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The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

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The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks



Pepper Hamilton LLP is a multipractice law firm with more than 500 lawyers nationally. The firm provides corporate, litigation and regulatory legal services to leading businesses, governmental entities, nonprofit organizations and individuals throughout the nation and the world.

Pepper's White Collar Litigation and Investigations team includes a highly skilled group of former judges, federal and state prosecutors, and corporate counsel, who bring unparalleled experience and judgment to legal representation in the areas of white collar defense and regulatory enforcement; corporate investigations; business integrity, compliance and ethics; and monitorships.



Our ambition at Allen & Overy is to help the world's leading businesses both maximize the opportunities that globalization presents and meet the potential challenges. As our clients have sought new markets, so have we. We are continuing to invest in a growing network of international offices that covers the Americas, Europe, Africa, Asia Pacific and the Middle East. With 44 offices in 31 countries, our footprint is among the largest of any legal practice.

Our New York and Washington, D.C. offices are the core of our global U.S. practice. An impact player in the U.S. for more than 30 years, our U.S.-qualified attorneys provide comprehensive legal services to the world's leading financial institutions, global corporations, funds and multilateral agencies on complex domestic and cross-border transactions and offer a full range of specialty areas, including capital markets, corporate/M&A, finance and litigation across a number of jurisdictions.

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Our success has been, and will always be, built around our singular focus on quality and results. Every day, we work to earn the trust of our clients by bringing innovative and effective solutions to our clients' most challenging matters. We strike the balance between scale and agility, handling large and complex matters, while remaining flexible to adapt to clients' needs and market developments.

Known for our teamwork – with one another, our clients and with other law firms – Hughes Hubbard has a distinguished history dating back more than a century. The firm was founded in 1888 by renowned jurist and statesman Charles Evans Hughes (future governor, secretary of state and chief justice), whose values and innovative thinking about the practice of law have been passed down through generations of our firm's lawyers.



Forensic Risk Alliance ("FRA") is an internationally acknowledged market leader in investigative accounting, complex data analytics, compliance and cross-border eDiscovery. We specialize in cross-border litigation and multi-jurisdictional investigations and our team of experts have extensive experience dealing with authorities all over the world. We have credentials in all major jurisdictions and emerging markets and our clients rely on us to bring industry-recognised solutions and approaches to all aspects of an engagement to assure governments, internal stakeholders and regulators worldwide on their behalf. We are a multi-national and multi-lingual team and many of us have lived and worked in a variety of jurisdictions meaning we bring real-life experience to bear on the challenges our clients face.

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The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks



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Mr. Bloor's practice is primarily focused on criminal and regulatory investigations of individuals and corporations, internal corporate investigations, particularly in connection with potential violations of the Foreign Corrupt Practices Act (FCPA), antitrust matters and securities and derivative litigation. Mr. Bloor also has experience in complex commercial litigation and appellate matters before federal and state courts.

Mr. Bloor also advises businesses on compliance issues under the FCPA, including drafting and implementing corporate compliance programs, and has extensive experience in conducting FCPA due diligence and advising on other FCPA risks in the context of mergers and acquisitions.



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Mark Scallon
Partner

Mark Scallon is a Partner in FRA's Washington DC office and leads the firm's Life Sciences practice. He has over 18 years' experience providing compliance advisory services and is a thought leader in international compliance matters.

Mark has extensive experience working with clients to transform their compliance function, with particular expertise in program development, monitoring, audits, risk assessments, spend transparency, global investigations, and FCPA matters. He has assisted a number of life sciences organizations in identifying compliance risks in order to develop practical recommendations to align their policies and procedures with industry practices, guidelines, regulations, and laws.

Prior to joining FRA, Mark was an Advisory Principal in KPMG's Life Sciences Regulatory Enforcement and Compliance Practice and a Partner at Polaris Management Partners.

Mark received his Bachelor's degree from SUNY Geneseo before earning a Master's degree in Health Administration from Cornell.

