



Scottsdale Regional Virtual Compliance & Ethics Conference

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Anti-Corruption / Anti-Bribery

BRIAN WALSH
VICE PRESIDENT & CHIEF COUNSEL
ARTESYN EMBEDDED TECHNOLOGIES

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Agenda

- ▶ FCPA Overview
- ▶ Enforcement Trends
- ▶ Observations & Comments
- ▶ Questions

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Foreign Corrupt Practices Act (FCPA)

Prohibits:

- ▶ Prohibits bribery of foreign government officials
- ▶ Requires public companies to maintain accurate books & records with internal controls

Applies to:

- ▶ U.S. publicly-traded companies
- ▶ Companies incorporated / based in U.S.
 - ▶ And, their officers, employees & agents
- ▶ U.S. nationals & residents even when outside the U.S.
- ▶ Any person who furthers bribery while in the U.S.

Enforced by:

- SEC (books & records provisions)
- DOJ (bribery provisions)

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FCPA Prohibitions

Bribery Provisions - 5 Elements

1. A payment, offer, authorization, or promise to pay money or anything of value
2. To a foreign government official (including a party official or manager of a state-owned concern), or to any other person, knowing that the payment or promise will be passed on to a foreign official
3. With a corrupt motive

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FCPA Prohibitions cont.

4. For the purpose of:
 - a) influencing any act or decision of that person
 - b) inducing such person to do or omit any action in violation of his lawful duty
 - c) securing an improper advantage, or
 - d) inducing such person to use his influence to affect an official act or decision
5. In order to assist in obtaining or retaining business for or with, or directing any business to, any person.

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Exceptions

Facilitation / Grease Payments

- ▶ Ex: routine licenses, provision of utility services; providing police protection or mail delivery; scheduling inspections associated with contract performance or the shipment of goods.
- ▶ Does not include any decision by a foreign official to award new business or to continue business with a party.
- ▶ It is important to note that this exception is not carte blanche to make small bribes.
 - ▶ Risky as little guidance available
 - ▶ Facilitating payment that is permitted under the FCPA may still be unlawful under other laws, including those of the country in which the payment was made.

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Exceptions

- ▶ Payments Permitted by Written Laws
 - ▶ The FCPA does not prohibit payments that are lawful under the foreign official's country
 - ▶ I am not aware of any country with written laws that permit bribery
- ▶ "Reasonable and Bona Fide Expenditures"
 - ▶ If the payment in question constituted "a reasonable and bona fide expenditure, such as travel and lodging expenses," and that it was directly related to:
 - a) promotion, demonstration / explanation of products or services;
 - b) performance of a contract with a foreign government or agency thereof.

Travel and lodging expenses intended to influence a foreign official's actions can violate the FCPA. EX: DOJ has taken the position that luxury or recreational travel provided for government officials can form the basis for FCPA prosecution.

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FCPA Penalties

- ▶ Individuals
 - Up to 5 years' imprisonment for each violation of the anti-bribery provisions / up to 20 years for willful violations
 - Fines up to \$5M for willful violations
 - Indemnification Prohibited
 - Companies cannot pay the criminal and civil fines that may be imposed on an officer, director, employee, agent, or stockholder
- ▶ Corporations
 - Fined up to \$2M for each violation, individuals as much as \$100,000.
 - Fines may be increased to \$25M for willful violations
- ▶ Fines may be increased to twice the gain obtained by reason of the offense or twice the loss to any other person

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Collateral Consequences

- ▶ Exclusion or debarment from certain federal programs
- ▶ Ineligibility to receive export licenses
- ▶ Suspension or debarment from the securities industry.
- ▶ Additional civil or criminal actions, including a private RICO action by an aggrieved competitor or forfeiture proceedings by the government
- ▶ **REPUTATIONAL RISK/DAMAGE**

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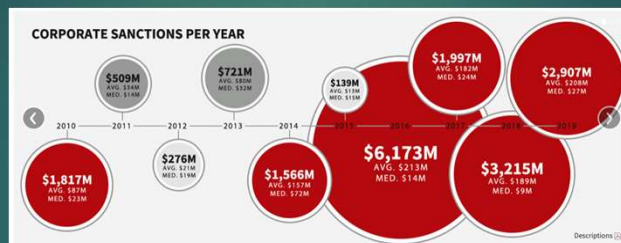
Enforcement Trends

