

The Institute of Internal Auditors Detroit Chapter Presents



Understanding the FCPA & Recent Trends

Presented by:

Scott Stringer

Director

Baker Tilly Virchow Krause, LLP

Mumta Taneja

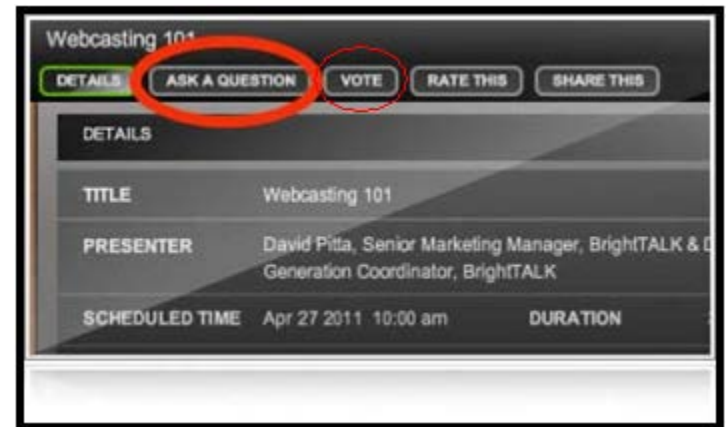
Manager

Baker Tilly Virchow Krause, LLP

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Agenda

- Overview of Foreign Corrupt Practices Act (“FCPA”)
- Recent Trends in Enforcement Actions
- Red Flags
- Compliance Methodologies and Frameworks
- Common Pitfalls and Considerations



OVERVIEW OF THE FCPA



How did it start?

- Foreign Corrupt Practices Act was enacted in 1977 after over 400 U.S. companies admitted to making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties
- Prohibits making improper payments to foreign government or officials
- Jointly enforced by the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”)



Key Elements

Anti-Bribery

- Prohibit offering or giving anything of value to a foreign official or political candidate, directly or indirectly, to obtain or retain business.
- *Foreign Official* - Any officer or employee of a foreign government or any department agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of any such public international organization.

(a) Books & Records and (b) Internal Controls

- Require that companies maintain proper internal books and records that reasonably reflect all transactions and dispositions of assets.
- Mandate internal accounting controls to assure that expenditures are authorized



Prohibited Payments

1

The FCPA prohibits not only actual payments, but also any offer, promise, or authorization of the provision of anything of value

- No payment needs to be made nor benefit bestowed for liability to attach.
- An offer to make a prohibited payment or gift, even if rejected, is a violation of the FCPA.

2

The FCPA also prohibits indirect corrupt payments

- The FCPA imposes liability if a U.S. company authorizes a payment to a third party while “knowing” that the third party will make a corrupt payment.
- Third parties include local agents, consultants, attorneys, subsidiaries, etc.

3

Political or Charitable contributions can violate the FCPA



Permissible Payments

1

Small payment to low-level foreign officials that serve only to expedite or secure “routine governmental action.”

- ❑ Can include securing basic services such as telephone, water and mail, processing visas, obtaining permits
- ❑ Must be reasonable, well-documented and appropriately recorded
- ❑ Sometimes referred to as “Grease Payments”

2

Payments permitted by local law

- ❑ Be aware that all local laws prohibit bribery
- ❑ Local law defense has never been applied in US courts

3

“Reasonable and bona fide” business expense payments to foreign officials.

Who does it apply to?



Issuers

Any company whose securities are registered in the U.S. or that is required to file periodic reports with the SEC.

- Applies to stockholders, officers, directors, employees, and agents acting on behalf of the issuer.
- Issuers must adhere to both the FCPA's Anti-Bribery and Accounting Provisions.



Domestic Concerns

Any individual who is a U.S. citizen, national, or resident of the United States, or any business organization that has its principal place of business in the U.S or which is organized in the U.S.

- Applies to stockholders, officers, directors, employees, and agents acting on behalf of the domestic concern.
- "Domestic Concerns" must adhere to the FCPA's **Anti-Bribery Provision**.



Other Persons

Anyone who takes any act in furtherance of a corrupt payment while within the territory of the U.S.



Criminal Penalties & Fines

Anti-Bribery

- **Individuals** - fines up to **\$250,000** per violation and imprisonment up to five years
- **Entities** - fines up to **\$2,000,000** per violation (or more under alternative fine rules) and disgorgement of resulting profits

Books and records:

- **Individuals** - fines up to **\$5,000,000** per violation and imprisonment up to 20 years
- **Entities** - fines up to **\$25,000,000** per violation (or more under alternative fine rules)



Civil Penalties & Fines

Anti-Bribery

- ▣ **Officers, directors, employees, and agents**
 - ▣ Fines up to **\$10,000** per violation for any willful act

- ▣ **Entities**
 - ▣ Fines up to **\$10,000** per violation and injunction
 - ▣ The SEC may seek disgorgement of profits resulting from illegal activity
 - ▣ Possible denial of export licenses and other tax consequences



Polling Question #1

“Grease payments” are a type of prohibited payment.

- A. True
- B. False

Largest FCPA Enforcement Penalties

#	Company	Total Resolution	DOJ Component	SEC Component	Date
1	Siemens AG	\$800,000,000	\$450,000,000	\$350,000,000	12/15/2008
2	Alstom S.A.	\$772,290,000	\$772,290,000	-	12/22/2014
3	KBR / Halliburton	\$579,000,000	\$402,000,000	\$177,000,000	02/11/2009
4	Teva	\$519,000,000	\$283,000,000	\$236,000,000	12/22/2016
5	Braskem / Odebrecht	\$419,800,000	\$354,800,000	\$65,000,000	12/21/2016
6	Och-Ziff	\$412,000,000	\$213,000,000	\$199,000,000	09/29/2016
7	BAE Systems	\$400,000,000	\$400,000,000	-	02/04/2010
8	Total S.A.	\$398,200,000	\$245,200,000	\$153,00,000	05/29/2013
9	VimpelCom	\$397,600,000	\$230,100,000	\$167,500,000	02/18/2016
10	Alcoa	\$384,000,000	\$223,000,000	\$161,000,000	01/09/2014