The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

Announced on April 5, 2016, the U.S. Department of Justice's (DOJ's) Foreign Corrupt Practices Act Pilot Program (FCPA) states that if a company voluntarily discloses an FCPA misconduct, participates in appropriate remediation, and offers full cooperation, then, it is eligible for reduced fine and may be considered for a declination. There is no question that FCPA prosecutions have skyrocketed over the last ten years. Significant enforcement actions, including the recent Och-Ziff and Embraer resolutions, have been made since the program began.

Now, more than ever, businesses should not only put compliance programs into place but should be able to communicate them repeatedly and enforce them properly throughout the entire organization to protect themselves in the event the government learns about prior violations.

In this two-hour LIVE Webcast, a panel of distinguished professionals and thought leaders assembled by The Knowledge Group will help companies and their counsel understand the fundamental aspects of the DOJ's FCPA Pilot Program. Speakers will also offer best compliance practices and will provide an in-depth discussion of weighing the positive benefits of self-disclosure.

Key topics include:

- The FCPA Pilot Program – Lessons Learned
- Notable Cases
- Opportunities and Drawbacks
- To Self-Disclose or Not?
- Regulatory Outlook

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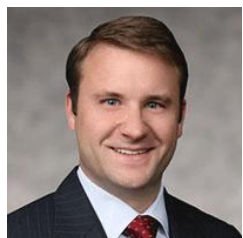
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The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

Introduction

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The Foreign Corrupt Practices Act ("FCPA")

- ▶ Anti-Bribery Provision: Makes it unlawful to offer or make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.
- ▶ Books & Records Provision: Requires corporations to:
 - Make and keep books and records that accurately reflect the transactions of the corporation; and
 - To devise and maintain an adequate system of internal accounting controls.



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FCPA Pilot Program

- ▶ April 5, 2016: DOJ announced a one year Pilot Program aimed at:
 - increasing prosecutions under the FCPA.
 - incentivizing companies to disclose, remediate and cooperate with the government's investigation of suspected FCPA violations
 - reducing unpredictability of what may happen once a company voluntarily discloses a potential violation
 - promoting transparency in the manner by which the DOJ offers reduced sanctions or declines prosecution
 - providing a tangible benefit for self reporting and/or cooperation

- ▶ The Pilot Program was extended and continues to be evaluated.



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FCPA Pilot Program

▶ Potential Benefits:

- Reduced monetary sanctions (more for self-disclosing & cooperating (50%); some for cooperating (25%))
- DOJ declines prosecution
- Avoid imposition of Monitor



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FCPA Pilot Program

- ▶ DOJ Expectations:
 - Voluntary self-disclosure
 - Full cooperation
 - Timely/Appropriate remediation
 - Disgorgement



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Pilot Program Declinations - Themes

1. Self-disclosure must be “prompt”/“timely”
2. “Thorough” investigation
3. “Full” or “fulsome” cooperation with DOJ
 - a) Document production
 - b) Witnesses available for interviews
 - c) Regular updates



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Pilot Program Declinations – Themes, cont.

4. Consequences for individual employees
 - a. Consistent with Yates Memo
 - b. Details on number of employees terminated



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Pilot Program Declinations – Themes, cont.

- 5. Remediation
 - a. Enhanced compliance program
 - b. Improved internal controls



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Pilot Program Declinations – Themes, cont.

6. Disgorgement

- a. Akami Technologies, Inc., Nortek, Inc, & Johnson Controls Inc. – Disgorgement calculated by SEC
- b. HMT, LLC & NCH Corp – Non-issuers; disgorgement calculated by DOJ: condition of declination



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Introduction

Claire Rajan's cross-border practice includes representing multinational corporate clients in investigations and litigation matters. Her primary focus is on anti-corruption laws, including the Foreign Corrupt Practices Act (FCPA) and political law regulation governing campaign finance, pay-to-play, lobbying, and gifts to public officials. Claire's experience includes cross-border litigation, internal investigations, federal and state government investigations, and transactional due diligence.

Claire also has extensive experience with evaluating compliance programs, particularly while on multiple secondments to major global financial services providers.

Prior to joining Allen & Overy, Claire worked as a litigation attorney for the Federal Election Commission (FEC) and served as counsel to Commissioner Ellen L. Weintraub. Her FEC litigation experience includes matters at the United States Supreme Court, as well as various federal circuit and district courts throughout the United States.

