



From Backroom to Boardroom: Strategies for Responding to Government Investigations

September 30, 2014



U.S. Foreign Corrupt Practices Act ("FCPA"): An Overview and Recent Trends

Government Investigations Roundtable
September 30, 2014

Objectives

- ❖ Provide an overview of the FCPA and compliance programs, including a discussion of third-party risks and the 2012 FCPA Guidance
- ❖ Provide a primer on conducting government investigations and voluntary disclosures
- ❖ Summarize 2014 (January – September) FCPA resolutions and declinations
- ❖ Highlight recent trends and other considerations

OVERVIEW

Overview: FCPA

ANTI-BRIBERY PROVISIONS

Prohibit bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage

ACCOUNTING PROVISIONS

Require SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls

Overview: Anti-Bribery Provisions

The FCPA prohibits the giving or offering—directly or indirectly—of gifts, payments, or “anything of value” to foreign government officials to secure an improper benefit

- ❖ Giving/Offering: includes promises to pay
- ❖ Improper Benefit: includes obtaining/retaining business *or* securing an improper advantage

Overview:

Foreign Official, “Instrumentality”

- ❖ The FCPA prohibits bribery of “foreign officials,” which is defined as “any officer or employee of a foreign government or any department, agency, or *instrumentality thereof*”
- ❖ DOJ and SEC have long pursued enforcement under a broad definition of “instrumentality”
- ❖ Adopting the DOJ’s broad definition, in May 2014 the Eleventh Circuit, in *United States v. Esquenazi*, defined the term “instrumentality” as:
 - ▶ “[A]n entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”
 - ▶ The court further elaborated that “what constitutes control and what constitutes a function the government treats as its own are fact-bound questions.”

Overview: Anti-Bribery Provisions— Affirmative Defense and Exception

❖ **Exception: Facilitating or “grease payments”**

- ▶ Payment by a foreign official to expedite or secure the performance of routine governmental actions
- ▶ Limited application in that defense applies only to non-discretionary actions by a foreign official
- ▶ Facilitation payments often violate local law

❖ **Affirmative Defense:**

- ▶ Reasonable and bona fide business expense
- ▶ Lawful under written local law
- ▶ Narrow in application

Overview:

Books and Records

Issuers must maintain books, records, and accounts that in reasonable detail accurately reflect the transactions and disposition of assets

- ❖ Failure to do so is a civil violation
- ❖ Knowingly failing to do so is a crime
- ❖ Applicable only to issuers

Overview: Internal Controls

- ❖ Issuers must devise and maintain a system of internal accounting controls sufficient to assure management's control, authority, and responsibility over the firm's assets.

Overview:

FCPA Compliance Programs

- ❖ **DOJ and SEC consider the existence and effectiveness of a corporation's pre-existing compliance program when conducting investigations, making decisions regarding charging, and negotiating settlements**
 - ▶ DOJ Principles of Federal Prosecution of Business Organizations
 - ▶ SEC Seaboard report
 - ▶ DPAs – e.g. Morgan Stanley

Overview:

Compliance Programs Expectations

❖ Guidance about what a compliance program should address can be found at:

- ▶ USSG
- ▶ DOJ / SEC FCPA Resource Guide
- ▶ Transparency International
- ▶ OECD
- ▶ WEF-PACI
- ▶ World Bank
- ▶ UK Bribery Act
- ▶ DPAs – e.g., Panalpina, Johnson & Johnson

Compliance Programs Elements

❖ Key Elements of an Effective Program Include:

- ▶ Risk Assessment
- ▶ Anti-corruption policies and procedures
- ▶ Organization and responsibilities
- ▶ Communication and training
- ▶ Business relationships
- ▶ HR and disciplinary actions
- ▶ Seeking guidance, raising concerns and investigations
- ▶ Internal controls and auditing
- ▶ Monitoring and review

Books & Records and Internal Controls – Common Challenges

- ❖ **Lack of clear ownership and accountability**
- ❖ **Incomplete risk assessment**
- ❖ **Ineffective training**
- ❖ **Lack of monitoring or auditing**
- ❖ **Missing controls**
- ❖ **Inadequate books & records:**
 - ▶ **Missing receipts**
 - ▶ **No description of attendees or business purpose**
 - ▶ **No contracts with service providers**

Overview: Fines and Penalties

Business Organizations

- US\$25 million criminal fine per violation (books & records and internal control violations)
- Up to US\$2 million criminal fine per violation (anti-bribery violations)
- US\$10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d) (twice the gain or loss)

Individuals

- 20 years in prison and/or US\$5 million per violation (books & records and internal control violations)
- 5 years in prison and/or US\$250,000 fine per violation (anti-bribery violations)
- US\$10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d) (twice the gain or loss)

THIRD-PARTY AND SUCCESSOR LIABILITY

Third-Party Risk and Exposure

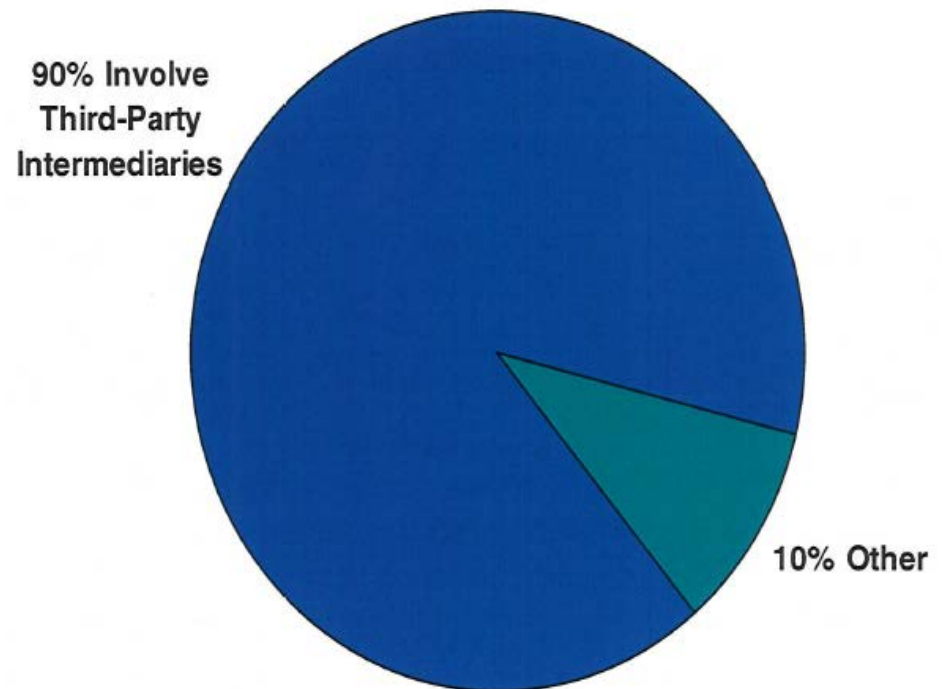
❖ Breadth of potential exposure:



Third-Party Risk and Exposure

- The use of third-party agents or intermediaries to interact with government officials on behalf of the company poses a risk in all areas of business operations

Conduct Underlying FCPA Enforcement Actions



Successor Criminal Liability

- ❖ DOJ has an expansive view under which a successor company can be charged with its predecessor's FCPA violations
- ❖ It is generally no legal defense that:
 - ▶ FCPA violations predated the acquisition
 - ▶ Successor did not know about the violations
 - ▶ Successor performed anti-corruption due diligence

CONDUCTING FCPA INVESTIGATIONS

Conducting FCPA Investigations: Why Conduct Them?

Benefits of an Internal Investigation:

- ❖ Early and accurate assessment of potential legal exposure
- ❖ Enables the identification and removal/discipline of employees involved in misconduct
- ❖ Demonstrates the company's commitment to ethics and compliance
- ❖ Enhanced credibility with enforcement authorities
- ❖ Protection for the Board of Directors and/or senior management

Conducting FCPA Investigations: Who Conducts Them?

- ❖ Structure of investigative team depends on:
 - ▶ Nature of alleged misconduct
 - ▶ Scope of investigation
 - ▶ Who does the investigation team report to (e.g., General Counsel, Board of Directors, Audit Committee)?

Conducting FCPA Investigations: Who Conducts Them?

Role of In-House Counsel v. Outside Counsel:

- ❖ The decision whether to use in-house or outside counsel may depend in part on the nature and scope of the alleged misconduct, budgetary constraints, and business pressure
- ❖ Using experienced outside counsel to conduct internal investigations, however, has advantages:
 - ▶ Increased independence
 - ▶ Avoidance of actual or perceived conflicts of interest
 - ▶ Ability to leverage knowledge and experience from prior investigations
 - ▶ Familiarity with the expectations of enforcement authorities
 - ▶ Greater deference to findings should there be a subsequent government inquiry
- ❖ Collaboration between in-house and outside counsel

Conducting FCPA Investigations: Who Conducts Them?

Role of Local Counsel

- ❖ Using local counsel with anti-corruption experience has certain key advantages:
 - ▶ Increased knowledge of geographic risk factors
 - ▶ Knowledge of local anti-corruption regulations
 - ▶ Ability to interface with local government authorities, which is particularly important given increased global enforcement and cooperation
 - ▶ Local language experience

Conducting FCPA Investigations: Who Conducts Them?

Role of Forensic Accountants:

- ❖ Depending on the nature and scope of the alleged misconduct (e.g., if it involves falsification of records, circumvention of controls, etc.), it may be necessary to use forensic accountants to do a targeted review of the relevant books and records and internal controls

Conducting FCPA Investigations: Who Conducts Them?