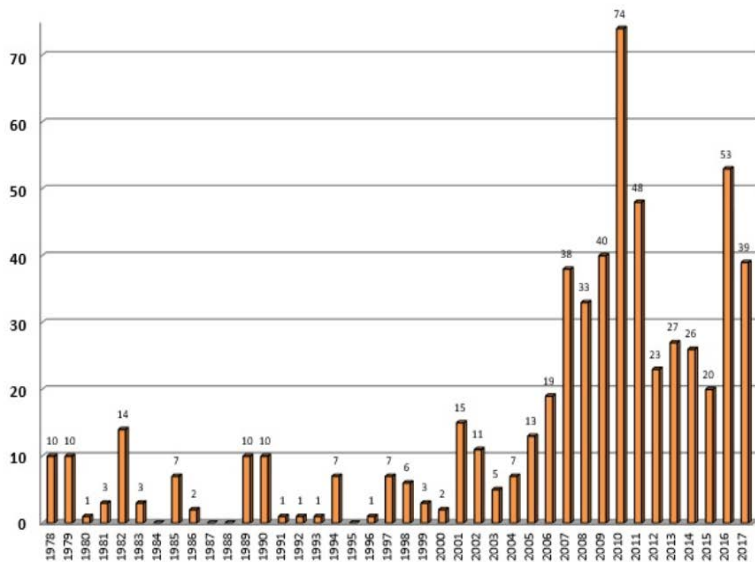
Update: In 2017, Telia Company AB agreed to pay a combined penalty for corrupt of **\$965 million** payments made in Uzbekistan and Keppel Offshore was assessed \$422 million in penalties



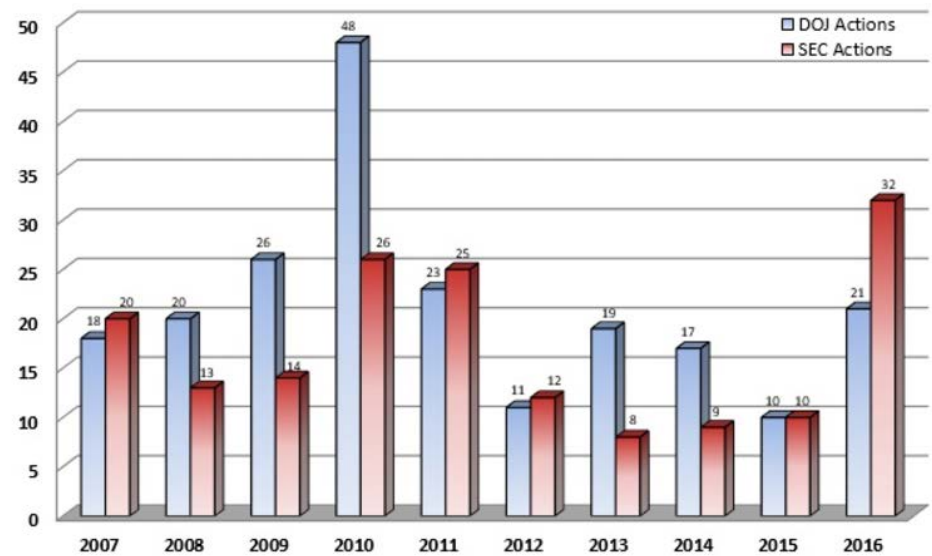
RECENT TRENDS IN ENFORCEMENT ACTIONS

Increase in Enforcement Actions

Combined DOJ/SEC FCPA Enforcement Actions Per Year (1978-2017)



Number of FCPA Enforcement Actions Per Year





Top Trends Based on 2017 Actions

1. Increased multi-jurisdictional
2. Increased focus on culpable individuals
3. The “Trump Effect”
4. Continued Importance of Effective Compliance Programs
5. Awards for Whistleblowers

Multi-jurisdictional Anti-corruption Enforcement

Multi-National Anti-Corruption Enforcement Actions – 2016 & 2017

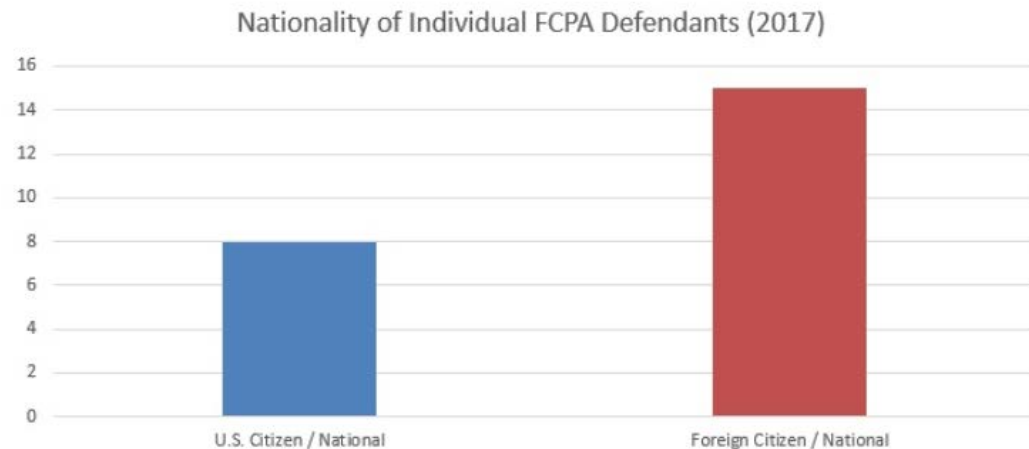
Company	Total Resolution	U.S. Portion	Other Countries Involved – Payments	
Keppel Offshore & Marine (Dec. 2017)	\$ 422,216,980	\$ 105,554,245 (DOJ)	Brazil (Ministério Público Federal) Singapore (Atty. Gen.'s Chambers)	\$ 211,108,490 \$ 105,554,245
SBM Offshore (Nov. 2017)	\$ 820,000,000	\$ 238,000,000 (DOJ)	Brazil (Ministério Público Federal) Netherlands (Openbaar Ministerie)	\$ 342,000,000 \$ 240,000,000
Telia (Sep. 2017)	\$ 965,773,949	\$ 483,273,949 (DOJ / SEC)	Netherlands (Openbaar Ministerie) Sweden (Åklagarmyndigheten)	\$ 274,000,000 \$ 208,500,000
Rolls-Royce (Jan. 2017)	\$ 800,305,272	\$ 169,917,710 (DOJ)	Brazil (Ministério Público Federal) United Kingdom (Serious Fraud Office)	\$ 25,579,170 \$ 604,808,392
Odebrecht & Braskem (Dec. 2016)	\$ 3,557,625,337	\$ 252,893,801 (DOJ / SEC)	Switzerland (Swiss Attorney General) Brazil (Federal Prosecution Office)	\$ 210,893,801 \$ 3,093,837,736
Embraer (Oct. 2016)	\$ 205,000,000	\$ 185,000,000 (DOJ / SEC)	Brazil (Federal Prosecution Office) Brazil (Securities & Exchange Comm.)	\$ 19,300,000 \$ 1,800,000
GlaxoSmithKline (Sep. 2016)	\$ 509,000,000	\$ 20,000,000 (SEC)	China (Changsha People's Court)	\$ 489,000,000
VimpelCom (Feb. 2016)	\$ 795,300,000	\$ 397,600,000 (DOJ / SEC)	Netherlands (Openbaar Ministerie)	\$ 397,500,000