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Cooperation

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What is full cooperation?

Focus on individuals	Identifying all individuals involved in or responsible for the conduct and providing all facts related to the misconduct are mentioned in all five Pilot Program declinations
Transparent	Provide non-privileged facts and updates regarding the investigation and its findings
Fulsome	If omissions are uncovered by the DOJ, it will be viewed as uncooperative and causing delay in its investigation
Timely	Disclosing key facts and developments in “real time” or promptly
Remove impediments	Assisting in the collection and analysis of evidence and make individuals available for witness interviews (especially in foreign jurisdictions), and translating foreign language documents



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What is full cooperation?



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Leslie Caldwell, former Assistant Attorney General for the Criminal Division

We expect that the complete facts about the wrongdoing will be provided, and in a timely way. As we work to be transparent, we expect transparency in return. Transparency is a two-way street, and we expect companies that are claiming to cooperate to walk the walk.

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Case studies in cooperation



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Johnson Controls

- Promptly and routinely provided the staff with the results of its investigation as it progressed, and provided all supporting documentation requested
- Provided factual chronologies, hot document binders, and interview summaries, as well as English translations
- Made employees available for interviews (including those abroad)
- Provided “real time” downloads of employee interviews
- When the company caught a Chinese employee shredding documents, it quickly secured the office to preserve evidence

Och-Ziff

- Audit Committee conducted a comprehensive internal investigation through counsel and regularly updated DOJ
- Collected and produced voluminous evidence located in foreign countries
- Efforts to make current and former employees available for interviews
- Failed to produce important, responsive documents on a timely basis
- Produced some documents only after the DOJ/SEC flagged for Och-Ziff that the documents existed and should be produced
- Provided some documents to other defense counsel prior to their production to the government

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Case studies in cooperation

Teva Pharmaceutical Industries

- Made foreign and U.S. employees available for interviews
- Deferred personnel actions and interviews to not conflict with DOJ's efforts
- Collected, analyzed, translated and organized voluminous evidence from multiple jurisdictions
- Provided updates to the Fraud Section as to the conduct and results of the investigation
- Provided all non-privileged facts relating to individual involvement in the conduct
- Disclosed conduct in Russia and Ukraine of which the Fraud Section was previously unaware
- Caused delays to the early stages of the investigation, including vastly overbroad assertions of attorney-client privilege and not producing documents on a timely basis in response to certain requests

Analogic

- Cooperation subsequent to self-disclosure did not include disclosure of all relevant facts that it learned during the course of its internal investigation
- Specifically, the Company did not disclose information that was known to the Company and Analogic about the identities of a number of the state-owned entity end-users of the Company's products, and about certain statements given by employees in the course of the internal investigation



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Remediation

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Timely and Appropriate Remediation



A company cannot expect to gain credit for remediation without cooperation.



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	Common types of remediation efforts
Stop the conduct	Suspend payments and terminate relationships with implicated vendors and consultants
Discipline employees	Consider termination, suspension or other remedies against employees involved in or responsible for the misconduct
Evaluate the compliance program	Evaluate the program holistically – evaluate the culture, reporting structure and dedication of resources.
Enhance the compliance program	Specific fixes may be made to prevent recurrence of similar conduct, such as: amend policies and procedures; increase financial controls around payments and invoicing; conduct further or more specific FCPA training; enhance due diligence for acquisitions and/or vendors.

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Pilot Program case studies in remediation



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Nortek, Inc.	Terminated employment of all 5 individuals involved in China conduct, including two high-level execs
Akamai Technologies, Inc.	Promptly suspended individual involved in misconduct at the start of the investigation (the employee subsequently resigned), terminated relationship with partner, disciplined 5 employees who <i>should have prevented</i> other violations
Johnson Controls, Inc.	All 16 employees involved in the misconduct were separated from the company, including high-level execs
HMT LLC	Terminated 8 employees, including 2 regional managers and a business development director; sanctioned 10 employees including with pay freezes, bonus suspensions, and reductions of responsibilities; and severed relationships with an agent and distributor
NCH Corporation	Terminated or took disciplinary action against all employees involved, including senior managers, low-level employees, and senior executives at headquarters in the U.S. who oversaw the subsidiary involved