- ▶ Increased resources = steady # of cases
- ▶ Focus on individuals
- ▶ DOJ FCPA Pilot Program Evolved into a Policy
- ▶ Cross-Border Enforcement
- ▶ Hiring Practices, Travel & Entertainment, Gifts – continued areas of risk
- ▶ SEC Whistleblowing has increased
- ▶ Prosecutors have increasingly been charging non-FCPA crimes (money laundering, fraud, etc.) along with the FCPA charges

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Recent Developments & Enforcement Trends

- Corporate Sanctions have ballooned



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Recent Developments & Enforcement Trends

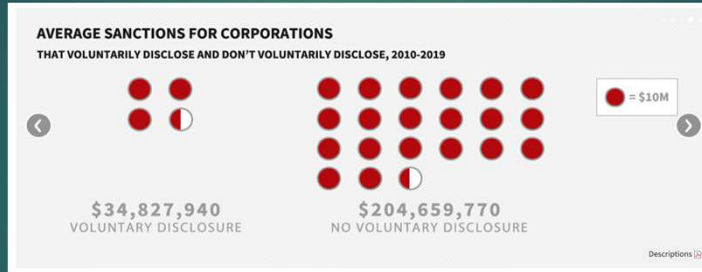
- New Highs and a revised Top 10 list

No.	Company*	Total Resolution	DOJ Component	SEC Component	Date
1	Ericsson	\$1,060,570,432	\$520,650,432	\$539,920,000	12/06/2019
2	Mobile TeleSystems	\$850,000,000	\$750,000,000	\$100,000,000	03/07/2019
3	Siemens**	\$800,000,000	\$450,000,000	\$350,000,000	12/15/2008
4	Alstom	\$772,290,000	\$772,290,000	—	12/22/2014
5	KBR/Halliburton	\$579,000,000	\$402,000,000	\$177,000,000	02/11/2009
6	Teva	\$519,000,000	\$283,000,000	\$236,000,000	12/22/2016
7	Telia***	\$483,103,972	\$274,603,972	\$208,500,000	09/21/2017
8	Och-Ziff	\$412,000,000	\$213,000,000	\$199,000,000	09/29/2016
9	BAE Systems****	\$400,000,000	\$400,000,000	—	02/04/2010
10	Total S.A.	\$398,200,000	\$245,200,000	\$153,000,000	05/29/2013

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Recent Developments & Enforcement Trends

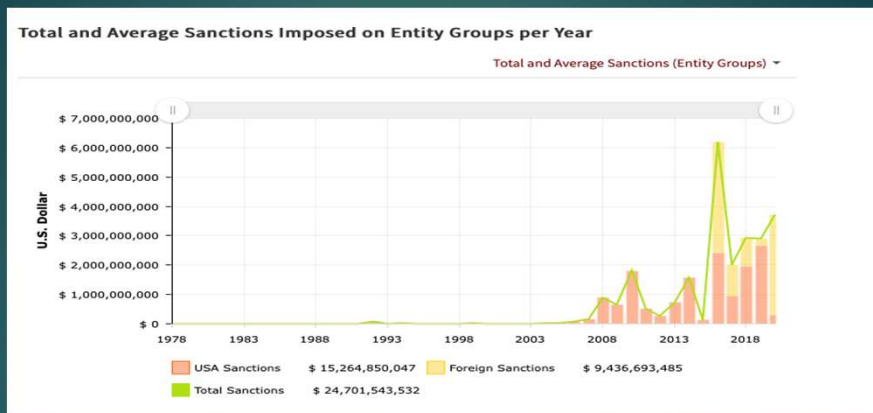
- ▶ Non-voluntary Disclosures Yield Substantial Penalties vs Voluntary Disclosures



***Data about voluntary disclosure is based on information that is disclosed in publicly available documents filed in connection with the Enforcement Actions, and may not reflect all instances of voluntary disclosure by companies.

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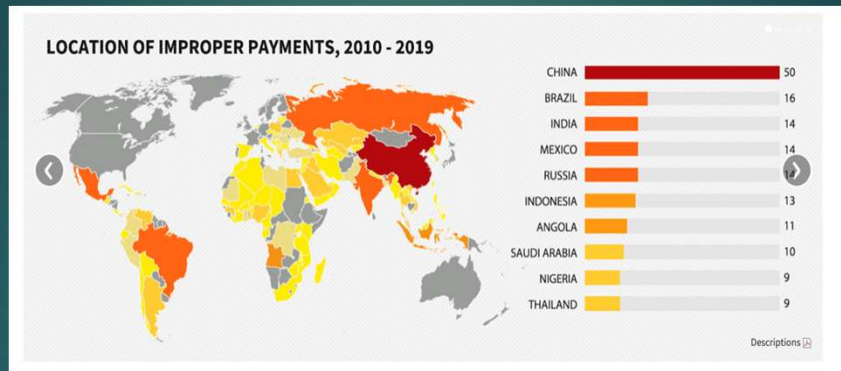
Total & Average Penalties



