



The Compliance Firm™ | Turning Compliance into a Competitive Advantage™

FCPA Enforcement Trends

| Create | Improve | Monitor | Integrate | Train | Audit | Investigate | Educate

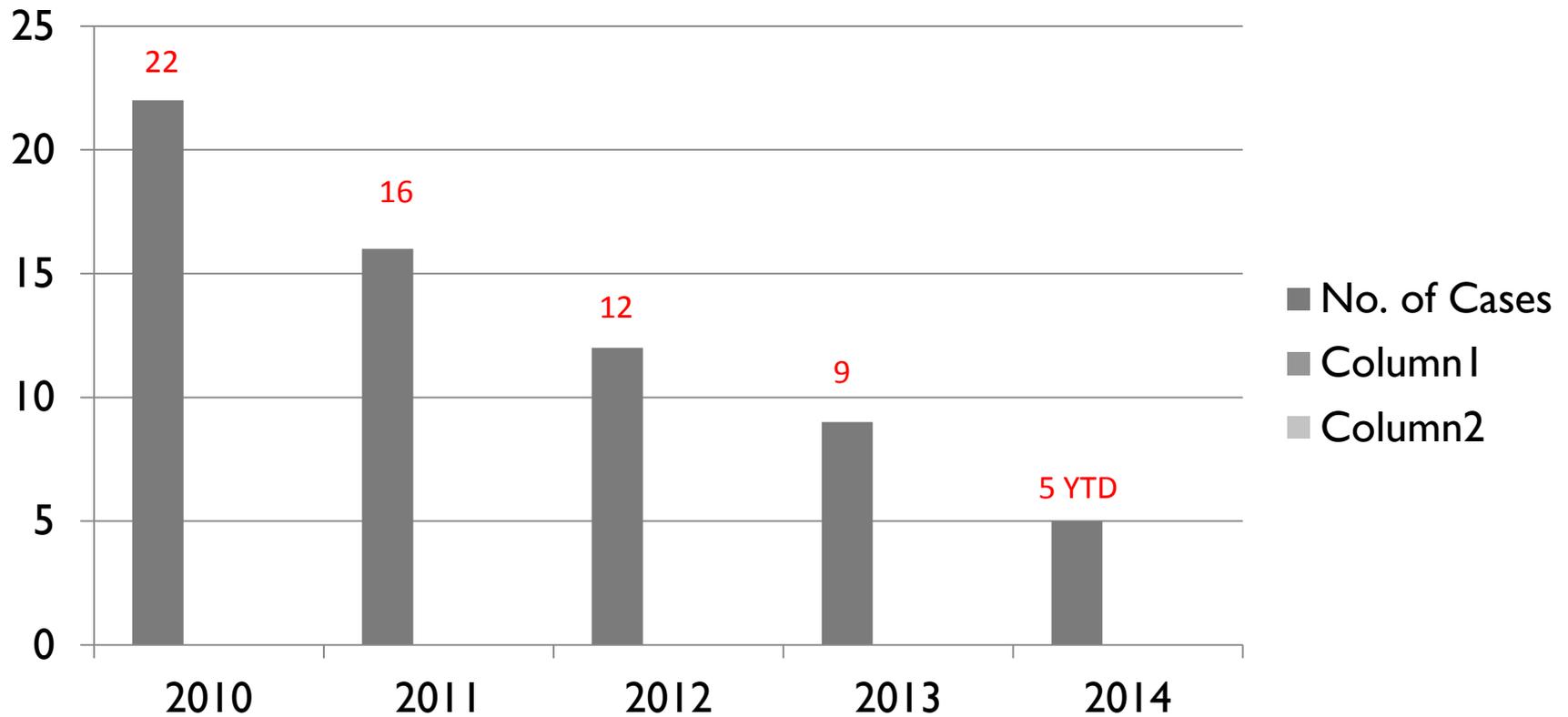
FCPA Enforcement Trends in 2014

- Fewer cases, higher returns
- Focus on prosecution of individuals
- Leniency for cooperation and remediation
- Parent liability
- Interpretation of two key FCPA elements
- Noteworthy activity outside the United States
- DOJ remarks on cooperation and compliance programs