Role of Forensic Accountants (con't)

- ❖ Using forensic accountants, as opposed to in-house audit personnel, has certain advantages, including:
 - ▶ Increased objectivity
 - ▶ Avoidance of potential conflicts of interest (especially true if alleged misconduct involves areas reviewed by internal controls/audit departments)
 - ▶ Prior experience in conducting like investigations
 - ▶ Greater deference to findings by DOJ/SEC
 - ▶ Greater likelihood findings will retain privileged so long as forensic accountants retained by outside counsel

Conducting FCPA Investigations: Reporting of Findings, Voluntary Disclosures

- ❖ **After completion of an investigation, the Company may decide to self-report or voluntarily disclose investigative findings to the appropriate government agencies**
 - ▶ FCPA does not require self reporting
 - ▶ 2012 FCPA Guidance emphasizes importance of voluntary disclosure in enforcement decisions

Conducting FCPA Investigations: Reporting of Findings, Voluntary Disclosures

Advantages of Voluntary Disclosure:

- ❖ Potential for more favorable resolution and lesser penalties (cooperation credit)
 - ▶ Declination; non-prosecution agreement (“NPA”); deferred-prosecution agreement (“DPA”)
- ❖ Greater likelihood of self monitoring and reporting as opposed to external monitorship
- ❖ Company controls timing of disclosure (and presentation of remedial efforts)
- ❖ Whistleblower awards (Dodd-Frank Act) and increased global enforcement make eventual disclosure to government more probable than in the past

Conducting FCPA Investigations: Reporting of Findings, Voluntary Disclosures

Risks of Voluntary Disclosure:

- ❖ Potential that government may not uncover violation
- ❖ Favorable resolution not guaranteed
 - ▶ 2012 NYU study concluding that voluntary disclosures do not affect FCPA penalty amounts
- ❖ Even if DPA/ NPA as the resolution:
 - ▶ Monetary penalties
 - ▶ Associated increased obligations (e.g., independent compliance monitor)
 - ▶ Risk of breach
- ❖ Negative publicity
- ❖ Increased risk of individual prosecutions

2012 FCPA RESOURCE GUIDE

2012 FCPA Resource Guide

- ❖ In November 2012 the DOJ and SEC jointly issued the FCPA Resource Guide, which contains insight on:
 - ▶ Voluntary disclosures
 - ▶ Third-party due diligence
 - ▶ Pre-acquisition FCPA due diligence and related post-acquisition compliance
 - ▶ Corporate successor liability
 - ▶ Jurisdictional scope of the anti-bribery provisions
 - ▶ Gifts, travel costs, and entertainment expenses, and
 - ▶ Related U.S. laws that may apply (e.g., Travel Act)

RECENT RESOLUTIONS

2014 FCPA Resolutions

❖ Notable 2014 corporate FCPA resolutions:

Date	Company	Summary of Alleged Conduct
January 9, 2014	Alcoa (aluminum sales)	Guilty plea and agreement to pay \$223 million in fines to resolve allegations that it paid bribes, through a London-based middleman, to government officials in Bahrain
March 19, 2014	Marubeni Corp. (trading company)	Guilty plea and agreement to pay \$88 million in fines to resolve allegations related to participation in a scheme to bribe Indonesian government officials in order to secure a power contract
April 9, 2014	Hewlett Packard ("HP") (technology)	HP and four of its international subsidiaries agreed to a total payment of more than \$108 million to resolve allegations that the subsidiaries bribed officials in Russia, Poland and Mexico. HP's Russian subsidiary pled guilty to four FCPA counts . HP's Polish subsidiary entered into a DPA

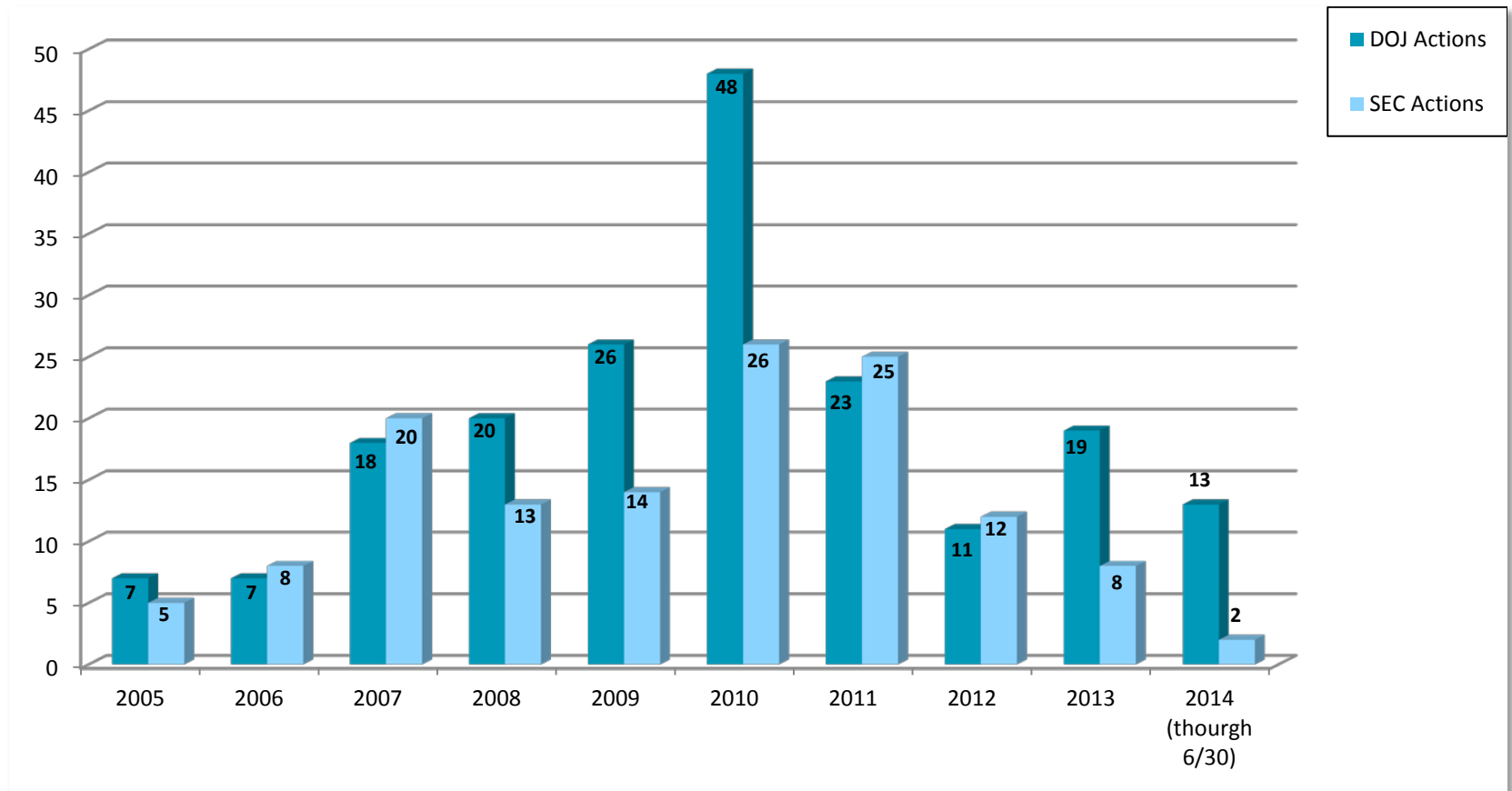
2014 Corporate Declinations

- Although DOJ and SEC do not publically report declinations, to date, 2014 has seen at least five corporate declinations:

Date	Company	Summary of Alleged Conduct
January 2014	Lyondell	DOJ declination stemming from March 2010 voluntary disclosure that a former project in Kazakhstan involved a \$7 million questionable payment
February 2014	Baxter Intl.	DOJ and the SEC declinations related to payments made by a Chinese joint venture
March 2014	SL Industries	DOJ declination related to gifts and entertainment provided to government officials by three Chinese subsidiaries (SEC investigation still open)
June 2014	Smith & Wesson	DOJ declination related to investigation into Company's Africa operations
September 2014	Image Sensing	DOJ and SEC declination related to Polish investigation voluntarily disclosed by Company to DOJ/SEC

Enforcement Statistics

FCPA Corporate Enforcement Actions initiated, by year:



RECENT TRENDS

Trends

- ❖ Subsequent to the issuance of the 2012 FCPA Guidance, certain enforcement trends have emerged, including:
 - ▶ High settlement values in corporate resolutions
 - ▶ Enhanced multi-jurisdiction enforcement and cooperation
 - ▶ Express credit for cooperation
 - ▶ Continued focus on individual prosecutions
 - ▶ Focus on high-risk industries

Trends: High Settlement Values

- ❖ **2013 FCPA resolutions included 2 of the 10 largest FCPA resolutions:**
 - ▶ Total, S.A.: \$398.2 million in combined penalties, forfeitures and pre-judgment interest
 - Represents fourth-largest FCPA resolution
 - Company also entered into a three-year deferred prosecution agreement (“DPA”) and agreed to retain a compliance monitor as part of the resolution
 - ▶ Weatherford International (and three subsidiaries): \$152.6 million in combined penalties and forfeitures, plus \$100 million for trade sanctions
 - Represents tenth-largest FCPA resolution
 - Company also entered into a three-year DPA and agreed to retain a compliance monitor as part of the resolution

Trends: High Settlement Values

- ❖ To date, 2014 corporate settlements follow the trend of high-settlement values:
 - ▶ Alcoa: \$384 million in combined penalties and forfeitures
 - Represents fifth-largest FCPA resolution
 - ▶ Hewlett Packard : \$108.2 million in combined penalties and forfeitures
 - ▶ Marubeni: \$88 million in combined penalties and forfeitures

Trends:

Enhanced Global Enforcement and Cooperation



- More global anti-bribery laws, including laws with broad jurisdictional reach
- Several parallel prosecutions by foreign regulators
- Three 2014 FCPA resolutions all cite to international cooperation and assistance, including sharing of information and exchange of investigative tactics

