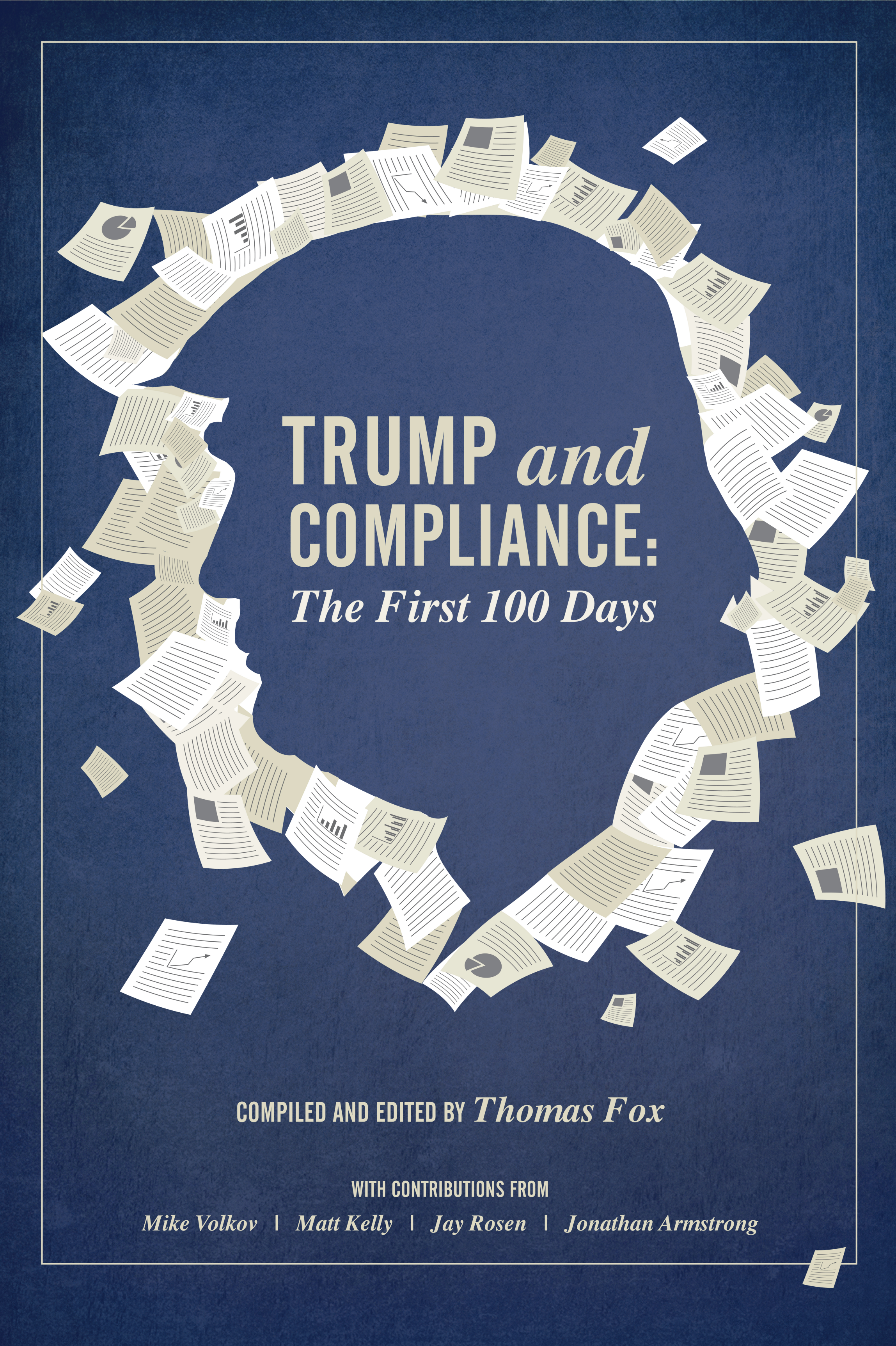
TRUMP and COMPLIANCE:
The First 100 Days
COMPILED AND EDITED BY Thomas Fox
WITH CONTRIBUTIONS FROM
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Foreword

Since November 9, 2016 the Apocalypse has not descended (at least as of the writing of this foreword). Since that time many of the leading compliance commentators have been considered what the first 100 days of the Trump Administration brought to Foreign Corrupt Practices Act (FCPA) enforcement and compliance. The ***Everything Compliance*** podcast has dedicated multiple episodes to these issues. After the first podcast, Maurice Gilbert asked this top panel of prognosticators and commentators to track the evolution of the Trump Administration and compliance. We have done so in this second installment of our Trump and Compliance series. Thanks to my co-contributors, Mike Volkov, Jay Rosen, Matt Kelly and Jonathan Armstrong for providing their collective thoughts for this eBook.