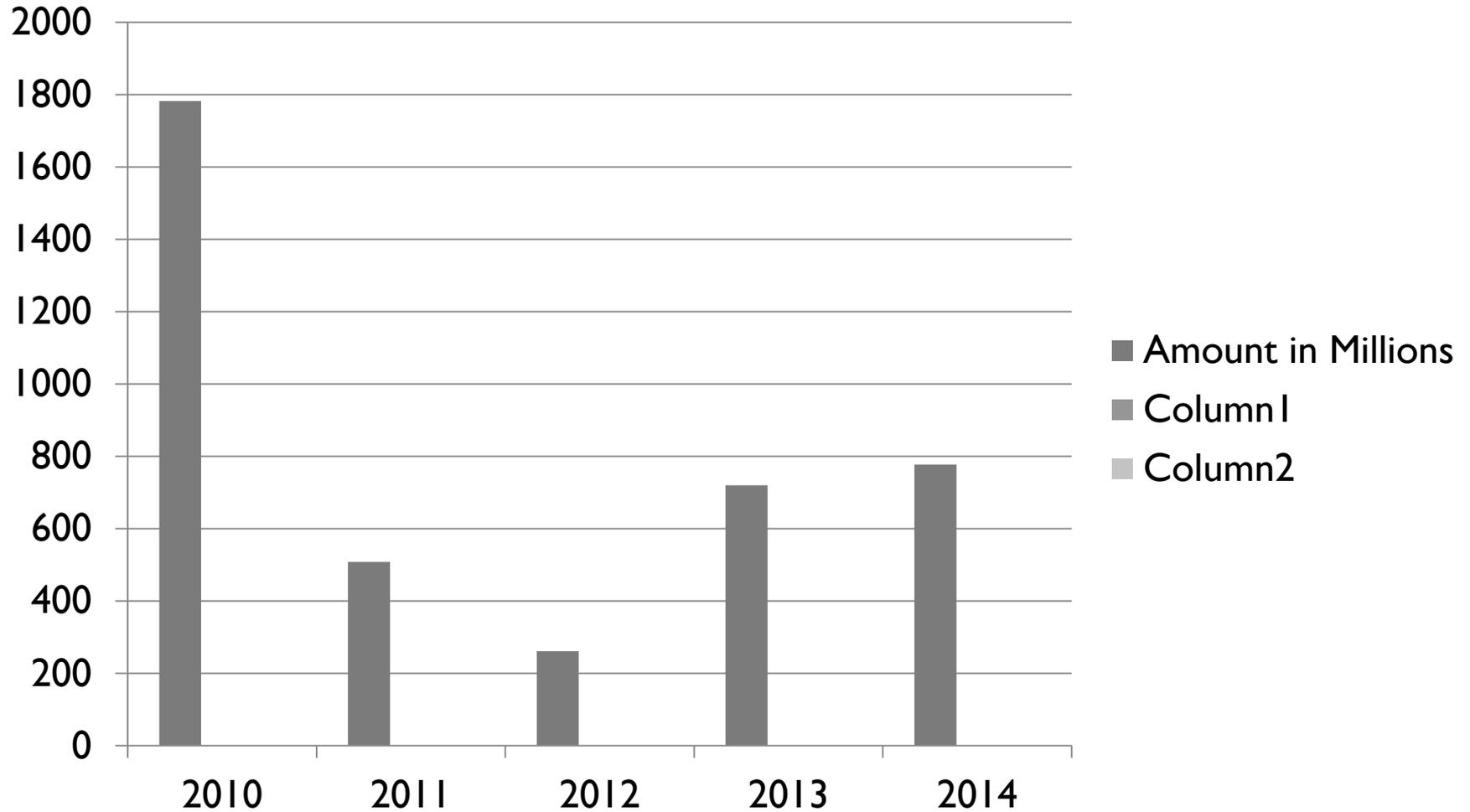


Fewer cases
Higher returns

Fewer Cases: Higher Stakes



Corporate Civil and Criminal Fines



The story of Billy Hayes' unbelievable courage...
It couldn't happen...but it did!



