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# Corporate Compliance and Regulatory Enforcement in the U.S.

**Presented by:**

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- Former New York State Attorney General and Former United States Attorney for Western District of New York
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# State vs. Federal

- State - Just as there are federal laws, enforcement agencies, and regulatory authorities, **each of the 50 states** have their own codified laws, criminal enforcement agencies, and civil regulatory authorities. Accordingly, criminal and civil cases in each state will differ, but will generally follow the framework detailed below.
  - In New York State, for example, the Attorney General's Office (1) prosecutes state crime, and (2) brings civil suit "to protect consumers and investors, charitable donors, the public health and environment, civil rights, and the rights of wage-earners and businesses across the State."
  - Federal and state laws can be seemingly contradictory, resulting in confusion. For example, marijuana is a federally controlled substance, but is legal for medical and/or recreational purposes in some states. If a person (not a licensed medical doctor) possesses marijuana on federal land, such as a military base or veterans hospital, that person can be federally prosecuted. However, in Colorado, for instance, possessing and smoking marijuana is legal for recreational purposes.



# State vs. Federal (Cont'd.)

- Federal - – there are many federal regulatory and law enforcement agencies within the United States government.
  - US Regulatory Agencies
    - Securities and Exchange Commission (SEC) – administers federal laws concerning the buying and selling of securities
    - Federal Trade Commission (FTC) – ensures free and fair competition and protects consumers from unfair or deceptive practices
    - Consumer Financial Protection Bureau (CFPB) – oversees finance-related products and services provided to consumers
    - Federal Communications Commission (FCC) – regulates interstate and foreign communication by radio, telephone, telegraph and television
    - Federal Deposit Insurance Corporation (FDIC) – insures bank deposits, approves mergers, and audit banking practices
    - Interstate Commerce Commission (ICC) – enforces federal laws concerning transportation that crosses state lines
    - Environmental Protection Agency (EPA) – maintains and enforces national environmental standards in consultation with state, tribal, and local governments
    - Others



# US Law Enforcement Agencies

- Federal Bureau of Investigation (FBI) – principal law enforcement agency
- Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) – unlawful firearms, illegal trafficking of alcohol and tobacco
- Drug Enforcement Agency (DEA) – combats drug smuggling



# US Department of Justice

- The federal law enforcement agencies listed above are part of the Justice Department. The Department is led by the US Attorney General, who is nominated by the President and confirmed by the Senate.
- After a federal law enforcement agency investigates a crime, the agency works with a prosecutor from one of the 93 US Attorney's Offices across the country. If the assigned prosecutor and the US attorney from that district believe there is sufficient evidence of a crime, the case will be prosecuted as described below.



# Parallel Investigation

- Civil regulatory and criminal law enforcement authorities can simultaneously initiate proceedings that relate to the same facts or overlapping targets.
  - Requires defense team to employ a coordinated legal strategy
  - Criminal authorities can often use information gathered in civil proceedings to pursue their own leads. Also, civil authorities can request the court's permission to obtain information from criminal grand jury process. But, government is prohibited from bringing a civil action solely to obtain evidence for a criminal prosecution



# Compliance Action Plans

- Should be implemented immediately when a government law enforcement agency first approaches.
- Key component – our Team is in immediate contact with the government.
  - Too often clients try to manage a crisis on their own and in the process they provide valuable information to the government which later will be used against their interests.





# Compliance Action Plans (Cont'd.)

- Our Team begins an internal investigation
  - We advance an internal investigation in order to put us in the position of knowing more facts than the government.
- Early involvement of our Team helps to:
  - Minimize the disruption to a client's business
  - Helps to protect the client's reputation throughout an investigation



# Compliance Action Plans (Cont'd.)

- Most importantly, through our early involvement, our Team can influence the course of an investigation to gain a positive outcome for our client.



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# Federal Plea Agreement

- Agreement between a prosecutor and a defendant in which the defendant pleads guilty (no trial) in order to receive a lesser sentence.
- A defendant may only plead guilty if they actually committed the crime and admits to doing so in open court before the judge. When the defendant admits to the crime, (s)he agrees (s)he is guilty and agrees that (s)he may be “sentenced” by the judge presiding over the court.
- Sometimes the Government will agree, as part of a plea agreement, not to recommend an enhanced sentence (such as additional time in prison for certain reasons) but it is left up to the judge to determine how the defendant will be punished.



# Proffer Agreement

- Written agreement between federal prosecutors and individuals under criminal investigation which permit these individuals to give the government information about crimes with some assurances that they will be protected against prosecution.
- Witnesses, subjects or targets of a federal investigation are usually parties to such agreements.
- Although the government cannot use actual proffer session statements against the individual in its case-in-chief, the information provided can be used to follow up leads and conduct further investigations. If those leads and further investigations lead to new evidence, the new evidence can be used to indict and convict the individual who gave the information in the proffer session.



