

Enforcement Actions: The Current Landscape - Tougher, Faster, Smarter

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Tone at the Top: A Tougher Enforcement Approach



Mary Jo White
Chair of SEC
(2013-Present)



Andrew Ceresney
ENF Director
(2013-Present)

- Specialized Units –now entrenched
- More Former Criminal Prosecutors in Leadership Positions (Regional Directors include: SF, Boston, Chicago, Salt Lake, Ft. Worth, Miami) = SEC looking more like DOJ
 - E.g., Cooperation Program; FBI agents now embedded in SEC's Office of Market Intelligence
- Issuer Reporting and Disclosure cases receiving greater attention

Increase in Enforcement Actions and Penalties

SEC ACTIVITY	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
Total Enforcement Actions Filed (Total “Stats”)	664	677	735	734	686	755	807
Total “Independent” Enforcement Actions Filed	—	—	—	—	—	413	507
Penalties and Disgorgement Ordered (in billions)	\$2.43	\$3.85	\$2.81	\$3.10	\$3.42	\$4.16	\$4.02

Current Landscape & Hot Topics

- Administrative proceedings vs. federal civil actions
- Update on Financial Reporting and Audit Task Force and increased enforcement relating to financial fraud and disclosure cases
 - New weapons
- 1st admissions case against large audit firm
- 1st major case focusing on ICFR as a standalone action
- Focus on holding individuals accountable
 - Clawbacks of CEO and CFO compensation
- Cybersecurity –1st SEC case against investment adviser
 - Are SEC cases against issuers next?
- Whistleblower Update: Retaliation and “Pretaliation”
 - Review your confidentiality agreements now
- FCPA
- Insider Trading

How Cases Get Started

- News Articles
- Self-Reporting
- Restatements
- PCAOB
- Other SEC Divisions
- Auditors
 - Change in Auditors – Form 8-K
 - Section 10A Reports
- Class Action Lawsuits
- Informants/Tips
- Sweeps or “Voluntary” Inquiry Letters
- Internal SEC Analysis and Analytics

Increasing Use of Administrative Proceedings

- Dodd-Frank: SEC may seek penalties against non-registered entities (issuers, individuals) in an administrative proceeding
- No right to jury—All proceedings are before an Administrative Law Judge employed by the SEC
- ALJ must render initial decision within 300 days of SEC instituting proceedings (bringing action)
- Very limited discovery
- Not governed by rules of evidence

Increasing Use of Administrative Proceedings

- Numerous federal lawsuits initiated by defendants in SEC administrative proceedings asking federal court to enjoin SEC proceedings as unconstitutional
 - Only a few successful, but pressure on SEC to reform
- May 8, 2015: SEC Issued “Approach” to forum selection in contested cases, but didn’t address fundamental shortcomings
- July 2015: Chamber of Commerce publishes critique of SEC enforcement practices, criticizing the lack of due process protections in SEC administrative proceedings
- Sept. 24, 2015: to address growing criticism, SEC proposes rules changes, including allowing limited discovery and extending the time for a hearing to occur in certain cases
- October 2015: U.S. House of Rep. bill: “Due Process Restoration Act of 2015”

They're Back on the Rise: Accounting and Disclosure Cases

- Between 2003-2005, accounting and disclosure cases accounted for 25% of enforcement actions; 2013 accounted for only 11%
- Renewed Focus Began in 2013 & Continues
 - July 2, 2013: Creation of “Financial Reporting and Audit Task Force” --*now the FRAud Group* – and is a permanent group
 - 2014: 135 Issuer & auditor cases up from 68 in FY 2013; 128 parties charged
 - 2015: 134 Issuer & auditor cases (unofficial count); 191 parties charged
- The importance of aggressively pursuing financial reporting deficiencies cannot be overstated. Comprehensive, accurate, and reliable financial reporting is the bedrock upon which our markets are based.”
– Andrew Ceresney, Director of Enforcement, Jan 25, 2016

The Financial Reporting and Audit Task Force

Announced by SEC on July 2, 2013:

- * **Mission and purpose:** to identify and prosecute securities law violations related to financial reporting and audit failures.

“Often, when you get a group of smart people in a room focused on a problem, you can find the answer. Kind of reminds me of that scene in Apollo 13 where they bring all of the disparate tools available on the space capsule into a room, dump it on to a table in front of a bunch of smart people, and say find a way to fix the problem. And so we created the **Financial Reporting and Audit Task Force** – what we like to call the **Fraud Task Force**. This is our **Apollo 13 moment**.”

