

In Case the Government Comes Knocking: Best Practices in Investigating and Remediating FCPA Issues

*Compliance and Ethics Institute
Society of Corporate Compliance and Ethics*

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What We Will Cover Today

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- ▶ Lessons from DOJ and SEC policies and settlements
 - ▶ Expectations of corporate internal investigations
 - ▶ Expectations of remedial efforts
 - ▶ Effect on corporate resolutions
- ▶ Managing effective FCPA internal investigations
- ▶ Designing and implementing effective remediation
- ▶ *This is an interactive workshop and we encourage open discussion and sharing ideas from everyone's experience in the field!*

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Audience Poll

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- ▶ Role
 - ▶ In-house, outside counsel, outside consultant.
 - ▶ Compliance professional, lawyer, accountant/auditor, other.
- ▶ Experience in ethics and compliance field
- ▶ Experience in anti-corruption compliance

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Lessons From DOJ And SEC Policies And Settlements

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FCPA Enforcement: Background

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- ▶ U.S. authorities are the leading enforcer when it comes to anti-corruption prosecutions.
- ▶ The DOJ and SEC have several advantages.
- ▶ 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.

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Enforcement Policies

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- ▶ DOJ The Principles of Federal Prosecution of Business Organizations
- ▶ U.S. Sentencing Guidelines
- ▶ SEC Seaboard Principles

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Enforcement Policies (cont.)

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- ▶ March 2019 updated DOJ FCPA Corporate Enforcement Policy
 - ▶ Guidance designed to encourage companies to voluntarily disclose FCPA matters by providing more transparency as to the credit a company may receive for disclosure and cooperation.
 - ▶ Addresses consideration and credit that may be given for "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation," absent "aggravating circumstances."
- ▶ April 2019 updated DOJ Evaluation of Corporate Compliance Programs Policy
 - ▶ Key questions: 1) Is the program well designed? 2) Is it well implemented? 3) Does it work in practice?
- ▶ May 2018 DOJ Policy on Coordination of Corporate Resolution Penalties
 - ▶ Emphasizes DOJ goal of reducing "piling on" of multiple punishment from different agencies when not "in the interest of justice"

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Enforcement Policies (cont.)

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- ▶ October 2018 DOJ Selection of Monitors in Criminal Division Matters
 - ▶ DOJ Criminal Division's policy approach will now allow companies to avoid monitorships as long as they can successfully demonstrate to DOJ investigators that misconduct has stopped and changes to internal processes or leadership will prevent future misconduct
- ▶ March 2019 CFTC Enforcement Advisory on Self Reporting and Cooperation for Commodity Exchange Act (CEA) Violations Involving Foreign Corrupt Practices
 - ▶ Guidance clarifies benefits of voluntary disclosure, cooperation, and remediation.

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Lessons from Recent Settlements

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- ▶ *Corporate Internal Investigative and Auditing Processes*
 - ▶ *Walmart (2019)*
 - ▶ Awareness of improper payments without corrective action for several years
 - ▶ Ignoring internal audit findings
 - ▶ Failure to establish controls for identified risks
 - ▶ Credited for cooperation even though initial disclosure was not voluntary
 - ▶ Monitorship imposed; repeated prior lack of response to warning signs

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Lessons from Recent Settlements (cont.)

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- ▶ *Fresenius Medical Care (2019)*
 - ▶ Ignored employee reports of misconduct
 - ▶ Management interference with internal investigation
 - ▶ Insufficient controls for compliance with anti-bribery laws
 - ▶ Geographically widespread misconduct
 - ▶ Multiple or willful control failures
 - ▶ Company credited for self-reporting but monitor imposed; pervasive issues and failure to respond to them

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Lessons from Recent Settlements (cont.)

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Privileged and Confidential/Attorney-Client
Communication/Attorney Work Product

- ▶ *Panasonic Aviation Corporation (2018)*
 - ▶ FCPA risks were identified by internal audit, but omitted from the final audit report.
 - ▶ Sales agents were terminated after failing third-party due diligence, but were then rehired as subs.
- ▶ *United Technologies Corporation (2018)*
 - ▶ Legal reviewed standard contract terms for intermediaries, without confirming whether required due diligence had been conducted.
 - ▶ Lawyers questioned the need for an intermediary, but ultimately approved the contract without an explanation.

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Managing Effective FCPA Internal Investigations

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FCPA Investigations Initial Triage

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Privileged and Confidential/Attorney-Client
Communication/Attorney Work Product

- ▶ Consider how quickly need to proceed, including factors such as
 - ▶ Risk of discovery
 - ▶ Pending business implicated
 - ▶ High-level personnel potentially implicated
- ▶ Consider how issue came up (internal complaint? Government inquiry? Other?) and implications for how to proceed
- ▶ Identify and inform key stakeholders within the business, and otherwise, as appropriate
 - ▶ Executives, Board or Board Committee, outside auditors, government customer, etc.
- ▶ Define the team
 - ▶ Internal resources (legal, compliance, internal audit, finance and/or HR)
 - ▶ Non-conflicted; adequate bandwidth, expertise, experience
 - ▶ External resources (legal, accounting, and/or e-discovery)

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FCPA Investigations Initial Triage (cont.)