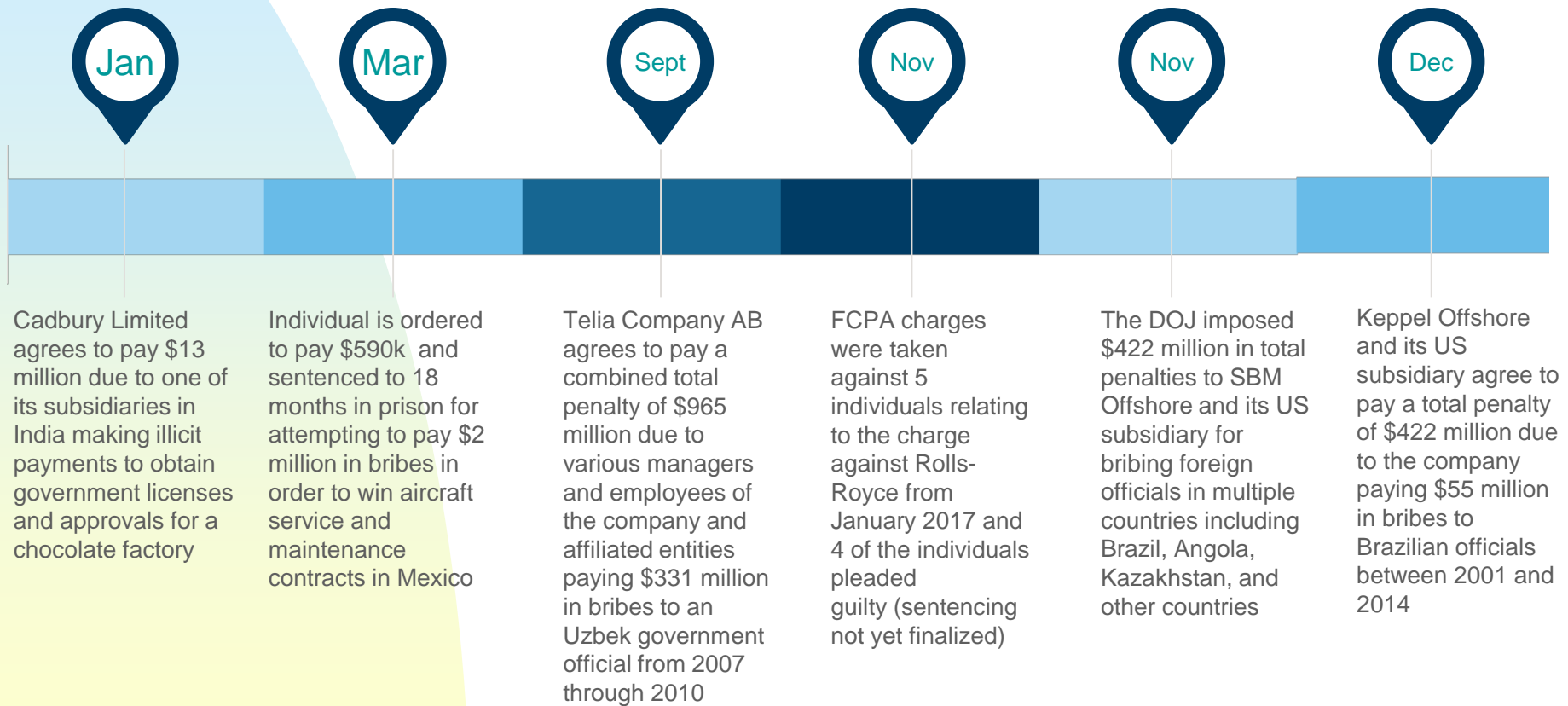


Focus on Individuals

- The 2015 “Yates Memo” was a key signal that DOJ and SEC would look to punish those individuals responsible for corporate misconduct
- In 2017, 20 individual FCPA prosecutions by the DOJ (~70%) - second highest number (2010 had the largest)
- Look to prosecute both domestic and foreign citizens/nationals



Recent Enforcement Actions (2017)





The “Trump Effect”

- Only 6 corporate FCPA resolutions during the last 49 weeks 2017, lower than the number of resolution in the first 3 weeks (25 resolutions in 2016)
- 17 prosecutions of individuals brought by the Trump Administration (overall increase)
- Announcement of new FCPA Enforcement Policy
- Significant enforcement action against Telia (\$965 million)
- US Supreme Court limited SEC’s ability to collect disgorgement to 5 year statute of limitation
- CONCLUSION: To Be Determined