Trends: Credit for Cooperation

❖ 2014 FCPA resolutions demonstrate value of cooperation:

▶ Alcoa

- Total \$384 fine (penalties and disgorgement) represents a departure from the minimum U.S. Sentencing Guidelines base range of \$486 million
- DOJ press release, plea agreement and related filings all expressly credit Alcoa for its voluntary disclosure, continuing and regular cooperation and implementation of remedial measures

▶ Hewlett-Packard

- Total fine of combined \$108.3 million (includes subsidiary guilty pleas)
- Criminal penalties below US Sentencing Guidelines range
- DOJ Press release and related filings note “extensive cooperation,” including a “robust internal investigation” and “remedial efforts”

▶ Marubeni Corporation

- Mid-guidelines penalty of \$88 million
- DOJ press release cites that the Company “refused to cooperate with the government’s investigation”
- Previously entered into a DPA for FCPA violations in 2012

Recent Trends: Continued Focus on Individuals

- ❖ To date, in 2014, DOJ and SEC have brought bribery-related charges (FCPA and other criminal laws) against over a dozen individuals
- ❖ More individual prosecutions could signal increased litigation and an uptick in judicial decisions interpreting the FCPA (e.g., Esquenazi)

"Prosecuting individuals as well as institutions is a significant focus for the FCPA unit, and it's a trend that's going to continue." (Patrick Stokes, Head of DOJ's FCPA Unit)

"A company . . . can only act through its employees and if an enforcement program is to have a strong deterrent effect, it is critical that responsible individuals be charged, as high up as the evidence takes us. And we look for ways to innovate in order to further strengthen our ability to charge individuals." (SEC Chair, Mary Jo White)

Recent Trends: High-Risk Industries

- ❖ Based on recently-initiated or resolved investigations, it appears that high-priority sectors for enforcement include:
 - ▶ Pharmaceuticals and medical device manufacturers
 - ▶ Food and consumer products
 - ▶ Technology
 - ▶ Mining, energy, and engineering
 - ▶ Oil, coal, and power generation

QUESTIONS?

Strategies for Responding to Government Investigations - Health Care Fraud -

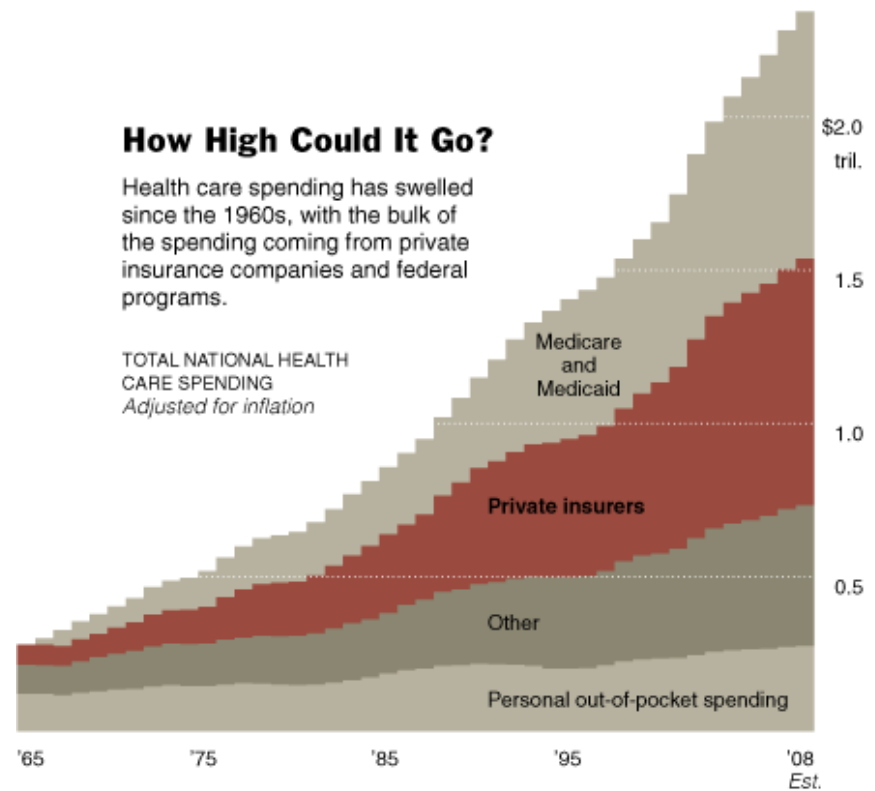
John Kelly
Member
Bass Berry & Sims
Washington, DC

Joseph Hudzik
Hospital Counsel
MedStar Health
Baltimore, MD

Peter Coughlan
Senior Counsel
HCA Healthcare Corp
Nashville, TN

Annual Healthcare Spending

- Health care spending in 2020 is projected to reach \$4.64 trillion, accounting for 19.8% of GDP.
- Lost to fraud: 3% - 10% (\$69 billion - \$230 billion).

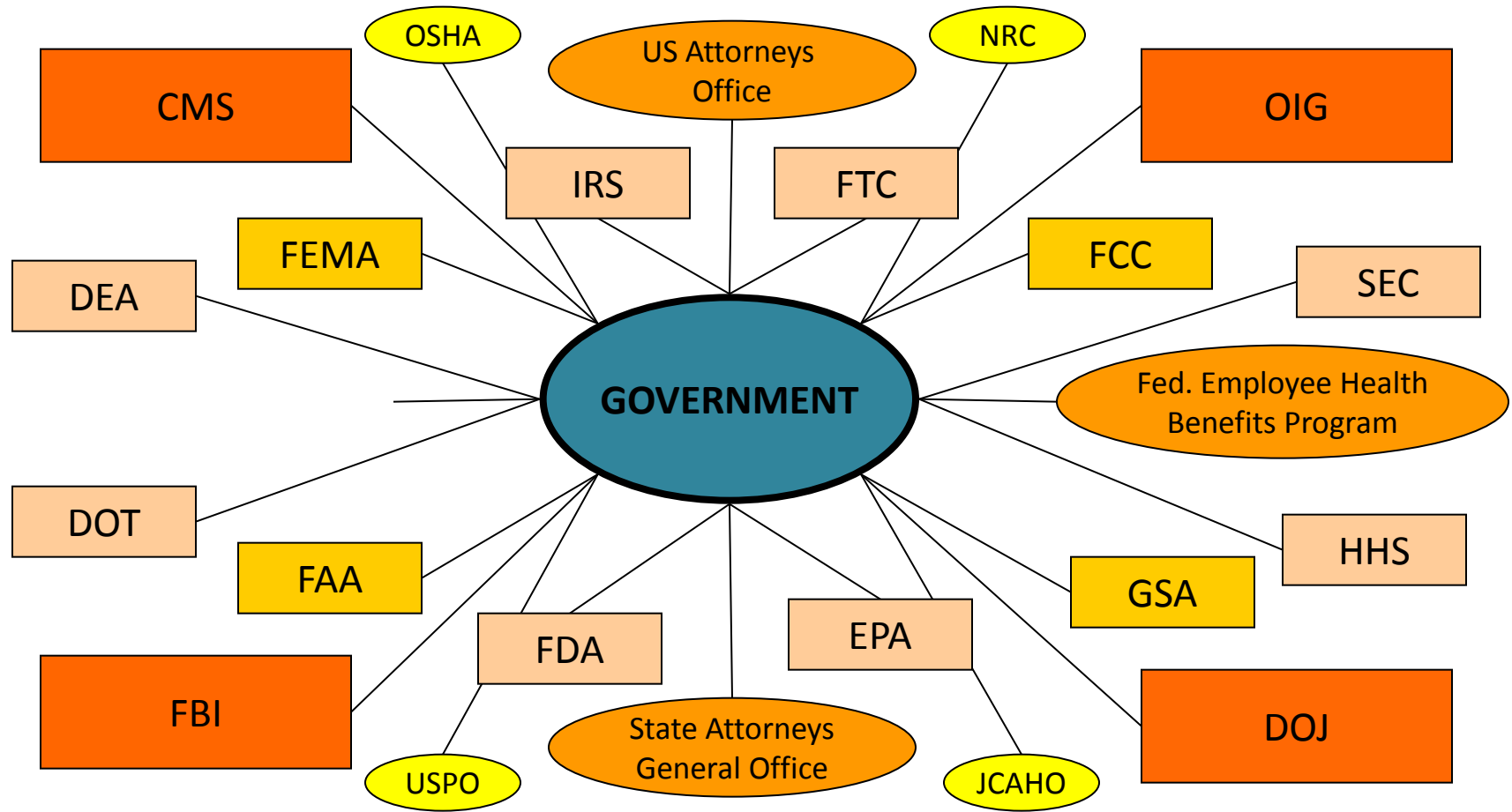


Out-of-pocket spending includes co-payments and deductibles. Other includes spending for the Department of Defense, Veterans Affairs, children's health and other programs.

Source: Centers for Medicare and Medicaid Services, Office of the Actuary

THE NEW YORK TIMES

Who is the Government?