Table of Contents

Foreword ... **3**

Introduction ... **5**

Chapter I - The Trump Administration: The Business Impact ... **7**
- ***A. Kaos is Bad for Business*** ... **7**
- ***B. Failures in Leadership and Management*** ... **9**
- ***C. Preparing for a Catastrophe*** ... **11**
- ***D. The Business Response*** ... **13**

Chapter II - DOJ Views on the FCPA at 40 ... **16**
- ***A. Evolution in Rationale in the Fight Against Bribery and Corruption*** ... **16**
- ***B. Corporate Responsibility for Compliance*** ... **18**
- ***C. DOJ Enforcement and the International Fight Against Bribery*** ... **20**
- ***A. Compliance in Trump Era: More Markers Placed*** ... **23**
- ***B. Trump Admin Whacks Telco Firm for $892 Million*** ... **25**
- ***C. Drone Industry Pans Trump Regulatory Plan*** ... **28**
- ***D. 'Trump Risk' Disclosures Start Rolling In*** ... **29**
- ***E. First SEC Whistleblower Award of Trump Era*** ... **32**
- ***F. Sessions Dodges, Weaves, Promises on FCPA*** ... **33**

Chapter IV - Notes from the Conference Scene ... **35**
- ***A. Still in the Enforcement Business and Evaluation of Corporate Compliance Programs*** ... **35**
- ***B. "It Was the Best of Times, It was the Worst of Times," or "Ignorance is Strength"*** **37**

Chapter V - View from Across the Pond ... **42**
- ***A. European Parliament agrees EU conflicts minerals compliance legislation*** ... **42**
- ***B. European Parliament agrees EU conflicts minerals compliance legislation*** ... **42**

Chapter VI - First Thing We Do Is Kill The Lawyers ... **43**
- ***A. FCPA Pilot Program Motors On*** ... **43**
- ***B. FCPA Remediation Focus on Supervisory Personnel*** ... **44**
- ***C. Yates, AG Sessions and Individual Criminal Prosecutions*** ... **45**

Introduction

Everything Compliance is the only roundtable podcast in the compliance arena. For this podcast, founder Tom Fox brought together four of the top commentators on the FCPA, compliance and privacy issues from the US and UK. The election of Donald Trump threw many persons, including compliance professionals into wonder, if not outright worry, about what the future may hold. To help answer these questions, each panelist has contributed multiple essays on where they see FCPA enforcement, the compliance profession and compliance practice going based on the first 100 days of the Trump Administration. In addition to myself, the other members of the Everything Compliance roundtable and contributors to this publication are:

- Jay Rosen - Vice President, Business Development Corporate Monitoring at Affiliated Monitors. Jay is my podcast partner for our weekly Friday podcast *This Week in FCPA*. Jay also curates weekly top FCPA and Ethics & Compliance stories for "Jay Rosen's Weekend Report" which is available on LinkedIn Pulse. Rosen can be reached at JRosen@affiliatedmonitors.com.
- Mike Volkov - One of the top FCPA commentators and practitioners around and is the Chief Executive Officer (CEO) and owner of The Volkov Law Group, LLC. Mike has over 35 years of experience in practicing law, is a former federal prosecutor and veteran white collar defense attorney, he has expertise in areas of compliance, internal investigations, anti-trust and enforcement matters. Volkov maintains the highly popular FCPA blog – ***Corruption, Crime & Compliance***. He is a regular speaker at events around the globe, and is frequently cited in the media for his knowledge on criminal issues, enforcement matters, compliance and corporate governance. Volkov can be reached at mvolkov@volkovlawgroup.com.
- Matt Kelly - Founder and CEO of Radical Compliance, is the former Editor of the noted *Compliance Week* publication. Matt is an independent compliance consultant who studies corporate compliance, governance, and risk management issues. On his blog, ***RadicalCompliance.com,*** he writes on the intersection of business issues, compliance, governance, and risk topics. Kelly was named as 'Rising Star of Corporate Governance' by Millstein Center for Corporate Governance in the inaugural class of 2008 and named on Ethisphere's 'Most Influential in Business Ethics' list in 2011 (no. 91) and 2013 (no. 77). Matt and myself also have the weekly podcast ***Compliance into the Weeds*** where we take dive deep into the weeds of a compliance-themed topic. Kelly can be reached at mkelly@radicalcompliance.com.
- Jonathan Armstrong - Rounding out the contributors is our UK colleague, who is an experienced lawyer with Cordery Compliance Limited in London. His practice concentrates on compliance and technology issues, including advising multinational corporations on matters involving risk, compliance and technology across Europe. He has handled legal matters in more than 60 countries involving allegations relating to bribery, whistleblower complaints, corporate governance, ethics code implementation, reputation, internal investigations and data privacy