# Q&A



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# A Washington D.C. Perspective on Corporate Compliance

**Presented by:**

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**September 9, 2019**

# Michael G. Rossetti



- Partner-in-Charge of Lippes Mathias' Washington DC office and Indian Law Practice Team Co-Leader
- Previously served for three years as personal counselor to the secretary of the Department of the Interior in Washington
- Advises clients regarding state attorneys general issues and federal investigations.

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# Partisanship and Enforcement of Criminal and Civil Law

- Democratic and Republican Administrations enforce the criminal and civil law
- No free ride in any Administration but some differences in approach may be discernable
  - DOJ viewed as less political but often in the eyes of the beholder, i.e., each political party assails the other for politicization of DOJ
  - From a business perspective, compliance must be taken very seriously irrespective of political party in White House





# Partisanship and Enforcement of Criminal and Civil Law (Cont'd.)

- Cases that grab headlines should not give false sense of comfort that your business will not be scrutinized
- Most vulnerable to enforcement if
  - The inherent nature of the business attracts attention
    - Arms
    - Legal pharmaceuticals
    - Technologies that could cause harm to domestic interests, including national security and financial system



# Divided Government Can Complicate Enforcement

- Majorities in the U.S. House and Senate have significant oversight powers
  - Limited check on congressional exercise (and abuse) of its oversight powers and grandstanding
- Republicans tend to do less oversight, Democrats more, significant in light of current House majority



# Divided Government Can Complicate Enforcement (Cont'd.)

- Oversight is very public, with public hearings intended to both collect facts and score political points
  - Reputational exposure is significant
  - Entities perceived as friendly to the other party or the Administration may attract oversight attention
  - Rules of engagement are not the same as those in the courts
  - Legal strategy as important in oversight as in criminal and civil enforcement
  - Compliance plan vital here too



# Other Important Law Enforcement Officials

- Any business that requires federal action by the Administration can attract complaints or attention
- Appointed to combat “waste, fraud and abuse”, Inspectors General can bring cases
  - Often in concert with other law enforcement officials, including the FBI
  - Accountability runs to the Administration and Congress, so Administration cannot easily stop investigations
- Many IG cases embarrass Administration officials even in investigation stage as leaks are common



# Other Important Law Enforcement Officials (Cont'd.)

- Sources of investigations can include the following:
  - Internal complaints by federal officials who may view themselves as whistleblowers, officially or unofficially
  - Program audits that pick up anomalies, including suspicious (or not) deviation from ordinary process
  - Congressional referrals, either based in fact or simple innuendo
  - Press reports
- Once an IG investigation begins it would require the same approach to compliance as has been addressed here today



# Practical Implications of Presidential Re-Election

- Presidential re-elections are always highly charged
  - Will generate external reports of inappropriate conduct by Administration officials, well founded or not
  - Reputational exposure is a risk, especially as media will have significant appetite to report on all



# Practical Implications of Presidential Re-Election (Cont'd.)

- Compliance plan is critical here too as some level of investigation will follow, and be public
  - Congressional oversight
  - Law enforcement (including Inspectors General)
  - State attorney general interest may be high, e.g., in states where the AGs are interested in political benefits of investigation
  - Claims that DOJ is not investigating for political reasons



# Foreign Agents Registration Act (FARA)

- **FARA** is a disclosure statute that requires persons acting as agents of foreign principals in a political or quasi-political capacity to make periodic public disclosure of their relationship with the foreign principal, as well as activities, receipts and disbursements in support of those activities
  - Disclosure allows the U.S. Government to monitor and evaluate activities of foreign agents
  - Enforced by Counterintelligence and Export Control Section of National Security Division
  - In 2007, Justice Department reported approximately 1,700 lobbyists representing more than 100 countries





# Foreign Corrupt Practices Act (FCPA)

- **FCPA** is a law first passed in 1977 that prohibits U.S. firms and individuals from paying bribes to foreign officials in furtherance of a business deal
  - Anti-bribery provisions apply to all U.S. persons, certain foreign issuers of securities, and foreign firms and persons who cause, directly or through agents, an act in furtherance of a corrupt payment to take place within U.S. territory
  - Requires companies whose securities are listed in the U.S. to
    - Keep books and records that accurately and fairly reflect transactions, and
    - Maintain an adequate system of internal accounting controls
  - Enforced by Security and Exchange Commission (SEC) and DOJ
  - September 2014: Hewlett Packard Russia pled guilty to FCPA violations in the Northern District of California for paying \$10.9M to the Prosecutor General of Russia to win a €35 million contract to supply computer equipment throughout Russia - Sentenced to pay \$58.7M fine



# Q&A



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# Thank you!