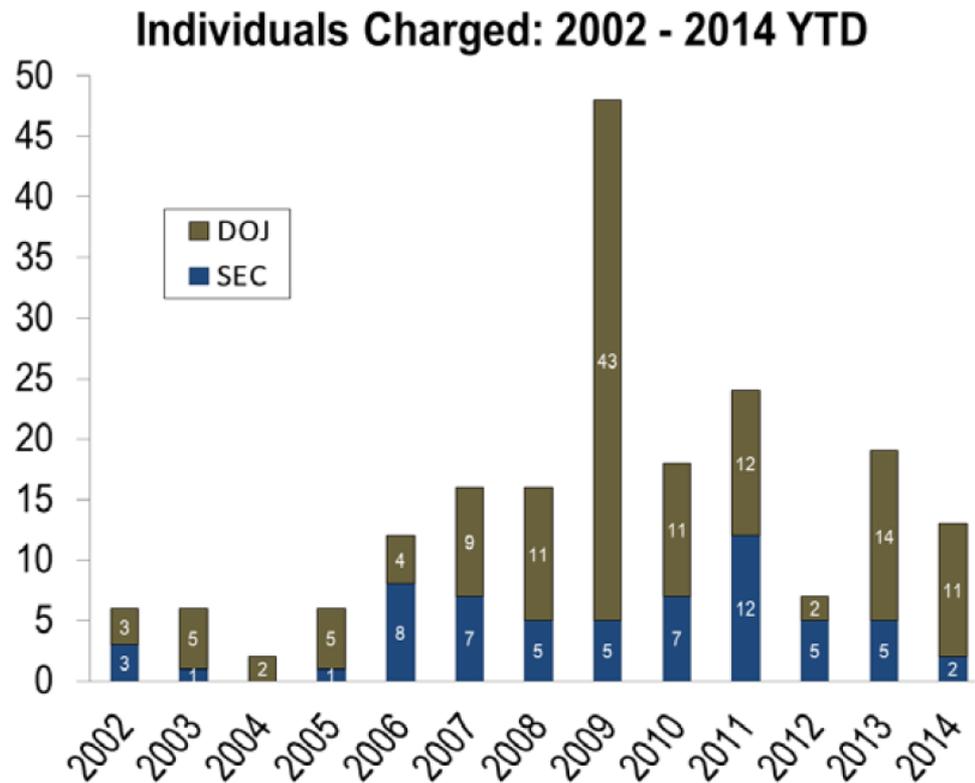
A STORY OF TRIUMPH

Midnight Express

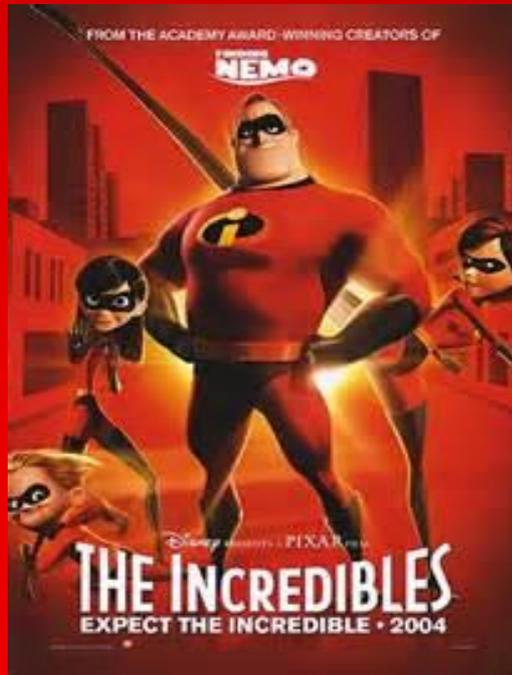
Individual Prosecutions

Individual Prosecution Statistics

Increased charges against individuals



Data from Recent Trends and
Patterns – Shearman & Sterling



Leniency: For the Cooperators and
the Preppers

DPAs/NPAs versus Guilty Pleas

2013

- Lots of DPAs/NPAs
- Ralph Lauren
- Archer Daniels Midland
- Weatherford International
- Diebold Inc.
- Parker Drilling Co.
- Total S.A.
- Bilfinger S.E.

2014

- DPAs/NPAs:
- Hewlett Packard
- Avon
- Bio-Rad
- Guilty Pleas:
- Alcoa
- Hewlett Packard (Russia)
- Marubeni
- Avon (China)

A Word About Compliance Monitors:

Their appointment appears to be on the decline. In 2014, only one has been appointed (Avon) and DOJ/SEC have directed select companies to report directly to them on compliance program improvements (Layne Christensen).

DPAs, NPAs, and guilty pleas

- In 2014, authorities are using a combination of guilty pleas and DPAs/NPAs (e.g., Hewlett Packard and Avon)
- The nature of the settlement often depends on:
 - A company's actions before and after a formal charge:
 - Quality of pre-existing compliance program
 - Cooperation, cooperation, and more cooperation
 - Getting head start on improvements during investigation/negotiations
 - The unique facts of each case:
 - Length of time scheme/conduct was ongoing
 - Bribery/corruption estimated amount
 - Whistles blown and no one listened
 - Financial health of company may also factor into the settlement amount (e.g., Alcoa)

Grounds for DPAs/NPAs



The Ralph Lauren Case

- Ralph Lauren entered into NPA in late 2013
- The Set Up:
 - Argentinian subsidiary approved payments and gifts to customs officials, through third parties
 - Misconduct lasted 4 years
 - Bribes permitted goods clearance without documentation and inspection
 - Estimated value of payments: \$568K USD in customs clearance payments and another \$100K or so in gifts to officials
- Resulted in an NPA: \$1.5M

Darling.
Luck favors
the prepared.



DPAs, NPAs, and guilty pleas

The Ralph Lauren Case – Why an NPA in this case?

Self-reporting

Within two weeks of
discovering the
violation

Cooperation

Provided translated
documents to SEC
and made
interviewees available

Existing program effectiveness:

Breach was found
during training

Continual improvement:

Updated, translated
anti-corruption policy

Upgraded third party
due diligence

Enhanced commissions
and gifts policies

Additional face-to-face
training

The Alcoa Case

- Alcoa entered a guilty plea for \$384M USD
- The Set Up:
 - Alcoa supplied aluminum to Alba (majority owned by the Kingdom of Bahrain) through contracts with a middleman, allowing for significant price markups
 - These markups created margin used to make payments to the Bahraini Royal Family, which held a majority interest in Alba
 - The scheme was carried out for almost 20 years

Alcoa enters into guilty plea

- Alcoa entered a guilty plea even though it:
 - Cooperated extensively with authorities
 - Undertook extensive internal investigation
 - Made employees available for interviews
 - Provided documents
- Guilty plea highlights DOJ/SEC's emphasis on facts, seriousness, and length of misconduct (20 years) without detection
- However, penalties could have exceeded \$1B USD

Hewlett-Packard

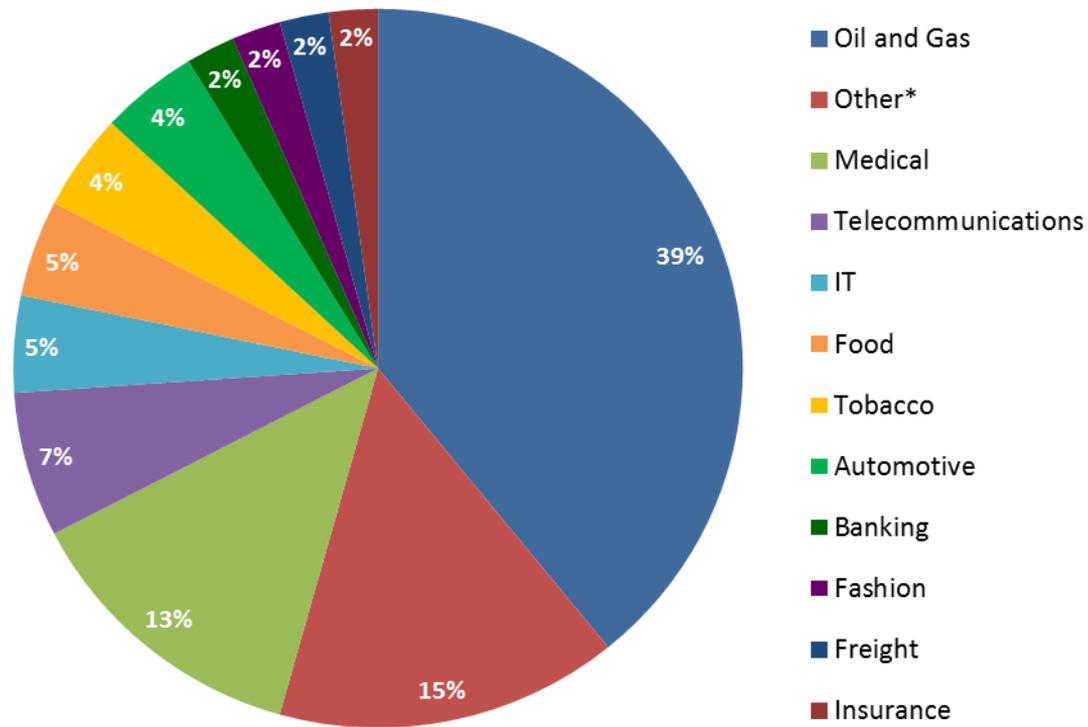
- The variance in outcomes across the three HP subsidiaries reflects the importance of facts (and likely amounts) underlying each subsidiary's illicit actions
- Russian subsidiary (guilty plea)
 - Subsidiary used millions of dollars in bribes from a secret slush fund
 - Some employees raised questions about the significant markup paid to the agents and consultants charged with winning the contracts, but nothing was done
- Polish subsidiary (DPA)
 - Provided gifts and cash bribes worth more than \$600,000 to a Polish government official to obtain contracts with the national police
- Mexican subsidiary (NPA)
 - HP paid a consultant to help the company win a public IT contract
 - At least \$125,000 was funneled to an official with whom the consultant had ties

