

FCPA 2015: Enforcement Trends & Predictions



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WELCOME!

Please standby. Our webcast will begin shortly.

Speaker Introduction



Tom Fox has practiced law in Houston for 30 years. He is now an Independent Consultant, assisting companies with anti-corruption and anti-bribery compliance. He was most recently the General Counsel at Drilling Controls, Inc., a worldwide oilfield manufacturing and service company. He was previously division counsel with Halliburton Energy Services, Inc. where he supported Halliburton's software division and its downhole division.

Tom is the author of the award winning FCPA Compliance and Ethics Blog and the international best-selling book "Doing Compliance" which lays how out to design, implement and enhance a best practices compliance program .

His latest book is "GSK In China: Anti-Bribery Enforcement Goes Global", which was released earlier this month. He writes and lectures across the globe on anti-corruption and anti-bribery compliance programs.

Speaker Introduction



Julie Moriarty leads product strategies for The Network's training and communications solutions. She has been helping companies create and maintain effective global ethics and compliance initiatives for more than 12 years.

Moriarty has spoken in the U.S. and internationally regarding methodologies for embedding company values into the global corporate culture and led teams that assist companies in implementing, managing and evaluating effectiveness of ethics and compliance programs.

Previously, **Moriarty** has been a strategic advisor regarding third-party due diligence and has held executive-level positions with responsibilities for delivering corporate integrity and training programs around the world.