Push For Stronger Enforcement

❖ Law Enforcement

- ▶ Fighting fraud and abuse is a priority
- ▶ More aggressive, coordinated, and successful
- ▶ HEAT: Health Care Fraud Prevention and Enforcement Action Team

❖ Support from the Hill / Political Climate

- ▶ FERA: Fraud Enforcement and Recovery Act
- ▶ PPACA: Patient Protection and Affordable Care Act
- ▶ HIPAA/HITECH

❖ More resources and expanded investigative tools

❖ Whistleblowers

Trends: Medicare Fraud Strike Force (HEAT)

- ❖ A multi-agency team of federal and state investigators fighting Medicare fraud through the use of data analysis techniques and community policing.
- ❖ Increased focus on corporate health care fraud and executives
- ❖ Currently located in 9 U.S. cities and looking to expand:

Miami, FL	Tampa, FL	Chicago, IL
Los Angeles, CA	Detroit, MI	Dallas, TX
Baton Rouge, LA	Brooklyn, NY	Houston, TX
- ❖ Strike Force Statistics for FY 2013:
 - ▶ 117 formal charges filed against 278 defendants
 - ▶ 251 guilty pleas
 - ▶ Average prison sentence was more than 48 months
 - ▶ More than \$51 million recovered in first 6 months of FY 2012

Trends: Increased Scrutiny

❖ **Scrutiny of Amounts Paid for Medical Products/Services**

- ▶ RACs (recovery audit contractors)
- ▶ ZPICs (zone program integrity contractors)
- ▶ MICs (medicaid integrity contractors)
- ▶ MACs (medicare administrative contractors)

❖ **Scrutiny of Need for Medical Products/Services**

- ▶ length of stay / in-patient v. observation status
- ▶ Up-coding / Unnecessary procedures

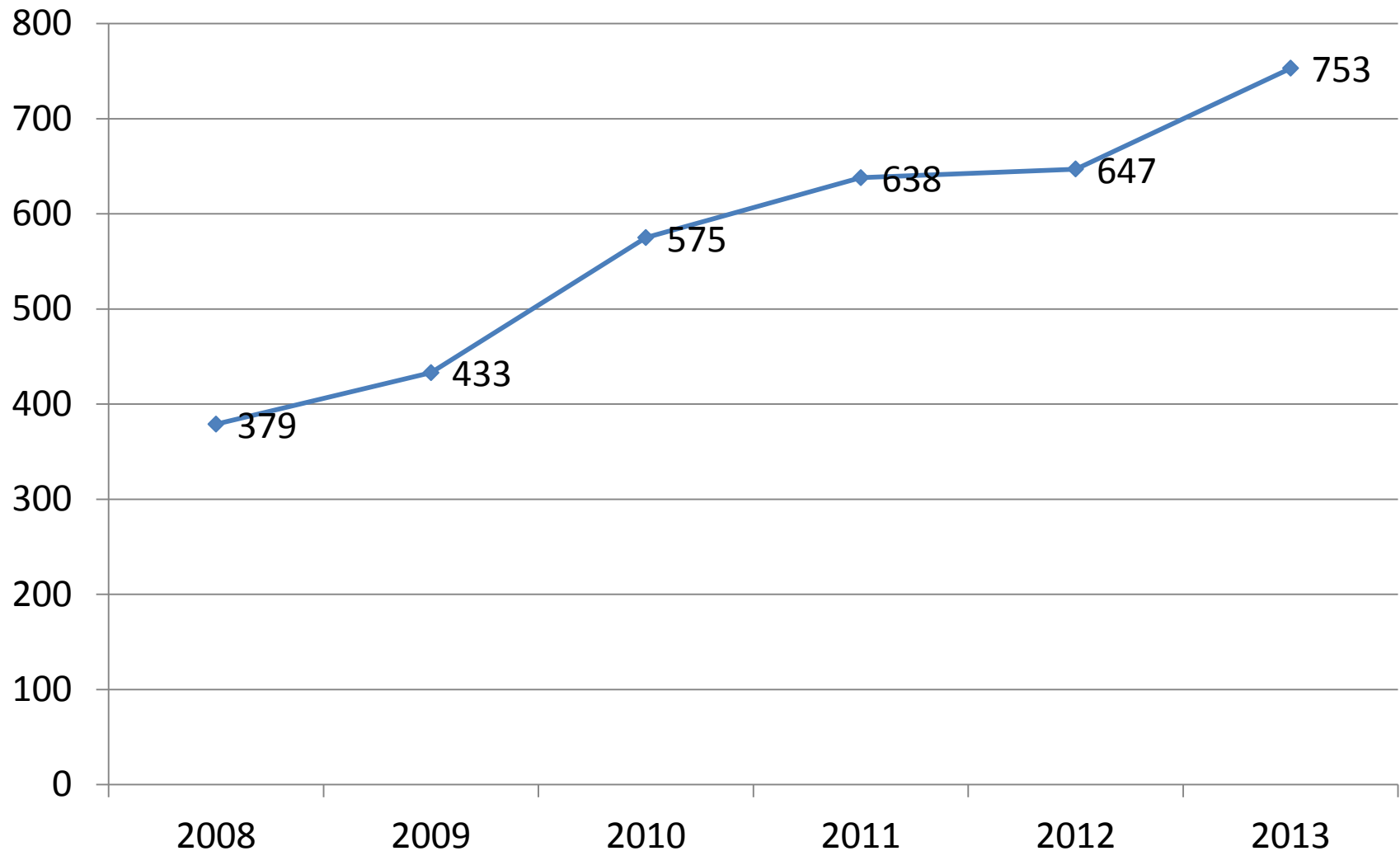
❖ **Managed Care**

- ▶ Health risk profiles

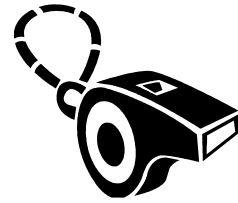
❖ **Individual Liability of Corporate Officers and others**

- ▶ Criminal prosecution of companies and individuals
- ▶ Exclusion

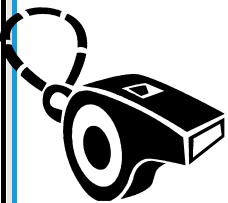
Number of new qui tam suits filed by year



Trends: Qui Tam Actions FY 2013



- ❖ \$3.8 billion was recovered in FCA settlements
- ❖ \$2.6 billion from HCF cases
- ❖ Relators collected more than \$387 million in awards
- ❖ Of the 753 new FCA matters opened last year, almost 83% were matters initiated by a whistleblower.
 - ▶ In 1987, relators initiated only 30 of the 373 new matters (8%).
- ❖ In FY 2014 – more than \$2 billion has already been recovered in FCA settlements
 - Endo Pharma -- \$192 million
 - Omnicare -- \$124 million
 - Shire Pharma -- \$56.5 million



Prosecutions / Exclusions in FY 2013

- Criminal Matters
 - ❖ DOJ opened 1,013 criminal healthcare fraud investigations
 - ❖ Cases involved 1,910 individuals
 - ❖ 718 defendants were convicted of healthcare fraud charges
 - ❖ Average prison term = 52 months
- Exclusions
 - ❖ 3,214 individuals & entities
 - ❖ 3,131 in FY 2012



Healthcare Investigations

Origination of Cases

- *Qui Tam* Lawsuits
- Proactive Investigations
- Referrals from HHS/OIG or Contractors
- Criminal prosecutions

Parallel Proceedings

- DOJ directive to pursue parallel civil and criminal recovery
- Requires evaluation at intake, investigation, and resolution
- Potential landmines for defendants



Office of the Attorney General
Washington, D. C. 20530

January 30, 2012

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS
DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
ALL ASSISTANT UNITED STATES ATTORNEYS
ALL LITIGATING DIVISIONS
ALL TRIAL ATTORNEYS

FROM:  THE ATTORNEY GENERAL

SUBJECT: Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings

What Does this Mean for the Healthcare Industry?

- ❖ Increased likelihood of facing enforcement actions.
- ❖ Increased likelihood of facing whistleblower complaints.
- ❖ Increased likelihood your company will undertake internal investigations.

QUESTIONS?

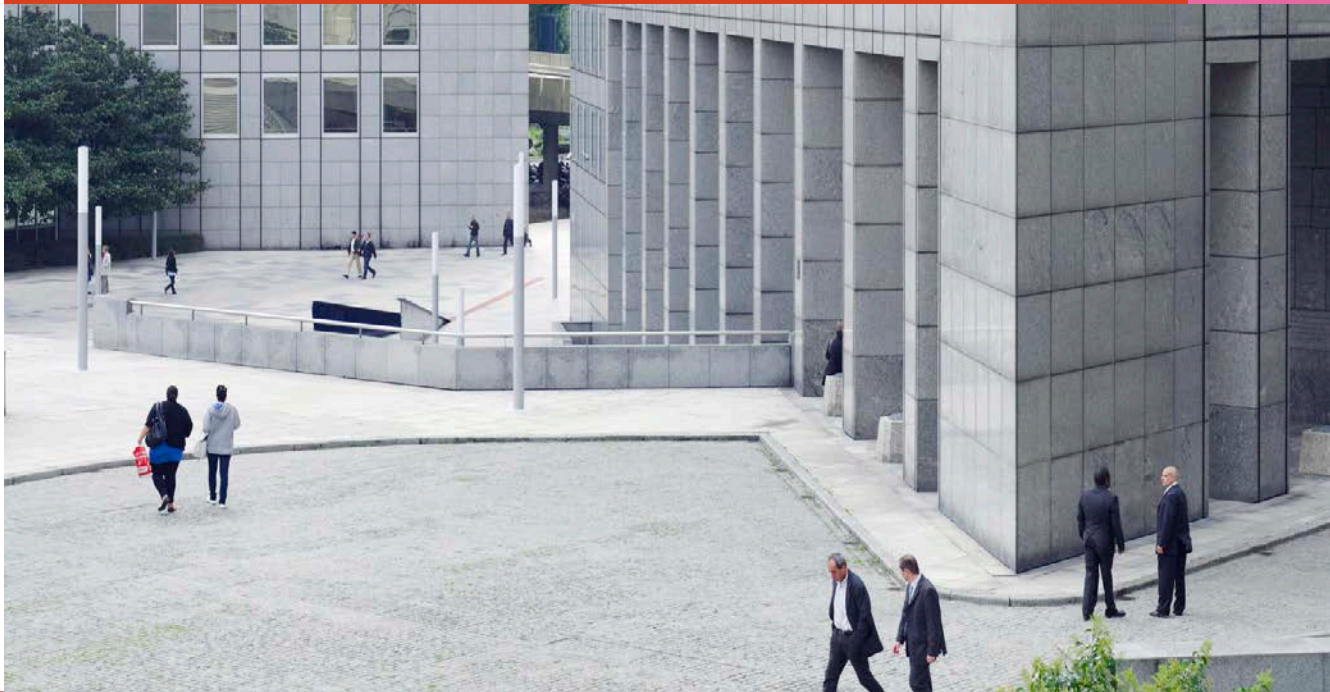
John Kelly
Member
Bass Berry & Sims
Washington, DC

