HOT TOPICS IN INVESTIGATIONS:

VOLUNTARY DISCLOSURE ISSUES

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AGENDA

Part I: FCPA and Global Corruption Risks

Part II: Voluntary Disclosure Considerations

Part III: FCPA Pilot Program and Analysis of FCPA Pilot Program Cases
PART I

Brief Background on the FCPA and Risks of Corruption
The World Bank estimates that there are over $1 trillion in bribes paid every year – 3% of the world economy.
- Over $2.5 billion in bribes every day or over $100 million in bribes every hour.

Corruption issues arise in nearly every stage of an international business:
- not only when obtaining contracts, but corruption identified in every type of interaction with government officials, including tax disputes, licensing and permitting, real estate transactions and customs clearances.

In a recent Transparency International Global Corruption Barometer, over one in four people (27%) acknowledged paying a bribe in the last year when interacting with key public institutions and services.

Corruption issues have been found in nearly every industry and geography, but certain areas have higher risks.
PART II

Voluntary Disclosure Considerations
9-28.300 - Factors to Be Considered

- any, governing the prosecution of corporations for particular categories of crime (see USAM 9-28.400);
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (see USAM 9-28.500);
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (see USAM 9-28.600);
- the corporation's willingness to cooperate in the investigation of its agents (see USAM 9-28.700);
- the existence and effectiveness of the corporation's pre-existing compliance program (see USAM 9-28.800);
- the corporation's timely and voluntary disclosure of wrongdoing (see USAM 9-28.900);
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see USAM 9-28.1000);
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (see USAM 9-28.1100);
- the adequacy of remedies such as civil or regulatory enforcement actions (see USAM 9-28.1200); and
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance (see USAM 9-28.1300)
9-28.900 - Voluntary Disclosures

In conjunction with regulatory agencies and other executive branch departments, the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. The Antitrust Division has a policy of offering amnesty to the first corporation that self-discloses and agrees to cooperate.

Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company's overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program. See USAM 9-28.700 and 9-28.800. However, prosecution may be appropriate notwithstanding a corporation's voluntary disclosure. Such a determination should be based on a consideration of all the factors set forth in these Principles. See USAM 9-28.300.

9-28.900 (Voluntary Disclosures)

- Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure, both as an independent factor and in evaluating the company’s overall cooperation and the adequacy of the corporation's compliance program and its management's commitment to the compliance program. See USAM 9-28.700 and 9-28.800. However, prosecution may be appropriate notwithstanding a corporation's voluntary disclosure. Such a determination should be based on a consideration of all the factors set forth in these Principles. See USAM 9-28.300.

9-28.700 (The Value of Cooperation) (FN1)

- Of course, the Department encourages early voluntary disclosure of criminal wrongdoing, see USAM 9-28.900, even before all facts are known to the company, and does not expect that such early disclosures would be complete. However, the Department does expect that, in such circumstances, the company will move in a timely fashion to conduct an appropriate investigation and provide timely factual updates to the Department.

- There may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government. Under such circumstances, the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.
8C2.5(f) “Effective Compliance and Ethics Program” –
- reduction in penalty not applicable if “the organization unreasonably delayed reporting the offense to appropriate governmental authorities.”

8C2.5 (g) “Self-Reporting, Cooperation, and Acceptance of Responsibility”
- Significant reduction if:
  - “(A) prior to an imminent threat of disclosure or government investigation; and
  - (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct”
PART II

FCPA Pilot Program Considerations
One year “pilot” effective April 5, 2016 – “provides guidance to [] prosecutors in reaching corporate resolutions” by “describing”:

- **Voluntary Self-Disclosure** –
  - Disclosure before “imminent threat of disclosure/government investigation” / “reasonably” promptly after becoming aware of offense
  - Disclosure of all known relevant facts (including information on individuals)

- **Full Cooperation** –
  - Timely disclosure of all relevant facts (including relating to individuals and third parties)
  - Proactive (v. reactive) cooperation – giving all “relevant” facts; going beyond requests
  - Facilitation of investigation (including facilitating interviews and third-party productions (U.S. and ex-U.S.), and identifying potential information outside the company’s control)

