Anti-Corruption

QUARTERLY

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NEWS

ISO ANTI-CORRUPTION CERTIFICATION: A BETTER WAY TO CERTIFY COMPLIANCE?

In late 2016, the International Organization for Standardization (ISO) will finalize and publish a standard to help organizations prevent, detect and address bribery. The future standard, to be known as ISO 37001, will be the first ISO standard to specifically address anti-bribery compliance programs.

ISO is an independent non-governmental organization that "develop[s] voluntary, consensus-based, market-relevant International Standards." Some of the most influential ISO standards govern processes related to manufacturing, but over the years, ISO has published over 21,000 standards covering a wide range of topics from occupational health and safety to water resource management.

ISO 37001 has been expressly developed to provide a flexible framework to address organizations' existing legal obligations under the anti-bribery laws in any country. Consistent with that intention, ISO 37001 covers all of the major requirements of both the UK Bribery Act and the Foreign Corrupt Practices Act (FCPA). In particular, the standard closely tracks the six principles outlined in the Ministry of Justice's Guidance on the UK Bribery Act and is even broader than the FCPA in that it, for example, applies to commercial bribery, not just bribery of foreign government officials.

ISO 37001 is a potentially significant development for companies not only because it provides another benchmark against which to assess their anti-bribery compliance programs, but also because it provides an opportunity to obtain certification of the sufficiency of their anti-bribery compliance programs from an independent organization. In particular, if widely accepted and adopted, ISO 37001 certification may provide companies with an independent and objective validation of their compliance programs that they can use to externally demonstrate the strength of their programs. ISO certification may, for example, be valuable in the context of third-party commercial dealings and reduce the cost and burden of individually negotiating compliance representations and warranties. ISO 37001 may also be useful in light of the government's increased focus on compliance programs, evidenced most strongly by DOJ's recent appointment of its first-ever full-time compliance expert. Whether during settlement negotiations or other interactions with DOJ or SEC, companies may be able to point to ISO 37001 as an externally validated framework for explaining the strengths of their own compliance programs.

ISO Requirements

ISO 37001 requires companies to undertake a number of steps, many of which will be familiar to those experienced in building and implementing robust anti-bribery compliance programs. The first step is to assess the company's overall structure and risk profile to inform the specific antibribery policies, procedures and controls needed. This includes an assessment of, among other things, the size and structure of the organization, the locations and industry sectors where it operates or intends to operate, the complexity of its activities and operations, its business associates, the nature and extent of its interactions with government officials, and all applicable statutory, regulatory, contractual and professional rules to which the organization is subject. Based on a consideration of those and other relevant factors, the organization must perform a risk assessment to determine which of its operations, employees, locations and business associates pose more than a low risk of bribery. Finally, as an initial matter, it must evaluate the suitability and effectiveness of the organization's existing controls.

In addition to the initial risk assessment, the organization must conduct risk assessments and due diligence at regular intervals for any planned or ongoing transactions, activities or business relationships, or "in the event of a significant change to the structure or activities of the organization."

In addition to the initial risk assessment, the organization must conduct risk assessments and due diligence at regular intervals for any planned or ongoing transactions, activities, business relationships, or "in the event of a significant change to the structure or activities of the organization." If the organization finds that certain individuals, locations or activities pose more than a low risk of bribery, the organization must mitigate that risk by implementing controls over those who have ultimate decision-making authority. The organization can require a business associate or third-party intermediary to certify that it has anti-bribery controls in place and to provide documentation demonstrating the existence of those controls, or to implement them if they have none. In the event that the organization finds that the risk of bribery is too great to mitigate feasibly, the organization must terminate the relationship, activity or personnel.

ISO 37001 requires that an organization's top leaders approve the anti-bribery policy and management system, take ownership of the system and integrate it into the organization's existing structure, and ensure that adequate and appropriate resources, both financial and human, are committed to the anti-bribery program. Moreover, top management must assign to "an antibribery compliance function" the responsibility of overseeing implementation and maintenance of the program. The compliance function may be external to the organization, but it must have direct and prompt access to the organization's governing body. ISO 37001's leadership commitment standards require a strong "tone at the top" that makes compliance a priority.

