The Foreign Corrupt Practices Act: Investigations And Enforcement

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Overview

- FCPA Background
- Compliance Program
  - Why
  - How
- Due Diligence
  - Background
  - Enforcement activity

Refresher: Background of the Statute

- Anti-Bribery Provision
- Accounting Provision
- Penalties
- Enforcement Authorities
- Jurisdiction

Potential Consequences of a Compliance Failure

- Criminal prosecution
  - United States Department of Justice
  - Foreign criminal enforcement authorities
- Civil enforcement action
  - United States Securities and Exchange Commission
- Significant monetary sanctions
- Prison time for executives

Potential Consequences of a Compliance Failure (cont.)

- Disruptions in
  - Business operations
  - Mergers & Acquisition activity
- Reputation risks
- Private civil action
  - Shareholder plaintiff lawsuit

Purpose of a Sound Compliance program

- Prevent violations
- Detect violations
- Enable enforcement defence

Preventing Violations: Tone at the Top

- At every level of leadership, from the Board of Directors and Audit Committee to “the next line up,” management must set a tone of compliance
- Workforce must understand that the tone of compliance is ingrained in the culture of the company

Preventing Violations: Foundation of a Compliance Program

- Code of Conduct
  - Management's general policy on compliance with FCPA
- FCPA Policies and Procedures
  - Management's specific guidance on constraints and how to comply
- Both must be approved by Audit Committee and top-level management

Preventing Violations: program Design

- Must be tailored to FCPA risk
  - Geographies: Corruption Perceptions Index
  - Business profile:
    - Interactions with government officials
    - Use of third party intermediaries, agents, representatives
    - Joint ventures
    - Acquisitions
- Must be tailored to the company
  - No one-size-fits-all compliance program

Preventing Violations: program Design (cont.)

- Basics:
  - Ensure appropriate program management and reporting
    - Management: Compliance professionals must be empowered to remedy violations
    - Reporting: Must be clear lines to Board and Audit Committee
  - Ensure effective compliance reporting lines – telephone, hotline, email, facsimile, in-person, paper forms

Preventing Violations: Training & Education

Key to effectiveness of a compliance program

- Make it real – Provide concrete, real-life examples of improper payments
- Make it personal – Ensure that the recipients appreciate the potential personal implications of improper payments
- Make it appropriate – Tune the training to cultural and language differences, and to the risk of the employee
- Make it accessible – Offer telephonic training, webcasts, podcasts, in-person training in a large group, in-person training in a small group, or paper. Any way to connect with the audience

Detect Violations: Test program Effectiveness

- Policies and guidance must be field-tested to ensure the workforce understands and implements it properly
- Books and records / internal controls must be tested and audited to confirm controls environment appropriate to the risk
- Demonstrate remediation when gap or compliance failure detected
- Maintain documentation of all testing

Compliance And Due Diligence

Importance of Corporate Compliance Policy

- Preventive medicine with respect to possible violations
- Mitigating consideration in event of violation
- Potential exposure in M&A transactions
  - ABB Ltd.
  - GE/InVision
  - Titan Corp.
- Sarbanes-Oxley Act of 2002
- Suspension or debarment from government contracting

Top Ten Elements of an Effective Compliance Program

1. Instill a corporate culture of compliance
2. Issue a written compliance policy
3. Assign implementation responsibility
4. Promulgate specific compliance measures
5. Provide periodic training programs and ready access to legal advice
6. Require periodic self-certification of compliance
7. Maintain compliance records
8. Apply disciplinary measures as appropriate
9. Conduct periodic internal and external compliance audits
10. Adjust the compliance program to current risk assessment

An Introduction To Due Diligence

- FCPA does not mandate that U.S. companies perform due diligence with respect to their international business associations
- No crime is committed nor regulation violated by a company's failure to perform due diligence
- FCPA charges U.S. companies with *knowledge* with respect to their international business associates
- Examine due diligence in the context of the meaning of *knowing* conduct under the Act

The Knowledge Standard

- A company or individual has the requisite knowledge if:

  i. such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur, [or]

  ii. such person has a firm belief that such circumstance exists or that such result is substantially certain to occur

Legislative History

- Simple negligence or mere foolishness not enough
- Actual knowledge or action that evidences a conscious disregard or deliberate ignorance of known circumstance that should reasonably alert one to the high probability of violation

Bottom Line

- FCPA covers any instance where "any reasonable person would have realised" the existence of the circumstances or results and the defendant has "consciously chose[n] not to ask about what he had 'reason to believe' he would discover."

