

ALSTON & BIRD



# Cross-Border Investigations in a Global Economy

April 9, 2019





## Your Panelists



***Brian D. Frey***  
Alston & Bird  
Partner  
Litigation & Trial Practice



***Todd Braunstein***  
Willis Towers Watson  
General Counsel



***Sulaksh Shah***  
PwC  
Forensics Services Partner



# Interactive Audience Polling

Participating easy and completely anonymous. Lets go ahead and get set up.

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# Overview

- Managing the initial response when a problem is identified.
- Practical and legal challenges with cross-border data collection and review.
- Interviewing witnesses at home and abroad.
- How to decide whether to voluntarily disclose a problem to the U.S. government or foreign authorities.
- Coordinating with the U.S. government and working towards a resolution.
- Remedial measures and the path forward after a problem is resolved.





# Initial Response to an Allegation of Misconduct

- **Who made the allegation?**
  - Internal referrals from audit/compliance/business personnel
  - Whistleblowers and the challenges of pursuing anonymous allegations
  - Third-party allegations - when competitors cry foul
  - Government subpoenas
- **What is your timeline to take action?**
  - Internal referrals often allow flexibility as to response time
  - Whistleblowers and third-party allegations create risks of public disclosure
  - Government subpoenas mandate a timeline but often negotiable





# Determining Scope and Staffing

- **What should you consider when determining initial scope?**
  - Limited or pervasive misconduct
    - Dollar value of business at issue
    - Number of employees
    - Length of time
  - Low level or senior personnel
  - Multiple countries
  - Potential impact on relationships with regulators
  - Potential criminal liability
  - Publicity risks
- **How should the investigation be staffed?**
  - Sufficient internal resources to conduct the investigation
  - Conflicts of interest
  - Practical difficulties of corporate counsel investigating business personnel





# Audience Participation

Participating easy and completely anonymous. To vote:

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## Audience Question #1: Do you typically handle investigations in house or hire outside counsel?

In  
House

Outside  
Counsel

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## So, You Decided to Hire a Law Firm or Consultant

- **Request a detailed investigation plan and budget upfront that covers:**
  - The names and rates of all members of the investigation team
  - Proposed document collection and review process and cost
  - Witness interview (preparation and actual interviews)
  - Preparing and investigation report
  - Potential disclosure to the government with related meetings and follow up requests
  - Remedial measures
  - Don't forget to consider travel time and expenses
  - Investigation plans and budgets should evolve; communication is key
- **The investigation plan should be designed to protect the privilege.**



## Preserving the Evidence and Maintaining Status Quo

- **Immediate document retention efforts should be broad.**
  - Send hold notices to all potentially relevant personnel
  - Turn off back end document deletion policies for email, network drives, and all other potentially relevant electronic system
  - Preserve electronic backups
- **Include I.T. personnel in retention discussions.**
  - How are systems configured?
  - Where are servers located?
  - Who has administrative rights?
  - Consider: shared drives, ERP systems, cloud systems, internal chat systems, company mobile devices





# Collecting Evidence Around the World

- Evidence should be secured, but collection efforts should be targeted to avoid “boiling the ocean”
- Address GDPR and foreign privacy laws on the front end, including obtaining foreign legal opinions to confirm permissible collection, transfer, and production requirements
- Consider foreign blocking statutes and conflict of laws issues
- Where will documents be stored for use in the investigation?
  - Repatriating foreign documents to the U.S. may not be the right answer
  - Consider U.S. jurisdictional implications of U.S. pipeline to access data stored abroad



# Document Culling and Review

- **How will documents be culled?**
  - Search terms versus the dawn of A.I.
- **Where will documents be reviewed?**
  - Not all document review tools are created equal: balancing cost and functionality
- **Who will conduct the review?**
  - Attorneys
  - Subject matter experts
- **How will the review process be documented?**
  - Create a document review protocol and update it as necessary
  - Plan ahead for privilege review and privilege log taking into account the differences in privileges in the U.S. and abroad





# Interviews at Home and Abroad

- **Current Employees**

- Does the individual require separate counsel?
- Is the company required to pay for or indemnify counsel?
- Practical need for employees to continue doing their jobs

- **Former Employees**

- Interviewing outside individuals creates risk of public exposure
- Whistleblower awards in the U.S. are becoming more frequent

- **Individuals Abroad**

- Concerns with foreign governments
- Risks of traveling to the U.S. and the case for neutral site interviews





## Audience Question #2: Have you previously been involved in making a voluntary self-disclosure?

Yes

No

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## Audience Question #3: What is your general view of whether to make a voluntary disclosure?