FCPA Compliance &
Enforcement Actions:
2015 and Going Forward

The Network

Doing Compliance





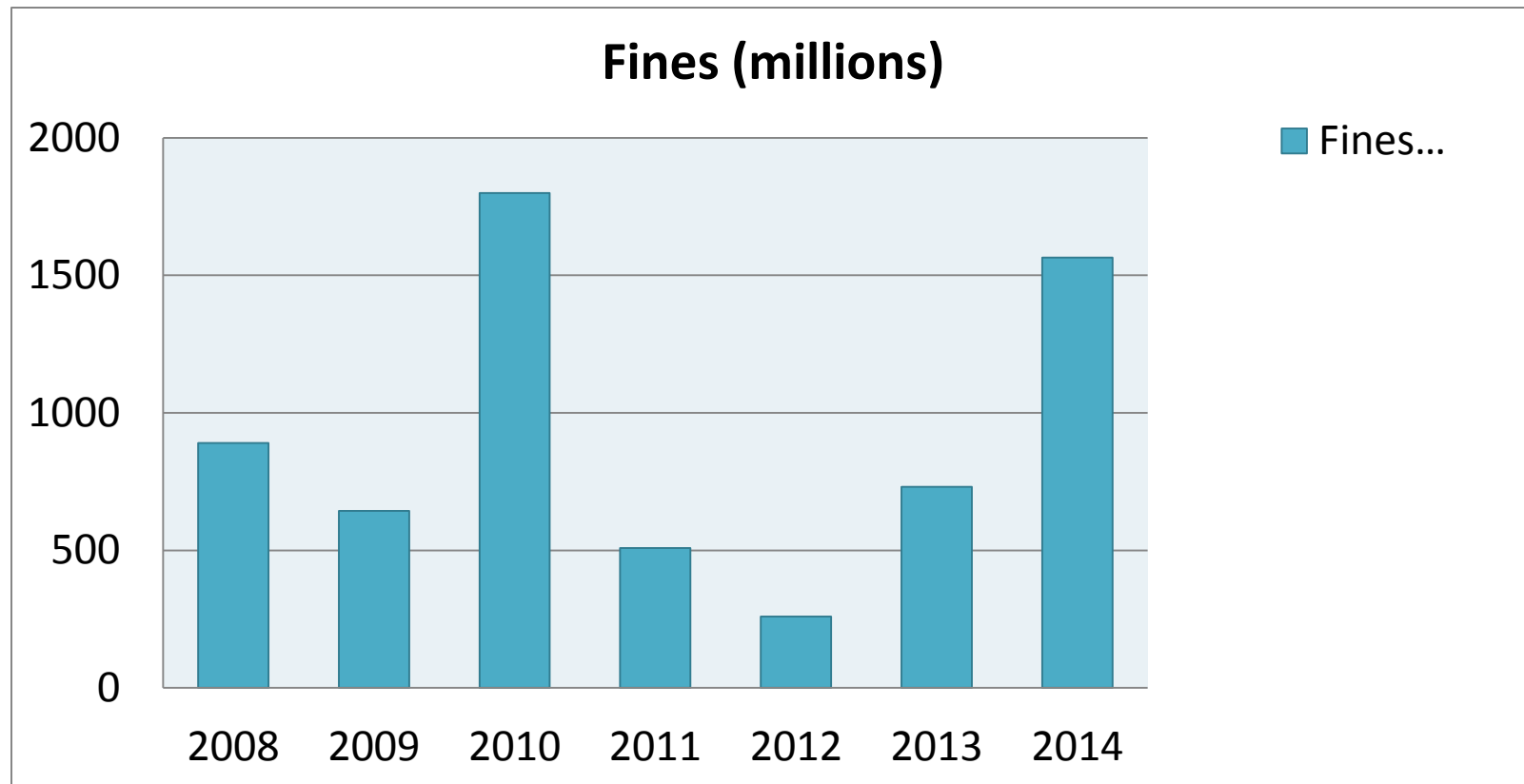
Enforcement Trends by the Numbers

The Numbers



- 10 Companies **settled** FCPA investigations by paying fines totaling \$1.565 billion
- 11 individuals were **indicted** for FCPA offenses
- Guilty Pleas
 - Guilty pleas: 1 BizJet, 2 Alstom, 2 Direct Access Partners
 - Pending criminal charges and likely trials: 1 Petro Tiger; 1 Alstom
- 11 corporate **declinations** which are publicly known

Total Corporate Fines: 2008-2013





Enforcement Actions

Corporate-Alcoa



- Alcoa-\$384MM fine
- Includes \$175MM in profit disgorgement
- 5th Largest fine of all-time
- No. 1 in disgorgement amount
- One Guilty in UK, one prosecution dropped

Key Lesson

Fine could have been up to \$1billion according to DOJ

Corporate-HP



- \$108MM total fine
- Multi-country bribery schemes
- Complete breakdown in internal controls
- Multiple enforcement tools:
 - Criminal Plea in Russia
 - DPA in Poland
 - NPA in Mexico

Key Lesson

You can make a comeback



- \$135MM total fines
- \$67MM to DOJ
- SEC amount \$52.85MM in profit disgorgement and \$14.5MM in pre-judgment int.
- Highest pre-settlement costs to-date, as high as \$500MM
- Over 6 years from initial whistleblower report
- 2 separate schemes (bribery scheme & cover-up scheme)

Key Lesson

\$8MM in bribes = as high as \$750MM in total expenses



- \$772MM fine **highest FCPA criminal fine ever**
- No SEC prosecution
- Multiple bribery schemes in Indonesia, Saudi Arabia, Taiwan, Bahamas and Indonesia
- Failure to cooperate during investigation
- Four Alstom executives indicted and have pled guilty