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Monitorships

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Pilot Program and Monitorships

	None of the companies that self-reported the conduct with matters resolved in 2016 were subject to a monitorship	
	Undertaking remediation efforts during the investigation may assist in either not needing a monitorship or limiting its scope	
	<p><i>ZTE</i> case: Presiding judge changed the terms of the settlement to:</p> <ul style="list-style-type: none"> (1) select his own monitor; (2) require that reports be submitted not only to DOJ, but also to the judge for <i>in camera</i> review; and (3) substitute the court's judgment for that of DOJ's in, for example, settling disputes between the monitor and the company 	



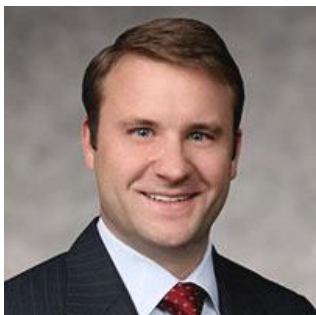
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DOJ Pilot Program: Potential Impact and Lessons Learned

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Impact of the Pilot Program on Self-Reporting

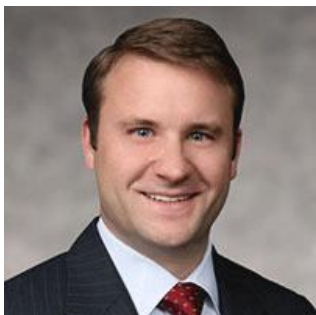
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Impact of the Pilot Program on Self-Reporting

- *“This pilot program is intended to encourage companies to disclose FCPA misconduct to permit the prosecution of individuals whose criminal wrongdoing might otherwise never be uncovered by or disclosed to law enforcement. Such voluntary self-disclosures thus promote aggressive enforcement of the FCPA and the investigation and prosecution of culpable individuals.”*

FCPA Enforcement Plan and Guidance— April 5th, 2016

- The question of whether the Pilot Program has had a real impact on a company's decision to self report is difficult to answer with certainty for a multitude of reasons:
 - Lack of public reporting of voluntary self-disclosures (unless and until a corporate resolution or declination)
 - Pilot Program still in its relative infancy and may still evolve
 - Decision to make a voluntary self-disclosure may be driven by multiple factors (including but not necessarily limited to the Pilot Program)



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Impact of the Pilot Program on Self-Reporting

- Other factors that may drive a decision to self-disclose:
 - Greater likelihood of detection through:
 - Increased law enforcement resources:
 - 50% increase in 2016 of Fraud Section FCPA Unit resources (10 new prosecutors)
 - Development of 3 FBI squads devoted to FCPA investigations and prosecutions
 - Increased international cooperation, including:
 - More active involvement of non-U.S. counterparts
 - Greater access to documentary and other evidence
 - Incentives for whistleblowers (Dodd-Frank Act in the U.S.)
 - “Leaks” culture
 - Wikileaks, Panama Papers, LuxLeaks, SwaziLeaks



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Tangible Benefits?

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Tangible Benefits?

- While difficult to say with certainty, the cases disclosed to date appear to reflect some benefit for those companies which have self-disclosed:
 - Between April 2016 and April 2017, the DOJ resolved 18 matters:
 - Seven were voluntary self-disclosures
 - Of these seven, five resulted in declinations (with disgorgement of any ill-gotten gains)
 - The two companies that did not receive declinations (General Cable Corp. and Analogic Corp.) received discounts of 50% and 30% respectively and entered into non-prosecution agreements
 - No company that made a voluntary self-disclosure was required to engage a monitor

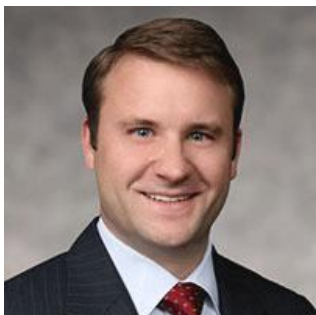


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Tangible Benefits?