The anti-bribery policy itself must, among other things:

- Prohibit bribery
- Require compliance with all applicable anti-bribery laws
- Encourage employees to raise concerns in confidence without fear of reprisal, even if it would mean losing business
- Explain the authority and independence of the compliance function
- Explain the consequences of not complying

The policy must be communicated to all personnel and business associates who pose more than a low risk of bribery. Under ISO 37001, bribery includes direct and indirect bribery in "the public, private and not-for-profit sectors," bribery made by the organization, and bribery by personnel or business associates acting on the organization's behalf. It also applies to bribes received by the organization and the organization's personnel or business associates. Accordingly, ISO 37001 focuses on both government and commercial bribery.

Finally, in the event that non-compliance occurs, the organization must promptly take action to control the non-compliance and correct it. The organization must assess whether any action is needed to eliminate the causes of the non-compliance so that it or a similar non-compliance does not occur in the future. In addition to remediating any actual non-compliance, the organization must also continually improve its anti-bribery management system.

Assessment Process

Once a company has decided to seek certification, it must find an organization to perform the assessment, as ISO itself does not perform certification assessments. ISO 37001 is a Type A requirements standard, which means that third parties can certify that an organization meets the standard. Although third parties conduct the assessment, ISO's Committee on Conformity Assessment (CASCO) has produced a number of standards to guide the certification process. The CASCO standards cover everything from principles and requirements regarding disclosure of information collected during the assessment, to codes of good practice for certification bodies.

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Since the development of the standard was first announced, ISO 37001 has generated a lot of interest in the anti-bribery compliance community because of ISO's reputation for developing influential and effective standards. ISO 37001 has the potential to foster an international consensus on anti-bribery management principles. The standard is designed to be compliant with all anti-bribery laws, so it may help to simplify compliance programs for multinational organizations. Although it provides organizations the flexibility to adapt their anti-bribery processes and management system to the needs and circumstances of that organization, ISO 37001 establishes firm principles that are rooted in the FCPA and the UK Bribery Act. Seeking certification may help companies identify and remedy weak points in compliance programs and validate the strength of existing processes, and, if obtained, will represent an external and objective vote of confidence in an organization's anti-bribery program.

D.C. CIRCUIT STOPS THE SECOND-GUESSING OF DPAS

A recent D.C. Circuit decision limited the ability of federal judges to influence the terms of deferred prosecution agreements (DPAs) between prosecutors and defendants. The decision represents a welcome relief for companies that are worried about federal judges second-guessing DPAs, which are used to resolve many corporate FCPA cases without resulting in a conviction for the defendant corporation in exchange for the corporation agreeing to fulfill certain requirements.

In June 2014, DOJ agreed to defer charges against Fokker Services, a Dutch aerospace firm, which in mid-2010 self-reported to the Department of Commerce's Bureau of Industry and Security and the Department of the Treasury's Office of Foreign Assets Control that it had exported aircraft parts, technologies and services to customers in Iran, Sudan and Burma in violation of the International Emergency Economic Powers Act. In a plea deal, Fokker admitted that it made more than 1,100 illegal shipments from 2005 to 2010 worth US$21 million. In settling the matter, Fokker agreed to forfeit US$10.5 million and pay a civil fine of US$10.5 million. The settlement included an 18-month DPA, through which Fokker promised to enhance and report on its trade sanctions compliance.

It was in connection with the parties' motion to extend the Speedy Trial Act's deadline that the District Court for the District of Columbia reviewed the DPA. Because a DPA involves the formal initiation of criminal charges in federal court, the agreement triggers the Speedy Trial Act's time limits for the commencement of a criminal trial. In order to enable the government to assess the defendant's satisfaction of the DPA's conditions over the time period of the

agreement—with an eye towards eventual dismissal of the charges upon the defendant's fulfillment of the requirements imposed by the DPA—the Speedy Trial Act specifically allows for a court to suspend the running of the time within which to commence a trial for any period during which the government defers prosecution under a DPA.

In a February 5, 2015 decision, Judge Richard Leon denied the motion and refused to approve Fokker's DPA, reasoning that the settlement was too lenient and an inappropriate use of prosecutorial discretion.

In a February 5, 2015 decision, Judge Richard Leon denied the motion and refused to approve Fokker's DPA, reasoning that the settlement was too lenient and an inappropriate use of prosecutorial discretion. Judge Leon said that the proposed US$21 million penalty was "grossly disproportionate to the gravity of Fokker Services' conduct in a post-911 world." He further said that "it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies." Judge Leon also expressed his surprise that DOJ did not prosecute any individual corporate officers for this conduct. Finally, Judge Leon said he remained open to approving a modified plea agreement if DOJ and Fokker agreed on different terms.