- **Remediation** –
  - Focus on traditional “hallmarks” of an effective program
  - No remediation credit absent cooperation
CURRENT ENFORCEMENT LANDSCAPE: DOJ FCPA GUIDANCE / “ENFORCEMENT PILOT PROGRAM” (APRIL 5, 2016)

VOLUNTARY DISCLOSURE
+ 
FULL COOPERATION
+ 
REMEDIATION

CREDIT

“credit” = potential reduction of 50% from bottom of Guideline range; “generally” should avoid monitorship; DOJ will “consider” declination)

Without voluntary disclosure = “markedly less” credit “limited to” not more than a 25% reduction from bottom of Guideline range
## PILOT PROGRAM: THE FIRST 6 MONTHS AT A GLANCE

<table>
<thead>
<tr>
<th>Disclosure</th>
<th>Akamai</th>
<th>Nortek</th>
<th>Johnson Controls</th>
<th>Analogic</th>
<th>LATAM</th>
<th>Key Energy</th>
<th>AstraZeneca</th>
<th>Nu Skin</th>
<th>AB-InBev</th>
<th>Och-Ziff</th>
<th>HMT LLC</th>
<th>NCH Corp.</th>
<th>GSK</th>
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<td>Co-op-eration</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Remedi-ation</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Partial</td>
<td>Yes</td>
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<td>No</td>
<td>Partial</td>
<td>Yes</td>
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</tr>
<tr>
<td>SEC</td>
<td>NPA</td>
<td>NPA</td>
<td>C&amp;D</td>
<td>C&amp;D</td>
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<td>C&amp;D</td>
<td>C&amp;D</td>
<td>C&amp;D</td>
<td>C&amp;D</td>
<td>C&amp;D</td>
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<td>C&amp;D</td>
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<tr>
<td>Investig. Length</td>
<td>~17 mo.</td>
<td>~17 mo.</td>
<td>~3 yrs</td>
<td>~5 yrs</td>
<td>~6 yrs.</td>
<td>~2 yrs</td>
<td>~10 yrs</td>
<td>~3 yrs</td>
<td>~7 yrs</td>
<td>~5 yrs</td>
<td>Unk.</td>
<td>Unk.</td>
<td>~7 yrs</td>
</tr>
<tr>
<td>Disgorge-ment</td>
<td>$652K + $19.4K int.</td>
<td>$291K + $30K int.</td>
<td>$11.8M + $1.4M int.</td>
<td>$7.67M + $3.81M int.</td>
<td>$6.74M + $2.7M int.</td>
<td>$5M</td>
<td>$4.325M + $822K int.</td>
<td>$431k + $34.6k int.</td>
<td>$2.7M + $292K int.</td>
<td>$1.18M</td>
<td>$1.15M</td>
<td>$431k</td>
<td>$2.7M</td>
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<td>Penalties</td>
<td>$0</td>
<td>$0</td>
<td>$1.18M (SEC)</td>
<td>$3.4M (DOJ)</td>
<td>$12.75M (DOJ)</td>
<td>$0</td>
<td>$375K (SEC)</td>
<td>$300K (SEC)</td>
<td>$3M (SEC)</td>
<td>$213M (DOJ)</td>
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<td>$0</td>
<td>$20M (SEC)</td>
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<td>Monitor</td>
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<td>1-yr. self</td>
<td>3-yr. self</td>
<td>27-mo. indep.</td>
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<td>No</td>
<td>2-yr. self</td>
<td>3-yr indep.</td>
<td>No</td>
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</tr>
<tr>
<td>Value of Alleged Misconduct</td>
<td>$155K</td>
<td>$290K</td>
<td>$4.9M</td>
<td>$20M</td>
<td>$1.15M</td>
<td>$431k</td>
<td>~$5M</td>
<td>$500K</td>
<td>$44K</td>
<td>$482M</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Other Factors Cited by DOJ or SEC
- Will coop. in indiv. Investig.; will enhance compl.
- Will coop. in indiv. Investig.; will enhance compl.
- Will coop. in indiv. Investig.; will enhance compl.
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- Will coop. in indiv. Investig.; will enhance compl.
- Will coop. in indiv. Investig.; will enhance compl.
- Will coop. in indiv. Investig.; will enhance compl.
- Will coop. in indiv. Investig.; will enhance compl.
- Business dissolved; amend. agmts; add'l training; doc. destruct.; delays in coop.
- Coop.; internal investig.; high value; serious offense
- Self-disc.; coop.; enhance compl.; action against indiv.
- Self-disc.; coop.; enhance compl.; action against indiv.
- Coop.; internal investig.; changes in business ops
AKAMAI (JUNE): DOJ DECLINATION / SEC NPA