—Andrew Ceresney, *Director of Enforcement*, Sep. 19, 2013

New SEC Enforcement Detection Tool: Big Data

- “Our Financial Reporting and Audit Task Force is using technology in a number of ways. It is working closely with the Division of Economic and Risk Analysis...to refine a tool they developed that compiles public company filing data, compares it with the results of other companies in the same industry and detects **anomalous results** that might call for further investigation. “
 - *Andrew Ceresney, Director of Enforcement, November 21, 2014*
- Accounting Quality Model
 - Analyzes financial statements for factors indicating or inducing earnings management
 - Includes textual analysis of MD&A—looks at the words, not just the numbers
 - Compares with peer-level metrics



New SEC Enforcement Detection Tool: Big Data

- 1st generation tool: Accounting Quality Model (AQM)
 - Isolate discretionary accruals and identify outliers to peers
 - Statements are processed and assigned a risk score by AQM within 24 hours of filing with the SEC.
 - Sample risk-indication factors
 - Choice of accounting policy
 - Interactions with/replacement of independent auditors
 - Sample risk-inducement factors
 - Loss of market share
 - Lower profitability
 - 9/10/14 SEC press release about the late Form 4 filer sweep: “Using quantitative analytics, we identified individuals and companies with especially high rates of filing deficiencies.....”

New SEC Enforcement Detection Tool: Big Data

- 2nd generation tool: Corporate Issuer Risk Assessment program (CIRA)
 - “CIRA is essentially the Accounting Quality Model on steroids”
 - SEC Director of the Division of Economic and Risk Analysis, June 2015
 - CIRA dashboard contains over 100 custom metrics to compare firms and look for anomalies
 - AQM now incorporated in CIRA
 - CIRA enables SEC staff to look, for example, at how inventory at a manufacturing company is moving relative to reported sales
 - SEC staff who saw increased inventory and declining sales may flag the company as ripe for fraudulent accounting adjustments
 - Data comes from XBRL filings and commercial databases

Financial Reporting Hot Buttons

- Improper Revenue and Expense Recognition
- Internal Controls
- Valuation and impairment
- Goodwill write-downs
- Disclosure
- Disclosure of Executive Perks in Proxy
- Audits/Role of Outside Auditor
- Role of Audit Committee
- Earnings Management

Increased Emphasis on Issuer Compliance and Controls

- Cases brought which indicate that
 - Issues were not discovered
 - Issues were not escalated
 - Management ignored information or recommendations from the compliance staff
 - Internal controls or accounting resources were insufficient for size of company's risk
 - Accounting personnel not sufficiently knowledgeable
 - Management leaves impression that issues not important

Increased Emphasis on Issuer Compliance and Controls

- Magnum Hunter Resources Corporation – Action brought March 10, 2016
 - Failures by company and its management to properly implement, maintain, and evaluate internal control over financial reporting for FYE 12/31/11 and to maintain ICFR sufficient to keep pace with the company's growth from 12/31/11 through quarter ended 9/30/13
 - Charges brought against the company, former CFO and CAO and two auditors
 - Emphasizes the differences between a significant deficiency and material weakness

Focus on Conduct of Individuals

- “When people fear for their own reputations, careers or pocketbooks, they tend to stay in line”
 - Sec.gov - Deploying the Full Enforcement Arsenal – Speech by Chair Mary Jo White at Council of Institutional Investors fall conference in Chicago, IL on 9/26/13
- According to Andrew Ceresney – The SEC “must ensure” that individuals “feel the pain of our remedies”
 - WSJ.com - SEC Ramps Up Fine Amounts to Deter Misconduct – 10/1/13
- DOJ Memo Sept. 9, 2015 (the “Yates Memo”): DOJ emphasizing prosecuting individuals in corporate financial fraud cases
 - To gain *any* cooperation credit, corporations must provide DOJ with relevant facts about the individuals involved in corporate misconduct

Individual Targets – Not Just CEO and CFO

- Outside Directors
- General Counsel
- Treasurer
- Mid-level Managers (e.g. Saba Software, Sept. 2014)
- Outside Auditors
- For regulated entities, CCOs
- Gatekeepers: “I am also strongly interested in seeking greater individual accountability for gatekeepers, including executives, compliance officers, accountants, and attorneys. “
 - *SEC Commissioner Kara Stein, February 21, 2014*