Importance of Compliance Programs

DOJ Initiated FCPA Pilot Program in 2016

- Voluntary disclosure of misconduct may result in declination of criminal prosecution
- Eligible for up to a 50% reduction of applicable fines
- During the 18 months of the pilot program, DOJ received 30 voluntary disclosures, a 66% increase over the prior 18 months

In February 2017, DOJ released the “Evaluation of Corporate Compliance Program” questionnaire in order to provide a detailed approach for evaluating compliance programs

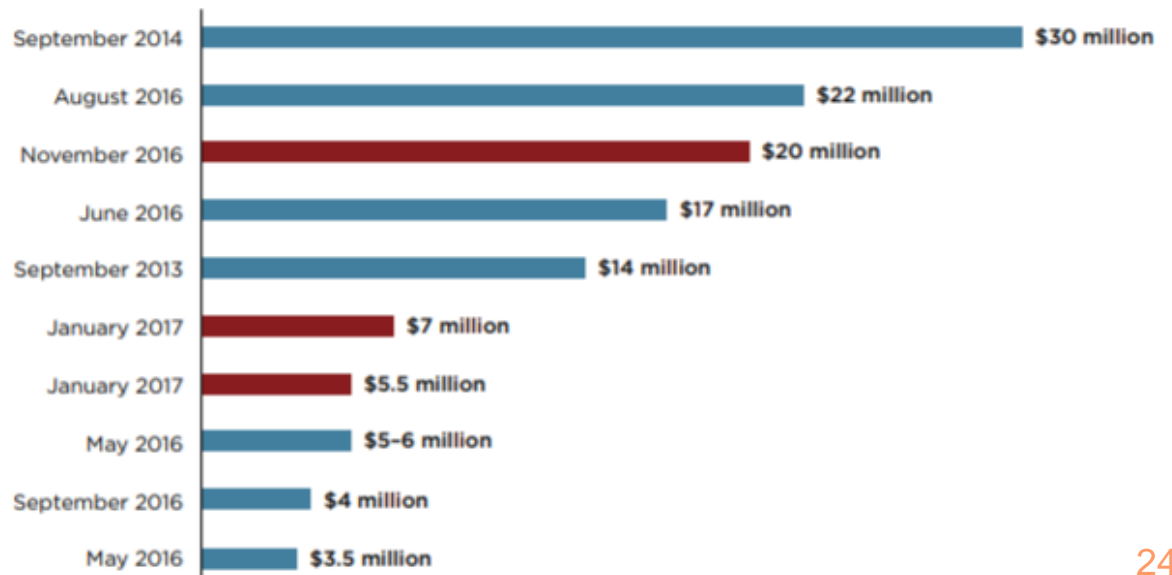


Awards for Whistleblowers

In FY 2017, the SEC ordered whistleblower awards of nearly \$50 million to 12 individuals that either led to the start of an investigation or contributed to a successful enforcement action.

TOP 10 SEC WHISTLEBLOWER AWARDS

From program inception to end of Fiscal Year 2017, the SEC awarded approximately \$160 million to 46 whistleblowers.





Polling Question #2

There is a(n) _____ focus on individuals as it pertains to FCPA prosecutions.

- A. Increased
- B. Decreased
- C. Unchanged



RED FLAGS & COUNTRY RISKS



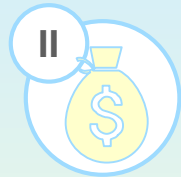
Watch out for payments made by third parties...

- FCPA expressly prohibits corrupt payments made through third parties or intermediaries
- A significant number of enforcement actions for FCPA violations resulted from payments made by third parties acting on behalf of corporations, including:
 - Lobbyists
 - Consultants
 - Brokers
 - Freight forwarders
 - Distributors
 - Sales representatives

Other Red Flags / Schemes



I Use of sham vendors to pay bribes to employees of government-owned entities



II Make payments to a charity to entice a government official to intervene in any on-going agency investigations



III Use third-party sales promoters to make improper payments to government officials



IV Use “pay-to-prescribe” schemes in order to increase sales by providing gifts, improper travel and entertainment, and cash and record these transactions as legitimate business expenses



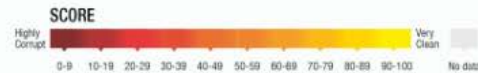
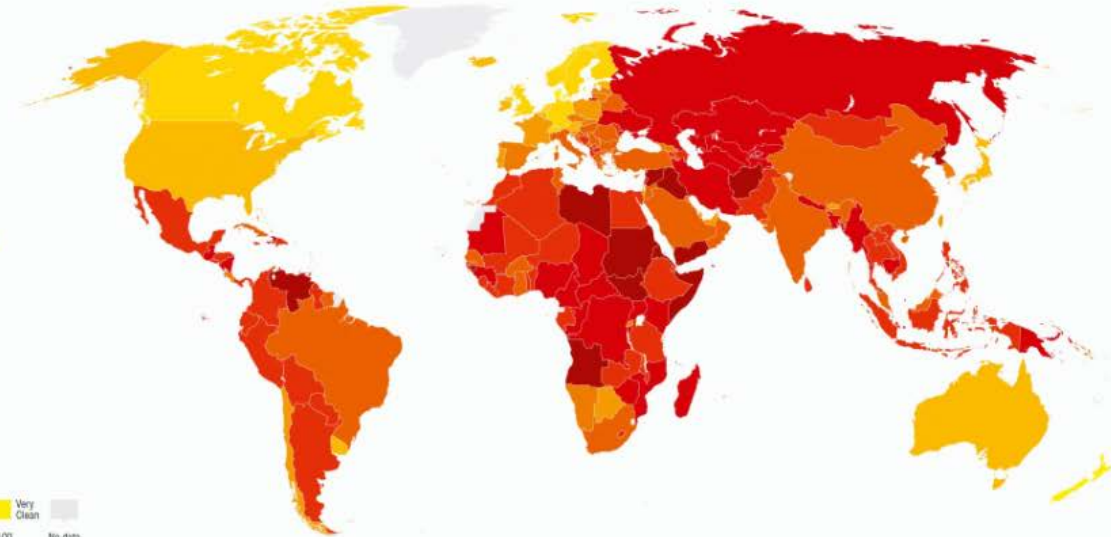
V Provide bribes in the form of meals, gifts, and cash to government officials in order to obtain sales

Emerging Trends – Heat Map



CORRUPTION PERCEPTIONS INDEX 2016

The perceived levels of public sector corruption in 176 countries/territories around the world.



RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE	RANK	COUNTRY/TERRITORY	SCORE
1	Denmark	90	21	Uruguay	71	89	Italy	47	95	Sri Lanka	36	188	Myanmar	28
1	New Zealand	90	22	Estonia	70	90	Sao Tome and Principe	46	101	Gabon	35	189	Nigeria	28
3	Finland	89	23	France	69	91	Saudi Arabia	46	101	Niger	35	190	Papua New Guinea	28
4	Sweden	88	24	Bahamas	66	92	Montenegro	45	101	Peru	35	191	Guinea	27
5	Switzerland	86	24	Chile	66	94	Oman	45	101	Philippines	35	192	Chad	20
6	Norway	85	24	United Arab Emirates	66	94	Senegal	45	101	Thailand	35	193	Haiti	20
7	Singapore	84	27	Bhutan	65	96	South Africa	45	101	Timor-Leste	35	194	Republic of Congo	20
8	Netherlands	83	28	Israel	64	97	Suriname	45	101	Trinidad and Tobago	35	195	Angola	18
9	Canada	82	29	Poland	62	98	Greece	44	108	Algeria	34	196	Eritrea	18
10	Germany	81	29	Portugal	62	99	Bahrain	43	108	Cote d'Ivoire	34	197	Iraq	17
10	Luxembourg	81	31	Barbados	61	100	Ghana	43	108	Egypt	34	198	Venezuela	17
10	United Kingdom	81	31	Qatar	61	101	Burkina Faso	42	108	Ethiopia	34	199	Guinea-Bissau	16
13	Australia	79	31	Slovenia	61	102	Serbia	42	108	Guyana	34	200	Nicaragua	26
14	Iceland	78	31	Taiwan	61	102	Solomon Islands	42	113	Armenia	33	201	Tajikistan	25
15	Belgium	77	35	Botswana	60	103	Bulgaria	41	113	Bolivia	33	202	Iran	29
15	Hong Kong	77	35	Saint Lucia	60	104	Kuwait	41	113	Vietnam	33	203	Ukraine	29
17	Austria	75	35	Saint Vincent and The Grenadines	60	105	Turkey	41	113	Mali	32	204	Russia	29
18	United States	74	38	Cape Verde	59	106	Turkey	41	116	Pakistan	32	205	Turkmenistan	22
19	Ireland	73	38	Romania	59	107	Brazil	40	116	Tanzania	32	206	Zimbabwe	22
20	Japan	72	38	Lithuania	59	108	Maldives	36	116	Togo	32	207	Cambodia	21
												208	Kyrgyzstan	28
												209	Democratic Republic of Congo	16
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Polling Question #3

Which country/territory is perceived to be the most corrupt according to Transparency International's 2016 Corruption Perception Index:

- A. Denmark
- B. North Korea
- C. United States
- D. Somalia



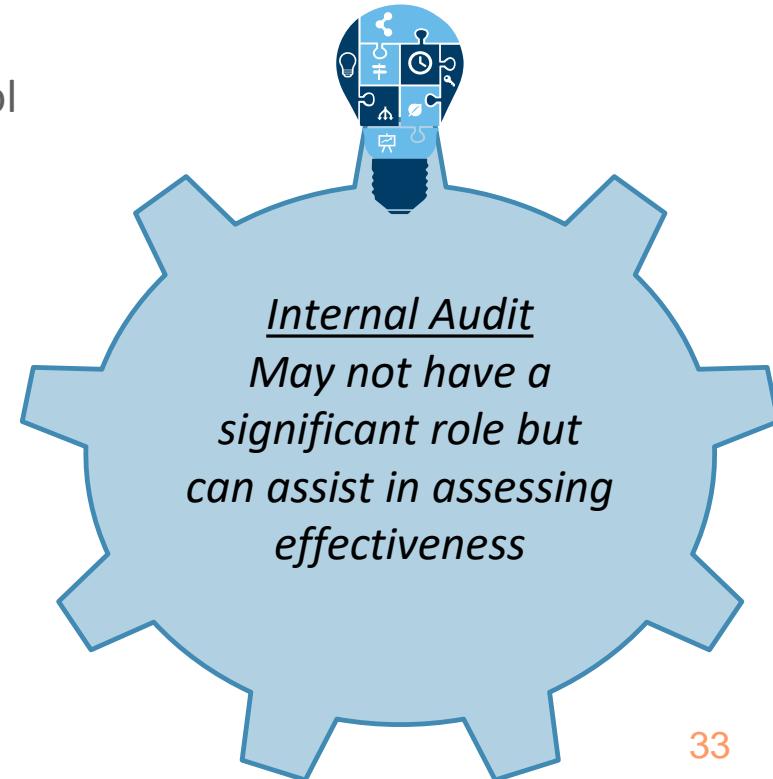
COMPLIANCE PROGRAMS & FRAMEWORKS

Top Elements of an Effective Anti-Bribery Framework

7 Elements of an Effective Compliance Program	Where is IA typically Involved?	Evaluation of Corporate Compliance Programs (Feb 2017)
Adequate Tone at the Top	Not involved	Autonomy and Resources Senior and Middle Management
Adequate anti-corruption policies and procedures	Involved	Policies and Procedures Incentives and Disciplinary Measure
Perform an anti-bribery & anti-corruption (“ABAC”) risk assessment	Lead	Risk Assessment
Third-party due diligence procedures	Involved	Third-Party Management
Implement a reporting mechanism (e.g. Compliance Hotline)	Involved	Confidential Reporting and Investigation Analysis and Remediation of Underlying Misconduct
Provide anti-corruption trainings	Not involved	Training and Communications
Perform anti-corruption audits	Lead	Continuous Improvement, Periodic Testing Review
	Involved	Mergers & Acquisitions

Autonomy and Resources & Senior and Middle Management

- How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question?
- What concrete actions have senior management taken to demonstrate leadership in compliance efforts?
- Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors?
- What compliance expertise has been available on the board of directors?
- What information have the board examined in their exercise of oversight?
- How has senior leadership modelled proper behavior to subordinates?