Practical Application

- Conduct a sufficient level of due diligence to ensure that circumstances – so-called "red flags" – do not exist that should reasonably alert the company to a high probability that a violation of the FCPA will occur
- Determining the appropriate degree of due diligence is a judgment to be based on a review of the facts and circumstances
- Company's actions always judged in hindsight
- No amount of due diligence can guarantee that an FCPA violation will not occur, but a healthy degree of caution and prudent business sense can carry a company a long way toward compliance

Due Diligence — FCPA Red Flags

- High risk countries
- Excessive or unusually high compensation
- Request for increase in compensation during sales campaign
- Request for payments to third countries or third parties
- Request for payments in cash or bearer instrument
- Lack of facilities or qualified staff
- Use of shell companies
- Lack of experience or “track record” with product field or industry

Due Diligence — FCPA Red Flags (cont.)

- Allegations related to integrity
- Reputation of representative or consultant
- Lack of written agreement
- Close relationships to government officials (close relative or financial/ownership interest)
- Representative or consultant recommended by government official or customer
- Violation of local law or policy (e.g., prohibitions on commissions, currency or tax law violations)
- Misrepresentation or inconsistencies in the application of the due diligence process

Twelve Steps to adequate due diligence for purposes of FCPA compliance

The following "Twelve Steps" should serve as basic considerations for any company that undertakes a due diligence or FCPA compliance program:

- Specific level and type of due diligence that is required for each foreign business associate will vary
- A company would be well-advised to develop and apply a standard minimum level of due diligence
- Steps have been developed for U.S. companies that deal with international sales consultants, they apply in principle with equal force to all foreign business associates of U.S. companies

Twelve Steps to adequate due diligence for purposes of FCPA compliance (cont.)

- Step One: Consider the territory
- Step Two: Determine the consultant's competence
- Step Three: Determine the consultant's integrity
- Step Four: Identify the consultant's relationship to foreign government officials
- Step Five: Determine the reasonableness of compensation and payment
- Step Six: Ensure that answers provided by consultant to due diligence questions are accurate

Twelve Steps to adequate due diligence for purposes of FCPA compliance (cont.)

- Step Seven: Ensure compliance with local law
- Step Eight: Integrate FCPA safeguards into the consultant agreement
- Step Nine: Provide for continuing oversight of the consultant's activities
- Step Ten: Maintain accurate books and records
- Step Eleven: When appropriate, consider seeking guidance from the Department of Justice
- Step Twelve: Consistent standards and common sense

Recent Trends

- Aggressive Prosecutions by DOJ and SEC
- More Voluntary Disclosures (*Syncor, ABB, Titan, InVision, DPC, BJ Services* and *Schnitzer*)
- Cases involving Mergers & Acquisitions (*Syncor, ABB, Titan* and *InVision*)
  - "Clean the books"
  - Successor liability
  - Due diligence on agents, consultants, etc. of newly acquired company
  - Implementation of approved compliance program

Recent Trends (cont.)

- Commentary on Compliance programs/Internal Controls
  - Due diligence directives
  - Independent audits
- Government's broad interpretation upheld (so far)
  - Intent or authorization sufficient
  - "Business nexus" requirement
  - Instrumentalities of the government (Pharmaceutical Industry – *Syncor, Micrus,* and *DPC*)

Prosecutions Involving Mergers And Acquisitions

Mergers & Acquisitions Considerations

- If you have the time and money to plead guilty to someone else's crimes, skip this section
- Issues regarding successor liability
- Defence Contractors — DOJ/SEC/DOD/DOS
- FCPA issues may arise in the course of financial or corporate due diligence
- FCPA representations in acquisition documents
- May affect the timing of the merger as well as the ultimate price paid for the company