Marubeni: Lack of Cooperation Driving Force

- Pled guilty and sentenced to pay \$88 m
- Utilized intermediaries to bribe Indonesian officials to obtain a \$118M contract with a state-owned electric company
- Guilty plea rather than DPA/NPA based on:
 - Failure to voluntarily disclose
 - Refusal to cooperate
 - Lack of an effective program
 - Failure to remediate
 - Prior history of conduct (*TSKJ* case)

- “Luck Favors the Prepared”: Assess/Benchmark Your Program
 - Internal Processes, Systems, Controls Examples:
 - Gifts, Travel, Entertainment
 - Third Party Roles/Functions: Get Rid of the “Miscellaneous” “General” “Other”
 - Third Party Funding and Services Delivered Reviews
 - Higher risk country assessments, including peer discussion about culture
 - Third Party Reviews
 - Assess your third party due diligence: risk-based approach?
 - High risk activities in higher risk countries
 - What is the company’s due diligence renewal strategy
 - Who deserves more attention?
 - Training and Communications
 - Measures of Effectiveness: Key Performance Indicators
- Plan for the unexpected: who is on your core team?
- Cooperation: How far to go? DOJ and SEC Say “All the Way!”
 - References in Agreements, Pleas, and Admin Opinions
 - DOJ (Leslie Caldwell) remarks: Oct 2014

Deferred Prosecution Agreements and Non Prosecution Agreements by industry (last 5 years, thru Q2 2014)