- Eleven resolutions were reached with companies that did not make voluntary self-disclosures
 - Nine of the eleven resolutions required the imposition of a corporate monitor
 - Nine of the eleven companies received discounts of 25% or less
 - 5 received discounts of 25% (representing maximum discount for companies that do not voluntarily self-disclose)
 - 3 received discounts of 20%
 - 1 received discount of 15%
 - 7 deferred prosecution agreements
 - 2 non-prosecution agreements
 - 5 guilty pleas (3 of which were with subsidiaries of parent corporations that simultaneously entered into deferred prosecution agreements)



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Public Declination Letters: Pros and Cons

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Public Declination Letters: Pros and Cons

- There are also pros and cons from one of the more prominent features of the Pilot Program – declination letters
 - Pros:
 - Companies avoid prosecution
 - Companies demonstrate to the market that they have taken serious steps to remediate wrongdoing
 - Declinations can further DOJ's goal of incentivizing others to self-disclose
 - Cons:
 - Companies (even ones who have taken positive steps to cooperate and remediate) may prefer matters to remain non-public
 - *I.e.*, companies that take a “wait-and-see” approach (and still take appropriate remedial measures) could have potentially avoided public disclosure of incidents



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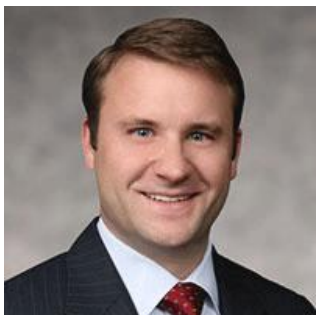
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Lessons Learned: Corporate Compliance Programs

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Lessons Learned: Corporate Compliance Programs

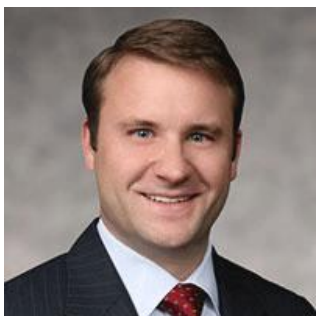
- Regardless of open questions on the success of the Pilot Program, companies can take lessons from disclosed cases in implementing or refining their compliance programs:
 - Emphasis on third party due diligence
 - 17 of the 18 cases resolved by the DOJ in the April 2016 to April 2017 period involved some form of third party
 - LATAM Airlines Group S.A. admitted that executives of LAN Airlines S.A. and of its subsidiaries paid bribes to Argentine labor union officials through a fictitious \$1.15 million contract with a third party consultant.
 - Teva Pharmaceuticals Industries Ltd.
 - Russia: Teva admitted to doing business with a repackaging company owned by an official at the Ministry of Health. The official earned about \$65 million through the agreement ...
 - Ukraine: Teva hired a government official as a consultant and paid him \$200,000 through monthly fees and travel



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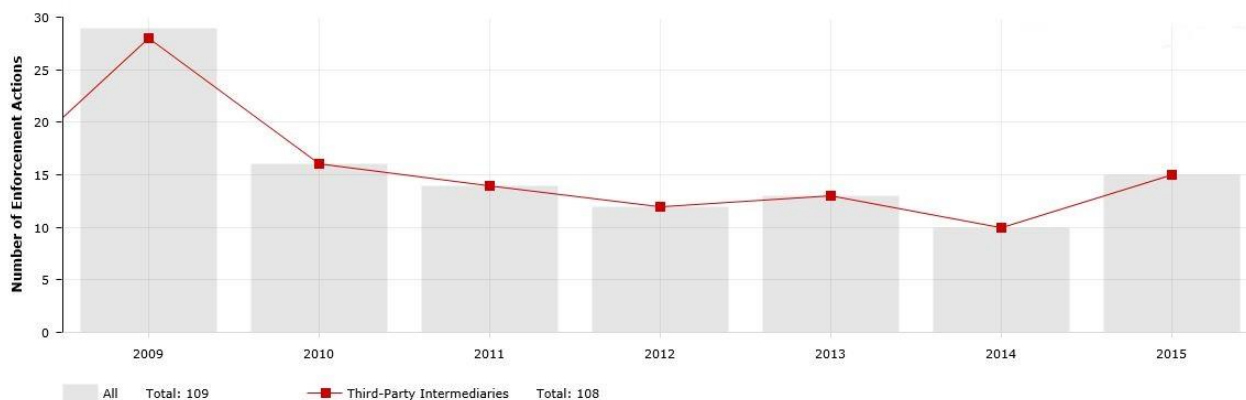
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Lessons Learned: Corporate Compliance Programs