Mergers & Acquisitions Cases (December 2002 — October 2007)

1. Syncor International Corporation
   (Acquired by Cardinal Health Inc.)

2. ABB Vetco Gray
   (Acquired by JP Morgan Partners, Candover Partners Limited and 3i Group)

3. InVision Technologies, Inc.
   (Acquired by General Electric Company)

4. Titan Corporation
   (Proposed acquisition by Lockheed Martin Corporation)

5. York International
   (Acquired by Johnson Controls, Inc.)

6. Paradigm
   (IPO)

Syncor International Corporation (December 2002)

FACTUAL ALLEGATIONS

- Acquisition of Syncor International Corporation, a radiopharmaceutical company based in California, by Cardinal Health, Inc.
- Between 1997 and 2002, Syncor's Taiwanese subsidiary made improper payments ("commissions" totaling $344,000) to physicians who were employed by state-owned hospitals to influence the doctors' decision to buy Syncor products and services
- Payments were authorised by Company's Board Chairman located in California

Syncor International Corporation (December 2002) (cont.)

FACTUAL ALLEGATIONS (cont.)

- SEC alleged additional payments, totaling $600,000, were made through Syncor's foreign subsidiaries in Mexico, Belgium, Luxembourg, and France. SEC alleged knowledge and approval of Syncor's Founder and Chairman
- Improperly recording the payments as "commissions" exposed Syncor to books and records violations of the FCPA

Syncor International Corporation (December 2002) (cont.)

ENFORCEMENT ACTION & SANCTIONS

- U.S. v. Syncor Taiwan Inc.
  - Syncor Taiwan Inc., a Taiwan corporation and wholly owned subsidiary of Syncor International Corporation, a Delaware Corporation, pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions
  - Syncor Taiwan Inc. was sentenced to 3 years of supervised probation and ordered to pay a $2 million fine

Syncor International Corporation (December 2002) (cont.)

ENFORCEMENT ACTION & SANCTIONS (cont.)

- SEC v. Syncor International Corp.
  - SEC alleged violations of the FCPA's anti-bribery, books and records, and internal controls provisions
  - Syncor agreed to pay a $500,000 civil penalty and to cease and desist in future violations
    - At the time, it was the largest penalty ever obtained by the SEC in an FCPA case
  - Required to retain an independent Consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures
- DOJ Review Release giving comfort to Cardinal Health for additional undiscovered pre-acquisition conduct

Syncor International Corporation (December 2002) (cont.)

LESSONS LEARNED

- Government investigation can slow the closing of corporate merger and acquisition transactions
  - The acquisition by Cardinal Health was delayed until the investigation was concluded and agreements were struck with the DOJ and SEC
  - The acquirer bought Syncor for a lower price than originally negotiated

Syncor International Corporation (December 2002) (cont.)

LESSONS LEARNED (cont.)

- This was the first time the DOJ charged a foreign company under the 1998 amendments, for taking acts – in the U.S. – i.e., Chairman's approval
- Parent liability established through the foreign subsidiary's books and records
- Employees of a state-owned entity are instrumentalities of the government

ABB Vetco Gray (July 2004)

FACTUAL ALLEGATIONS

- Acquisition of Upstream Oil and Gas business of ABB Limited, (Asea Brown Boveri), a Swiss corporation with ADR's listed on the NYSE by "Equity Club" (JP Morgan Partners, Candover Partners Limited and 3i Group)

- ABB Vetco Gray of Houston, Texas and ABB Vetco Gray of UK paid more than $1 million to officials of NAPIMS, a Nigerian government agency to obtain confidential bid information and favourable recommendations from Nigerian government agencies in connection with seven oil and gas construction contracts in Nigeria for which companies expected to realise profits greater than $12 million

ABB Vetco Gray (July 2004) (cont.)

FACTUAL ALLEGATIONS (cont.)

- Payments were also made to foreign government officials in Angola and Kazakhstan for similar reasons that payments were made in Nigeria
- Payments included:
  - Cash and gifts to NAPIMS officials
  - Travel and entertainment
  - Per diem payments

ABB Vetco Gray (July 2004) (cont.)