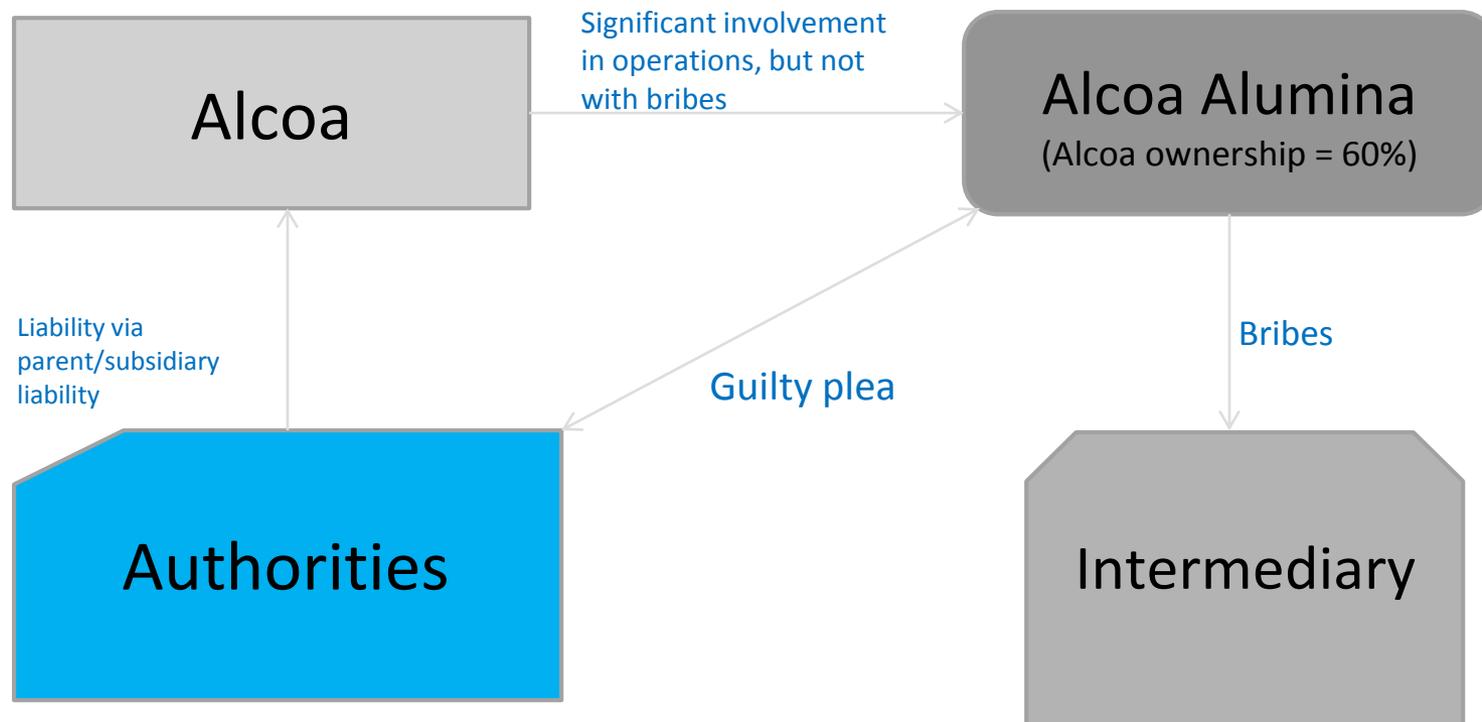




Parent Liability: Subsidiaries and Affiliates

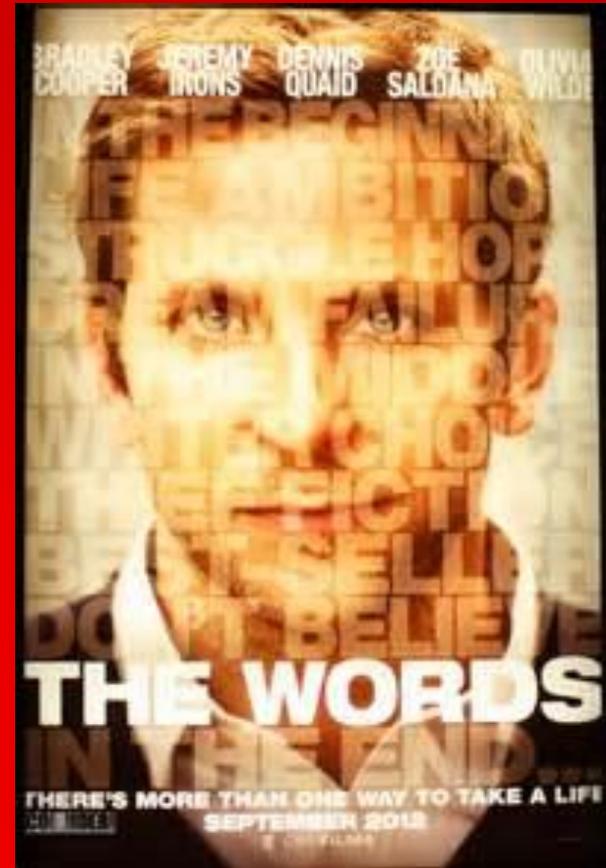
- Alcoa case revolved around activities of Alcoa World Alumina (Russia)
- No allegations re: misconduct or knowledge by employees of parent company
- For books and records violations:
 - Applies only to “issuer”: that is Alcoa Corporation, the parent
 - 50% or > ownership = strict liability for books/records violations of sub
- For anti-bribery provisions, parent liability attached where parent: authorized, directed, controlled misconduct ... this decision turns that theory on its head.
- Despite lack of direct involvement, parent held liable because:
 - Parent appointed majority of seats on council that manages subs
 - Parent and sub exchanged personnel
 - Parent set goals for subs and “coordinated” legal, compliance, and audit functions
 - Parent oversaw sub employees managing the problematic business
 - Govt customer was also a key Parent customer
 - Parent discussed general relationship with Alba with sub and its intermediary
 - Parent knew and approved of agent/intermediary sub used to facilitate bribes, but was unaware that bribes occurred.

Parent-subsidiary liability



- Alcoa case demonstrates the need for parent company to:
 - Monitor implementation and effectiveness of subsidiary compliance program
 - Administer/oversee compliance committee or working groups
 - Creates opportunities for leverage (and even reduced spend)
 - Heightened transparency across lines of business: disparate processes/technologies
 - Acquisition integration: compliance program comparative assessment
 - Obligations do not end at:
 - Pre-acquisition due diligence is usually quite limited (GTE, contracts, third parties snapshot)
 - Provision of paper policies/procedures to the newly acquired company
 - Analyze for program element gaps and assess compliance culture
 - Requires business buy-in: combatting “if ain’t broke, don’t fix it” view point
 - This closer look even applies to select operating units within the company that have been allowed to operate uninterrupted for years following acquisition (particularly in emerging markets)
 - Assess how much business control/involvement parent should exercise

FCPA Interpretation





“Anything of Value”

- *JP Morgan*: “Sons and Daughters” hiring program in China
- Does a “job/internship” constitute “anything of value”?
- At JP Morgan, they kept a written log/tally of the hires and how business with the state officials was mapping following the hiring
- What if there was no documented evidence or witness testimony of tracking business benefits to company stemming from the program?



“Instrumentality” of Government Department or Agency

- *Esquenazi*: defendants argued for “core government function” standard
- DOJ usually focuses on extent of government control
- 11th Circuit ruled that test should be based on: i) degree of control exercised by government; and ii) government function.
- Might courts narrow the interpretation of what kinds of businesses are considered government instrumentalities (energy companies, airlines)?