- Chinese subsidiary of Massachusetts-based technology company
- Provided gifts and entertainment to Chinese officials and made \~$155k in third-party payments to customers in exchange for purchase of excess network capacity (\~$40k to state-owned enterprises)
- Investigation took about **17 months**
- DOJ Declination & SEC NPA ($652K disgorgement + $19K interest)
- Received **full mitigation credit**

**Factors cited in DOJ Declination:**

- “[P]rompt voluntary disclosure” (SEC: “Within weeks” of complaint)
- “[F]ull remediation” (disciplined employees & terminated partners)
- “[T]horough investigation” and “fulsome cooperation”
- Agreement to **cooperate in investigations of individuals**
- Enhancement of compliance program & accounting controls
NORTEK (JUNE): DOJ DECLINATION / SEC NPA

- Chinese manufacturing subsidiary of Rhode Island-based industrial services company
- Provided cash payments (400+ totaling ~$290k), gifts, and entertainment to officials for preferential regulatory treatment
- Investigation took about 17 months
- DOJ Declination & SEC NPA ($291K disgorgement + $30K interest)
- Received full mitigation credit

Factors cited in DOJ Declination:

- “[P]rompt voluntary disclosure” (SEC: during internal audit)
- “[F]ull remediation” (terminated employment of wrongdoers)
- “[T]horough investigation” and “fulsome cooperation”
- Agreement to cooperate in investigations of individuals
- Enhancement of compliance program & accounting controls
Chinese subsidiary of Wisconsin-based global HVAC provider

Provided $4.9M in illicit payments via a scheme about which the parent company had notice from a prior monitor and in which subsidiary management was directly involved (resulting in $11.8M profit)

Investigation took ~3 years

DOJ Declination, SEC C&D Order ($11.8M disgorgement + $1.4M interest), Civil Penalty to SEC ($1.18M), and one-year self-monitorship

Received full mitigation credit + civil penalty

**Factors cited in DOJ Declination:**

- "[V]oluntary self-disclosure" (SEC: after retaining outside counsel & 1 mo. after 2nd complaint)
- "[F]ull remediation" (terminated employment of wrongdoers)
- "[T]horough investigation" and "full cooperation"

Agreement to cooperate in investigations of individuals

Enhancement of compliance program & accounting controls
ANALOGIC (JUNE): DOJ NPA / SEC C&D

- Danish subsidiary (BK Medical ApS) of Mass.-based medical device co.
- Engaged in “hundreds” of “sham transactions” from 2001 to 2011 directed by distributors in six countries, resulting in ~$20M transferred to third parties
- BK Medical CFO allegedly “personally authorized” ~150 payments and submitted “numerous” false certifications to Analogic
- Approx. five-year investigation
- DOJ NPA w/ subsidiary (BK Medical); $3.4M criminal penalty (30% reduction from low end of range); three-year self-monitorship; SEC C&D Order against Analogic and BK Medical's CFO ($7.67M disgorgement + $3.81 interest)
- Received partial mitigation credit

Factors cited in DOJ NPA:

☑️ Voluntary, prompt self-disclosure
(SEC: after internal investigation)

☒️ Partial cooperation (initial failure to disclose relevant facts from internal investigation)

☑️ Agreement to implement extensive remedial measures

☒️ Nature & seriousness of the offense (10-year scheme to fraudulently conceal ~$20M in distributor payments)