Joseph Hudzik
Hospital Counsel
MedStar Health
Baltimore, MD

Peter Coughlan
Senior Counsel
HCA Healthcare Corp
Nashville, TN

Financial Crimes **Today's Forensic Investigations**

September 30, 2014



Speakers

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Agenda

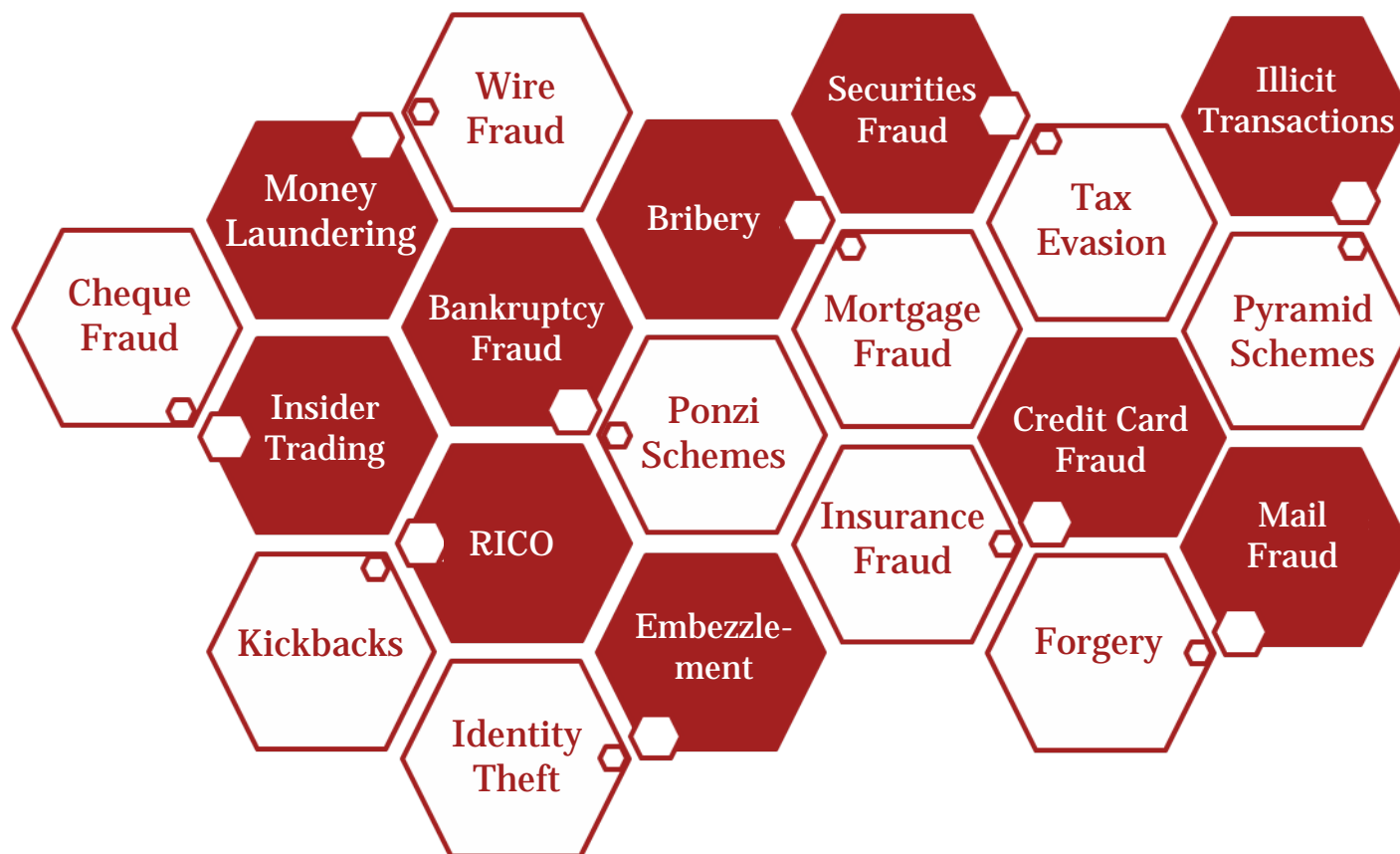
1. A Focus on Financial Crime
2. Challenges in the Face of an Inquiry
3. Approaching Today's Forensic Investigations
4. Q & A

A Focus on Financial Crime

1

Types of Financial Crimes

In 2014, the threat posed by economic crime is fresh in our collective memory as we work to recover from a financial meltdown and near economic collapse caused by fraudulent practices in our financial markets. While important strides have been made in recent years, economic crime continues to pose a grave threat to financial interests in the United States as a whole, and to US businesses both at home and abroad. Financial and economic crime is an ever evolving threat, and new criminal trends relentlessly emerge in different sectors and industries as economic events, natural disasters, and innovation re-shape our world.



Recent Enforcement Actions

Telegraph.co.uk

BNP Paribas 'to pay \$9B over sanctions breach'

France's largest bank, BNP Paribas, is expected to pay \$9bn and accept other punishments from the US Department of Justice, following allegations that it breached American trade sanctions against Iran, Sudan and Cuba. Under the proposals, the bank would be banned from clearing dollars, most likely for months, hobbling its American operations. It would also plead guilty to conspiring to violate the International Emergency Economic Powers...

Bank of America agrees to nearly \$17B settlement

USA Today, August 21, 2014

Bank of America has agreed to pay nearly \$17 billion to settle federal and state allegations it sold risky, mortgage-backed securities to investors before the national financial crisis, a person familiar with the matter said Wednesday.

Citigroup to pay record fine in \$7-billion mortgage settlement

LA Times, July 14, 2014

Citigroup Inc. will provide \$7 billion in cash and consumer relief to settle federal and state investigations into the sale of defective mortgage investments during the subprime housing boom, the Wall Street giant and federal officials said

Monday. California is among several states that will share in the settlement, which includes a record \$4 billion in civil fines and \$500 million in repayments for public pension fund and other losses, plus \$2.5 billion in consumer relief..

JPMorgan Chase to Pay \$1.7 Billion In Largest Bank Forfeiture In History, Settles Criminal Madoff Charges

FORBES, January 7, 2014

Bernard Madoff's \$65 billion Ponzi scheme was the biggest investment scam in history so the numbers associated with it are always huge. Nearly three years ago the scandal produced the largest single forfeiture recovery in U.S. history, when Barbara Picower agreed to pay \$7.2 billion. Federal prosecutors on Tuesday announced that JPMorgan Chase JPM +0.68%, where Madoff kept the bank account at the center of his fraud, would settle criminal charges and pay \$1.7 billion in the largest bank forfeiture in history.

HSBC to Pay \$1.92 Billion to Settle Charges of Money Laundering

The New York Times, December 10, 2012

HSBC announced on Tuesday that it had agreed to a record \$1.92 billion settlement with authorities. The bank, which is based in Britain, faces accusations that it transferred billions of dollars for nations like Iran and enabled Mexican drug cartels to move money illegally through its American subsidiaries.

Recent Statements by Regulators

An emphasis on individuals

September 2014

Marshall Miller, Principal Deputy Assistant A.G. for the Criminal Division

- “The prosecution of individuals ... is at the very top of the Criminal Division’s priority list”
- “If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation”

Elizabeth Warren, Senate Banking Committee (D-MA)

- “No corporation can break the law unless the individual within that corporation broke the law”
- “If you steal \$100 on Main Street, you’re probably going to jail. If you steal a billion bucks on Wall Street, you darn well better go to jail, too”

September 2014

May 2014

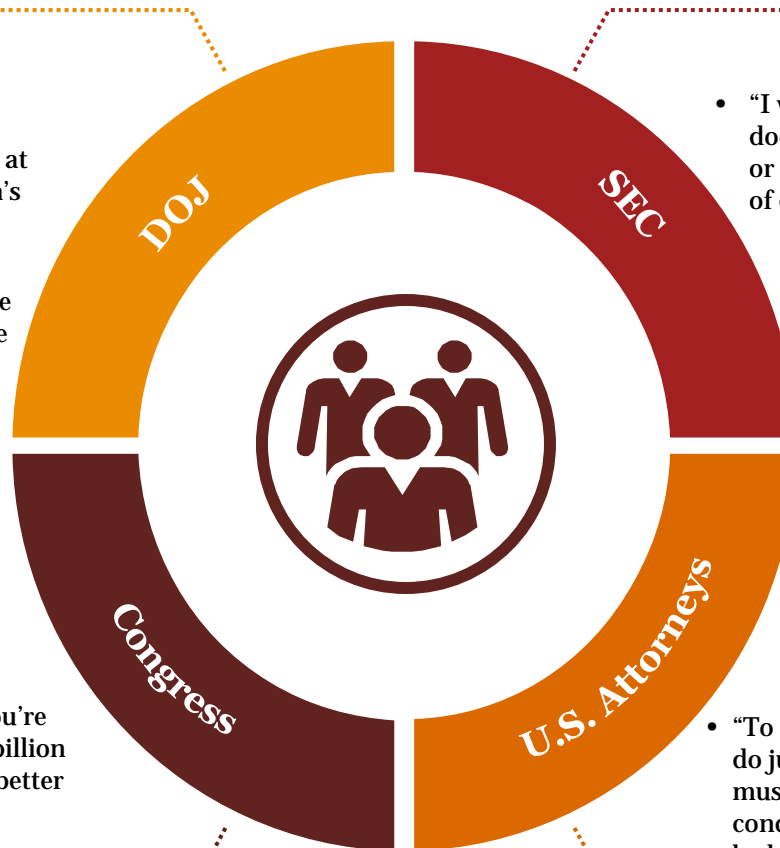
Mary Jo White, SEC Chair

- “I want to dispel any notion that the SEC does not charge individuals often enough or that we will settle with entities in lieu of charging individuals”
- “A company can only act through its employees and if an enforcement program is to have a strong deterrent effect, it is critical that responsible individuals be charged, as high up as the evidence takes us”

Preet Bharara, U.S. Attorney for SDNY

- “It is critical to prosecute individuals who have committed crimes. That is the bread and butter of what prosecutors do”
- “To effectively deter criminal conduct and to do justice, we need to do both. Individuals must be held accountable for criminal conduct... blameworthy institutions need to be held accountable too.”