ENFORCEMENT ACTION & SANCTIONS

- U.S. v. ABB Vetco Gray Limited & ABB Vetco Gray U.K. Limited
  - ABB Vetco Gray Inc., the U.S. subsidiary, was charged as a "domestic concern," whereas ABB Vetco Gray UK Ltd. was charged under the 1998 provision expanding jurisdiction to foreign companies that take acts in the U.S. in furtherance of a bribe
  - Both companies pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions
  - ABB Vetco Gray Inc. and ABB Vetco Gray U.K. Limited *each* fined $5.25 million

ABB Vetco Gray (July 2004) (cont.)

ENFORCEMENT ACTION & SANCTIONS (cont.)

- SEC v. ABB Limited
  - SEC alleged violations of the FCPA's anti-bribery and books and records provisions by Swiss parent company
  - Parent company agreed to pay $5.9 million in disgorgement and prejudgment interest penalties and a $10.5 million penalty, which was satisfied by payments of criminal fines by its subsidiaries

ABB Vetco Gray (July 2004) (cont.)

ENFORCEMENT ACTION & SANCTIONS (cont.)

- Parent company was required to retain an independent consultant to review its FCPA compliance policies and procedures even though it sold off the Vetco Gray entities
- SEC is currently investigating individuals that were implicated in the payment scheme
- DOJ Review Release was issued to new owners agreeing not to charge them for any additional undiscovered pre-acquisition conduct under certain circumstances

ABB Vetco Gray (July 2004) (cont.)

LESSONS LEARNED

- Necessity to conduct rigorous due diligence and monitor the activities of foreign agents, consultants, representatives, distributors, suppliers and joint venture partners
- After acquiring a new company, a number of issues within the context of the FCPA must be addressed:
  - System of internal controls
  - Compliance program and due diligence procedures
  - Disciplinary actions
  - Change in business culture
- Disgorgement of profits

InVision Technologies, Inc.
(December 2004 — February 2005)

FACTUAL ALLEGATIONS

- Involved the acquisition of InVision Technologies, Inc., which is based in Newark, California, by General Electric Company. InVision manufactures airport security/explosive detection systems to scan checked baggage by airport security personnel

- InVision marketed and sold its equipment via local sales agents and distributors

InVision Technologies, Inc. (December 2004 — February 2005) (cont.)

FACTUAL ALLEGATIONS (cont.)

- InVision was aware of the high probability that its agents or distributors in Thailand, China and the Philippines had paid or offered to pay money, i.e., travel expenses and/or gifts, to foreign officials or political parties, in connection with the sale of airport security screening machines
- SEC alleged that InVision improperly accounted for certain payments in its books and records as a "cost of goods sold," realizing profits of approximately $589,000 from the sale of two machines in China
- SEC also alleged that InVision failed to develop an adequate process to select and train its foreign sales agents and distributors

InVision Technologies, Inc. (December 2004 — February 2005) (cont.)

ENFORCEMENT ACTION & SANCTIONS

- DOJ Settlement Agreement
  - Deferred prosecution and penalty of $800,000
  - Accept responsibility for its misconduct and agree to a statement of facts summarizing the subject transaction
  - Integrate the InVision business into GE's FCPA compliance program
  - Retain an independent consultant to evaluate the efficacy of InVision's efforts
  - Full cooperation with the DOJ in its continued investigation

InVision Technologies, Inc. (December 2004 — February 2005) (cont.)

ENFORCEMENT ACTION & SANCTIONS (cont.)

- SEC v. GE InVision Inc. (formerly known as InVision Technologies, Inc.)
  - Disgorged $589,000 in profits plus an additional $28,700 in interest
  - Civil penalty of $500,000
  - SEC alleged violations of the FCPA's anti-bribery, books and records, *and* internal controls provisions
    - Failure to have a system of internal controls to detect and prevent FCPA violations
  - Integrate the InVision business into GE's FCPA compliance program
  - Retain an independent consultant to evaluate the efficacy of GE's efforts

InVision Technologies, Inc. (December 2004 — February 2005) (cont.)