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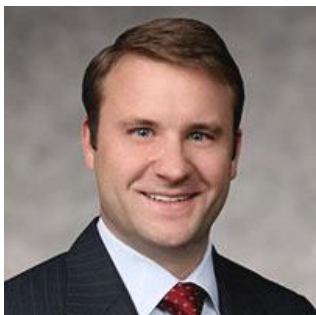
Third-Party Intermediaries



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Lessons Learned: Corporate Compliance Programs

- Periodic risk-based reviews of operations can prove effective at identifying potential areas of risk
- Training and communication (particularly from the Top) are key
- Remediation in event of identified wrongdoing is key
 - *Even if a decision is made not to self-disclose, timely and appropriate remedial action will allow for potential benefits if conduct is later investigated (assuming a cooperative posture is also taken)*



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The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

Introduction

Mark Scallon is a Partner in FRA's Washington DC office and leads the firm's Life Sciences practice. He has over 18 years' experience providing compliance advisory services and is a thought leader in international compliance matters.

Mark has extensive experience working with clients to transform their compliance function, with particular expertise in program development, monitoring, audits, risk assessments, spend transparency, global investigations, and FCPA matters. He has assisted a number of life sciences organizations in identifying compliance risks in order to develop practical recommendations to align their policies and procedures with industry practices, guidelines, regulations, and laws.

Prior to joining FRA, Mark was an Advisory Principal in KPMG's Life Sciences Regulatory Enforcement and Compliance Practice and a Partner at Polaris Management Partners.

Mark received his Bachelor's degree from SUNY Geneseo before earning a Master's degree in Health Administration from Cornell.



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Pilot Program or Enforcement Trend?

The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

FCPA cases in 2016 – a year in review

With close to 30 companies paying out ~\$2.5 billion to resolve FCPA cases, 2016 was the largest enforcement year in FCPA history. For comparison:

- 2015: 11 companies paid \$133 million
- 2014: 10 companies paid \$1.56 billion
- 2013: 12 companies paid \$731 million*

April 2016, DOJ's Fraud Section introduced the FCPA one-year pilot program (Pilot Program) to encourage voluntary disclosure, cooperation, and remediation efforts for companies. The benefits for companies to self-report could potentially include:

- Reduction in financial penalties – up to 50% off the bottom range of USSG range
- More leniency towards charges
- Possible declinations

*<http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html>



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DOJ's FCPA PILOT PROGRAM - April 2016 – April 2017

Seven corporate FCPA matters were resolved under the Pilot Program, 5 of which received a declination of prosecution:

- **General Cable Corporation:** manufactures wire and cable solutions
- **Analogic Corporation (BK Medical ApS):** healthcare and security technology

Declinations:

- **Nortek Inc.:** manufactures products to build homes
- **Akamai Technologies Inc.:** content delivery network (CDN) provider for media
- **Johnson Controls Inc.:** technology company
- **HMT LLC:** storage tanks
- **NCH Corporation:** cleaning products

Based on the outcomes of these companies (all received an NPA and did not require monitors) it would appear that the Pilot Program does provide incentives for companies to self-report misconduct.



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DOJ's FCPA PILOT PROGRAM - April 2016 – April 2017

The following 2 companies received credit towards their fines, NPAs, and no monitor was required:



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General Cable Corporation: Manufacturer of wire and cable solutions

Subsidiaries of General Cable paid ~\$13 million to 3rd party intermediaries, some of which was used to bribe government officials, in Bangladesh, China, Angola, Thailand, Indonesia, and Egypt. This resulted in netting the company ~ \$51 million in profits. The company admitted that some executives and employees were aware that 3rd party intermediaries were used to bribe foreign officials to increase business. Although employees reported misconduct in 2011, General Cable failed to implement controls to remediate and did not investigate the payments. Additionally, adequate FCPA training was not provided to employees to ensure compliance.