March 2014



Challenges in the Face of an Inquiry

2

Challenges in the Face of an Inquiry

Hurdles organizations face when performing investigations today



Approaching Today's Forensic Investigations

A case study

3

The Situation

Investigation into potential money laundering

- A financial institution receives a subpoena from the local U.S. Attorney's Office related to potential money laundering activity by certain customers and accounts.
- Subpoena requests:
 - ***Any and all records*** associated with the accounts held in the name of **35 customer names** (e.g. Joe's Appliance Center)
 - Any and all records associated with **accounts related or linked to those accounts**

Approaching Today's Forensic Investigations



1. Spend time carefully understanding and defining the scope of the investigation:

- Which customers/accounts?
- What is the time frame?
- How to define related/linked?
- What is the alleged activity?
- What is the risk/exposure?
- What legal/regulatory obligations?

2. Prior to beginning, design an approach that is/has:

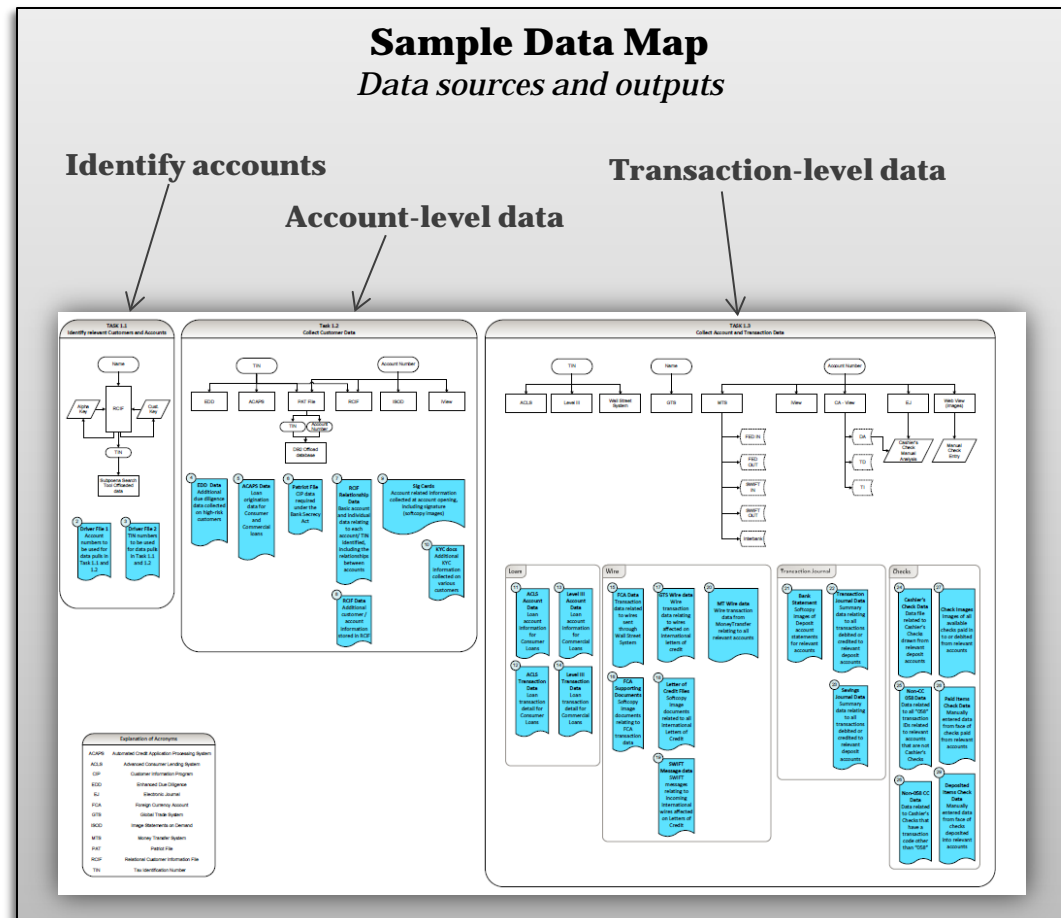
- Comprehensive
- Structured
- Flexible should changes arise
- Defined roles/responsibilities
- Defined timelines

Approaching Today's Forensic Investigations



Today's investigations are dependent on ***complete*** and ***accurate*** data, despite complex IT environments. Obtaining relevant data requires:

- Performing IT system/ process interviews
- Understanding data sources and outputs
- Providing comprehensive data requests
- Managing data issues (delivery, quality, archives, x-border, etc.)



Approaching Today's Forensic Investigations

I. Define Scope
& Approach

II. Obtain
Relevant Data

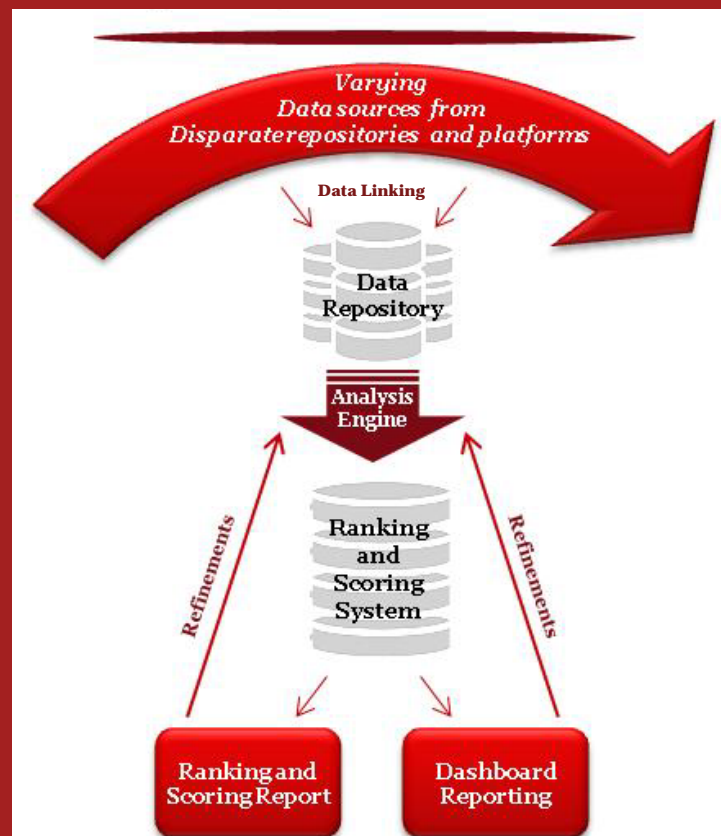
III. Data
Consolidation

IV. Transaction
Analysis

V. Reporting &
Visualization

VI. Improve

Investigative Analytics Framework



Complex and disparate data sources typically require a consolidated data repository be created to perform investigative analytics. Steps include:

- Database framework design
- Data loading & validation
- Data cleansing & standardization
- Linking analysis to aggregate disparate data sets into master reporting tables
- Identifying gaps and new requirements for incremental data requests

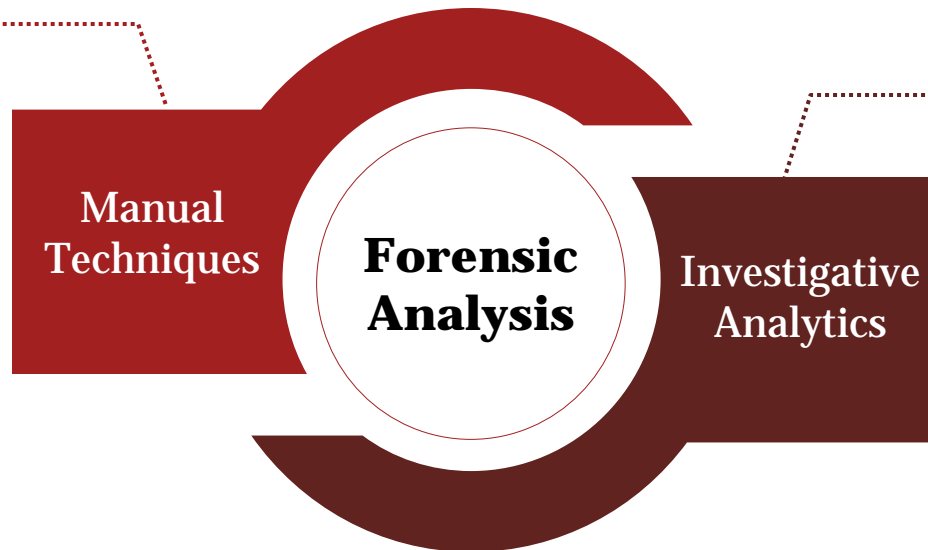
Approaching Today's Forensic Investigations



Today's effective investigations leverage a combination of *traditional manual forensic techniques* and *investigative analytics* to efficiently attack the problem.