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Chapter I - The Trump Administration: The Business Impact

By Tom Fox

A. Kaos is Bad for Business

While it may seem odd that a 1960s television seems to presage where we currently find ourselves, it turns out that Mel Brooks and Buck Henry had it right with *Get Smart*. The two competing forces were *CONTROL,* headed by Chief and home of Agents 99 and 86 and *KAOS*, formed in Romania but incorporated in Delaware "for tax purposes". Thomas Friedman pointed out the congruity of these competing ideologies in the context of global politics in his most recent book *Thank You For Being Late* but I see this dichotomy in the current domestic political situation.

From the more general business perspective, one can only term the first two weeks of the Trump Administration as chaotic. Peggy Noonan, writing in her weekly Wall Street Journal (WSJ) column, in a piece entitled "*In Trump's Washington, Nothing Feels Stable",* wrote of President Trump and Congressional Republicans, "when they look at him see Chief Crazy Horse." Leaving aside the political chaos engendered over the past two weeks, it has been as equally chaotic for US businesses. From tweeting, to mixed signals and messages to the ban on Muslims entering the US with a valid Green Card or Visa, to insulting one of our two closest neighbors - Mexico; our largest trading partner - the EU; and our most steadfast ally for the past 70 years - Australia; it has been very un-nerving time for US businesses with an international sales component or international supply chain.

Daniel Henninger, also writing in the WSJ in a piece entitled "*Trumpian Shock and Awe"*, said, the Muslim ban "has politicized people the administration didn't need among the disaffected. That includes the management and employees of the entire tech industry and of many other American companies. It includes some Republicans and important staff in Congress, numerous U.S. universities and research scientists, ambivalent pro-Trump voters, and foreign leaders such as Theresa May, Angela Merkel and Enrique Peña Nieto. Not to mention the men and women now rethinking offers to take subcabinet positions after watching the public humiliation of an unprepared federal attorney in a Brooklyn courtroom Saturday."

The markets responded poorly to the ban as well. James Stewart, writing in his *Common Sense* column in the New York Times (NYT), said, "Wall Street did take notice. After months of cheering the prospect of tax reform and infrastructure spending, investors sold stocks after a weekend of chaos at the nation's airports connected to the president's executive order on immigration. On Monday, the Dow industrials experienced the biggest one-day decline since the election, fueled by worries that a dysfunctional White House wouldn't be able to execute Mr. Trump's policies."

If there was one lesson I learned from my work in corporate America, it was that business leaders did not respond well to uncertainty. The chaos engendered by the new administration by the Muslim refugee ban is far beyond simple uncertainty as it moves to truly uncharted waters. Working in the self-proclaimed Energy Capital of the World, Houston TX, this ban has been particularly problematic. Obviously, a large portion of the energy industry is centered in Middle Eastern, Muslim countries or countries like Indonesia, the world's largest Muslim country by population. Iraq and Iran both have large national energy concerns. As noted by Christopher Drew and Clifford Krauss, writing in a NYT article entitled "*Immigration Order Complicates U.S. Companies' Plans in Middle East*", said that US companies which have worked with the Iraqi government to help rebuild the country since 2003, "are irritated that their country, which is working closely with the United States to battle the Islamic State, was one of seven predominantly Muslim nations included in the 90-day immigration ban imposed by the order."