Clawbacks of CEO and CFO Incentive-Based Compensation When Restatement Required

- SOX Section 304
- SEC's aggressive posture: In 2014, Saba Software CEO required to return over \$2.5 million in incentive compensation, and former CFOs required to pay back approx. \$50,000, **even though none were charged or implicated in Saba's wrongdoing** (Sept. 24, 2014)
 - Also: Saba had not yet done a restatement, but SEC took position that the company was “required” to file restatement, which is all section 304 requires
- Dodd-Frank rules to come – much broader



Recent Revenue Recognition Cases

- Computer Sciences Corp. (“CSC”) (June 5, 2015)
 - SEC charged company and five execs with accounting fraud
 - After company learned it would lose money on a large contract, the CEO and others changed CSC’s accounting models to generate artificial profits to mask the loss and avoid reporting a large hit to earnings
 - The company also improperly used “cookie jar” reserves and other illegal accounting maneuvers in several of its foreign subsidiaries to enable CSC to hit estimates
 - CEO and CFO settled by paying significant penalties and returning over \$4 million in incentive compensation under the SOX 304 clawback
 - CSC paid a \$190 million penalty and agreed to retain a consultant to examine its compliance programs and report to SEC

Recent Revenue Recognition Cases

- OCZ Technology Group (Oct. 6, 2015)
 - SEC charged the now-bankrupt seller of computer memory storage with inflating OCZ's revenues and gross margins through "channel stuffing," intentional misclassification of expenses, and other gimmicks
 - The CEO charged with fraud, and the SEC is seeking clawback of stock sale profits and bonus
 - The CFO also charged with fraud, and settled by paying disgorgement and agreeing to an officer and director bar

Recent Case Involving Purchase Accounting

- CVS Caremark Corp.
 - Filed April 2014
 - *SEC alleged that CVS made improper accounting adjustments by altering the accounting treatment for its acquisition of Longs*
 - Improperly reduced value of \$189 million of personal property in Longs stores to \$0
 - Reversed \$49 million depreciation that had been taken on those assets, which increased earnings and enabled CVS to meet analysts' expectations
 - According to retail controller's email, this change in accounting turned Longs from a "bad guy" to a "good guy" for CVS's profitability
 - Retail controller settled for \$75,000 and one-year Rule 102(e) suspension
 - CVS settled for \$20 million.

Recent Earnings Management Case

- Bankrate, Inc. (Sept. 8, 2015)
 - SEC charged CFO, Director of Accounting, & VP of Finance of internet-based consumer banking network with intentionally manipulating financial results to meet analyst estimates for **one quarter in 2012**
 - The CFO directed various company divisions to book nonexistent revenue and make unsupported reductions to certain marketing expense accruals, with the knowledge of the VP of Finance and CAO.
 - Bankrate paid a \$15 million penalty, and the VP of Finance paid a \$150,000 penalty and agreed to a 5 year O & D bar.
 - The CFO and CAO are litigating

Disclosure Fraud Cases

- Proxy Disclosure of Executive Perks
 - MusclePharm (September 8, 2015)
 - The SEC settled charges against 3 execs, former audit committee chair, and company for failure to disclose nearly \$500,000 in perks, including company payments for cars, private jet service, clothing and golf club memberships
 - Company also charged with other accounting disclosure violations
 - Polycom (March 31, 2015)
 - In March 2015, the SEC charged former CEO of Polycom, Inc with fraud for a scheme in which he submitted false expense reimbursements to obtain nearly \$200,000 in undisclosed perks, including luxury vacations, expensive dinners, and similar items. Case is in litigation
 - Company settled and paid \$750k for having inadequate controls to catch the scheme and for filing false proxy statements that understated the perks

Disclosure Fraud Cases

- Assisted Living Concepts (Dec. 3, 2014)
 - SEC charged former CEO and CFO of Assisted Living Concepts, a large provider of senior living residences, with fraud for allegedly falsifying resident counts to its landlord to avoid a lease covenant default.
 - The SEC claimed that the company's SEC filings were misleading because it falsely reported that it was in compliance with the lease covenants, when, absent the CEO and CFO's falsified counts, it was not.
 - Note that the company never falsely reported revenue –the sole fraud involved the false certification that it was in compliance with the lease.
 - In January 2015, the CFO settled, agreeing to permanent O & D and 102(e) bars.
 - The case against the CEO is being tried in an SEC administrative court.