Examples:

- Interviews
- Subpoena review
- KYC (Know Your Customer)
- EDD (Enhanced Due Diligence)
- Customer financials review
- Transacting parties research
- High risk transaction categorization
- Sampling analysis
- Document review
- Scheme mapping



Examples:

- Account transaction profiles
- Account relationship mapping
- Flow of funds mapping
- Vendor/Customer analysis
- Red flag analysis
- Pattern and correlation analysis
- Geo-mapping
- Exception spotting
- Transaction completeness

Approaching Today's Forensic Investigations

I. Define Scope & Approach

II. Obtain Relevant Data

III. Data Consolidation

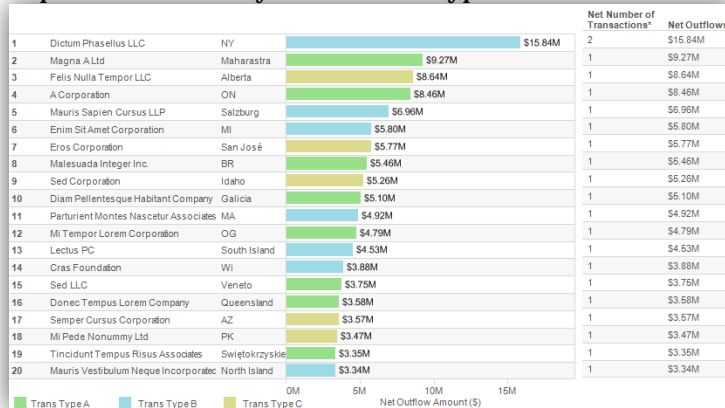
IV. Transaction Analysis

V. Reporting & Visualization

VI. Improve

Data visualization vastly enhances the ability to communicate findings to management and regulators. Visualization is key in quickly grasping the scope and severity of an event.

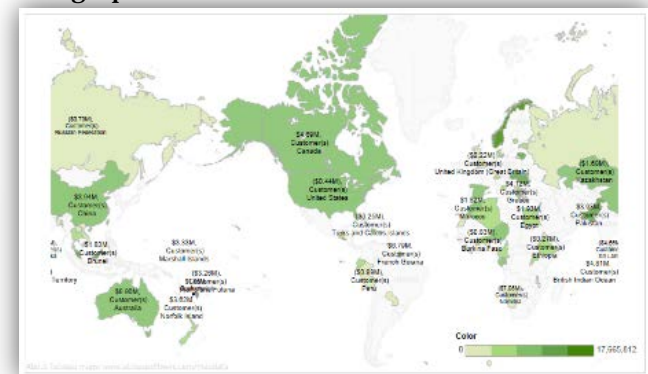
Top 20 Customers by Transaction Type



EDD Expected Transactions vs. Reality



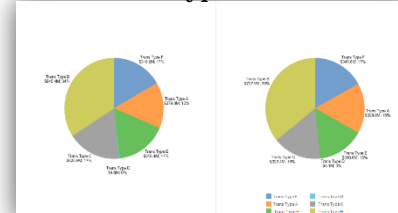
Geographic Flow of Funds



Source of Funds Distribution



Transaction Type Breakdown



Approaching Today's Forensic Investigations



- Regardless of the outcome of an investigation, it is critical to use the results to improve as an organization.
- Investigations are costly and time consuming – that investment should result in enhancements to your risk profile or identification of similar issues that can be addressed and disposed of in a more proactive manner.
- Never waste a good crisis!

Questions?

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Negotiating a Deal with the Government

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VICTIMS**The Forgotten Art: Advocacy on Behalf of Corporate Victims of Federal Crimes**

BY ELI RICHARDSON

White-collar criminal practitioners have numerous skills and employ them in many different contexts. In the realm of white-collar practice, however, one discipline goes largely unpracticed: corporate victim advocacy.

Victim advocacy is a valuable tool for achieving important objectives for corporations harmed by white-collar crimes. It is also an opportunity for white-collar practitioners to demonstrate their versatility in providing value to corporate clientele. The corporate client may be pleasantly surprised to learn that white-collar counsel is not necessarily limited to performing reactive and expensive damage control but can also, through victim advocacy, proactively achieve positive results including recovery of corporate assets.

Unfortunately, the potential of corporate victim advocacy often is overlooked, resulting in missed opportuni-

ties for both corporate victims and their counsel. To avoid this, white-collar practitioners should have a firm grasp of victims' legal rights and the potential advantages and methods of asserting them on behalf of corporate victims.

These topics are discussed below, using the federal system as an example.

**Federal Victims' Rights:
A Short Primer**

Three main federal victims' rights laws exist. One prescribes a full panoply of victims' rights, while the others relate solely to restitution.

The Crime Victims' Rights Act (CVRA) provides every "crime victim" with:

- (1) The right to be reasonably protected from the accused;
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime, or of any release or escape of the accused;
- (3) The right [generally] not to be excluded from any such public court proceeding . . . ;
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea [or] sentencing . . . ;
- (5) The reasonable right to confer with the attorney for the government in the case;
- (6) The right to full and timely restitution as provided in law;
- (7) The right to proceedings free from unreasonable delay; and
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.¹

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¹ 18 U.S.C. § 3771(a).

These rights are enforceable in various ways, by the prosecutor and/or the victim.² For example, the prosecutor and the victim—separately or jointly—can file a motion to enforce them.³ A victim may also file a complaint with the Justice Department alleging violation of these rights by responsible Justice Department employees, who are subject to discipline for violations.⁴ The CVRA also specifically contemplates victims retaining counsel to enforce these rights.⁵

Importantly, “crime victim” here means, in pertinent part, “a person directly and proximately harmed as a result of a Federal offense.”⁶ The term encompasses artificial persons such as corporations.

Under the CVRA, crime victims have a right of restitution. The goal of restitution in federal criminal cases is “to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury.”⁷ That goal is effectuated via two statutes: the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A, and the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. § 3663. These statutes have many similarities, but “the MVRA makes restitution mandatory for the crimes it covers, and the VWRA enables discretionary restitution for non-MVRA crimes.”⁸ In both, a “victim” is defined in pertinent part as “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”⁹ Again, a corporation can be such a person.¹⁰

A client must be a “crime victim,” or a “victim,” to invoke rights under the CVRA, or MVRA or VWRA, respectively. (Hereinafter, unless the context requires otherwise, “victim” refers to a person qualifying as a “crime victim” under the CVRA and/or a “victim” under either the VWPA or MVRA). Victim status will be obvious in some but not all cases,¹¹ and counsel must endeavor to establish that the corporate client has such status whenever possible.

Objectives and Benefits Of Corporate Victim Advocacy

Assuming the corporate client is a victim, the client likely will not know what that means—what the client can gain from victim status or how to get it. Counsel

² See *United States v. Ferguson*, 584 F. Supp. 2d 447, 458 n.15 (D. Conn. 2008) (noting that victim or government may raise with district court rights enumerated in CVRA).

³ Section 3771(d)(3).

⁴ Section 3771(f)(2).

⁵ See Section 3771(c)(2).

⁶ Section 3771(e).

⁷ *United States v. Battista*, 575 F.3d 226, 229 (2d Cir. 2009) (quoting *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006)).

⁸ *Id.* at 231. The MVRA, however, does contain limited exceptions, deeming restitution nonmandatory under certain circumstances. See Section 3663A(c)(3).

⁹ Section 3663(a)(2); Section 3663A(a)(2).

¹⁰ See, e.g., *United States v. Amato*, 540 F.3d 153 (2d Cir. 2008) (affirming restitution order for corporate victim).

¹¹ See *Battista*, 575 F.3d at 230 (discussing and deciding whether party claiming “victim” status under VWPA in fact was “victim”); Petition for Certiorari at 4-5, *Instituto de Costarricense de Electricidad v. United States*, No. 12-581 (S. Ct. Nov. 1, 2012) (describing petitioner’s dispute with federal government as to whether petitioner was “crime victim” under CVRA).

should be prepared to explain what victim advocacy can accomplish and why it should be employed by the client.

The objectives of corporate victim advocacy include enabling the corporate victim to:

- (1) stay informed of the status of the criminal investigation or prosecution;
- (2) be protected from additional criminal acts of the accused;
- (3) urge federal prosecutors to expedite the case;
- (4) have input on the form and/or terms of the case’s resolution;
- (5) make a written victim impact and/or oral victim impact statement at sentencing if desired;
- (6) ensure that the court grants an appropriate and adequate restitution order;
- (7) ensure that the restitution order is correctly reflected in the written judgment in the criminal case; and
- (8) maximize recovery pursuant to a restitution order.

Even sophisticated corporate clients typically need an explanation of these objectives because victims’ rights matters are not commonplace for most corporations.

Of course, not all objectives are applicable in every case. Victim advocacy must be case-specific, fitting the needs and budget of the corporate victim at issue. At the outset, counsel and the corporation should identify particular objectives sought from victim advocacy.

Although I served eight years as a federal prosecutor, handling or supervising dozens of cases involving corporate victims, I cannot recall a single occasion on which a corporation actively pursued any of these objectives. Whatever the cause of such inaction, it leaves vindication of victims’ rights solely to the executive and judicial branches of government, which may not realize that the corporation possesses and wishes to exercise particular victims’ rights. This could deprive the corporation of the information, voice, restitution, prompt closure, or preferred sentencing outcome they might have obtained via victim advocacy. Therefore, a corporate victim generally is best served by retaining its own counsel to promote its interests by pursuing selected objectives.

