

# What to do when the government comes knocking

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# Legal Disclaimer

- The views stated herein are solely those of the presenter.
- Everything in this presentation is a generalization and is subject to numerous exceptions.

# What this presentation will cover?

- Overview
- Pre-Investigation Actions
- Document, Document, Document
- Key is to be ready beforehand
- Ten Steps to Take When You Receive the Knock at the Door (or phone call)

# Key Components of Compliance Program

# Best Practices Compliance Policy

- 1. Code of Conduct
- 2. Tone at the Top
- 3. Anti-Corruption Policies and Procedures
- 4. Use of Risk Assessment
- 5. Annual Review
- 6. Senior Management Oversight and Reporting
- 7. Internal Controls
- 8. Training
- 9. Ongoing Advice and Guidance
- 10. Discipline
- 11. Use of Agents and Other Business Partners
- 12. Contractual Compliance Terms and Conditions
- 13. Ongoing Assessment

# Corporate Prosecution Principles

- Nature and seriousness of the offense;
- Pervasiveness of the wrongdoing within the business;
- History of similar misconduct;
- Timely and voluntary disclosure of wrongdoing and willingness to cooperate in the investigation;
- Existence and effectiveness of pre-existing compliance program;
- Remedial actions, including efforts to implement corporate compliance program;
- Collateral consequences, including existence of disproportionate harm to shareholders;
- Adequacy of prosecution of individuals responsible;
- Adequacy of civil or regulatory remedies.

# What Will the Prosecutor Ask

- What resources were appropriated?
- How do I know the risk assessment was objective?
- Were risks in the C-suite and Boardroom addressed?
- How was risk examined at vendor/agent level?
- If raw work product was not retained, does the final report provide sufficient detail on methodology?
- Was culture and attitude measured (tone from the top)?
- Was knowledge assessed?

# What Will the Prosecutor Ask-cont'd

- Was anyone terminated or disciplined as a result of the risk assessment?
- Who among the governing authority of the corporation received the final report or was briefed on the outcome?
- How were the risk assessment outcomes used?

# Benchmarking Your Program

- Knowing your story
- Avoiding a “paper program”
  - “Everyone’s got an ethics policy, but you’d be surprised at the number of big name companies that have paper-only policies.”
- Keeping it current
  - Risk assessment
  - Reviews

# McNulty Maxim's

- What did you do to prevent it?
- What did you do to detect it?
- What did you do going forward?

# Bringing it all Home-Best Practices

- Training

- Local Anti-Corruption training and messaging at appropriate levels
- Risk based approach in training content and frequency requirements

- Accounting/Audit

- Anti-Corruption risk assessments performed on an annual basis
- Incorporate anti-corruption audits as part of corporate internal audit

- Systems

- Automated risk assessment tools that assist in the identification and evaluation of significant anti-corruption risks
- Track high risk payments and entertainment expenses for government employees
- Government contracts can be segregated, identified and tracked
- Use of technology to prevent and detect questionable payments

# Bringing it All Home

- **Compliance Environment**

- Strong and regular message from leadership emphasizing the importance of compliance and zero tolerance policy
- Compliance officer charged with responsibility and supported by adequate resources
- Anti-corruption and FCPA guidelines built into ethics framework

- **Legal**

- Centralization of legal approval of agents and standard anticorruption provisions
- Risk-based approach in due diligence guidelines
- Supply Chain Management/Tracking/Verification

# 11 Steps to Take

1. Understand the purpose and the scope of the investigation (how was information obtained; what is the investigation based upon and who is involved in the investigation – DOJ/SEC/FBI, etc.)
2. Review of Subpoena or search warrant- is it immediate? Call Company counsel even if not FCPA counsel immediately.
3. Notification to the Board

# 11 Steps to Take con't

4. Retain Outside FCPA Counsel- A full-scale internal investigation is likely to be required. Need a “Crisis Management Plan”)
5. Is the alleged misconduct ongoing? If yes, take all steps to stop the misconduct
6. Appropriate Communication to Company Employees regarding the investigation and communication. Employee options if approached by law enforcement for an interview; give or refuse an interview or request that they be interviewed only in the presence of an attorney.

# 11 Steps to Take con't

7. Separate Document Hold Notice
8. Notification to Insurers – D and O/ Anti-bribery policy
9. Collection of Historical Information regarding Compliance Program

# 11 Steps to Take con't

10. Initial Internal Investigation:
  - a. Determine the Members of the Team required: Lawyers, Forensic Accountants, Forensic Computer Specialist, etc.
  - b. Document preservation and collection (paper and electronic documents)
  - c. Interviewing of relevant witnesses- Upjohn Warning; Separate Counsel
  - d. Developing a record of the investigation
11. Meeting with the SEC/DOJ
  - a. Waiving the Attorney-Client Privilege
  - b. Settlement or Defense of case?
  - c. Monitor?

# *Questions?*