☑️ No criminal history

☑️ Agreement to cooperate in investigations of individuals

☑️ Commitment to enhance compliance program
LATAM (JULY): DOJ DPA / SEC C&D

- Predecessor-in-interest (LAN Airlines, S.A.) of Chile-based commercial airline
- Executed false $1.15M consulting agreement to facilitate payments to Argentine labor union officials to evade labor rules and save ~$6.7M
- Significant executive involvement (including CEO)
- Approx. six-year investigation
- DOJ DPA (3 years); $12.75M criminal penalty (25% above the low end of range); independent compliance monitor for at least 27 months; SEC C&D Order ($6.74M disgorgement + $2.7M interest)
- Received minimal cooperation credit

Factors cited in DOJ DPA:

- Full cooperation
- Commitment to enhance compliance program
- Agreement to cooperate in ongoing FCPA prosecutions of individuals

- Failure to voluntarily disclose
- Failure to remediate adequately
- did not discipline responsible employees, incl. executive
- Inadequate compliance program when misconduct occurred
- Nature & seriousness of the offense
- Criminal history, including a subsidiary’s guilty plea in 2009 re: price-fixing conspiracy
Houston-based energy company with Mexican subsidiary

Between 2010 to 2014, Mexican subsidiary made 58 payments to a purported consulting firm totaling about $561K, at least $229K of which went to an employee of Mexico’s state-owned oil and gas monopoly for inside information and help landing contracts

Involvement by Mexico country head

Approx. two-year investigation

DOJ declination (announced in May 2016); SEC C&D Order ($5M disgorgement only; SEC did not impose a civil penalty after considering the company’s current financial condition and its ability to maintain necessary cash reserves to fund operations and meet liabilities)

Received significant cooperation credit

Factors cited in SEC C&D Order:

- Self-disclosure and full cooperation
- Commitment to enhance compliance program, including hiring a new CCO
- Voluntarily disclosed results of internal investigation
- Commitment to enhance compliance program, including enhanced vendor due diligence and compliance audits
- Inadequate compliance program and internal controls when misconduct occurred
- Nature & seriousness of the offense

Factors cited in SEC C&D Order:
UK-based pharmaceutical company with subsidiaries around the world, including China and Russia
- China and Russia sales and marketing staff made improper payments of gifts, conference support, travel, cash, and other benefits to government-employed health care providers to reward or influence purchases of AstraZeneca products
- Involvement of executives at China and Russia subsidiaries
- Approx. ten-year investigation; company waived five-year statute of limitation defense for civil penalties
- DOJ closed investigation and took no action
- SEC C&D Order ($4.325M disgorgement + $822K interest + $375K civil penalty)
- Received significant cooperation credit

Factors cited in SEC C&D ORDER:

- Significant cooperation, despite not self-reporting initially
- Voluntarily disclosed results of internal investigation
- Commitment to enhance compliance program
- Independently initiated remedial measures prior to investigation
- Inadequate controls, compliance program, and training when misconduct occurred
- Length of misconduct period (5 years)
NU SKIN (SEPTEMBER): DOJ (NO ACTION) / SEC C&D

- US-based cosmetic and nutritional product company with global subsidiaries, including in China
- Chinese officials launched an investigation into Nu Skin China’s direct marketing without a license. Nu Skin China employees sought intervention of a Chinese Communist Party official to influence the investigation.
- Nu Skin China employees arranged a ¥1 million (approx. $154,000) payment to a charity designated by the Party official, as well as letters of recommendation by an influential US person for college applications of the Party official’s son. Following the donation and letters of recommendation, the Chinese investigation was closed with no charges or fines.
- Approx. three-year investigation; only the second FCPA case based solely on charitable contributions.
- DOJ took no action; SEC C&D Order ($431k disgorgement + $34.6K interest + $300K civil penalty)
- Received credit for “remedial acts promptly undertaken” and cooperation

Factors cited in SEC C&D ORDER:

- Full cooperation
- Initiated prompt remedial measures
- Inadequate controls and due diligence related to charitable contributions
Anheuser-Busch InBev – one of the largest beverage conglomerates with operations worldwide

Company’s minority-owned JV used third-party sales promoters to make improper payments to Indian government officials to secure extra brewing hours and increase sales and production.