Achieving Corporate Client Objectives Via Victim Advocacy

Reliable methods exist for pursuing the various objectives of corporate victim advocacy.

Staying abreast of the case:

To keep up with an investigation or prosecution, victims have an option typically unavailable to nonvictims: conferring with the prosecutor as a matter of right under the CVRA. The scope of this right remains unclear. It is unclear how much information a prosecutor must share in conferring with victims’ representatives, and the amount shared will depend on the specific case and prosecutor involved. Nevertheless, the CVRA gives victims leverage to push for relatively full disclosure of the status of the case.

Protection from additional criminal acts:

Like any victim, corporate victims may need protection from additional crimes by accused defendants. For example, a corporation may be vulnerable to future hacking by a defendant arrested for previously hacking the corporation's electronic systems. The right to such protection is specifically provided by the CVRA and can be exercised via communications with the prosecutor regarding pretrial bail and detention issues. Counsel can encourage the prosecutor to request pretrial detention of the defendant or at least special conditions of release reasonably calculated to protect the corporation from specific future criminal acts—such as, in the above example, prohibiting the defendant from accessing any computer. Counsel also can convey to the prosecutor pertinent corporate information to help the prosecutor show the court the need for detention or special conditions.

Expediting the case:

Victims have yet another unique prerogative: a chance to seek to expedite the investigation or prosecution. Exercising the right to confer, counsel can prompt the prosecutor to move the case along more quickly. Again, the success of such efforts depends upon the case and the prosecutor involved, but counsel's persistence can move cases to the prosecutor's front burner. However, to my recollection, as a federal prosecutor I never received a request from any corporate victim to expedite a case. I attribute this in part to widespread lack of recognition of a victim's prerogative to attempt to motivate the government to expedite cases.

Providing input on the substance of the case's resolution:

Corporate victims are concerned with the substance, as well as the speed, of the case's resolution. Although the substance of a resolution is ultimately not entrusted to the victim, corporate counsel should not hesitate to discuss substance with the prosecutor, who should take seriously a corporate victim's input as to the form and terms of a case's resolution.

Regarding the form of a resolution, there are several options: declination of prosecution; a guilty plea with or without a plea agreement; an agreement not to prosecute; an agreement to defer a pending prosecution; or trial. A prosecutor should consider the views of any corporate victim, not only to honor the victim's right to confer but also to obtain the corporation's unique perspective regarding key factors bearing on the proper resolution of the case, including the seriousness of the criminal offense and the background of the offender.¹² Thus, counsel should make known the corporation's views. For example, how would the corporation feel if prosecution were to be declined? If the case were to go to trial? If a charged defendant were offered a deferred prosecution agreement? Speaking of agreements, what terms would the corporation want included in any agreement with the offender?

¹² These factors, among others, must be considered by the court before imposing sentence on a federal offender. See 18 U.S.C. § 3553(a)(1). They also, under current Justice Department policy, should be considered by federal prosecutors in deciding whether to file charges and whether to enter into a plea agreement with a defendant. See U.S. ATTORNEY'S MANUAL, §§ 9-27.230, 9-27.420.

The corporation can also offer information bearing on the proper calculation of the U.S. Sentencing Guidelines range. In white-collar cases, the guidelines range typically is driven largely by the amount of "loss" caused by the crime.¹³ A corporate victim can help the prosecutor accurately determine the total "loss" by providing relevant facts and helpful insight as to the crime's impact on the corporation. The corporation likewise can assist with other determinations necessary to properly calculate the guidelines range, including whether the defendant abused a position of trust within the corporation.¹⁴

When I was a federal prosecutor, however, corporate counsel never approached me with such input. By leaving estimated guidelines calculations completely up to me, corporations were taking their chances because my perspective and factual knowledge were never identical to theirs.

Ensuring submission of a written and/or oral victim impact statement if desired:

Under the CVRA, a victim has the right to be reasonably heard at sentencing.¹⁵ Accordingly, a corporate victim may provide the court a written victim impact statement (VIS) before sentencing. Counsel should discuss with the corporation whether to do so, a decision that should turn largely on whether a written VIS would promote justice or help achieve specific corporate objectives.

If the client decides to submit a written VIS, it should explore with counsel the statement's possible tone and content. Should the VIS sound indignant rather than conciliatory? Downplay rather than emphasize the crime's effect on the corporation? Provide details regarding the crime? Counsel also can help identify a sufficiently knowledgeable and willing corporate official to execute the statement on the corporation's behalf.

A victim also can be heard by making an oral VIS at the sentencing hearing. If a corporate victim wishes to exercise this right, corporate counsel can ensure this happens by so advising the U.S. Attorney's Office or the U.S. Probation Office before sentencing.

As to what will be spoken, and how, several options exist. They range from reading aloud a previously submitted written VIS to speaking "from the heart" without notes. Each option carries its own drawbacks and advantages. Counsel can help the client make a good choice, one that balances the desire for a compelling oral VIS against the need to minimize the financial and emotional costs of preparing and delivering it. Throughout this process, counsel and the corporation should remember that this may be an excellent opportunity to address an audience (including shareholders, employees, and the general public) beyond just the sentencing court, although the corporation must avoid thereby disclosing nonpublic information it does not wish to reveal.

In sentencings I handled as a federal prosecutor, a written VIS was rare and an oral VIS rarer. This may be due largely to a general lack of understanding of the right to be heard at sentencing or an underestimation of

¹³ See U.S.S.G. § 2B1.1(b)(1) (mandating, for various white-collar crimes, a sentencing offense level calculated largely on the basis of the extent to which the "loss" exceeded \$5,000).

¹⁴ See U.S.S.G. § 3B1.3.

¹⁵ 18 U.S.C. § 3771(a)(4).

the powerful impact an oral VIS can have on the sentencing court.

Obtaining an appropriate restitution order:

In particular cases, it may be unclear whether a corporation is entitled to restitution—and, if so, in what amount and when. Among the pertinent issues here are whether the corporation qualifies as a “victim,” whether restitution is mandatory or discretionary, how restitution is calculated, and what the schedule (if any) should be for restitution payments. Questions also may arise regarding, for example, the effect of insurance coverage on any restitution order. Counsel should ascertain and then assert the client’s position as to each issue.

Regardless of the nuances in particular cases, an informed client generally will want a restitution order, and counsel can help obtain one. Counsel can urge the prosecutor to insist upon restitution in a plea agreement and at sentencing. Counsel likewise can advocate for a particular figure or manner of calculating restitution. Also, counsel can provide to the prosecutor crucial factual information to support the desired restitution order. Moreover, if necessary, counsel can speak at sentencing on the issue of restitution.

Ensuring the written judgment includes the restitution order:

The oral pronouncement of an appropriate restitution order at sentencing is a good start. However, it does a victim little good if it is not reflected—correctly—in the written final criminal judgment, and omissions and clerical errors can occur. For example, even if a restitution order is properly included in the final judgment, the amount or the name of the corporate victim could be stated incorrectly. By scrutinizing the final judgment, corporate counsel may timely catch such mistakes so that an error-free amended final judgment can be requested.

Maximizing chances of recovery on a restitution order:

Although a correct written restitution order is essential, a corporate victim is made financially whole only insofar as it is collected. White-collar counsel can greatly aid corporate clients in the collections process.

First, counsel can inform the corporation of collection options. For example, a victim can obtain from the federal court clerk an abstract of judgment, certifying that a judgment has been entered in its favor in the specified amount. This document then can be recorded consistent with applicable state law, thereby operating

as a lien on the defendant’s property in that state just like a state court judgment.¹⁶

The corporation also should understand the federal government’s role in enforcing restitution orders for victims through the Financial Litigation Unit (FLU) of the respective U.S. Attorney’s Offices. This role complements or may even overshadow the victim’s role, depending on the victim’s ability and inclination to undertake its own collection efforts.¹⁷

The federal government is authorized to enforce restitution orders,¹⁸ and the various U.S. attorneys are responsible for collecting restitution orders.¹⁹ It is the Justice Department’s policy to try diligently to collect restitution on behalf of victims.²⁰ The federal government has numerous specific collection options,²¹ which counsel should explain to the corporate client.

Counsel also can discuss enforcement with the prosecutor or FLU attorneys, urging the government to do its part in collecting restitution. Further, counsel can assist the FLU’s enforcement efforts by providing additional relevant information regarding the defendant’s assets.

Finally, if the government has obtained assets of the defendant pursuant to a forfeiture order, counsel can seek to have those assets transferred to the corporate victim. Depending on the particular case, there are multiple ways to seek assets the government has obtained by forfeiture, including filing with the Justice Department what is known as a petition for remission or mitigation of forfeiture.²² Whether assets actually have been forfeited is a question counsel should raise intermittently with the FLU; if so, whether to seek such assets is a question counsel should raise with the corporate client.

Conclusion

Corporate victim advocacy is too often a neglected aspect of both white-collar criminal procedure and representation of corporate clientele. By assertively advocating on behalf of victimized corporate clients, white-collar counsel can accomplish much for them. Doing so successfully, and cost-effectively, is something of an art form, one that requires knowledge, experience, and judgment. But when counsel do practice this art and practice it well, they and their corporate clients will be glad they did.

¹⁶ 18 U.S.C. § 3664(m)(1)(B).

¹⁷ U.S. ATTORNEY’S MANUAL, § 3-12.600.

¹⁸ 18 U.S.C. § 3664(m)(1)(A).

¹⁹ U.S. ATTORNEY’S MANUAL, §§ 3-12.100 and 3-12.200.

²⁰ Id. § 3-12.600.

²¹ Id.

²² See 28 CFR Part 9; 28 CFR § 9.8; U.S. ATTORNEY’S MANUAL, § 9-121.100.