Increased Emphasis on Issuer Compliance and Controls

- 3 Recent Internal Controls Cases (all settled)
 - The St. Joe Company (Oct. 27, 2015): \$2.75M penalty
 - Improper accounting for declining value of real estate developments and inadequate controls
 - Home Loan Servicing Solutions (Oct. 5, 2015): \$1.5M penalty
 - Misstatements about the handling of related party transactions and the value of its primary asset and had inadequate accounting controls
 - Failure to properly document credit committee approvals and to follow its disclosed valuation method
 - Stein Mart, Inc. (Sept. 22, 2015): 800,000 penalty
 - Discount retailer had allegedly inadequate controls over inventory resulted in materially overstated pre-tax income
 - Decisions about characterizations of mark-downs done by personnel with inadequate understanding of valuation acting

Gatekeeper Cases Against Outside Directors

- AgFeed Industries – March 11, 2014
 - Company and executives charged with fraud for creation of fake invoices, including fake hogs.
 - AND: Chair of Audit Committee charged for failing to investigate red flags brought to his attention
- L& L Energy – March 27, 2014
 - Audit Committee chair charged with signing an annual report containing a false SOX certification after being informed that company misrepresented who ran business
- MusclePharm Corp – September 8, 2015
 - Audit Committee Chair charged with failures to disclose and signing materially false statements regarding executive compensation

First Admissions of Wrongdoing Case Against Audit Firms

- BDO USA (Sept. 9, 2015)
 - As part of a larger financial fraud case filing against General Employment Services, Inc. (“GEE”), the SEC charged audit firm BDO USA and five of its partners, including national office partners
 - After the auditors saw red flags suggesting that a mysterious \$2.3 million bank CD on GEE’s books may not have existed. After first demanding an internal investigation, the auditors backed off and dropped the matter, issuing a clean audit opinion
 - The CD was later shown to be part of a criminal financial scheme
 - BDO paid a \$1.5 million penalty, admitted wrongdoing, and agreed to specific remedial measures including an outside evaluation of its audit and interim review quality controls

First Admissions of Wrongdoing Case Against Audit Firms

- Grant Thornton (Dec. 2, 2015)
 - Grant Thornton and two partners charged for ignoring red flags concerning alleged frauds at two audit clients, Assisted Living Concepts and Broadwind Energy
 - Same audit partner on both engagements despite receiving numerous warnings of quality issues of the partner; did not compensate for those weaknesses
 - Grant Thornton admitted wrongdoing and agreed to forfeit approximately \$1.5 million in audit fees and interest plus pay a \$3 million penalty
 - Grant Thornton is required to review and issue a report on its quality controls, including its policies and procedures for audits and interim reviews regarding the following, and have the report reviewed by an independent consultant

Cybersecurity

- 3/26/14: SEC hosted Cybersecurity Roundtable
 - “The SEC’s formal jurisdiction over cybersecurity is directly focused on the integrity of our market systems, customer data protection, and disclosure of material information.”
 - *SEC Chair White, March 26, 2014 Cybersecurity Roundtable*
- April 2015: SEC Division of Investment Management published guidance for investment companies and investment advisors to address cybersecurity threats
- 4/29/15: DOJ Cybersecurity Unit released best practice guidelines for handling data breaches
- 6/29/15 Speech by SEC Commissioner Luis Aguilar:
 - SEC “proactively examining how it can bring more cybersecurity enforcement actions”
 - Suggested need for further SEC guidance

Cybersecurity (cont.)

- R.T. Jones Capital Equities Management (Sept. 22, 2015)
 - 1st SEC cybersecurity enforcement case
 - SEC found that Investment Adviser R.T. Jones failed to establish required cyber policies and procedures under Regulation S-P in advance of a breach that exposed PII of approx. 100,0000 individuals
 - \$75,000 penalty
- No SEC Enf. Cases against issuers yet, but investigations ongoing
 - Press reports that SEC ENF currently pursuing investigations following cyber breaches by several issuers
 - Closed the investigation into Target
 - Today's breach victim quickly becomes tomorrow's SEC enforcement target

Cybersecurity (cont.)