Company also ignored whistleblower report, fired him in retaliation, and entered into a Separation Agreement that forbade disclosure of information to government authorities.

Company also failed to intervene after SEC informed it that JV employees intended to destroy documents.

Approx. **seven-year investigation**.

DOJ took no action; SEC C&D Order ($2.7M disgorgement + $292K interest + $3M civil penalty; imposition of two-year reporting requirement on compliance improvements)

Received credit for **subsequent remedial measures**, including training

Factors cited in **SEC C&D ORDER**:

- **☑** JV dissolved
- **☑** Amended separation agreements to make clear no prohibition on communications with government
- **☑** Conducted FCPA training
- **☒** Ignored whistleblower and retaliatory firing
- **☒** Document destruction
- **☒** Delayed response to subpoenas
- **☒** Over-assertion of privilege to stymie investigation

PAUL HASTINGS
OCH-ZIFF CAPITAL MANAGEMENT GROUP (SEPTEMBER): DOJ (DPA) / SEC C&D

- Hedge fund manager and global alternative asset management firm with more than $39 billion in assets under management.
- Paid bribes to officials in at least four African countries to help win mining rights for a JV involving Och-Ziff. One employee even removed language from an internal audit report that called for an investigation into possible bribery.
- Also paid bribes (approx. $2.5M) to officials in Libya to encourage sovereign wealth fund investments in Och-Ziff managed funds.
- Africa subsidiary also pled guilty to FCPA violations; sentencing in March 2017.
- CEO paid $2.2M in settlement with SEC; CFO agreed to settlement (amount TBD)
- Approx. five-year investigation.
- DOJ ($213M criminal penalty [20% reduction for cooperation] + 3 year compliance monitor); SEC C&D Order ($173M disgorgement + $25.8M interest)
- Received credit for cooperation and “very thorough and comprehensive internal investigation”

Factors cited in DPA:

- Significant improvements to compliance program and internal controls
- Agreement to imposition of independent monitor
- Failed to self report
- Delays in early stages of investigation
- High value of bribes and seriousness of offense
HMT LLC

- Non-public Texas-based manufacturer of above-ground liquid storage tanks for the oil and gas industry.
- Paid $500K in bribes to officials in Venezuela and China in exchange for business that profited $2.7M.
- DOJ issued declination letter, but required disgorgement of $2.7M, with no penalties.

NCH Corporation

- Non-public Texas-based cleaning products manufacturer.
- China subsidiary gave Chinese officials approx. $44,000 in cash, gifts, meals, and entertainment in exchange for business that profited $335K.
- DOJ issued declination letter, but required disgorgement of $335K, with no penalties.

DOJ cited Pilot Program in letters of declination that both companies:

- Provided timely, voluntary self-disclosure
- Conducted thorough and comprehensive global investigations
- Committed to full cooperation
- Agreed to disgorgement of profits
- Implemented enhancements to compliance regimes
- Took employment action against culpable individuals
Pharmaceutical giant with operations worldwide, including in China.

Chinese authorities accused GSK of paying $482M in bribes (including gifts, improper travel and entertainment expenses, shopping excursions, family and home visits, and cash) to health officials and doctors to boost sales between 2010 and 2013.

- In 2014, a Chinese court fined GSK $490M.

- Approx. seven-year investigation.

- SEC C&D Order ($20M civil monetary penalty + 2 year reporting obligation on compliance improvements)

- Received credit for prompt and regular briefings regarding its own internal investigation; prompt response to document requests; global changes to business operations.

Factors cited in C&D:

- Extensive cooperation
- Timely disclosure of facts learned in internal investigation
- Enhancements to compliance program, third party oversight, and training
- Significant changes in business operations in the area of the investigation
- Pervasive misconduct
- High value of bribes and seriousness of offense
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