Although Judge Leon was the first federal judge to refuse to put a criminal case on hold pursuant to a DPA because he thought the deal was too lenient, this was not his first foray into critically evaluating corporate settlement terms. In 2012, Judge Leon rejected a proposed US$10 million civil settlement in an FCPA case between SEC and IBM. He said IBM should be required to report all accounting violations and not just FCPA anti-bribery problems as part of the DPA. Judge Leon later approved a revised settlement in mid-2013 with an enhanced reporting requirement about IBM's compliance program. In the years since Judge Leon's IBM ruling, SEC has trended toward using its administrative process to obtain cease-and-desist orders—rather than filing suit in federal court to obtain court-ordered settlements—perhaps, in part, to avoid judicial scrutiny of the settlements.

In a unique appeal where both DOJ and Fokker sought the same outcome—approval of the DPA—the parties argued that judges have limited legal authority to review DPAs and that Judge Leon's review went beyond those limitations. On April 5, 2016, a three-judge panel for the U.S. Court of Appeals for the District of Columbia agreed, noting that courts have long held that judges cannot second-guess prosecutors' charging decisions, which involve weighing many factors, including the strength of the evidence, their agency's enforcement priorities, and the deterrence effect of these decisions.

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The D.C. Circuit emphasized "the prosecution's constitutionally rooted exercise of charging discretion" and held that the Speedy Trial Act did not allow judges to reject DPAs simply because they believe the agreements are too lenient. At the heart of the decision was the rationale that a "court's withholding of approval would amount to a substantial and unwarranted intrusion on the executive branch's fundamental prerogatives."

The D.C. Circuit's opinion clarifies the DPA process for both companies and prosecutors. Had Judge Leon's opinion been affirmed, prosecutors may have been inclined to avoid offering DPAs with more moderate terms and instead seek harsher terms out of concern for heightened judicial scrutiny when courts review the DPAs. Companies can now enter into DPAs with confidence that federal judges will not be allowed to second-guess the terms and potentially cause DPAs to be torn up entirely. Additionally, companies may see SEC bring more actions in federal courts, instead of as administrative proceedings, as the D.C. Circuit significantly reduced the uncertainty of the court approval process.

LEAKED PANAMA PAPERS PUT COMPLIANCE PROGRAMS IN THE CROSSHAIRS

In April 2016, a number of news media outlets published articles based on what they claim are stolen documents, referred to as the Panama Papers, from the Panamanian law firm Mossack Fonseca. The firm was one of the world's leading creators of shell companies, and the Panama Papers reportedly cover nearly 40 years of interactions between the firm and its clients. An anonymous source provided the documents to the German newspaper, Süddeutsche Zeitung, which collaborated with the International Consortium of Investigative Journalists (ICIJ) to compose a searchable online database of nearly 320,000 offshore entities, at least a portion of which are shell companies. In May 2016, the ICIJ released its latest round of data about the offshore companies and their beneficial owners.

Soon after the release of the Panama Papers, various U.S. federal authorities indicated they were reviewing them for evidence of violations of federal law, including the FCPA. Leslie Caldwell, head of DOJ's Criminal Division, indicated that DOJ is "reviewing the reports." Soon thereafter, the U.S. Attorney for the Southern District of New York, Preet Bharara, sent a letter to the ICIJ stating that a criminal investigation had been opened, "regarding matters to which the Panama Papers are relevant." And Kara Brockmeyer, chief of SEC's FCPA Unit, confirmed in April that SEC also would look at the publicly available ICIJ database for potential violations of the FCPA.

Nonetheless, many of the structures documented in the Panama Papers reveal that shell companies have also been used to obscure ownership, launder money and make corrupt payments.

Many of the structures documented in the Panama Papers are not unlawful. There can be legitimate reasons to use shell companies. Nonetheless, many of the structures documented in the Panama Papers reveal that shell companies have also been used to obscure ownership, launder money and make corrupt payments. With respect to the FCPA, numerous entities within the ICIJ database have been linked to at least 128 politicians or public officials, from the prime minister of Pakistan to the children of the president of Azerbaijan. Some of these links are explicit. For example, the Prime Minister of Iceland was listed as a beneficial owner of Wintris, Inc., a company that held investments in bonds of three major Icelandic banks. Others are more opaque. The Guardian, for example, claimed that numerous offshore shell companies were beneficially held by close friends and relatives of Russian President Vladimir Putin who benefited from Putin's patronage. Aside from FCPA concerns, dozens of these offshore entities have been linked to a variety of criminal enterprises, from drug cartels to terrorist organizations, giving rise to money laundering issues.

