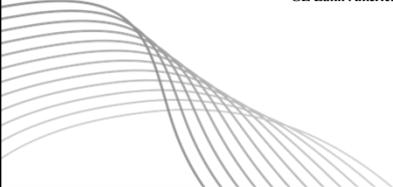


SESSION 101:
FROM FCPA PROSECUTORS TO COMPANY PROTECTORS

**LESSONS FROM FORMER DOJ FCPA UNIT PROSECUTORS
ON HOW TO BEST PROTECT YOUR COMPANY FROM THE
RISKS OF CORRUPTION**

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GE Energy Connections &
GE Latin America



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AGENDA 2

**Part I: Brief Background on Origins of the FCPA and
Corruption Risks**

Part II: FCPA Enforcement Trends

**Part III: An Effective Compliance Program—
Elements & Expectations**

**Appendix A: Non-US Anti-Corruption Legislation and
Enforcement Actions**

Appendix B: Analysis of FCPA Pilot Program Cases

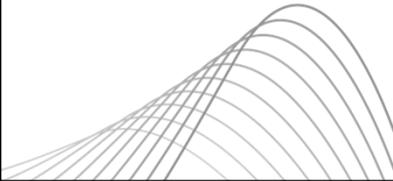


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PART I

Brief Background on the FCPA and Risks of Corruption



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RICHARD NIXON

4



Source: <http://www.corbisimages.com/stock-photo/rights-managed/BE023919/richard-nixon-giving-v-sign-after-resignation>

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BACKGROUND OF THE FCPA: 1970S CORRUPTION SCANDALS IN THE U.S.

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- In the 1970s, Watergate scandal resulted in the investigation of unreported domestic corporate campaign contributions and subsequent investigations of American corporate involvement in foreign political campaigns
- The U.S. Securities and Exchange Commission found:
 - Over 400 companies admitted making questionable or illegal payments, including many Fortune 500 companies
 - Companies reported paying out in excess of U.S. \$300 million in corporate funds to foreign government officials, politicians and political parties
 - Payments ranged from bribery of high-ranking officials to secure favorable action to "facilitating payments" made to ensure government functionaries discharged ministerial or clerical duties

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BACKGROUND OF THE FCPA: 1970S CORRUPTION SCANDALS IN THE U.S. (CONT'D)

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- Lockheed Martin Scandal: Bribery scandal involving Japan & Netherlands and foreign officials from other countries, including Italy, Germany, Denmark and Saudi Arabia; Lockheed had paid over \$22 million in bribes to various government officials in these countries
- U.S. based companies subject to consent decrees with SEC for "questionable" overseas payments include: Lockheed Martin, Boeing, Northrop, Textron, Exxon Oil, Ashland Oil, Gulf Oil, and others
 - Several agreed in consent decrees to no longer make these "questionable" payments

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INTERNATIONAL ANTICORRUPTION FRAMEWORK 7

- Between 1977 (passage of the FCPA) and the present:
 - U.S. FCPA enforcement was minimal for several decades until the mid-2000s
 - Since mid-2000s, significant enforcement actions against US and foreign companies
 - Broad U.S. government support for anticorruption efforts
 - Very slow reaction in the international community with minimal enforcement actions, but significant legislation passed.
- Global and regional response to increased U.S. enforcement, such as:
 - United Nations Convention Against Corruption, OECD Anti-Bribery Convention, Inter-American Convention Against Corruption, Council of Europe, African Union, Asia Pacific Economic Cooperation
 - Increased foreign corruption enforcement in certain countries
 - Increased domestic corruption enforcement in many countries

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- 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.

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CORRUPTION PERCEPTION INDEX - 2015 9

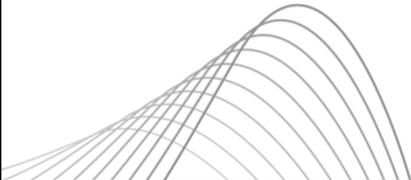


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Denmark	85								
Finland	84								
Netherlands	83								
Sweden	82								
Switzerland	81								
Germany	80								
France	79								
Canada	78								
United Kingdom	77								
Belgium	76								
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PART II