But more than simple irritation from business leaders, there is real concern about retaliatory travel restrictions which will inevitably result from the unilateral US action. Dragen Vuckovic, President of Mediterranean International Inc., a Houston-based service company that operates across the Middle East and North Africa, was quoted in the piece "It's tit for tat." The article noted, "Vuckovic said he had been scheduled to travel to Iraq soon to speak to officials in the country's energy ministry but had changed his plans" and went on to say, "I have a visa but they may not let me into the country in retaliation to Trump's travel ban. I'm not going over there for nothing. It's a very bad situation."

The concerns are broader than simply the seven countries listed in the Muslim ban. It could easily and quickly spread to other Muslim countries and the resulting backlash could well be devastating for America's short and long term business interests. The NYT piece cited to "Michael Dynan, vice president for portfolio and strategic development at Schramm, a manufacturer based in West Chester, Pa., that has supplied rigs to companies working in more than 100 countries including Iraq" who noted "tensions over the immigration order could affect American business beyond the seven countries." Dynan stated, "My concern is retaliation, and that is just going to open things up for competitors like the Chinese. What I am scared of is there could be a backlash in other Muslim countries or in general against America. We've always opened our borders and been the leader in trade and exports. It's our brand."

The response of several companies in Houston was to ban international travel by its employees. The reason, with the chaos and uncertainty these companies did not want their employees caught in a country they could not get into or worse, get out of and be stuck in some type of limbo. This travel concern also plays into persons coming into the US, who are not from countries subject to the Muslim refugee ban, yet who may have traveled to such countries during the pendency of their current passports. Here one might consider the example of the former Prime Minister of Norway, Kjell Magne Bondevik, who was traveling under a Norwegian diplomatic

passport, identifying him as a former PM, yet was detained at Dulles airport because he had traveled to Iran and had an Iranian visa in his passport. All of this in spite of contact between the Norwegian embassy and its US counterparts in Washington during the detention, explaining that Bondevik was a former PM of Norway and as such was no terroristic threat to the US.

Noonan observed, "The president and his advisers are confusing boldness with aggression. They mean to make breakthroughs and instead cause breakdowns. The overcharged circuits are leaving them singed, too. People don't respect you when you create chaos. Prudence is not weakness, and carefulness is a virtue, not a vice." Gretchen Morgenson, no doubt channeling her inner Bette Davis her Fair Game column, advised businesses to 'buckle up" as it will likely be a bumpy ride.

One of the things that both Noonan and Henninger made clear in their articles was their biggest concerns were over the chaos in planning and execution. The failure of the administration in these most critical business functions can only be said in the following terms, *Kaos* indeed.

B. Failures in Leadership and Management

Next consider, the Muslim refugee ban and its disastrous miss-steps by the new administration in its design, execution and delivery. Matt Kelly, writing in his blog Radical Compliance in a piece entitled "*Refugee Ban: A Policy Management Disaster*", listed four leadership failures by the administration in the rollout of the ban, all of which provide some excellent lessons for any business leader who may be trying to initiate change at a company.

The first was listed as "no communication". While Kelly conceded, the President could have sold the request he was making to the American people, he failed to engage in the communication required to sell the ban. Kelly identified it as a failure of leadership because the message from the administration was "dictating orders and expecting others to obey" rather than engaging in dialogue to persuade.

The second Kelly labeled as "flawed implementation" where he stated, "Trump and his team had no plan to implement the refugee ban on a practical basis. Or, in the language of compliance-speak: they ordered a change in procedure without first having a process in place to make it happen." This left the groups required to implement the ban completely in the dark and with "no time to implement new procedures (call them compensating controls) to handle questions from suddenly visa-less travelers around the world." For the Chief Compliance Officer (CCO) or compliance practitioner, Kelly posed the following questions, "Imagine how the board would react to a CEO who orders a new policy, sharply at odds with institutional history and employee values, without planning for its effective implementation. If you were the compliance or audit leader at that company, counseling the board, what would you recommend they do with the CEO?"