- SEC is focused on several issues for public companies
 - Internal controls to prevent breaches and protect the integrity of the financial reporting process
 - Disclosure in periodic filings of risks to the issuer's business of a breach, and what controls exist to prevent
 - Disclosure of threats and incidents
 - *Question is when and how to disclose*
 - *Materiality*
- What you should do now:
 - Board of Directors must proactively oversee cyber policies and procedures.
 - Create (or update) rapid response team to deal with breaches. Include expert in SEC disclosure and dealing with SEC enforcement inquiries.
 - Internal investigation protected by attorney-client privilege

SEC Whistleblower Program

– courtesy of sec.gov



The banner features the SEC logo on the left, which is a circular seal with an eagle and the text "U.S. SECURITIES AND EXCHANGE COMMISSION" and "MCMXXXIV". To the right of the logo, the text "U.S. Securities and Exchange Commission" is displayed. Below this, a navigation bar contains the links: ABOUT, DIVISIONS, ENFORCEMENT, REGULATION, and EDUCATION.



The image shows a silver whistle with the SEC logo on its side. Above the whistle, there are three small square buttons labeled 1, 2, and 3, with button 2 being the active one.

Whistleblower Information
Submit a tip, learn about the program, or claim an award

Dodd-Frank Act – Whistleblower Bounty Provision Rules

- Person who voluntarily provides SEC with original information that leads to successful enforcement action resulting in sanctions greater than \$1 million may be entitled to 10 – 30% of the funds recovered
- Effective Date – August 12, 2011
- Covers tips provided to SEC from July 21, 2010 to present
- Office of Whistleblower established
 - Sean McKessy hired February 27, 2011
 - Supported by many staff
 - Required to report on activity
 - Subject to Inspector General (“IG”) oversight – Evaluation report filed January 18, 2013

Dodd-Frank Whistleblower Rules

- Persons who may qualify as a “Whistleblower”
 - Employees, consultants, agents, vendors, competitors, customers, etc.
 - Excluded persons: Entities, govt. employees, person knowingly making false statement or convicted of crime related to the action
 - MAY include, if certain conditions met: Attorneys, auditors, internal compliance staff, officers/directors who learn through compliance
 - *If report to audit committee, chief legal officer or chief compliance officer and 120 days lapse*
 - *Entity impeding investigation*
 - *Necessary to prevent substantial injury to investors*

Current Environment for SEC Whistleblowers

- Awards issued to date
 - First award in September 2012 of \$50,000 – recently received an additional \$150,000 and may grow larger
 - Largest award – Sept. 22, 2014: \$30 MILLION.
 - Continued awards – including reward to compliance officer
- General profile of whistleblower award recipient.
 - Over 40% were current or former employees; 20% were contractors or consultants
 - 80% of the current or former employees raised issue internally before reporting to SEC
- As of November 5, 2015, the Office of Whistleblower has issued over 800 Notices of Covered Action
- Decisions regarding Award decisions now being publicized; not all who report will qualify for an Award – and may not be the maximum

First SEC Retaliation Case

- SEC Rule 21F-17(a) Prohibits Employers From Doing Anything that Impedes or Discourages WB From Going to the Government, Specifically **Including “enforcing, or threatening to enforce, a confidentiality agreement....”**
- June 2014: SEC brought first retaliation case against Paradigm Capital Management
 - SEC alleged that, among other things, employer marginalized whistleblower by modifying responsibilities following report of wrongdoing
 - 4/28/15: SEC awarded \$600,000 – the maximum payment of 30% of amounts collected as penalties to the employee WB

SEC Enf. Action Against KBR Alleges Confidentiality Agreement Had Potential to Dissuade Whistleblower Reporting

- April 2015: SEC charged KBR, Inc. with violating whistleblower rules because it required witnesses to sign confidentiality agreements which warned that a witness could face discipline if he/she discussed the matters with third parties without prior approval
 - KBR paid a \$130,000 penalty
 - No evidence that any witness was ever in fact dissuaded from going to SEC –only the potential.
 - Upshot: every public company needs to examine confidentiality agreements with its employees with the assistance of counsel and redraft if the agreements can be read to dissuade or chill employees from becoming a whistleblower
 - Consider putting in agreements specific statement like: “nothing in this agreement prohibits any person from reporting concerns to the SEC or other governmental agency”
 - Be particularly sensitive to these issues when negotiating a severance agreement with employee who is, or you have reason to believe, might be a WB.