Key Lesson

Lack of cooperation will cost you

Poll Question #1



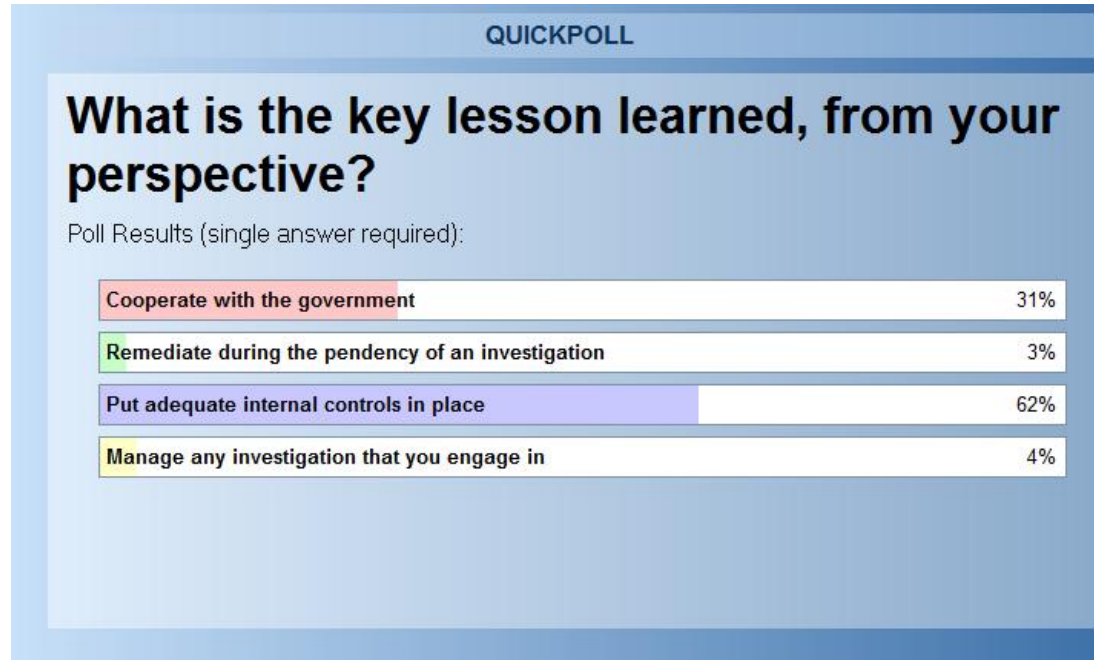
What is the **key lesson** learned, from your perspective?

1. Cooperate with the government
2. Remediate during the pendency of an investigation
3. Put adequate internal controls in place
4. Manage any investigation that you engage in

Poll Question #1 - RESULTS



What is the **key lesson** learned, from your perspective?



Individuals-PetroTiger



- Accusations of **bribing an official** at Ecopetrol SA, Colombia's state-controlled oil company, and defrauding PetroTiger by **taking kickbacks**.
- Joseph Sigelman, the former co-CEO of PetroTiger Ltd., was charged with substantive FCPA violations.
- Attorney/client issues
- Cost of going to trials





Esquenazi

First Court to Rule on SOEs



- Court held that **state owned enterprises** can be instrumentalities under FCPA
- Rejected **defense arguments** that:
 - (1) “that only an actual part of the government would qualify as an instrumentality” or
 - (2) the FCPA should be construed to encompass only foreign entities performing ‘core’ governmental functions similar to departments or agencies.

Court Creates Two-Prong Test



- Recognizing that the least is not dispositive, the Court articulated a **Two-Prong Test**:
 - ✓ Control Test
 - ✓ Function Test



Control Test



- (1) The foreign government's **formal designation** of the entity
- (2) Whether the government has an **interest** in the entity
- (3) The government's ability to **hire and fire** the entity's principals
- (4) The extent to which the **entity's profits**, if any, go directly into the governmental fisc
- (5) The extent to which the **government funds** the entity if it fails to break even
- (6) The **length of time** these indicia have existed

Function Test



- (1) Does the entity have a **monopoly** over the function it exists to carry out
- (2) Does the **foreign government subsidize** the costs associated with the entity providing the services
- (3) Does the entity **provide services** to the public at large in the foreign Country
- (4) Does the foreign government generally perceive the entity to be **performing a governmental function?**



Opinion Releases

14-01



- Foreign Government Official Buy-out clause from prior contract relationship
- Changed contract formula to allow positive gain
- Government official would not pass on business awards to relator
- Short time frame-just over 6 months to resolution

14-02



- Emphasized due diligence in the pre-acquisition phase of M&A
- Full investigation and disclosure
- If remediated, no liability going forward for acquiring company or persons not previously subject to FCPA