- ▶ 2019 – Foreign \$252,071,833 & US \$2,655,348,851
- ▶ 2020 – Foreign \$3,406,288,559 & US \$303,304,972

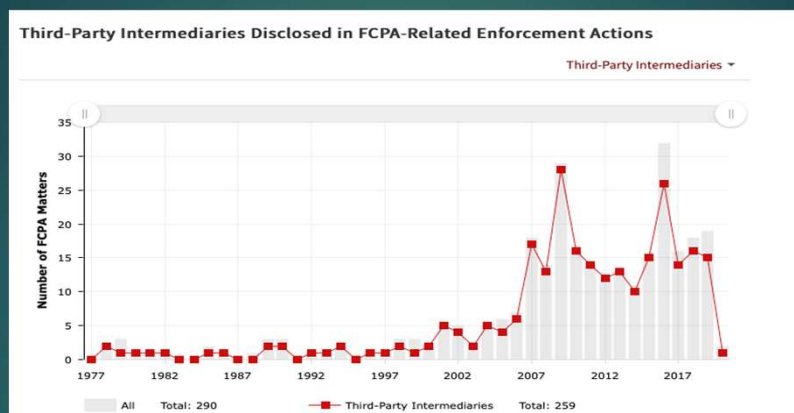
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Geographic Trends



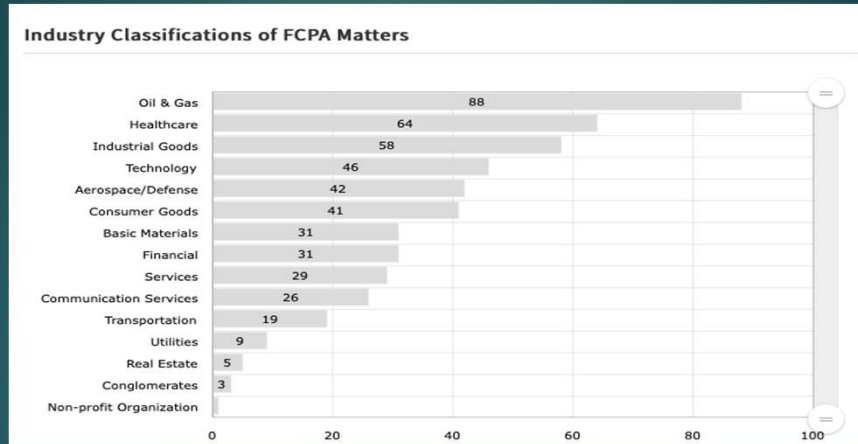
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Intermediaries



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Industry Trends



Since enactment

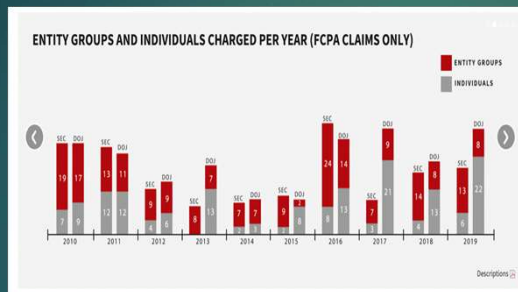
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Focus on Individuals

- ▶ As early as the Sally Yates Memo – DOJ memo (2015)
 - ▶ Puts focus on individuals from start of investigation
- ▶ To the initial comments by Jay Clayton, Trump-appointed head of SEC
 - ▶ Stresses "individual accountability" over corporate penalties

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Recent Developments & Enforcement Trends



- ▶ Total Enforcement actions steady (approx. 40 p/yr but)
- ▶ SEC actions have increased
- ▶ Noticeable focus on Individuals

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Individuals Indicted or go to Trial recently

- ▶ Lawrence Hoskins, Alstom Indonesia Investigation
 - ▶ 69 Yr Old sentenced to 15 months.
- ▶ Mark T. Lambert, Transport Logistics
 - ▶ Convicted on 4 FCPA counts, 2 Wire Fraud counts, 1 count wire fraud.
 - ▶ Sentencing scheduled March, 2020
- ▶ Andrew Pearse, Surjan Singh & Detelina Subeva , Investment Bankers
 - ▶ Indicted on charges conspiracy to violate FCPA anti-bribery & Internal Controls, wire fraud, and money laundering.
- ▶ Yanliang "Jerry" Li, Hongwei "Mary" Yang, Jean Boustani, Roger Richard Boncy, Najib Allam, Manuel Chang, Antonio do Rosario, Teofilo Nhangumele indicted or charged etc, etc, etc.....