Resolution: December 2016

- NPA with 50% credit of bottom of USSG fine range due to full cooperation and remediation
- Monitor not required
- \$20.5 million penalty in criminal penalties, with a combined total of \$75.75 million paid

The maximum 50% credit rewarded was due to self-reporting, full cooperation, and remediation.

The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

DOJ's FCPA PILOT PROGRAM - April 2016 – April 2017

Analogic Corporation (BK Medical Aps): Medical device company

Engaged in sham transactions which ended up funneling ~\$20 million to 3rd parties which included individuals in Russia, some of whom were physicians considered foreign officials, and shell companies in Cyprus, the British Virgin Island, Seychelles, and Belize.

Resolution: June 2016

- NPA with 30% credit of bottom of USSG fine range due to self reporting and remediation efforts
- Monitor not required
- \$7.7 million in disgorgement with \$3.8 million interest paid, and \$3.4 million in criminal penalty

The maximum of 50% credit was not awarded due to Akamai not disclose all relevant facts fully at the beginning of the investigation which caused some delay. This demonstrates the impact of the factors the DOJ takes into consideration towards leniency.



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DOJ's FCPA PILOT PROGRAM - declinations

The following 5 companies received declinations:



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Nortek Inc: Manufactures products to build homes

Paid ~\$290,000 in bribes to Chinese officials to receive preferential treatment, through gift cards, meals, travel, accommodations, and entertainment.

Resolution: June 2016

- \$291, 000 in disgorgement and \$30,000 interest paid

Akamai Technologies: Content delivery network services provider

From 2012 – 2015, paid ~\$40K in bribes to government owned entities in China via gift cards, meals, and entertainment to build business.

Resolution: June 2016

- \$652, 500 in disgorgement with \$19,400 interest paid

Johnson Controls Inc.: technology company

Johnson Controls' Chinese subsidiary paid ~\$4.9 million in bribes through sham vendors to Chinese shipyard and ship-owners, who were government employees, to retain business.

Resolution: July 2016

- \$11.8 million in disgorgement and \$1.4 million interest paid, and \$1.8 million civil penalty

Additionally, all three of these companies were placed under an NPA, with no requirement of a monitor.

The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

DOJ's FCPA PILOT PROGRAM – Declinations with disgorgement

The DOJ did not require disgorgement for prior declinations, hence enforcing a new category of FCPA enforcement actions – declinations with disgorgement- for the following 2 companies.

HMT LLC: storage tanks

Paid ~\$500K in bribes in China and Venezuela, resulting in ~ \$2.7 million in profits

NCH Corporation: cleaning products

Chinese officials were given ~\$44K in cash, gifts, meals, and entertainment by a Chinese subsidiary, resulting in \$335,00 in profits.

Resolution for both: September 2016

- Declination and NPA
- Monitor not required
- HMT LLC: \$2.7 million in disgorgement paid
- NCH Corporation: \$335,000 in disgorgement paid

Again, based on the outcomes of these 7 FCPA matters, it would appear that it is beneficial to self-report misconduct.

Question: What were the outcomes for self-reported FCPA issues PRIOR to the Pilot Program?



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Self-reporting before the pilot program

The following 2 cases are FCPA matters that were resolved in 2015 and 2014, respectively. Both self-reported misconduct, fully cooperated, and remediated.



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Louis Berger International Inc.: construction management

From 1998 – 2010, paid \$3.9 million in bribes to foreign officials in India, Indonesia, Vietnam and Kuwait to win government contracts.

Resolved: July 2015

- DPA, Monitor required
- No credit

A DPA was issued due to self-disclosure, cooperation, and remediation efforts.

BioRad Laboratories: products for life science research

A Bio-Rad subsidiary located in France, paid 3rd parties commissions of 15-30% in exchange for sham services in Russia, Vietnam, and Thailand.

Resolved: November 2014

- NPA, Monitor not required
- No credit

An NPA was issued for self-disclosure, cooperation, and remediation efforts.