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- ▶ Defining the scope
 - ▶ Identifying alleged violations of FCPA
 - ▶ Identifying personnel involved
 - ▶ How high up
 - ▶ Determining if incident was “one-off” or recurring
 - ▶ Identifying relevant controls and if/how they failed
 - ▶ Examining business partners for culpability
 - ▶ Right sizing your investigation: effective, complete, but doesn’t seek to “boil the ocean”

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FCPA Investigations In-House Counsel and Outside Counsel

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- ▶ Considerations for in-house counsel involvement
 - ▶ Legal vs. business responsibilities
 - ▶ Ongoing, long-term relationships within the business
 - ▶ Know the business and its people
- ▶ Managing outside investigation counsel
 - ▶ Issues that can come up
 - ▶ Budget and scope issues
 - ▶ Imposition on the business
 - ▶ Language and culture
 - ▶ Tips from our panel for effective collaboration with and management of outside counsel

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FCPA Investigations Local Laws

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- ▶ Local laws that can come up
 - ▶ Local anti-corruption, money laundering, fraud laws
 - ▶ Data privacy and data handling regulations (GDPR, CCPA)
 - ▶ Labor & employment laws
 - ▶ State secrets laws
- ▶ Tips for making effective use of local counsel

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FCPA Investigations Attorney-Client Privilege & Work Product Protection

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- ▶ U.S. legal protections – understand their operation and how to establish and maintain them
 - ▶ Assess early and establish solid protocols
 - ▶ Inform, train, and reinforce privilege protocols with all team members (internal and external) who will be supporting the investigation
- ▶ Local law re privilege – consider impact if any
 - ▶ E.g., protections for communications with in-house counsel

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FCPA Investigations Nuts and Bolts: Investigation Plan

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- ▶ Why have an investigation plan
- ▶ What should be in an investigation plan
- ▶ Keeping the plan current

Privileged and Confidential/Attorney-Client
Communication/Attorney Work Product

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FCPA Investigations

Nuts and Bolts: Work Product Tools

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Privileged and Confidential/Attorney-Client
Communication/Attorney Work Product

- ▶ Document and data identification, preservation and collection protocol and documentation of execution
 - ▶ Company / personnel documents and data
 - ▶ Third party documents and data
 - ▶ Special situations: Board member documents and data; former employees; etc.
- ▶ Document review protocol, including
 - ▶ Document reviewer recruitment (if applicable) and training
 - ▶ Foreign language document review – tips and precautions
- ▶ AI technology – pros and cons
- ▶ Case chronology (ies)
- ▶ Key players list
- ▶ Key statements
- ▶ Glossary
- ▶ Interview key takeaways and / or memoranda
- ▶ Forensic accounting analysis
- ▶ Evaluation of personnel and/or business partners – “score cards” and other tools

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FCPA Investigations

Nuts and Bolts: Investigation Reports

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Privileged and Confidential/Attorney-Client
Communication/Attorney Work Product

- ▶ Pros and cons of a written report or presentation
- ▶ Who is your audience
- ▶ How likely that government will become involved
- ▶ Risk of third-party litigation (e.g., shareholder lawsuits)
- ▶ Most effective format given case needs
- ▶ Include legal analysis and conclusions?
- ▶ Tips for working effectively with outside counsel to ensure robust, nuanced, and executable investigation report and recommendations

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Developing Effective FCPA Remediation

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FCPA Remediation Types of Remediation

- ▶ Personnel action
- ▶ Policies and procedures
- ▶ Employee training
- ▶ Changes or increases in relevant resourcing (e.g., for gatekeeper functions)
- ▶ Targeted or enhanced messaging from leadership
- ▶ Withdrawal or other changes in approach to pending business transactions and opportunities
- ▶ *Third party relationships*
- ▶ Disclosure to client/customer
- ▶ Disclosure to enforcement or regulatory authorities (more on this later)

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FCPA Remediation Determining Appropriate Measures

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- ▶ Factors to consider include:
 - ▶ Root cause of the incident/issue
 - ▶ Input and buy-in from key stakeholders
 - ▶ Balancing risk mitigation with business needs
 - ▶ Assessing litigation risk (e.g., employment disputes)
 - ▶ Culture and geography challenges and opportunities
 - ▶ Industry practices and standards
 - ▶ Enforcement authority guidance and/or requirements

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FCPA Remediation Third Parties

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- ▶ In FCPA matters, third party business partners and the risks they entail are often central to the issue
- ▶ Modifying or ending existing relationships
 - ▶ Training, contract changes, or other modifications
 - ▶ Ending the relationship – considerations, consequences
 - ▶ What if the remediation would result in a breach of contract?
- ▶ Augmenting third party processes going forward:
 - ▶ Due diligence
 - ▶ Training
 - ▶ Contractual requirements
 - ▶ Monitoring and audit processes going forward

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FCPA Remediation Voluntary Disclosure to U.S. Authorities

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- ▶ Pros, Cons, and Risk Analysis for Voluntary Disclosure
 - ▶ Scope of misconduct
 - ▶ Risk of discovery
 - ▶ Corporate culture
 - ▶ Special considerations for SEC-regulated companies
 - ▶ Outside auditors
 - ▶ Potential benefits of disclosure
- ▶ “Timely” disclosure
- ▶ “Complete” disclosure

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FCPA Remediation Financial Statements Disclosures

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- ▶ Companies registered on U.S. stock exchanges have to consider whether / when to disclose an FCPA matter to shareholders
- ▶ No general requirement under the Securities laws to disclose
- ▶ But, if the matter is material within the meaning of the Securities laws, a requirement to disclose can arise
- ▶ Also, even if not required, companies may choose to disclose based on various practical considerations
 - ▶ Views of outside auditors can play a critical role
 - ▶ Relevant statutory and regulatory provisions to consider include Section 10(b) of the Securities Act and Rule 10b-5; SEC Regulation S-K, sections 103 and 303; as well as Sections 11, 12, 15 and 17 of the Securities Act
- ▶ Advice from competent securities law counsel is key: analysis of whether required and/or wise, even if not required, very case and company-specific

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Questions?