCPA cases and pursue enforcement cases, and have considerable expertise in doing so• Guidance includes the DOJ Criminal Division's Evaluation of Corporate Compliance Programs from April 2019 and the DOJ and SEC's FCPA Resource Guide from 2012	<p>The DOJ asks three basic questions in reviewing a compliance program:</p> <ul style="list-style-type: none">• Is the company's compliance program well designed?• Is it being applied in good faith? In other words, is it being implemented effectively?• Does it work in practice?
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DOJ updated guidance on compliance programs

The 12 topics in the April 30, 2019 guidance fall under three themes:

1 Is the compliance program well designed?	2 Is the compliance program implemented effectively?	3 Does the compliance program work in practice?
Risk assessment	Commitment by senior and middle management	Continuous improvement, periodic testing, and review
Policies and procedures	Autonomy and resources	Investigation of misconduct
Training and communications	Incentives and disciplinary measures	Analysis and remediation of underlying misconduct
Confidential reporting and investigations		
Third party management		
Mergers and acquisitions		

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Regulators will rely on their own guidance

Assume that DOJ and SEC mean what they say

- Agencies expect effectiveness in all aspects of an ABC compliance program
- Effectiveness in some, but not all, aspects will not earn the company a declination or no penalty

Assume that you will have to prove what you say

- Be prepared to show regulators or investigators in detail what the company has done in each aspect of its ABC program, and why that is effective

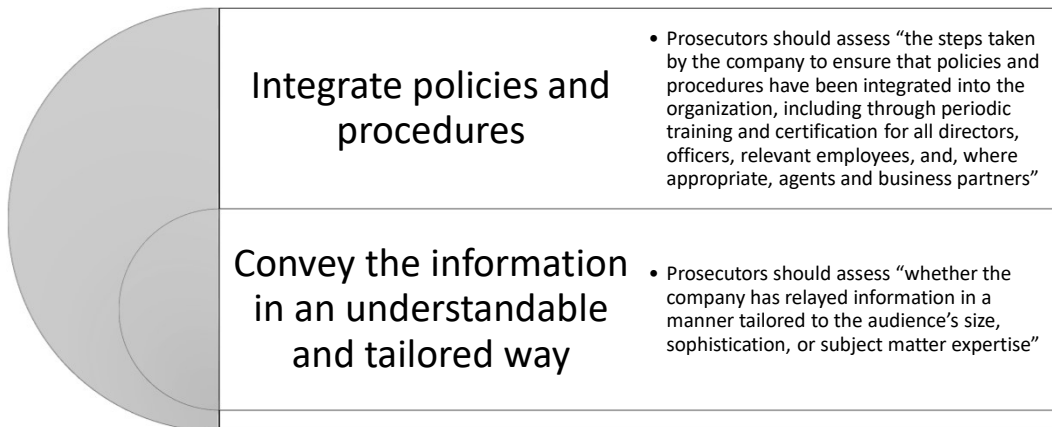
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Program Design – Risk Assessment

- The company is in a far better position to identify and assess its risks than regulators or prosecutors
- FCPA Resource Guide: “When assessing a company’s compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces.”
 - Evaluation Guidance: Prosecutors will be prepared to examine “the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness of the market, the regulatory landscape, potential clients and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations”
- Don’t drive by looking in the rear-view mirror
 - ABC risk assessment is a process, not just a questionnaire, and needs to take into account current or near-term data as well as historical data

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Program Design – Policies and Procedures



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Program Design - Training

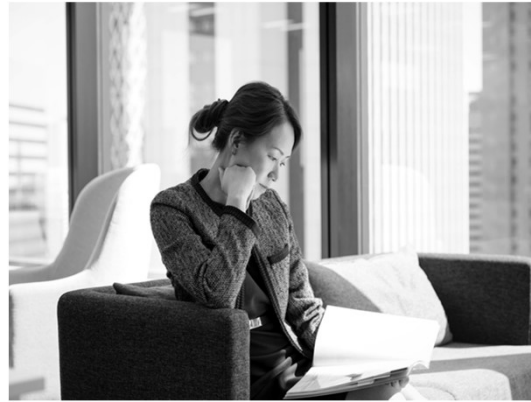
- Questions on risk-based training:
 - “What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees, including training that addresses risks in the area where the misconduct occurred? Have supervisory employees received different or supplementary training? What analysis has the company undertaken to determine who should be trained and on what subjects?”
- One approach: Three levels of training:
 - General ABC training for all employees
 - More detailed ABC compliance training directed to particular categories of executives and employees, based on business case (in cooperation with training function)
 - Tailored training for specific categories of executives and managers in higher-risk positions (e.g., relationship managers)
- Be prepared to show how the company determines that the training is effective

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Program design - communications

Consider:

- cross-functional communications on a regular basis
 - Biweekly “ABC Forum”
 - Monthly written briefers on ABC developments
- Communications in local languages
- Tailored communications based on job roles
- Provide information to employees about misconduct and discipline taken



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Effective Implementation - Autonomy and Resources

Staffing and funding

- Evaluation Guidance: “Has there been sufficient staffing for compliance personnel to effectively audit, document, analyze, and act on the results of the compliance efforts? Has the company allocated sufficient funds for the same?”
- One approach: Count number of people (and percentage of their time) dedicated at first, second-, and third-line levels to ABC compliance, and talk to their managers at all three levels about whether they think their staffing is sufficient to be effective and why

Experience and Qualifications

- Evaluation: “Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time?”
- One approach: Ask managers at all three levels about backgrounds and qualifications of their ABC team members, and encourage them to get those team members to compliance conferences and appropriate certification training

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Effective Implementation – Discipline and incentives

Disciplinary procedures

Evaluation Guidance: "Prosecutors should assess whether the company has clear disciplinary procedures in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations."