Poll Question #2



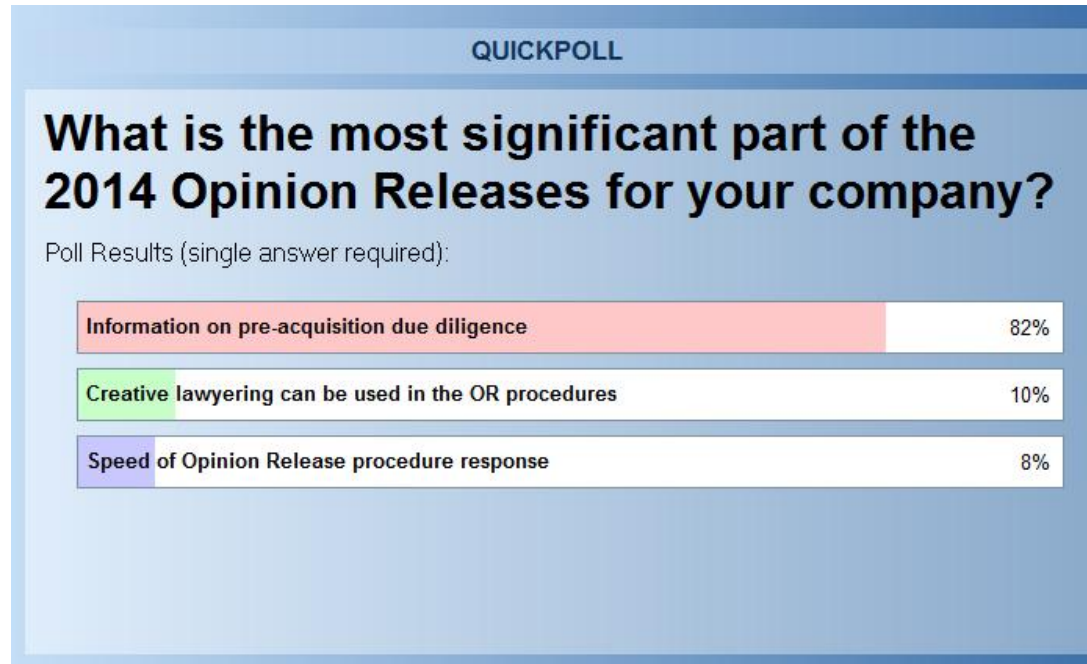
What is the most significant part of the **2014 Opinion Releases** for your company?

1. Information on pre-acquisition due diligence?
2. Creative lawyering can be used in the Opinion Release Procedure?
3. Speed of Opinion Release procedure response?

Poll Question #2 - RESULTS



What is the most significant part of the **2014 Opinion Releases** for your company?





SEC and Internal Controls

SMITH & WESSON



- **No DOJ prosecution**
- No internal controls present when company went overseas
- S&W did not contest charges in administrative proceeding
- \$2.1 MM fine and penalty



LAYNE CHRISTENSEN



- **Declination by DOJ**
- SEC Cease and Desist Order - \$5.1MM
- Mischaracterization of payments
- No check with second set of eyes

Bio-Rad-the Bribery Schemes



- Russia-third parties
- Vietnam-sales commissions
- Thailand-JV





Business Solutions to the FCPA

Scott Killingworth and P2P



“Embodied in contract clauses and codes of conduct for business partners, these obligations often go beyond mere compliance with law and address the methods by which compliance is assured. They create new compliance obligations and enforcement mechanisms and touch upon the structure, design, priorities, functions and administration of corporate ethics and compliance programs. And these obligations are contagious: increasingly accountable not only for their own compliance but also that of their supply chains, companies must seek corresponding contractual assurances upstream. Compliance is becoming privatized, and privatization is going viral.”

Questions?



Q&A

Contact Us



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THANK YOU!



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Upcoming Events...



ON-DEMAND WEBCASTS

Corruption Risks in Brazil: Ensuring Compliance with FCPA & BCCA

Featuring Matteson Ellis

April 2nd @ 1:00 pm Eastern Time

EVENTS

Annual Ethics & Compliance Conference 2015 (Hosted by ECOA)

March 17th -- March 20th | **Visit us at booth 2 & 4!**

Corporate Compliance Exchange | San Francisco

March 26th -- 1:00 pm – 5:00 pm Pacific Time

Visit www.tnwinc.com/resources for more details...

Want to watch the full webcast?



Download the full webcast and slide deck here:

<https://www.tnwinc.com/12292/demand-webinar-fcpa-2015-enforcement-trends-predictions/>