LESSONS LEARNED

- Government investigation will slow the closing of corporate merger and acquisition transactions
  - In this case, GE announced the acquisition in March 2004 and the transaction did not close until December 2004, after the company agreed to a deferred prosecution
- Voluntary disclosure allowed the transaction to close
  - The credibility of the acquirer's compliance program was an important factor
- Disgorgement of profits

Titan Corporation (March 2005)

FACTUAL ALLEGATIONS

- Involved the acquisition of Titan Corporation, California, by Lockheed Martin Corporation, Maryland - the acquisition ultimately failed
- Titan employed a consultant and paid $3.5 million to a known business advisor of the President of Benin
  - Of the $3.5 million paid to the advisor, approximately $2 million were indirect contributions to the President's re-election campaign
  - At the direction of a Titan senior officer, at least two payments of $500,000 each were wired from Titan's bank account in San Diego, California, to the agent's account in Monaco. The remaining payments were made to the agent in cash

Titan Corporation (March 2005) (cont.)

FACTUAL ALLEGATIONS (cont.)

- Payments were characterized on Titan's books and records as "social program payments" that were required by its contract with the government

- Titan gave a $1,850 pair of earrings to the President of Benin's wife
- Titan falsified documents to enable its agents to under-report local commission payments in Nepal, Bangladesh, and Sri Lanka
  - SEC Complaint alleges that Titan falsely reported to the U.S. government commission payments on equipment exported to Sri Lanka, France and Japan

Titan Corporation (March 2005) (cont.)

ENFORCEMENT ACTION & SANCTIONS

- U.S. v. Titan Corporation
- Titan pleaded guilty to substantive violations of the FCPA's anti-bribery and books and records provisions, as well as a tax violation
- Titan was sentenced to 3 years of supervised probation and ordered to pay a $13 million fine
- Titan ordered to institute a strict compliance program and internal controls designed to prevent FCPA violations

Titan Corporation (March 2005) (cont.)

ENFORCEMENT ACTION & SANCTIONS (cont.)

- SEC v. Titan Corporation
  - SEC alleged violations of the FCPA's anti-bribery and books and records provisions
  - Titan agreed to pay $15.5 million in disgorgement and prejudgment interest penalties and a $13 million penalty, which was satisfied by payment of the criminal fines
  - SEC required the company to retain an independent consultant to review its FCPA compliance procedures and to adopt its recommendations
  - SEC issued a 21(a) Report criticising Titan's proxy statement for incorporating what it deemed false FCPA representations and warranties

Titan Corporation (March 2005) (cont.)

LESSONS LEARNED

- Conduct meaningful due diligence with respect to foreign agents and consultants
- Ensure that the services alleged to be performed are actually provided
- Representations and Warranties in a Merger Agreement must be accurate (or qualified) when included in a proxy statement
- Internal Controls must be designed to detect “red flags,” such as offshore payments and inconsistent invoices

Titan Corporation (March 2005) (cont.)

LESSONS LEARNED (cont.)

- Other Offences
  - Risk of additional prosecution under the International Traffic in Arms Regulations ("ITAR") and possible suspension of export privileges
  - Potential U.S. and foreign tax exposure
  - Department of Defence — possible contractor debarment issues
- Deal failed when Titan was unable to meet contractual agreement to settle with the U.S. Government by a certain time.

York International (October 2007)

FACTUAL ALLEGATIONS

- Initially an Oil-for-Food investigation, the York International prosecution involved kickbacks to Iraqi officials to obtain air conditioning contracts in Iraq
- Conduct also involved “hundreds of improper payments” to government officials in Bahrain, Egypt, India, Turkey and the UAE to obtain government contracts for air conditioning

York International (October 2007) (cont.)

ENFORCEMENT ACTION & SANCTIONS

- Entered a three-year deferred prosecution agreement with Department of Justice
  - $10,000,000 fine
  - Three-year compliance monitor
- Settled enforcement action with Securities and Exchange Commission
  - $2,000,000 fine
  - $10,000,000 disgorgement and prejudgment interest
  - Three-year compliance monitor

York International (October 2007) (cont.)