Considering both companies did not receive a credit, and instead a DPA and NPA, respectively, for self-reporting, one would assume that the Pilot Program does provide incentives to self-disclose. **However...**

The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

Pilot program or overall enforcement changes?

...when looking at FCPA matters resolved in 2016, for companies that did NOT self-disclose, but fully cooperated and remediated, and whose investigations started before implementation of the Program, the DOJ resolved under principles that were consistent with the Program.

Company	Resolved	Agreement	Monitor?	% Credit	Considerations
VimpelCom Ltd.: telecommunications	Feb 2016	DPA	Y	45%	Large credit due to prompt acknowledgement of wrongdoing after being informed of DOJ investigation, full cooperation, and willingness to resolve criminal liability on an expedited basis
Olympus Corporation: digital equipment	Mar 2016	DPA	Y	20%	Credit due to cooperation and remediation
Las Vegas Sands Corp: resort developer	Apr 2016	NPA	Y	25%	Credit due to cooperation and remediation
JP Morgan Securities (Asia Pacific) Ltd.	Nov 2016	NPA	N	25%	Credit due to cooperation and remediation

Of note is JP Morgan Securities, where the outcomes were similar to those who self-reported under the Pilot Program – an NPA, monitor not required, and 25% credit due to cooperation and remediation.

This begs the question: Are the incentives a result of the Pilot Program or just current DOJ enforcement trends?



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Not all declinations are the same

Company	Notes	Disgorgement
Nortek Inc.	Declination	\$321,000 total to SEC
Akamai Technologies Inc.	Declination	\$652,500 total to SEC
Johnson Controls Inc.	Declination	\$14 million total to SEC
HMT LLC	Declination with disgorgement	\$2.7 million to DOJ
NCH Corporation	Declination with disgorgement	\$335,000 to DOJ

DOJ did not require disgorgement for Nortek, Akamai, and Johnson Controls. Additionally, the DOJ did not commonly publicize declinations prior to the Pilot Program.

Through the Pilot Program:

- 'Declination' page is publically available on the DOJ website (<https://www.justice.gov/criminal-fraud/pilot-program/declinations>) with all 5 declination letters posted
- However...HMT LLC and NCH Corporation declination letters differ from others:
 - Summary of DOJ's investigation detailed publically – not the case for the other 3 declinations
 - Disgorgement requirements to the U.S. Treasury



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Considerations and implications

HMT LLC and NCH Corporation declinations beg the following questions:

- Do the benefits mute the disgorgement and potential reputational and collateral damage from details of investigation made public?
- Is a declination, made public, from self-reporting better than a declination provided without self disclosure?
- Will the DOJ publicize all self-reported declinations in the future?

Bio-Rad Laboratories:

"The disclosure of the NPA and the SEC Order could harm our reputation with these customers, which could materially adversely affect our business, results of operations and financial condition."

- January 23, 2015 – a shareholder derivative lawsuit was filed in the Superior Court of California against three of Bio-Rad's then current directors and one former director
- August 13, 2015 and August 18, 2015 - a stockholder derivative complaint was filed in the Delaware Court of Chancery against four of Bio-Rad's then current directors and one former director.
- May 27, 2015, Bio-Rad's former general counsel, Sanford S. Wadler, filed a lawsuit in the U.S. District Court, Northern District of California, against Bio-Rad and four of Bio-Rad's then current directors and one former director.



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Considerations and implications

Brings back the question:

Does the DOJ's Pilot Program provide incentives for companies to self-disclose misconduct?



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Trevor McFadden (acting principal deputy assistant attorney general) stated that his team is examining “more [DOJ] can do to promote voluntary compliance with the law” and improve “transparency regarding our expectations and prosecutorial priorities”. *

*<http://globalinvestigationsreview.com/article/1139747/doj-could-encourage-more-voluntary-disclosure-mcfadden-says>

The DOJ's FCPA Pilot Program: Exploring Opportunities and Drawbacks

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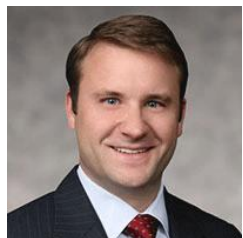
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- ▶ Questions will be answered in the order they are received.

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