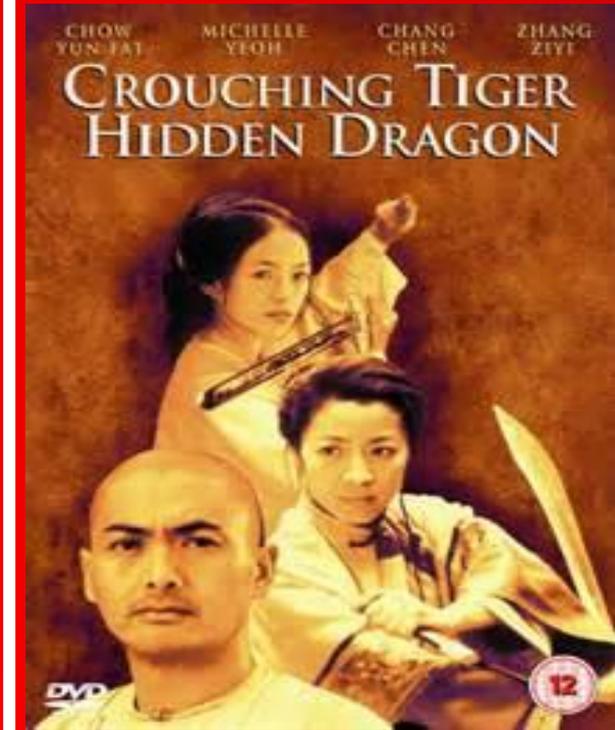
Key Takeaways: Interpretation

“Anything of Value”

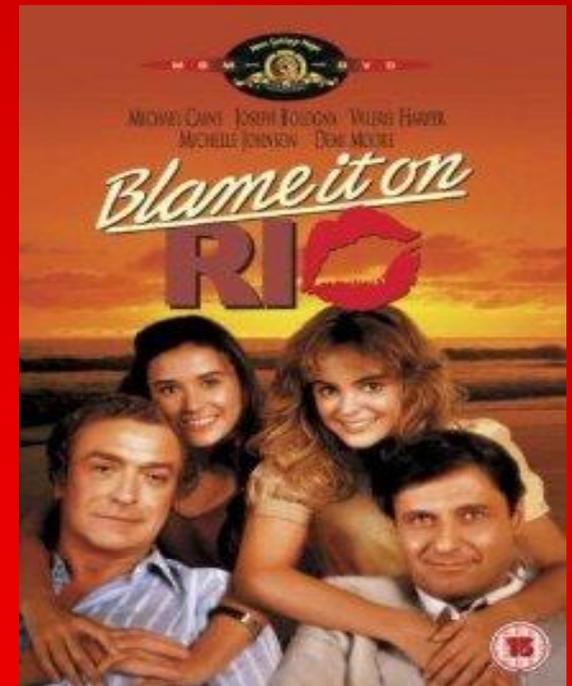
- Even back office functions such as HR must be vigilant about monitoring for problematic benefits
- ABAC Training for all: not just sales and marketing
- Tailor training/awareness by function/department
- “Sons and Daughters”: make certain hires are qualified and follow normal procedures – assess current outstanding bids/opportunities

“Instrumentality”

- A “foreign official” is “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”
- A narrowing could have big impact on FCPA enforcement
- Impact on third party due diligence and GTE processes/limits
- Still need to be concerned about commercial bribery



Enforcement Abroad



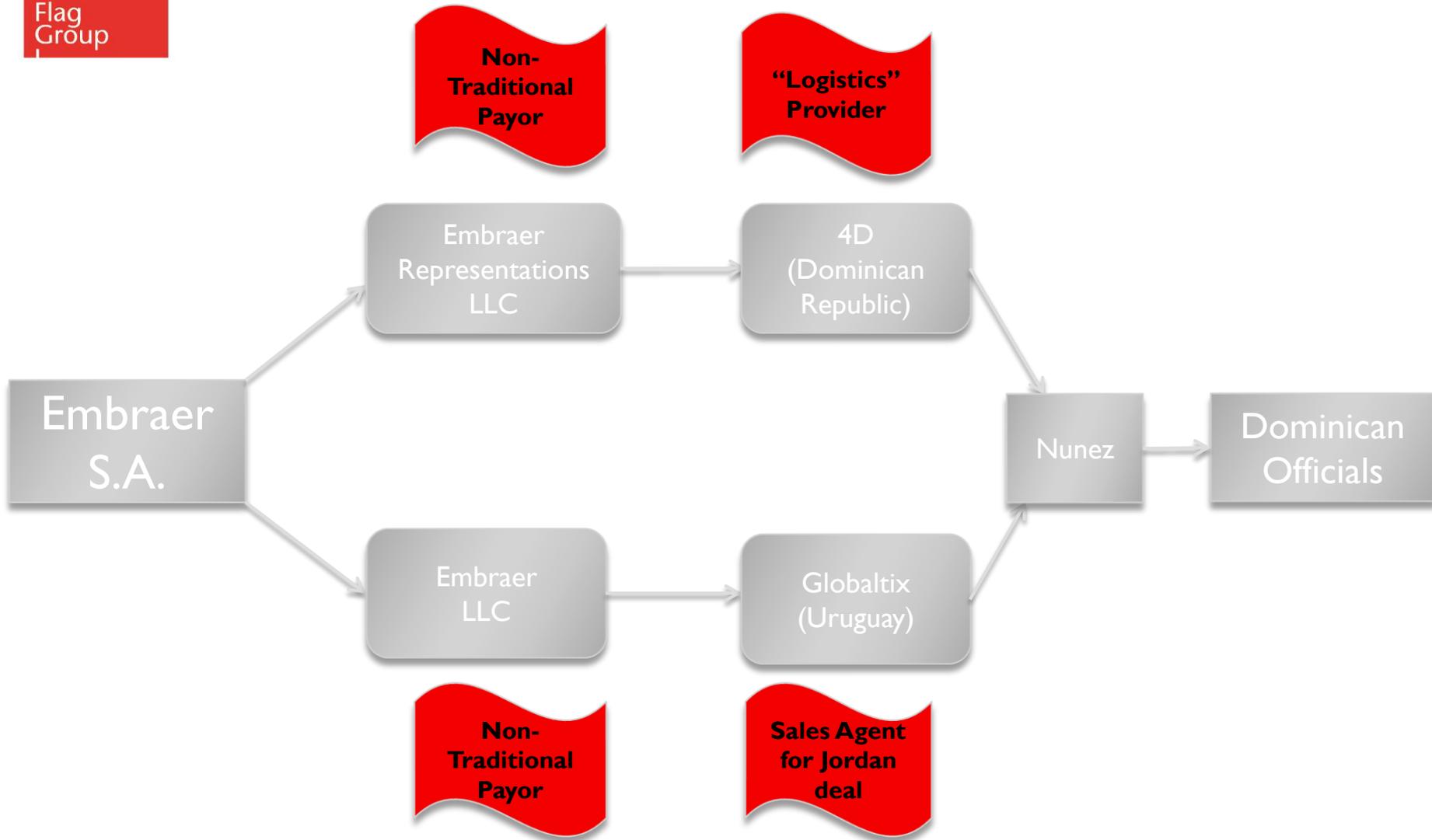
China has Awakened as Enforcement Threat