One approach: Develop policies and a method to apply them consistently when faced with misconduct. Maintain data on employees disciplined for ABC-related matters

Positive incentives for ethical behavior

Evaluation Guidance: Some companies have found "that providing positive incentives – personnel promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership – have driven compliance"

One approach: Establish company-wide annual recognition for exceptional work on ABC compliance (not including your own unit)

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Working in practice – Internal Audit

The role of Internal Audit in continuous improvement, periodic testing and review

- Evaluation Guidance: Prosecutors should evaluate whether internal audit functions are conducted "at a level sufficient to ensure their independence and accuracy"
 - One approach: Independence does not have to mean isolation. Don't wait for formal audits to communicate and share information with auditors.
- Evaluation Guidance suggests prosecutors examine Internal Audit's role, its process for determining where and how frequently internal audit will conduct an audit, and the rationale behind the selection.
 - One approach: The compliance function can share information with Internal Audit and highlight corruption risk areas to examine

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Arguments for an increased anti-corruption compliance budget

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Five arguments for an increased anti-corruption compliance budget

1. The Company needs to be able to show that all aspects of its ABC compliance program are effective

- Emphasize that enforcement agencies expect all aspects of program to be effective, and that the company needs to respond with specific and timely data
- DOJ's recent guidance specifically tells prosecutors to look at the resources of compliance departments, qualifications of staffing, and funding
- Year-over-year data showing that the company is cutting its ABC compliance dollars while expanding into higher-risk markets and transactions will not prove effectiveness

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Five arguments for an increased anti-corruption compliance budget

2. ABC Compliance costs less than FCPA settlements

- Settlement costs include –
 - Enforcement penalties
 - In last 14 months, FCPA settlements (deferred and non prosecution agreements) averaged \$353.95 million
 - Costs of internal investigation, costs of outside legal fees, costs of external compliance monitor if one is ordered
 - Business disruption from an internal and government investigation
 - Potential reputational damage and potential shareholder litigation
 - Possible debarment from government contracts
- Remember that these cases can be prosecuted criminally – the stakes are high

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Five arguments for an increased anti-corruption compliance budget

3. ABC compliance isn't a "cost center," it's "catastrophic loss prevention"

- Resist the argument that reducing compliance dollars is a "saving" to the company
 - A number of companies have "saved" money by cutting compliance funding, to their detriment
- If a company needs to increase its fire and flood insurance as its changes or expands its physical plants, it needs to change ABC compliance dollars to meet changing circumstances (e.g., expansion into high-risk jurisdictions or businesses)

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Five arguments for an increased anti-corruption compliance budget

4. ABC compliance is like heart attack prevention

- No one can completely avoid risk of heart attack, but everyone can reduce their risk by adopting a “heart-healthy lifestyle” that includes diet and exercise choices (Mayo Clinic)
 - Diet – Limit your intake of salts, sugars, and certain fats
 - Exercise – Combination of moderate and vigorous exercise
- A company should adopt a similar strategy
 - Diet – Limit your “intake” of high-risk relationships and transactions (via risk assessments, third-party risk management, etc.)
 - Exercise – ABC compliance should involve moderate activity for some business operations, more vigorous activity for other operations

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Five arguments for an increased anti-corruption compliance budget

5. For some firms (financial institutions), ABC compliance is likely to cost far less than other types of financial crimes compliance

- Anti-money laundering and sanctions require 24/7/365 monitoring of transactions, based on the nature of the underlying financial-crime risks
- Frequency and velocity of bribery-related transactions far less than AML/sanctions-related transactions
- ABC compliance functions may be able to “piggyback” on AML/sanctions transaction monitoring functions

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Questions?

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Resources

DOJ Criminal Division's Evaluation of Corporate Compliance Programs (April 2019): <https://www.justice.gov/criminal-fraud/page/file/937501/download>

DOJ's FCPA Corporate Enforcement Policy (Nov. 2017): <https://www.justice.gov/criminal-fraud/file/838416/download>

DOJ and SEC's *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012): <https://www.justice.gov/criminal-fraud/fcpa-guidance>

DOJ's Principles of Federal Prosecution of Business Organizations (Justice Manual 9-28.000): <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700>

DOJ's "Piling on policy" ("Policy on Coordination of Corporate Resolution Penalties") (May 2018): <https://www.justice.gov/opa/speech/file/1061186/download>

SEC FCPA enforcement actions: <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>

U.K. Serious Fraud Office's Corporate Co-Operation Guidance (August 2019): <https://www.sfo.gov.uk/download/corporate-co-operation-guidance/>

U.S. Sentencing Commission's guidelines on sentencing of organizations: <https://www.uscc.gov/guidelines/organizational-guidelines>

OECD's Anti-Corruption Ethics and Compliance Handbook for Business (2013): <https://www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm>

World Bank's Integrity Compliance Guidelines:
https://siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf

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Thank you

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