Whistleblowers Get Their Own Chapter in FCPA Guidance



chapter 8 Whistleblower Provisions and Protections

A Resource Guide to the U.S. Foreign Corrupt Practices Act

By the Criminal Division of the U.S. Department of Justice and
the Enforcement Division of the U.S. Securities and Exchange Commission

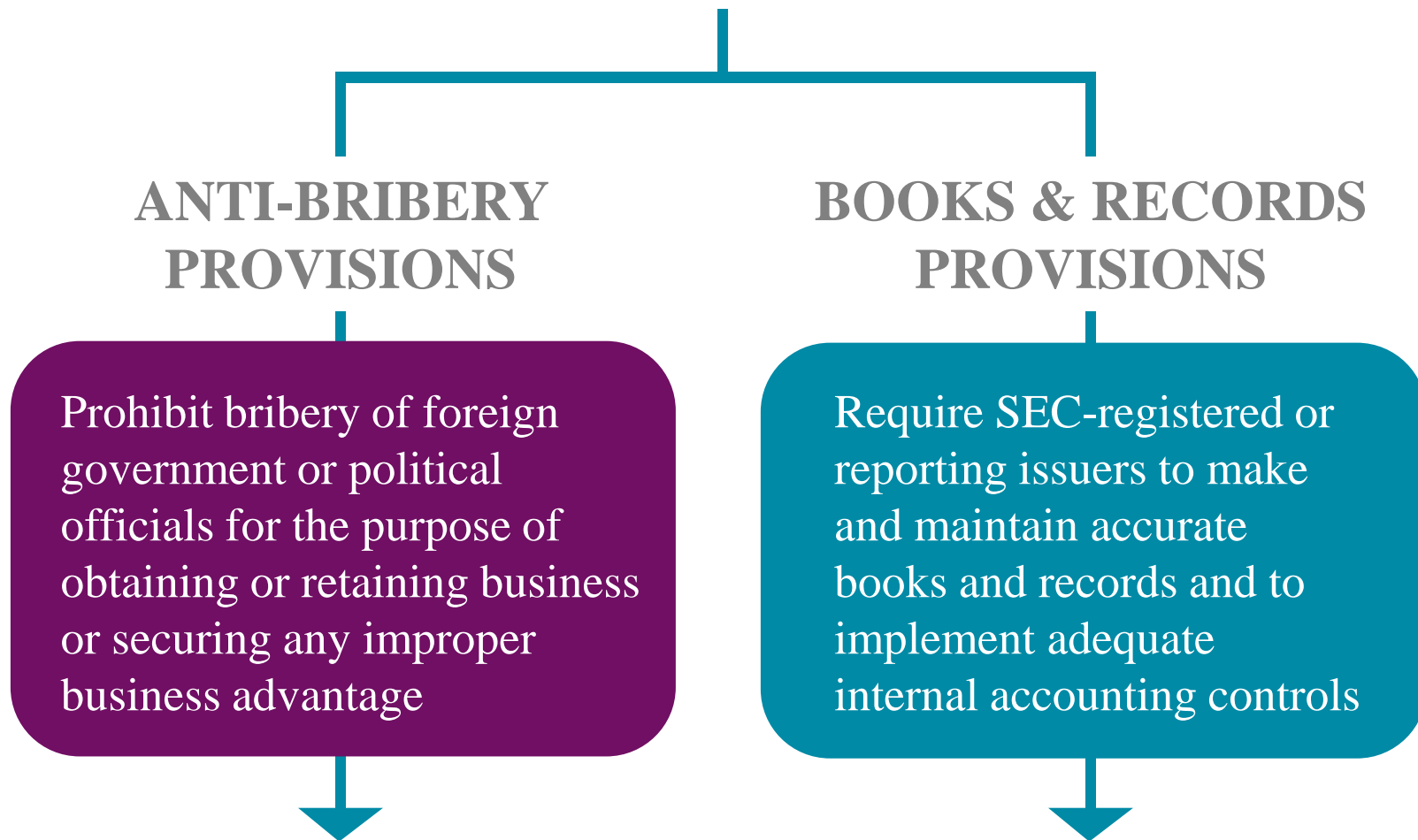
WHISTLEBLOWER PROVISIONS AND PROTECTIONS

Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal. Through their knowledge of the circumstances and individuals involved, whistleblowers can help SEC and DOJ identify potential violations much earlier than might otherwise have been possible, thus allowing SEC and DOJ to minimize the harm to investors, better preserve the integrity of the U.S. capital markets, and more swiftly hold accountable those responsible for unlawful conduct.