- GSK China set annual sales growth targets at 25% (very high)
- Doctors not well paid in China
- Chinese authorities investigated local travel agencies and discovered fake contracts and invoices used by Glaxo Smith Kline (GSK) to bribe physicians, hospital administrators, government officials, and foundations.
- GSK used travel agencies as slush funds to facilitate bribes: one small agency billed out \$16M USD
- Same agency worked with: Merck, Roche, Sanofi, and Novartis
- Several GSK China executives (including foreign executives) detained
- Ultimately, GSK was fined \$489M USD (executives freed)
- GSK Sales in China plummeted by 20%
- Industry sweep underway: likely more to follow

- Case Background:
 - Embraer, Brazilian aircraft manufacturer, used a series of “dummy” third parties and foreign transactions/accounts to pay bribes to officials in the Dominican Republic to win a large bid for purchases of military aircraft.
 - Too many red flags and internal systems/controls breakdowns to count

- US DOJ – Brazilian Authority Cooperation:
 - DOJ conducted initial investigation, compiled evidence
 - Encountered issues with cooperation and jurisdiction
 - Handed investigation file over to Rio State Prosecutor’s Office
 - Case not prosecuted under Clean Companies Act
 - Brought against individuals under Brazilian Criminal Code
 - Investigation hand-off pre-dated Brazilian Anti-Corruption law