FCPA Enforcement Trends



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COUNTRIES IMPACTED BY "FOREIGN" CORRUPTION

- **Countries Affected**
 - Supply Side Countries – those who provide the bribes
 - Intermediary Countries – those involved in the movement and concealment of bribes
 - Demand Side Countries – those whose officials are bribed
- **Potential Violations**
 - Foreign Bribery (active bribery)
 - Receipt of Foreign Bribes / Solicitation (passive bribery)
 - Money Laundering
 - Domestic Bribery / Solicitation (passive bribery)
 - Other offenses (commercial bribery, fraud, tax violations, other regulatory violations)



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U.S. FOREIGN CORRUPT PRACTICES ACT

- The U.S. Foreign Corrupt Practices Act of 1977 (FCPA) prohibits U.S. businesses and citizens from making "corrupt" payments to foreign officials. (Anti-bribery Provisions)
- The FCPA also requires publicly traded companies (US issuers) to maintain certain recordkeeping and accounting practices to prevent corporate "slush funds" that finance such payments. (Accounting Provisions)



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FCPA ENFORCEMENT AUTHORITIES

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Aggressive, active enforcement by DOJ and SEC

- According to the OECD, the U.S. prosecutes 75% of all foreign bribery cases

Department of Justice - Criminal and civil enforcement authority

- Criminal enforcement authority over issuers, domestic concerns, and foreign persons and entities (acting within the territory of the U.S.)
 - Civil (anti-bribery) enforcement authority over persons and non-issuers subject to the FCPA
- All prosecutions must be brought by Fraud Section of the Criminal Division in Washington, DC
- Three dedicated FBI squads, with support from regional FBI offices and other U.S. law enforcement around the United States

Securities and Exchange Commission - Civil enforcement authority

- Civil enforcement authority only over issuers (and their officers, employees, etc.)
- Dedicated FCPA Unit housed in numerous SEC regional offices

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THE FUTURE OF INTERNATIONAL ANTICORRUPTION ENFORCEMENT

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Significant developments in non-US laws and enforcement (See Appendix A)

Increased cooperation between U.S. law enforcement and foreign law enforcement

- Multilateral organizations (OECD)
- Bilateral arrangements (UK SFO; Brazilian, Japanese and Norwegian prosecutors, US-China Joint Liaison Group Anti-Corruption Working Group)
- U.S. conducting international training

Increased information sharing

- Formal MLA requests
- Informal intelligence

Coordinated investigations / Follow-On Prosecutions

Division of Prosecution and Penalties

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CURRENT ENFORCEMENT LANDSCAPE: DOJ FCPA GUIDANCE / "ENFORCEMENT PILOT PROGRAM" (APRIL 5, 2016)

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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

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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

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PILOT PROGRAM: THE FIRST 6 MONTHS AT A GLANCE 17

	Akamai	Nortek	Johnson Controls	Analogic	LATAM	Key Energy	Astra Zeneca	Nu Skin
Disclosure	Yes	Yes	Yes	Yes	No	Yes	No	No
Cooperation	Yes	Yes	Yes	Partial	Yes	Yes	Yes	Yes
Remediation	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
DOJ	Decln.	Decln.	Decln.	NPA	DPA (3 yrs.)	Decln.	Decln.	Decln.
SEC	NPA	NPA	C&D	C&D	C&D	C&D	C&D	C&D
Investigation Length	-17 mo.	-17 mo.	-3 yrs	-5 yrs.	-6 yrs.	-2 yrs.	-10 yrs.	-3 yrs.
Disparagement	\$652K + \$19.4K int.	\$291K + \$59K int.	\$11.8M + \$1.4M int.	\$7.67M + \$3.81M int.	\$6.74M + \$2.7M int.	\$5M	\$4.325M + \$822K int.	\$431k + \$34.6k int.
Fines	\$0	\$0	\$1.18M (SEC)	\$3.4M (DOJ)	\$12.75M (DOJ)	\$0	\$375K (SEC)	\$300k (SEC)
Monitor	No	No	1-yr. self	3-yr. self	27 mo. indep.	No	No	No
Value of Alleged Misconduct	\$155K	\$290K	\$4.9M	\$20M	\$1.15M			\$431k
Other Factors Cited by DOJ or SEC	Will coop. in indiv. Investig.; will enhance compliance	Will coop. in indiv. Investig.; will enhance compliance	Will coop. in indiv. Investig.; will enhance compliance	No crim. history; coop. in indiv. Investig.; will enhance compliance; serious offense	Crim. history; serious offense; will coop. in indiv. Investig.; poor compliance; will enhance compliance	Will coop. in indiv. Investig.; will enhance compliance	Will coop. in indiv. Investig.; will enhance compliance	Cooperation and prompt remedial action to enhance compliance