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Some DOJ FCPA Enforcement Policy Sharpening

- ▶ Evaluation of Corporate Compliance Programs:
 - ▶ Evaluation document centers around 3 fundamental Core questions (many sub questions):
 - ▶ Is it well designed ?
 - ▶ Applied in Good Faith ?
 - ▶ Does it work in practice ?
- ▶ M&A Diligence
 - ▶ Presumption of declination on pre-acquisition wrong-doing if discovered during DD or Post Acq Audit & there is voluntary self-disclosure.
- ▶ Ephemeral Messaging
 - ▶ No longer disqualifying to receiving full cooperation credit for using ephemeral messaging app's. However, appropriate guidance and controls must be used to provide adequate data retention.

DOJ stated that they seek to ensure policies that provide the right message and mix of incentives to receive Cooperation Credit

e.g. Disclosure of all relevant facts "known at the time of disclosure" to qualify v. prior requirement of "all facts".

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Risks

- ▶ Hiring & Favors
 - ▶ Qualcomm (2016) – paid \$7.5M to settle charges related to hiring of relatives of Chinese officials related to public procurement project
 - ▶ JP Morgan (2016) – paid \$264M to settle charges related to hiring relatives of Chinese officials to win banking deals
- ▶ Charitable Contributions
 - ▶ Nu Skin (2016) – paid \$766k to settle charges related to making a \$150k payment to a charity set up by a high-ranking Chinese official (also obtained recommendation letters to U.S. universities for official's child)

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Risks

- ▶ Gifts and Travel
 - ▶ Olympus (2016) - \$22.8M to settle charges that it provided cash, travel & gifts to Latin American officials
 - ▶ AstraZeneca (2016) – \$5.5M to settle charges re: improper payment of gifts and cash to doctors in Russia & China
 - ▶ PTC (2016)
 - ▶ \$28M to settle charges re: gifts, travel & entertainment provided to Chinese officials
 - ▶ Gifts ranged from \$50-\$600

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Lessons learned

- ▶ Emerging markets represent area of most risk
- ▶ Conduct by portfolio companies / subsidiaries creates risk
- ▶ Heightened standards for due diligence on partners & acquisitions
- ▶ Risk to senior executives for decision-making roles
- ▶ Limited protection from legal advice
 - ▶ Consultation with counsel does not per se protect against liability
- ▶ **Reputational risk significant**

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Risks- Covid-19 Implications

- ▶ Crisis = Risk + Opportunity
 - ▶ For Compliance Professionals , Risk is on us.....Opportunity is for the Bad Actors
 - ▶ Crisis Mentality:
 - ▶ Supply Chain shifts due to factory down scenarios increases risk of bribery & graft as everyone is competing for the same widget.
 - ▶ Loosens otherwise normal controls in getting product.
 - ▶ Data Privacy issues arise with remote work from home mandate.
 - ▶ Misconduct could fester or grow due to delays in investigative on-site visits or interviews.

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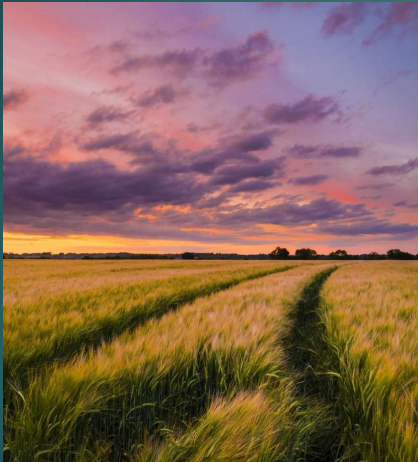
Risks- Covid-19 Implications

- ▶ Now is the time to Standup and make a Significant Positive Impact on your business.
 - ▶ Get out ahead by creating Alerts, Communications and Reminders of the Company's Compliance Programs. Very effective if it is Toned at the Top
 - ▶ Remind Employees of the "See Something Say Something" culture. Reassure employees that the Compliance group is willing to help navigate the new compliance challenges.
 - ▶ Review processes and protocols and make adjustments when needed to accommodate for the remote work environment.
 - ▶ Embrace the mantra "The Best Defense is a Great Offense".

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After the Crisis:

When the Board or C-Suite members look out the window, what will they see ?



A Compliance Program that met the Challenge

VS



A Compliance Program that Failed