FCPA

- The Foreign Corrupt Practices Act is a US federal law enacted in 1977 to prohibit companies from paying bribes to foreign government officials and political figures for the purpose of obtaining or retaining business.
- Enforcement of the regulation has increased dramatically in the past three years – focusing on:
 - The antibribery provisions and
 - The book and records and internal control provisions

U.S. Foreign Corrupt Practices Act



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 payments, promises to pay, and authorizations of payments prohibited
 - “Anything of Value”: Includes cash, travel expenses, charitable donations, gifts, tickets, etc.
 - Improper Benefit: Includes obtaining/retaining business or securing an improper advantage
 - Indirect action: Making indirect payments gifts or contributions via third parties or agents is prohibited

“Foreign Official”

- “Foreign Officials” include:
 - Relatives of government officials
 - Business partners of government officials
 - Officers and employees of government-controlled entities
 - All those who act on behalf of or in the interest of government official
 - Relatives of government officials
 - Business partners of government officials
- FCPA Resource Guide
 - Focus on government “instrumentalities” (state-owned/controlled entities)
 - Whether a particular foreign entity constitutes an “instrumentality” under the FCPA requires a fact-specific analysis of the entity’s ownership, control, status, and function

Potential FCPA Fines and Penalties

Business Organizations

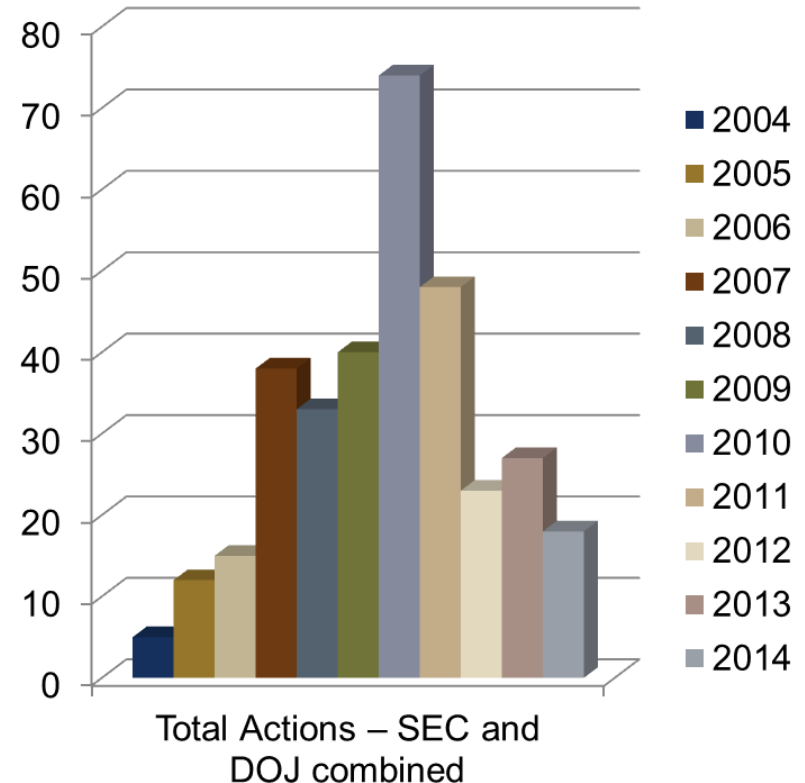
- US\$25 million criminal fine per violation (books & records and internal control violations)
- Up to US\$2 million criminal fine per violation (anti-bribery violations)
- US\$10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d) (twice the gain or loss)

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)

FCPA

- Increased emphasis in recent years by SEC and DOJ – aggressive DOJ tactics
- Increased interest by international regulatory counterparts
- Increased international cooperation and coordination
- Disgorgement of profits and fines can be massive
- Investigations are lengthy and expensive
- For 2015: total of 16 combined actions