While violations of the FCPA require that the company act "knowingly" that all or part of a money transfer will be offered to a foreign official, the government may meet this requirement by showing the company was willfully blind to the high probability that money from a transaction would be offered as a bribe and took a deliberate act to avoid learning that fact. For example, if a company engages a local partner in a foreign country and that organization is beneficially owned by a shell company that provides money to a foreign official, federal prosecutors may question how much the company knew and whether it actively turned a blind eye to potential red flags, potentially implicating the FCPA.

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As exemplified by the numerous federal inquiries into the Panama Papers, any shell company found to have a link with a foreign official or criminal activity may be enough for federal prosecutors to later question whether companies with any business dealings connected to that shell company were aware of red flags and ignored them. Accordingly, the Panama Papers highlight the importance of companies conducting due diligence of their business partners and the risks they face if they do business with companies beneficially owned by or through offshore shell companies. Depending on the nature of the transaction, companies should consider a variety of measures. For example, a business might review publicly available information to identify any possible red flags, request information or representations from an organization regarding its relationship with offshore shell companies, or obtain an independent report on the nature and reputation of the organization.

Companies should use the Panama Papers as an opportunity to review their own due diligence procedures prior to engaging in transactions with an organization that is either beneficially owned by an offshore shell company or that proposes using an offshore shell company to facilitate the transaction.

It is important not only for businesses to understand the entities involved, but also to document their review should their efforts be scrutinized. Generally, due diligence policies should be designed to reveal and address any red flags. For example, if a company is concerned that an organization with which it may do business is indirectly beneficially owned by a foreign official, due diligence should review as many levels of beneficial owners as is necessary to address any potential concerns. It is also critical to document the process. If nothing in the initial reviews identifies beneficial ownership as a concern, documenting that may be helpful should the due diligence ever be questioned.

For businesses that find themselves interacting with corporations that have ties to offshore shell companies, the 2.6 terabytes of data confirm that such connections may serve as a red flag for potential liability. Companies should use the Panama Papers as an opportunity to review their own due diligence procedures prior to engaging in transactions with an organization that is either beneficially owned by an offshore shell company or that proposes using an offshore shell company to facilitate the transaction. Proper due diligence can reduce the risk that the transaction will lead to criminal penalties for the company.

IN THE INTERIM

April 5, 2016: DOJ announced a one-year pilot program to encourage companies to self report FCPA offenses and cooperate with DOJ. According to the new FCPA Enforcement Plan and Guidance (FCPA Pilot Program), companies that report early and cooperate will receive up to a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines fine range, and the appointment of monitors will not be required "if a company has, at the time of resolution, implemented an effective compliance program."

April 11, 2016: Chinese prosecutors announced the arrest of Yang Ling, the president of Chinese-based Hefei Tianxing Pharmaceutical Co., for organizational bribery. Hefei's parent company, Nanjing Pharmaceutical, said in a release that it did not receive notice prior to the arrest, but will cooperate with the government's investigation.

April 18, 2016: China's Supreme People's Court and Supreme People's Procuratorate released a joint judicial interpretation of the country's anti-bribery and corruption laws. The "Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery" (Interpretation) clarifies the recent amendments to the Criminal Law that took effect in August of last year. In particular, the Interpretation expands the definition of bribes to include certain intangible benefits and payments made after benefits are received. The Interpretation also raised the minimum bar for prosecutions for most bribery offenses from RMB 5,000 (about US$770) to RMB 30,000 (about US$4,600), unless certain other factors are involved.

April 20, 2016: Colorado-based Newmont Mining disclosed an internal investigation into the foreign business operations of the company, its affiliates, and contractors. The investigation includes a review of the company's compliance with the FCPA. In connection with the investigation, Newmont entered into a one-year statute of limitations tolling agreement with both SEC and DOJ.

IN THE INTERIM continued

April 21, 2016: Dmitrij Harder, a Russian national living in Pennsylvania and owner of Chestnut Consulting Group, pleaded guilty to two counts of violating the FCPA for bribing an official at the European Bank for Reconstruction and Development (EBRD). Harder admitted that between 2007 and 2009, he paid approximately US$3.5 million to an EBRD official to influence the official's actions on applications for EBRD financing from two of Harder's clients. Harder earned about US$8 million in "success fees" from the EBRD's approval of the two applications. Harder faces up to 10 years in prison.