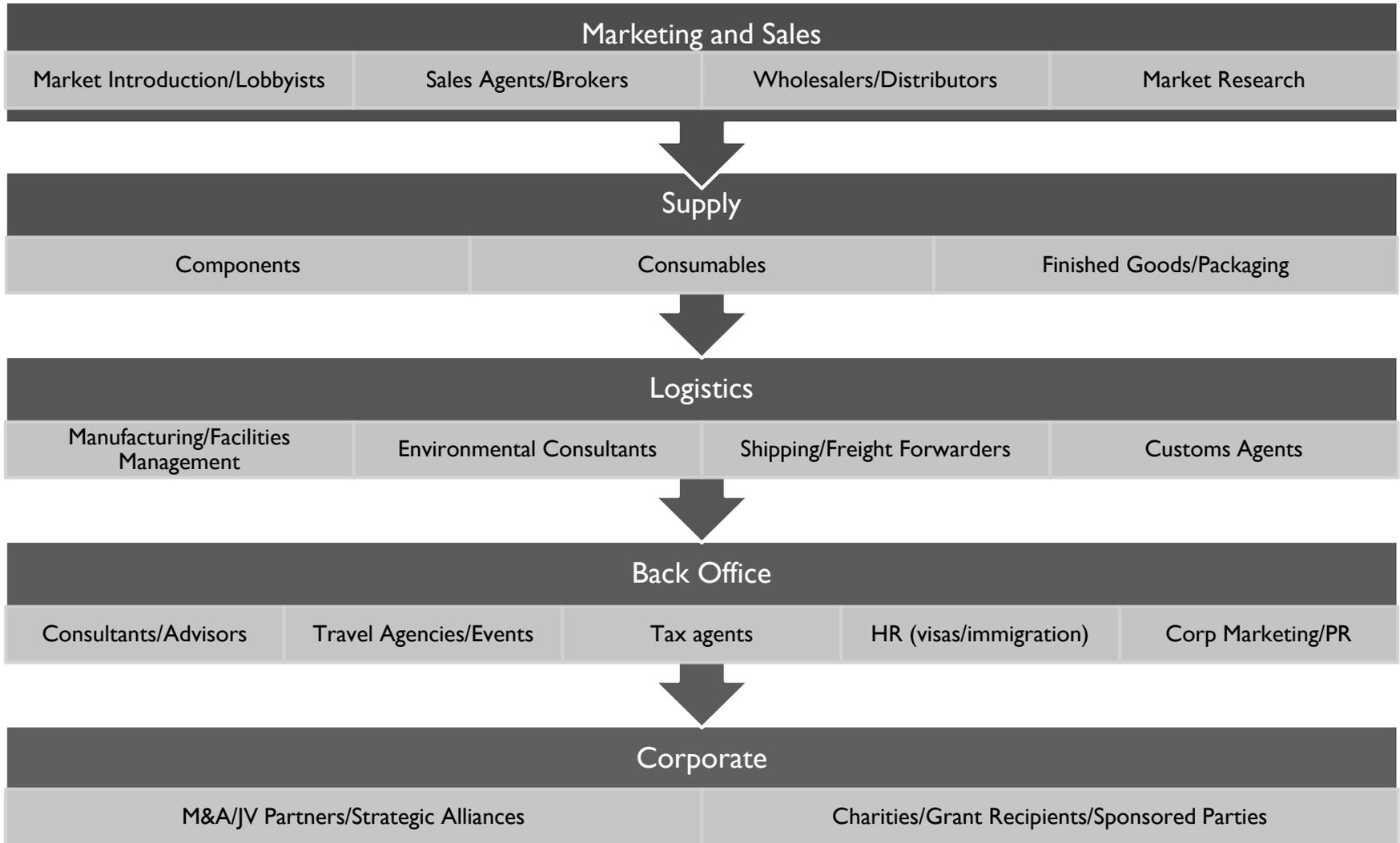
Case Study: The Set Up

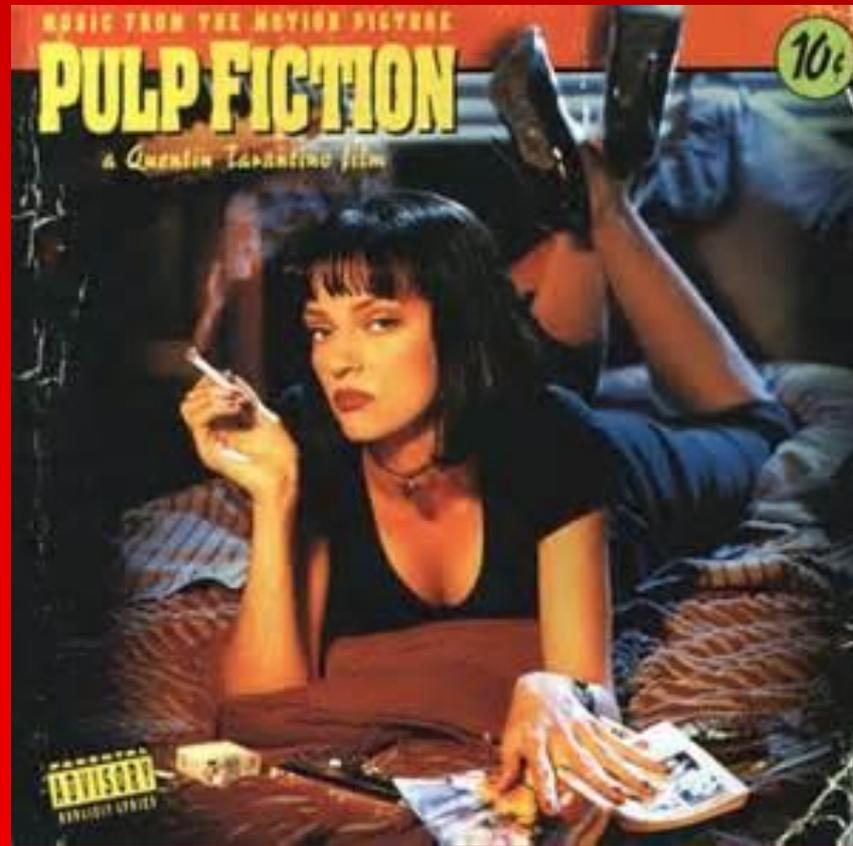


Foreign Enforcement and Cooperation

- UK Serious Fraud Office: are they rolling now (*GSK, Innospec*)
- China: In the wake of *GSK*, we can expect to see:
 - Continued crackdown on government officials
 - Continued scrutiny of foreign companies (\$490M USD good start for China)
 - Industry sweeps
 - Other countries piling on: *GSK* (UK SFO and DOJ investigating)
- Brazil: *Embraer* indictments → Clean Companies Act (CCA)
- Canada:
- Is India next? Modi won election on “anti-corruption” platform

- It's not just about the DOJ/SEC subpoenas any longer
 - Need to be prepared for investigations/enforcement in other countries
 - Dawn raid procedures
 - Attorney-client privilege
 - Privacy and data protection concerns
 - Executive detainment: does the company have a plan?
- Country-Focused Program Implementation Monitoring
 - After *GSK*, companies more vigilant about program implementation in China
 - Assessments/audits (company and third parties)
 - Tightened systems/controls
 - Examination of corporate goaling
 - Expansion of third party due diligence and focus on renewals
 - Training and awareness: more focus on face-to-face in local language
 - Is guanxi diminishing: will enforcement drive change?
- Which countr(ies) are next?
- Which industries are next?





The Latest Official Word from DOJ

Summary of Remarks, DOJ Asst. Attorney General Leslie Caldwell, October 1, 2014: **On Cooperation**

- Conduct robust internal investigation
- Uncover misconduct and ID individuals
- No “whitewash” during internal investigation
- Fully disclose facts to the government
- Relevant documents and evidence in a timely fashion
- Current and former employees made available
- No hiding behind foreign data protection laws



<http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics>

Remarks of Asst. Attorney General Leslie Caldwell, October 1, 2014: On Credit for Corporate Compliance Programs



THE WOLF

"I solve problems."

"More often, we encounter companies with compliance programs that are strong on paper, but much weaker in practice."

"All of these warnings went unheeded in favor of continued profits. The "tone at the top" in BNPP was, frankly, not just unsupportive of compliance, but against it. And, the company put its profit margins ahead of its business ethics."

"There is, of course, no "off the rack" compliance program that can be installed at every company. Effective compliance programs must be tailored to the unique needs and risks faced by each company."

"Effective compliance programs must be embedded in a company's culture. And they need to be applied even in the face of misconduct by other companies in the same industry, even if that might mean a short-term competitive disadvantage. A company's executives can choose to rise above the rest -- or race to the bottom."