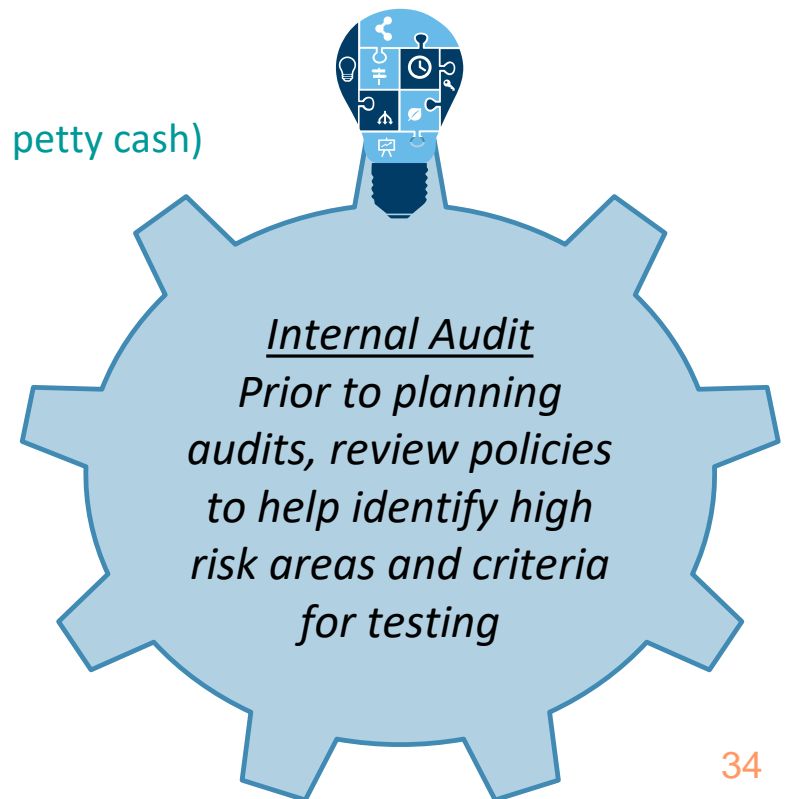
Policies and Procedures Incentives and Disciplinary Measures

- Prepare a distinct policy that provides operational guidance on:
 - ❑ Dealing with government officials
 - ❑ Misreporting and concealment in the company's accounting records
 - ❑ Use of third-party agents and consultants
 - ❑ Facilitating payments
 - ❑ Travel, entertainment and gifts
 - ❑ Other areas of high risk (customs, M&A, petty cash)

- How has the company assessed whether these policies and procedures have been effectively implemented?

- How has the company incentivized compliance and ethical behavior?

- Have the disciplinary actions and incentives been fairly and consistently applied across the organization?



Risk Assessment

Stage 1:

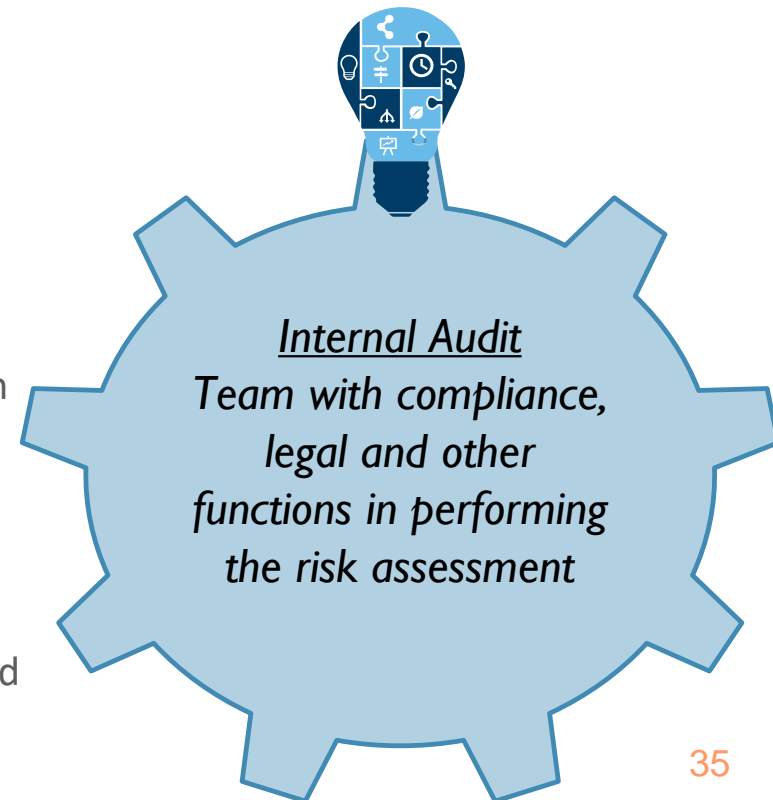
- Assess bribery and corruption risks by specifically looking at geographic locations, business partners, and nature of business activities
- Consider and assess the degree of business and interactions with government officials

Stage 2:

- Identify the policies and controls in place to mitigate corruption risk
- Analyze the effectiveness of the policies and controls and determine the residual corruption risk still facing the company

Stage 3:

- Prepare a plan to remediate identified gaps and implement additional controls where needed



Third Party Management

- How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company?
- What types of background searches are performed on third parties?
- What company policies are third parties required to sign-off on?
- How has the company trained the relationship managers about what the compliance risks are and how to manage them?
- Were red flags identified from the due diligence of the third parties?