LESSONS LEARNED

- Acquiring company, Johnson Controls, Inc., obtained language in the DPA that nearly all the conduct pre-dated the acquisition, and that there would be no prosecution of Johnson Controls
- Johnson Controls agreed to implement a rigorous anti-corruption compliance program

Paradigm B.V. (September 2007)

FACTUAL ALLEGATIONS

- Preparing to list shares in an initial public offering, management conducted due diligence of various international operations
- Private company headquartered in Houston, but founded as a Dutch company
- Discovered improper payments, or agreements to make improper payments, in Kazakhstan, China, Nigeria, Mexico and Indonesia for various purposes

Paradigm B.V. (September 2007) (cont.)

ENFORCEMENT ACTION & SANCTIONS

- Paradigm obtained a non-prosecution agreement from the Department of Justice
  - $1,000,000 fine
  - Independent compliance consultant
  - Agreements regarding FCPA compliance program

Paradigm B.V. (September 2007) (cont.)

LESSONS LEARNED

- Due diligence for FCPA compliance arises in many different contexts
- Cost of entry into U.S. markets may be voluntary disclosure
- Use of intermediaries
- Agreement regarding compliance program is important for government

Minimizing Successor Liability

- Conduct extensive due diligence to determine any areas of initial concern
- If areas of concern are identified — conduct a complete and thorough investigation
- If violations are discovered, ensure that they are resolved prior to closing:
  - Make full disclosure to the DOJ and SEC
  - Reach disposition of any charges by the Seller
- Obtain an advisory opinion from the DOJ assuring that no enforcement action will be taken against the successor

Minimizing Successor Liability (cont.)

- Implement new systems and procedures acceptable to the DOJ and SEC, including:
  - Assurance of continued cooperation with continuing DOJ and SEC investigations
  - Adoption of a comprehensive code of conduct
  - Implementation of an effective compliance program (procedures and training)

Conducting An Internal Investigation That Will Satisfy The Government

Conducting and Reporting on an Investigation

- Conducting document preservation and review
- Conducting interviews
- Developing remedial recommendations
- Memorializing investigative steps and findings
- Communications with the board/auditors

Preserving Documents and Information

- Determine the scope of the Investigation
  - Dates
  - Key Players
  - Departments or Business Units
  - Documents
- Counsel should insist on complete access to:
  - Witnesses
  - Documents
  - Electronic data/emails
  - In-country document collection issues

Preserving Documents and Information (cont.)

- Company must suspend automatic document destruction practices to avoid inadvertent destruction
- Counsel must work with IT department to understand company's computer systems and steps necessary to preserve electronic data
- Issue preservation memo
- Preserve back-up tapes
- Document preservation steps
- Criminal risks

Preserving Documents and Information (cont.)

- Suspend routine or automatic disposal of documents and electronic data
  - Includes:
    - Email accounts
    - PDAs
    - Laptops
    - Zip drives
    - Electronic calendars
    - Instant messaging
    - Voice mails
  - Consider making mirror image of accounts of key employees
  - Consider help from outside experts

Preserving Documents and Information (cont.)

- Work with IT department to understand:
  - Computer hardware and systems
  - Applications and software programs
  - Company's databases, backup procedures and archival data
  - Company's Backup Procedures
  - Company's Archival Data
  - Company's Databases

Preserving Documents and Information (cont.)

- Work with IT department to understand:
  - Computer hardware and systems
  - Applications and software programs
  - Company's databases, backup procedures and archival data
  - Company's Backup Procedures
  - Company's Archival Data
  - Company's Databases

Preserving Documents and Information (cont.)

- Issue preservation memo
  - Identify all documents to be retained
  - Identify all persons who may possess relevant data, including employees overseas
  - Identify third parties who may have relevant data
  - Consider having recipients acknowledge receipt and understanding
  - Establish procedure for preserving data of departing employees
  - Reissue Preservation Memo periodically

Preserving Documents and Information (cont.)

- Counsel must monitor compliance
  - "Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." *Zubulake v. UBS Warburg,* 2004 WL 1620866 (S.D.N.Y.)
  - Court held document "hold memos were not sufficient, since they subsequently were ignored." *In re NTL Securities Litigation,* 2007 WL 241344 (S.D.N.Y.)