Analysis of Actions Brought

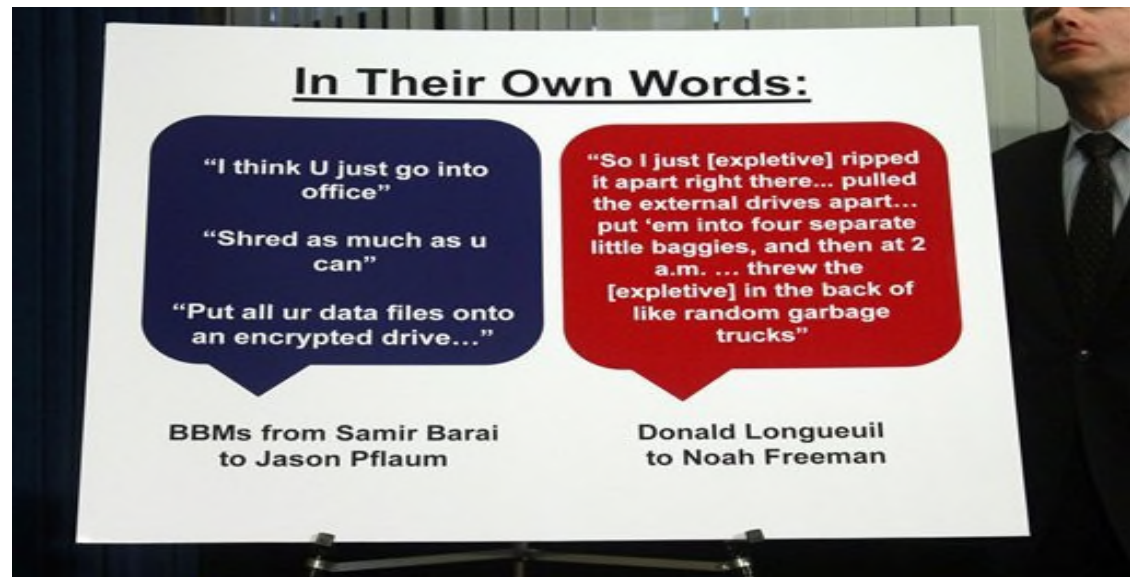
- Most DOJ and SEC FCPA enforcement actions were the result of voluntary, self-reporting by the company following investigations
- Incentive: DOJ and SEC Cooperation Programs
 - Can result in declination, non-prosecution agreement, or deferred prosecution agreements for issuer
 - 2013: SEC gives Ralph Lauren NPA
 - November 30, 2012: DOJ declines prosecution of Grifols, SA due to prompt investigation, disclosure and remedial efforts
- Govt. increasingly targeting individuals
- Over 100 companies have ongoing FCPA investigations
- Costly: Siemens spent more than \$500 million plus additional costs of the monitor; Walmart's investigation and related controls enhancements has exceeded that amount and is continuing

Insider Trading

- Continued high priority and high profile area for the SEC, despite some unfavorable court rulings
- SEC has technology to connect trading relationships across public companies and the securities industry
- DOJ is using undercover techniques – including wiretapping, turning witnesses, and executing search warrants
- Greater coordination with international regulatory enforcement counterparts and cross-border assistance
- Newman: 2nd Circuit decision in criminal insider trading case being more widely adopted. Requires government in tipping case to prove that tippee received a tangible benefit of a pecuniary nature (e.g. money), and, in the case of a remote tippee, that the remote tippee knew that the first-level tippee received such a benefit

Recent Insider Trading Actions – Who Tipped or Traded?

- Expert Networks
- Hedge Fund Managers
- Corporate Executives or Board Members
- Professionals
- Government Employees
- Friends and Family



Recent Insider Trading Actions – What Information Did They Trade On?

- Pending mergers or acquisitions
- Offers to sell
- Earnings announcements – positive or negative
- Drug testing results or FDA approval
- Other significant company events or transactions

Recent Insider Trading Actions How Much Did They Profit?

- Size of Unjust Enrichment Varies Widely – ranging from thousands to hundreds of millions
- Number of tippers/tippers/traders varies widely
- Some trades involve complex schemes
- Some trades are very simple
- Penalties can be quite severe
 - Disgorgement of profit, penalties, liability for others' trades
 - Loss of employment, professional licenses and reputation
 - Reputational damage to companies
 - SIGNIFICANT JAIL TIME

QUESTIONS?



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THANK YOU

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