Third Party Management (cont.)

Internal audit should consider the following controls and processes:



Bidding Process



Due Diligence
Procedures



Follow up on Red
Flags



Contractual Language
and Right to Audit



Vendor Approval and
Payment



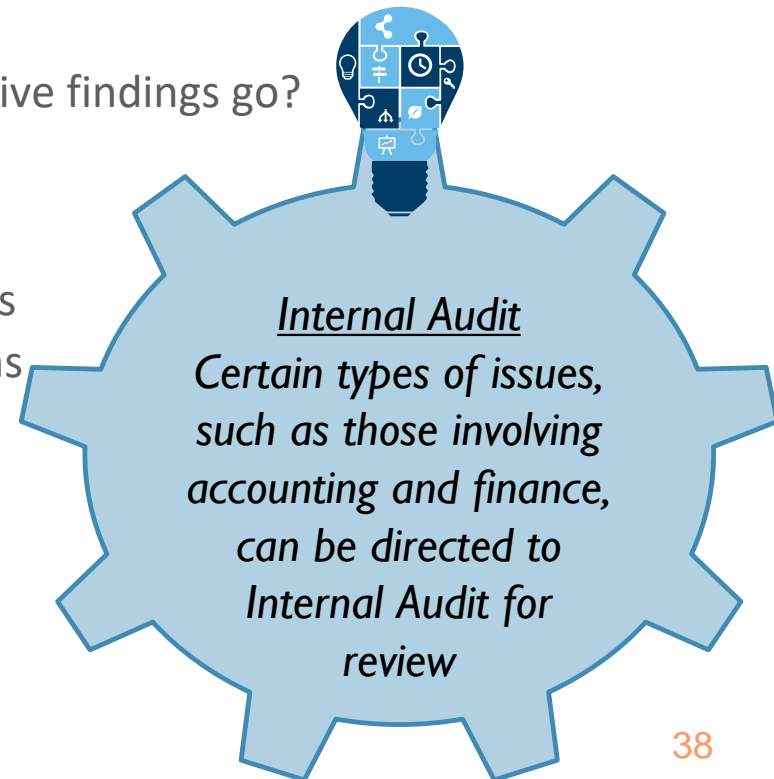
3rd Party sign-off on
Code of Conduct or
FCPA Policy



Required trainings
for employees and
agents

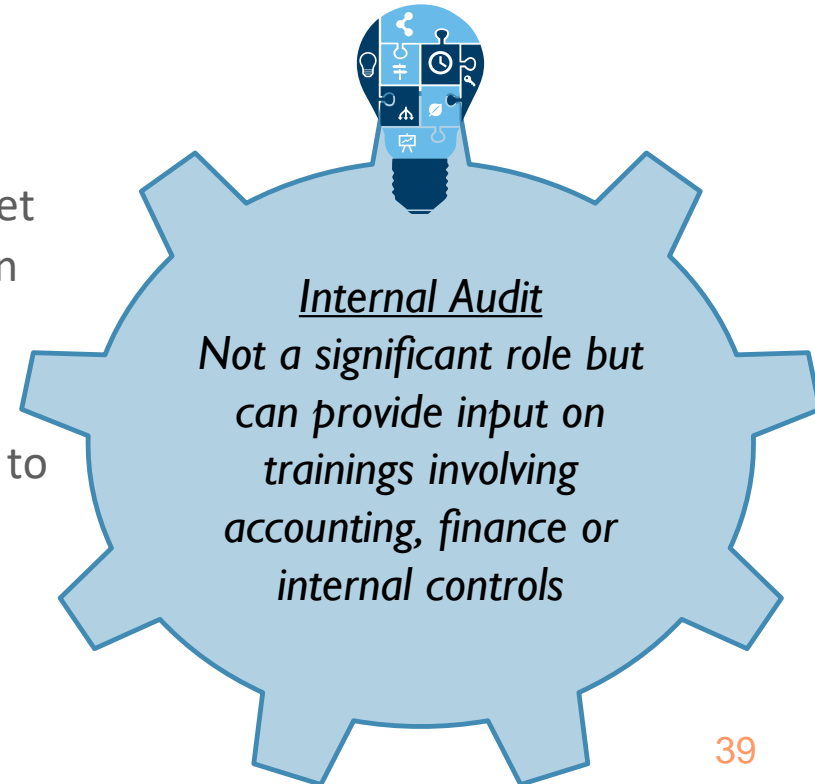
Confidential Reporting and Investigation Analysis and Remediation of Underlying Misconduct

- How has the company collected, analyzed, and used information from its reporting mechanisms?
- How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?
- How high up in the company do investigative findings go?
- Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations involving similar issues?
- What is the company's analysis of why such opportunities were missed?