Always

Often

Sometimes

Rarely

Never

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# To Disclose or Not to Disclose, That is the Question

- **Where would you disclose?**
  - Multi-jurisdictional resolutions are on the rise
  - Risk of non-U.S. jurisdictions “piling on”
  - Practical need for foreign government assistance to facilitate government investigation
  - Civil, criminal, or both?
- **Should you disclose?**
  - Recent DOJ guidance highlights the potential rewards of self-disclosure, but some argue that the benefits are overstated
  - Regulatory agencies provide guidance on calculating penalty discounts for self-disclosure
  - Likelihood of disclosure by an outside source
  - Full cooperation with the government may require disclosure of information about business partners





## Cooperating with the U.S. Government

### Not all Cooperation is Created Equal

- **Keys to “extraordinary cooperation” include:**
  - Full disclosure and upfront explanations of legal limitations
  - Proactive communication and timely follow up
  - Separating facts from advocacy
  - Working through coordination with foreign governments to facilitate access to information abroad
  - Willingness to give full information about individuals and third-parties
  - Trust is hard to win but easy to lose
- **The risk of being deemed an “agent of the government” and the loss of privilege and work product protections**



## What is the Value of Self-Disclosure and “Extraordinary Cooperation?”

- Some government agencies such as OFAC provide formulaic calculations for reduction of penalties
- Recent resolutions from the SEC and FINRA suggest that some agencies are significantly reducing or even eliminating penalties
- Impact on DOJ enforcement is less clear, although recent guidance suggests that more criminal declinations may occur going forward
- Despite the benefits, disclosure is not always appropriate. Once disclosure has occurred, however, full cooperation is nearly always advisable.



## Case Study on Benefits of Self-Disclosure and “Extraordinary Cooperation”

- On February 13, 2019, a large technology resolved a multi-year investigation into FCPA issues.
- The resolution revealed that the company had paid approximately \$2 million in bribes to foreign officials.
- The bribery scheme involved members of senior management.
- In announcing that it was declining to prosecute, DOJ cited a number of factors including prominently highlighting the fact that the company had made the decision to disclose the matter to DOJ within two weeks of learning of the misconduct, fully cooperated, and engaged in significant voluntary remediation.
- Notably, the company nonetheless resolved the matter civilly, paying monetary penalties and disgorgement. DOJ also individually charged a senior executive.



# Negotiating a Resolution

- **Global resolutions avoid “piling on,” but the request must come from the company**
  - U.S. and foreign governments can and do coordinate investigations and resolutions in some instances
  - Governments in countries with higher corruption risks have been known to extort “me too” settlements
- **Make it “easy” for the government in order to facilitate a faster resolution**
  - If penalty calculations apply, run them in advance
  - Put proposed resolutions in concrete context by reference to prior resolutions including:
    - Dollar amounts
    - Egregiousness
    - Relative size of companies
  - Request an opportunity for a formal advocacy presentation supported with written advocacy
- **Never negotiate against yourself, and demand supervisor review if necessary**





## Case Study on Multi-Jurisdictional Global Resolution

- On September 27, 2018, a large energy company entered into a global resolution with U.S. and Brazilian authorities and agreed to pay a total of \$853.2 million in penalties.
- The settlement documents revealed that the company had paid hundreds of millions of dollars of bribes to Brazilian foreign officials.
- SEC and DOJ each received 10% of the penalty while Brazil received the remaining 80%.
- Not only did the global resolution avoid duplicative settlements between the U.S. and Brazil, it also reflected a discount of 25 percent off of the low end of the applicable U.S. sentencing guidelines fine range.
- As the DOJ press release explained, “[t]his case is just the most recent example of our ability to work with our foreign counterparts to investigate companies and other criminal actors whose conduct spans multiple international jurisdictions.”



## Remedial Measures

- Consideration of remedial measures should be a part of the investigation process
- Demonstrable improvements to compliance practices before the negotiation stage facilitate better settlements
- Employee discipline:
  - Who should be disciplined?
  - Degree of discipline?
  - Timing in light of government investigation?
- Recent DOJ guidance suggests that compliance monitors are becoming disfavored, but strong self-imposed remediation still helps



## Resources

- **The Practitioners Guide to Global Investigations**
  - <https://globalinvestigationsreview.com/edition/1001290/the-practitioner%E2%80%99s-guide-to-global-investigations-third-edition>
- **Principles of Federal Prosecution of Business Organizations**
  - <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations>
- **Evaluation of Corporate Compliance Programs**
  - <https://www.justice.gov/criminal-fraud/page/file/937501/download>
- **DOJ Guidance on Voluntary-Self Disclosure, Full Cooperation, and Timely and Appropriate Remediation**
  - <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120>
- **Good Practice Guidance on Internal Controls, Ethics, and Compliance**
  - <https://www.oecd.org/daf/anti-bribery/44884389.pdf>
- **The National White Collar Crime Center**
  - <https://www.nw3c.org/>

# Thank You!



***Brian D. Frey***

Alston & Bird  
Partner  
Litigation & Trial Practice  
202.239.3067  
brian.frey@alston.com



***Todd Braunstein***

Willis Towers Watson  
General Counsel



***Sulaksh Shah***

PwC  
Forensics Services Partner