PART III: AN EFFECTIVE COMPLIANCE PROGRAM—ELEMENTS & EXPECTATIONS

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CORE REGULATOR GUIDANCE

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- **SEC and DOJ's FCPA Resource Guide** ("FCPA Guide")
 - Provides guiding principles of enforcement, an overview of resolutions / penalties, and key elements of effective compliance programs
- **Prior enforcement actions**
- **DOJ Opinion Procedure**
- **SEC's Enforcement Manual**
- **U.S. Federal Sentencing Guidelines Manual** ("FSG Manual")
 - Like the FCPA Guide, the FSG Manual provides elements of an effective compliance and ethics program, which may reduce a defendant's "culpability score"
- **SFO Guidance on U.K. Bribery Act**
 - Provides guiding principles for compliance with Bribery Act / preventing corruption

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"HALLMARKS" / ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

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"Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective."

FCPA Resource Guide page 58

Regulatory Guidance Identifies the Following Core Components or "Hallmarks" of an Effective Compliance Program

- 1) Commitment from Senior Management / "Tone from the Top"
- 2) Code of Conduct and Compliance Policies and Procedures
- 3) Oversight, Autonomy, and Resources
- 4) Risk Assessment
- 5) Training and Continuing Advice
- 6) Incentives and Disciplinary Measures
- 7) Third-Party Due Diligence and Payments
- 8) Confidential Reporting and Internal Investigation
- 9) Continuous Improvement: Periodic Testing and Review
- 10) Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

So what does this actually require ...

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ELEMENTS OF A COMPLIANCE PROGRAM: COMMITMENT OF SENIOR MANAGEMENT

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- **Commitment / Leadership from Senior Management**
 - **Clearly Articulated Compliance Values:** Clear, understandable, available messaging about values and expectations
 - **"Tone from the Top" – and the middle:** From the board through mid-management, actions and messaging set / demonstrate the expected standards

FCPA Guide: DOJ/SEC will evaluate "whether **senior management** has **clearly articulated company standards**, communicated them in **unambiguous terms**, **adhered to them** scrupulously, and **disseminated them** throughout the organization."

Bribery Act Guidance: Leadership must "foster a culture in which bribery is never acceptable."

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**ELEMENTS OF A COMPLIANCE PROGRAM:
CODE OF CONDUCT / POLICIES AND PROCEDURES** 22

- **Code of Conduct** sets the framework for expectations and principles by which the Company governs itself

FCPA Guide: A company's code of conduct [should be] . . . **clear, concise, and accessible to all employees** and to those conducting business on the company's behalf.
- **Policies & Procedures** detail the appropriate process for handling enterprise-specific risk areas; should clearly outline roles, responsibilities, and required documentation

FCPA Guide: Should be **tailored to "the size and nature of the business"** and the risks associated with" it.

Bribery Act Guidance: "[P]rocedures . . . [should be] proportionate to the bribery risks and to the nature, scale, and complexity of the commercial organization's activities. They [should be] clear, practical, accessible, effectively implemented and enforced."
- **Key policies and procedures** in view of **prior concerns and anticipated operations**, likely to include:

<ul style="list-style-type: none"> • Third Parties (diligence, integration, monitoring) • Import / export / procurement • Gifts, travel and entertainment • Charitable and political donations 	<ul style="list-style-type: none"> • Interactions / transactions with government officials • Financial controls relating to core risk areas (e.g., vendors, payments, petty cash) • Facilitating and expediting payments
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**ELEMENTS OF A COMPLIANCE PROGRAM:
THIRD PARTY / EMPLOYEE DILIGENCE AND SCREENING** 23