Training and Communications

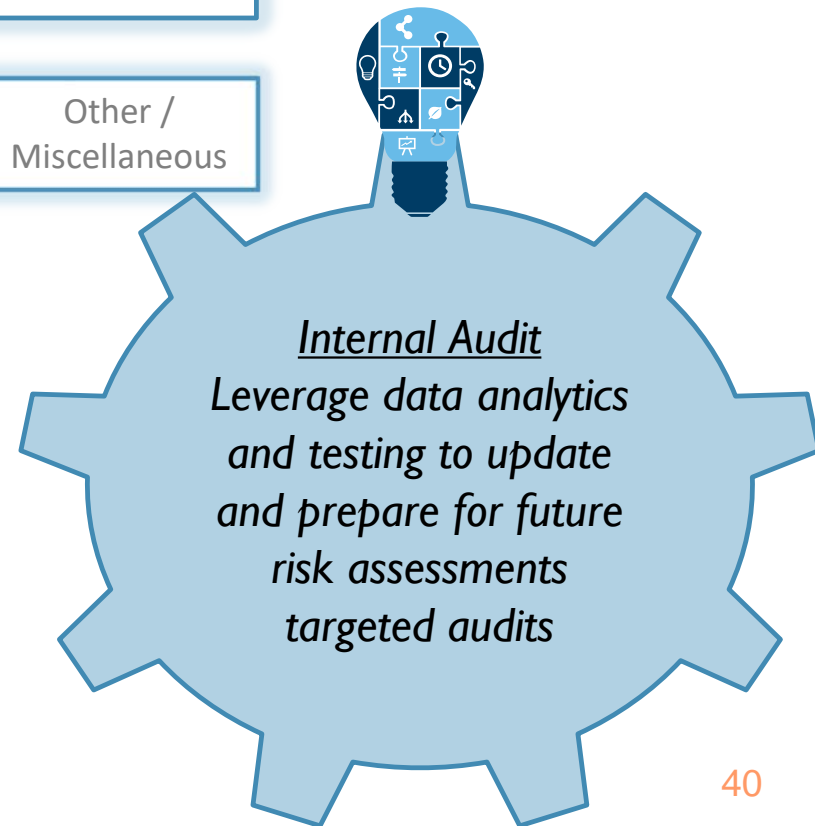
- What training in relevant control functions are required?
- Has the company provided tailored training for high-risk and control employees?
- What analysis has the company undertaken to determine who should be trained and on what subjects?
- How has the company measured the effectiveness of the training?
- What has senior management done to let employees know the company's position on the misconduct that occurred?
- What resources have been available to employees to provide guidance relating to compliance policies?



Continuous Improvement, Periodic Testing and Review

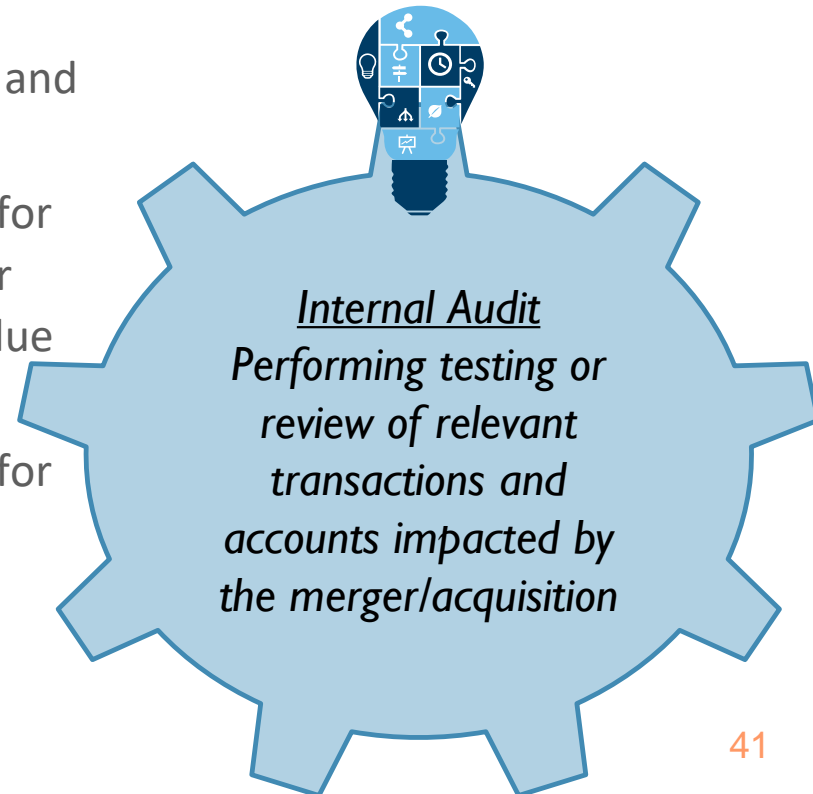
Example of high risk accounts:

Gifts & Entertainment	Refunds	Professional Fees / Services	Agent Fees
Travel	Commissions	Events	Other / Miscellaneous
Rebates	Donations	Credit Card Advances	
License Fees	Facilitation	Promotional / Marketing	
"Discretionary" accounts	Petty Cash		



Mergers and Acquisitions (M&A)

- Was risk of misconduct identified during due diligence?
- Who conducted the risk review for the acquired/merged entities and how was it done?
- What has been the M&A due diligence process generally?
- How has the compliance function been integrated into the merger, acquisition, and integration process?
- What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process?
- What has been the company's process for implementing compliance policies and procedures at new entities?





Polling Question #4

The FCPA is enforced by:

- A. DOJ
- B. SEC
- C. Both DOJ and SEC
- D. Neither DOJ or SEC



COMMON COMPLIANCE PITFALLS AND CONSIDERATIONS



Leading Practices and Common Pitfalls

- Leverage outside expertise where appropriate
- Constant monitoring, assessment and benchmarking of the program
- Risk-based Approach
- Spotting state-owned companies
- Underestimating the Cost of Compliance
- Risk of Third-Party Corruption
- Fixating on Tone at the Top (and not involving middle management)



Investigation Considerations

- Delayed Response
- Ignoring Complaints
- Inappropriate Planning
- Mishandling Evidence
- Losing Objectivity
- Destroying Credibility
- Evidence Collection and Review Challenges –
Most Costly Part of an Investigation
- Not Following up on Key Issues
- Overly Aggressive Tactics



Confidentiality and Privilege Considerations

- **Communicating with Regulators and Privilege Considerations:**
 - Waiving Privilege
 - Sharing Work Product

- **Dealing With Other Stakeholders:**
 - Shareholders
 - Auditors

- **Report Considerations:**
 - Report Format – Written vs. Verbal
 - Who Sees the Report?
 - Careful Consideration when Sharing Report



Questions?



Scott Stringer

Forensic, Litigation & Valuation Services
Director

scott.stringer@bakertilly.com

Mumta Taneja

Risk, Internal Audit, and Cybersecurity
Manager

mumta.taneja@bakertilly.com