Preserving Documents and Information (cont.)

- Back-up tapes
  - Companies need not preserve every email and backup tape as such a rule would "cripple large corporations." *Zubulake,* 220 F.R.D. 212, 217

    (S.D.N.Y. 2003)
  - Where backup tapes are sole source of discoverable information, may be required to preserve tapes.
    Fed. R. Civ. P. 37(f), committee notes
  - Consider retaining then-existing backup tapes for relevant personnel

Preserving Documents and Information (cont.)

- Document rationale for preservation decisions to support good faith showing
  - Outline steps taken immediately on service of subpoena or when duty to preserve attaches
  - Identify groups of employees instructed to preserve data

Preserving Documents and Information (cont.)

- Criminal Risks
  - Employees must understand the need to cooperate
  - Sarbanes-Oxley: It is a criminal act to deliberately destroy information subject to a preservation obligation
  - Criminal obstruction statute: section 802 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1519):
    - Whoever knowingly alters or destroys any document
    - With the intent to impede, obstruct, or influence the investigation
    - Shall be fined or imprisoned not more than 20 years, or both

Conducting and Reporting on an Investigation

The Interviews

- Company employees should be informed of the process and guidelines for the interviews
- How to handle request by employee for obtaining their own outside counsel
- How to handle interviews with outsiders to the company: risks and rewards

The Interviews (cont.)

- Tips and Strategies for Interviews
  - Do not allow employee to impose conditions on the interview
  - Ask probing questions; not prosecutorial
  - Ask the “w” questions: who, what, where, when, why
  - The goal is to obtain credible information
  - Use documents and other information
  - Interview one witness at a time

Conducting and Reporting on an Investigation

Remediation

Developing Remedial Recommendations:

1. Nature and seriousness of offense
2. Pervasiveness of wrongdoing within corporation
3. Corporation's prior history
4. Cooperation and voluntary disclosure
5. Corporate compliance programs
6. Restitution and remediation
7. Collateral consequences
8. Adequacy of the prosecution of individuals responsible for the corporation's malfeasance
9. Non-criminal alternatives

Conducting and Reporting on an Investigation

Remediation (cont.)

Sample Remedial Recommendations:

1. Hire your own corporate monitor, if necessary
2. Institute robust FCPA policies and procedures
3. Institute periodic reviews to detect FCPA concerns
4. Books and records
5. Institute due diligence process for joint ventures and business combinations
6. FCPA education and training
7. Termination of wrongdoers (SOX Section 806 - civil remedy for whistle-blowers who suffer retaliation)
8. Termination or renegotiation of problematic contract or agreement, if necessary
9. Review agents and consultants periodically
10. Document all of the above steps

Conducting and Reporting on an Investigation

Remediation (cont.)

- Monitors and voluntary disclosures
  - Most recent DOJ and SEC resolutions impose an independent monitor / compliance consultant:
    - Third party overseer for period of 2-3 years
    - Reports directly to DOJ/SEC
    - Additional expense / management time
    - Required in Statoil, Baker Hughes, Vetco Gray, York resolutions
    - Not required in Dow Chemical, Textron resolutions
  - Voluntary disclosure:
    - Credit for cooperation

Conducting and Reporting on an Investigation

The Report: to write or not to write

- Should the report be written or not? Benefits and costs
- Content of the report depends on the intended purpose
- Assume the report is discoverable
- Considerations for limited circulation and protecting document
- Written reports should summarize the following:
  - Circumstances that led to the investigation
  - The investigative steps that were taken
  - The facts revealed by the investigation
  - Internal policies or practices relevant to the events
- Steps taken to "correct" the issues identified by the investigation

Conducting and Reporting on an Investigation

Communication with Client

- Communication with the Board/Special Committee/Audit Committee
  - If investigation is directed by Audit Committee, scope and progress should be discussed periodically
  - Discuss requests or need to expand scope of investigation
  - Discuss “request” or “gentle suggestion” of waiver
  - Role of management in wrongdoing, if any
  - Report: To write or not to write
  - Resolving prosecution and enforcement action, if any

Questions