- **Diligence and Integration of Third Parties**—Entity may be liable for the acts of third parties on its behalf; program should include:
 - **Risk-based process** for third parties that . . .
 1. ensures they are **qualified**;
 2. identifies any **historic corruption / business concerns** (including screening for prior corruption concerns and against OFAC sanctions list);
 3. verifies a **legitimate business rationale** for use of the third party; and
 4. once in place, ensures **appropriate certifications** from and **monitoring** of the third party.
 - **Informing** third parties of the **company's standards** and expectations
 - Ensuring **appropriate agreement terms**—generally anti-corruption representations and warranties, audit rights, and exit rights
- Ongoing strategy for **monitoring** third parties
- **Employee Screening**—at onboarding and periodically—to ensure evaluation of connection to government officials and potential conflicts of interest

Bribery Act Guidance: The corporation must "apply] due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization"



ELEMENTS OF A COMPLIANCE PROGRAM: MERGERS & ACQUISITIONS / BUSINESS DEVELOPMENT TRANSACTIONS 24

- **Develop policies and procedures that ensure pre-acquisition due diligence and post-acquisition integration**
 - Due diligence should ensure an **understanding of the risk profile of the target** and any historic concerns
 - Integration should include the **development and implementation of a compliance program tailored to the risk profile** of the going forward entity

FCPA Guide: "Companies that conduct effective . . . due diligence on their . . . targets are able to evaluate more accurately each target's value [These] actions demonstrate to DOJ and SEC a company's commitment to compliance and are **taken into account when evaluating any potential enforcement action.**"



**ELEMENTS OF A COMPLIANCE PROGRAM:
COMMUNICATIONS, TRAINING, AND PROGRAM ACCESS** 25

FCPA Guide: DOJ / SEC "will evaluate [whether the Company conducts] . . . **periodic training and certification** for all directors, officers, . . . employees, and . . . appropriate third parties."

FSG Manual: "An organization shall **communicate periodically . . . its standards and procedures**, and other aspects of the compliance and ethics program . . . by **conducting effective training programs . . .**"

- **Communications:** Regular messaging and information relating to compliance expectations and relevant policies and procedures
- **Access to Policies and Procedures:** Policies, procedures, and other relevant guidance should be available in an appropriate medium and language
- **Training:** Risk- and function-based training provided at all levels of the organization and—where appropriate—third parties



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**ELEMENTS OF A COMPLIANCE PROGRAM:
INCENTIVES & DISCIPLINE, REPORTING & INVESTIGATIONS** 26

- **Incentives and Disciplinary Measures:** Well-publicized, clear and specific measures for rewarding compliance leadership and disciplining non-compliant conduct

FCPA Guide: "A compliance program should apply from the board room to the supply room—**no one should be beyond its reach.**"

Then-SEC Enforcement Director, Stephen Cutler (Dec. 2004): "[M]ake . . . **compliance part of the promotion, compensation, and evaluation process** . . . [I]f employees are led to believe that . . . all that counts is short-term profitability, and that cutting ethical corners is an acceptable way of getting there, they'll perform to that measure."

- **Confidential Reporting:** Well publicized and anonymous mechanisms for reporting concerns (e.g., hotlines, email contact, ombudsmen) coupled with clear non-retaliation policy
- **Internal Investigations:** Detailed process for investigating and remediating concerns—"efficient, reliable, and properly funded process"

FSG Manual: "[T]he organization shall take **reasonable steps to respond appropriately** [to concerns] . . . and to **prevent further similar [] conduct**, including making any necessary modifications to its compliance and ethics organization."

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**ELEMENTS OF A COMPLIANCE PROGRAM:
APPROPRIATE COMPLIANCE GOVERNANCE FRAMEWORK** 27

- **Compliance function / responsibility should have both autonomy and resources**
 - **Adequate staffing and resources** to match enterprise size/structure, operations, and risk profile
 - Compliance leaders should have a **direct line of reporting to an independent monitoring body** (e.g., the Board or Audit Committee)
 - Compliance should be **managed by a senior corporate officer** with sufficient autonomy from management

FSG Manual: "**Specific individual(s) within high-level personnel shall be assigned overall responsibility** for . . . compliance. . . . Others . . . shall be delegated day-to-day operational responsibility . . . [and] shall be given **adequate resources, appropriate authority, and direct access** to the governing authority . . ."