April 28, 2016: DOJ has contacted several companies in connection with its FCPA investigation into Monaco-based Unaoil. FMC Technologies, a Houston-based energy and equipment services provider, reported that it received a DOJ inquiry on March 28 related to whether certain Unaoil services violated the FCPA. FMC said that it is cooperating with the inquiry and conducting its own investigation. Other companies also reported that they are cooperating with DOJ requests for information related to the Unaoil investigation.

April 29, 2016: In the decision of *Wallace v. World Bank*, the Supreme Court of Canada rejected an effort by defendants in a Canadian corruption prosecution to obtain access to the World Bank Integrity Vice-Presidency's records related to its investigation, which it had disclosed to the Royal Canadian Mounted Police (RCMP). In so doing, the Supreme Court of Canada made clear that the World Bank's privileges and immunities as an international organization prevent third parties from accessing its archives and its staff, and any implied waiver of its immunities by virtue of its sharing information with the RCMP would "have a chilling effect on collaboration with domestic law enforcement."

May 3, 2016: The New York-based hedge fund Och-Ziff Capital Management Group LLC announced that it has reserved US$200 million for a settlement of alleged FCPA violations with DOJ. According to the company, the investigation concerns an investment by a foreign sovereign wealth fund in some of Och-Ziff's funds in 2007 and investments by some of Och-Ziff's funds in a number of companies in Africa.

May 6, 2016: In an advice memorandum from the Office of the Chief Counsel, the IRS said that it did not consider a disgorgement payment to be tax deductible in an FCPA enforcement action. The IRS rejected the taxpayer's argument that the payments were compensatory, which could have allowed the company to deduct the fines in its tax returns. On the facts of the case, the IRS concluded that the primary purpose of the disgorgement payment was to punish the company rather than compensate the U.S. government for specific losses caused by the violation.

May 11, 2016: Following a five-week trial, a UK court convicted Peter Chapman, the former manager of a polymer banknote manufacturer, Securency PTY Ltd, of four counts of making corrupt payments to a foreign official. The Southwark Crown Court found that Chapman had paid bribes to an agent of Nigerian Security Printing and Minting PLC to secure orders for the purchase of reams of polymer substrate from Securency.

May 13, 2016: Vantage Drilling reopened an investigation into customs and immigrations bribes in Asia after learning that one of its agents was involved in the Brazilian Petrobras scandal. The Houston-based drill ship operator first investigated bribery allegations from 2010 to 2011 before concluding that disclosure was not warranted.

IN THE INTERIM continued

May 30, 2016: Brazil may be backtracking on its anti-corruption efforts. Acting President Michel Temer dissolved Brazil's primary anti-corruption agency, the Comptroller General, upon taking office. Brazil's Transparency Minister Fabiano Silveira also resigned on May 30 after a recording surfaced of him counseling a senator on how to avoid prosecution for corruption.

June 1, 2016: DOJ named Daniel S. Kahn chief of the FCPA Unit. Kahn had been the unit's acting chief since March, when the former chief, Patrick Stokes, was made DOJ's senior deputy chief in the Fraud Section.

June 6, 2016: DOJ said in a court filing that Indiana-based Biomet breached a 2012 deferred prosecution agreement by failing to implement and maintain an effective FCPA compliance program. In 2014, the medical device manufacturer self-reported conduct in Brazil and Mexico that constituted the breach and could lead to criminal prosecution.

June 7, 2016: Akamai and Nortek received the first publicly announced declination letters under DOJ's new FCPA Pilot Program. DOJ said that the companies' voluntary self-disclosure of illegal payments by Chinese subsidiaries and subsequent cooperation in DOJ's investigation led to its decision not to prosecute. SEC entered into non-prosecution agreements with Akamai and Nortek after the companies agreed to forfeit profits from the payments.