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KEY TAKEAWAY: EVOLVING COMPLIANCE STANDARDS 28

- Significant emphasis by US government authorities on compliance programs to
 - Prevent;
 - Detect; and
 - Remediate corruption problems.
- Compliance programs can lead to reduced fines, alternative types of resolutions, fewer collateral consequences and even declinations of prosecution.
- “Paper” programs are not sufficient, and compliance programs must be tailored to the risks and business profile of the company.

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APPENDIX A: NON-US LAWS AND ENFORCEMENT

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NON-US LAWS AND ENFORCEMENT 30

- Notable statutory developments
 - **UK** – Bribery Act (2010) – outlaws bribery of individuals or foreign public officials for corporate gain; also establishes an offense for failure of a company to prevent bribery through inadequate compliance programs
 - **China** – Amendments to Article 164 of PRC Criminal Law outlawing bribery of foreign officials (2011)
 - **Brazil** – Clean Company Act (2014), providing administrative and strict liability for foreign and domestic companies for improper payments to public officials or related parties
 - **Russia** – Law on Combating Corruption (2008, with 2013 amendments requiring compliance programs)
 - **India** – “Lokpal and Lokayuktas Law” (passed in 2013, establishing independent body to investigate and prosecute corruption)
 - **Canada** – 2013 amendments to Corruption of Foreign Officials Act, increasing penalties and establishing books and records violations
 - **Mexico** – Established anti-corruption law in 2012

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NORTEK (JUNE): DOJ DECLINATION / SEC NPA 34

- 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:

<input checked="" type="checkbox"/> "[P]rompt voluntary disclosure " (SEC: during internal audit)	<input checked="" type="checkbox"/> Agreement to cooperate in investigations of individuals
<input checked="" type="checkbox"/> "[F]ull remediation " (terminated employment of wrongdoers)	<input checked="" type="checkbox"/> Enhancement of compliance program & accounting controls
<input checked="" type="checkbox"/> "[T]horough investigation " and "fulsome cooperation"	

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JOHNSON CONTROLS (JUNE): DOJ DECLINATION / SEC CEASE & DESIST ORDER 35

- 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:

<input checked="" type="checkbox"/> "[V]oluntary self-disclosure " (SEC: after retaining outside counsel & 1 mo. after 2nd complaint)	<input checked="" type="checkbox"/> Agreement to cooperate in investigations of individuals
<input checked="" type="checkbox"/> "[F]ull remediation " (terminated employment of wrongdoers)	<input checked="" type="checkbox"/> Enhancement of compliance program & accounting controls
<input checked="" type="checkbox"/> "[T]horough investigation " and "full cooperation"	

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ANALOGIC (JUNE): DOJ NPA / SEC C&D 36

- 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:

<input checked="" type="checkbox"/> Voluntary, prompt self-disclosure (SEC: after internal investigation)	<input checked="" type="checkbox"/> Partial cooperation (initial failure to disclose relevant facts from internal investigation)
<input checked="" type="checkbox"/> Agreement to implement extensive remedial measures	
<input checked="" type="checkbox"/> No criminal history	<input checked="" type="checkbox"/> Nature & seriousness of the offense (10-year scheme to fraudulently conceal ~\$20M in distributor payments)
<input checked="" type="checkbox"/> Agreement to cooperate in investigations of individuals	
<input checked="" type="checkbox"/> Commitment to enhance compliance program	

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ASTRAZENECA (AUGUST): DOJ DECLINATION / SEC C&D 40

- 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:

<input checked="" type="checkbox"/> Significant cooperation, despite not self-reporting initially	<input checked="" type="checkbox"/> Inadequate controls, compliance program, and training when misconduct occurred
<input checked="" type="checkbox"/> Voluntarily disclosed results of internal investigation	<input checked="" type="checkbox"/> Length of misconduct period (5 years)
<input checked="" type="checkbox"/> Commitment to enhance compliance program	
<input checked="" type="checkbox"/> Independently initiated remedial measures prior to investigation	

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NU SKIN (SEPTEMBER): DOJ DECLINATION / SEC C&D 41

- 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:

<input checked="" type="checkbox"/> Full cooperation	<input checked="" type="checkbox"/> Inadequate controls and due diligence related to charitable contributions
<input checked="" type="checkbox"/> Initiated prompt remedial measures	

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THE AMERICAS **ASIA** **EUROPE** 42

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