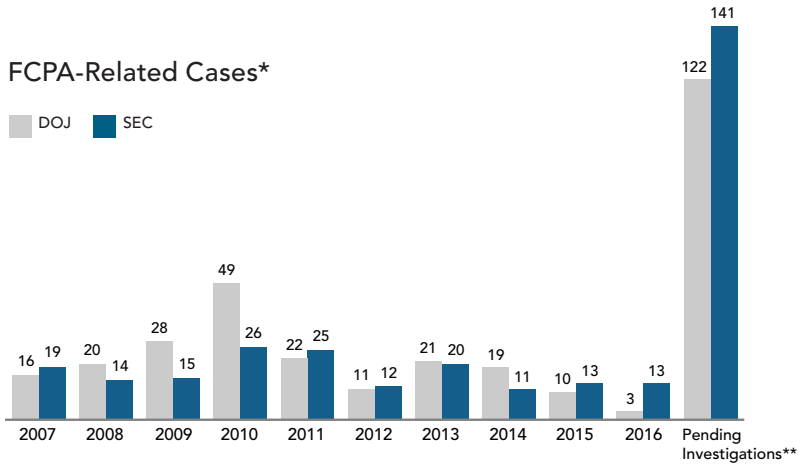
June 10, 2016: Frederico Curado, the CEO of Brazilian Embraer SA, announced that he will step down just weeks after a company consultant told Brazilian prosecutors that Curado was aware of illegal payments tied to the sale of military aircraft to the Dominican Republic. In 2014, prosecutors brought corruption and money laundering charges against eight vice presidents, directors and managers of the commercial aircraft manufacturer.

June 13, 2016: Frank's International, a Houston-based oil services company, is conducting an investigation into its West African subsidiaries for potential FCPA violations. The company voluntarily disclosed the investigation to SEC and DOJ in June and indicated it would cooperate with both agencies.

June 16, 2016: Roberto Enrique Rincon Fernandez (Rincon), the owner of multiple U.S.-based energy companies, pleaded guilty to FCPA charges arising from a scheme to secure contracts from Venezuela's state-owned oil and natural gas company, Petroleos de Venezuela S.A. (PDVSA). Rincon admitted that he paid bribes to PDVSA purchasing analysts to ensure that his companies were included on bidding panels. Rincon is the sixth individual to plead guilty as part of DOJ's ongoing investigation into bribery at PDVSA.

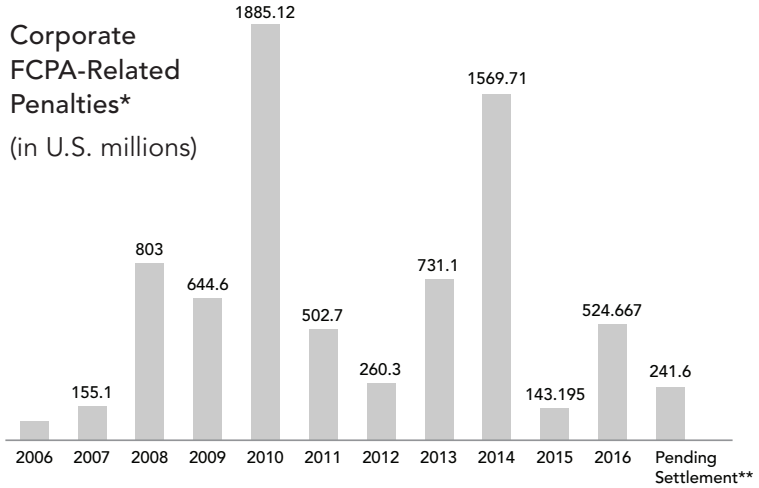
June 21, 2016: Analogic Corporation, a Massachusetts-based medical technology company, and its Danish subsidiary, BK Medical ApS, settled FCPA violations with DOJ and SEC. The SEC investigation found that BK Medical funneled close to US$20 million to third parties in Russia and several other countries. Analogic agreed to pay US$7.7 million in disgorgement and US$3.8 million in prejudgment interest to SEC, and BK Medical paid US$3.5 million to secure a non-prosecution agreement from DOJ.

FCPA GOVERNMENT INVESTIGATIONS AND CORPORATE SETTLEMENTS



* New criminal or civil cases (settled or contested) instituted by year

** Based upon public disclosures of investigations



* Includes disgorgement; does not include non-U.S. fines

** Includes publicly disclosed reserves for future FCPA settlements

THE FCPA/ANTI-CORRUPTION PRACTICE OF SIDLEY AUSTIN LLP

Our FCPA/Anti-Corruption practice, which involves over 90 of our lawyers, includes creating and implementing compliance programs for clients, counseling clients on compliance issues that arise from international sales and marketing activities, conducting internal investigations in more than 90 countries and defending clients in the course of SEC and DOJ proceedings. Our clients in this area include Fortune 100 and 500 companies in the pharmaceutical, healthcare, defense, aerospace, energy, transportation, advertising, telecommunications, insurance, food products and manufacturing industries, leading investment banks and other financial institutions.

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