Next is that there was no incorporation of the feedback the administration received. While it is certainly the prerogative of the administration to hold the course after the announcement, to claim as Trump did that "It's working out very nicely" belies the facts on the ground. If you are not able or willing to take information into your decision-making calculus, you miss out on a valuable set of inputs. Kelly's final point is that this entire exercise was a "wasted opportunity" because a majority of Americans are inclined to support the President. Some other type of action, more Constitutionally focused and better explained would have probably been accepted.

James Stewart wrote about more broad and systemic failures in management in his *Common Sense* column in the New York Times. While echoing Kelly points on leadership, Stewart provided additional insight for the CCO, compliance practitioner or business leader in the administration's failures around its Muslim refugee ban. Lindred Greer, an assistant professor of organizational behavior at the Stanford Graduate School of Business, said the mistakes were "so basic, it's covered in the introduction to the M.B.A. program that all our students take." Stewart cited to Jeffrey Pfeffer, a professor of organizational behavior at Stanford and the author of *Power: Why Some People Have It and Others Don't,* who said "Trump's executive actions as president "are so far from any responsible management approach" that they all but defy analysis."

Jeffrey T. Polzer, professor of Human Resource Management at Harvard Business School, said, "The core principles [of leadership] have served many leaders really well. It's really common sense: You want to surround yourself with talented people who have the most expertise, who bring different perspectives to the issue at hand. Then you foster debate and invite different points of view in order to reach a high-quality solution." However, to do so, "requires an openness to being challenged, and some self-awareness and even humility to acknowledge that there are areas where other people know more than you do. This doesn't mean decisions are made by consensus. The person at the top makes the decisions, but based on the facts and expertise necessary to make a good decision."

Neither the Secretaries of Homeland Security or Defense were consulted in advance about the substance of the ban. Stewart reported, the Secretary of Homeland Security, "John F. Kelly, was still discussing a proposed executive order restricting immigration when Mr. Trump went ahead and signed it. Nor was Jim Mattis, the defense secretary, consulted; he saw the final order only hours before it went into effect." Greer opined, "Not to consult thoroughly with top cabinet officers before deciding on the order "is insane," since they "have the expertise and should be on top of the data. Ignoring them leads to bad decisions and is also incredibly demoralizing."

These failures also came at the expense of another key lesson of business management - buy-in. The more people who are involved in a decision, the more people will support it and work towards its success. Stewart cited to Professor

Polzer, "When people are genuinely involved in a decision and their input is heard and valued and respected, they are more likely to support and buy into the decision and be motivated to execute to the best of their abilities, even if the decision doesn't go their way." He went on to note, "Conversely, people who aren't consulted feel they have no stake in a successful outcome."

Most interestingly, and for the CCO, compliance practitioner or business leader, was the insight Stewart received when he told the persons he interviewed for the article to "ignore their views about the merits of Mr. Trump's policies." Their uniform response was that you cannot do so because "execution and substance are inextricably linked." He quoted to Professor Polzer that "When you're on the receiving end of a policy decision, the merits of the decision and the execution go hand in hand. If either one is done poorly, the outcomes will be bad. Even good plans that are poorly rolled out aren't going to work well."

Finally, Stewart addressed the myth that businesses thrive on chaos, noting "But every expert I consulted said there is no empirical data or research that supports the notion that chaos is a productive management tool." He once again cited from Professor Polzer, "I don't really know what's going on in the White House, so I don't feel comfortable commenting on that specifically. But I can say in general that in organizational settings, less chaos is a good thing."

Both Kelly and Stewart ended their pieces that if such chaos was demonstrated by a business leader, that leader would likely change their tune or be shortly shown the corporate door. As a CCO, compliance practitioner or business leader, you should study both leadership and management failures by the administration in its Muslim refugee ban rollout and implementation, so you do not make the same mistakes.

C. Preparing for a Catastrophe

Writing in her weekly NYT Fair Game column, in a piece entitled "*The Trump Effect: Time To Buckle Up*", Gretchen Morgenson noted, "investors are now scratching their heads trying to figure out what his presidency will really mean for their portfolios. The recent flurry of executive orders from the new president provides a taste of what may lie ahead. This much is clear to many strategists: Mr. Trump's mercurial tendencies will bring heightened volatility to individual stocks as well as to the securities markets over all. Let's just say that fastening your seatbelt is probably a smart move." As Bette Davis might intone, it's going to be a bumpy ride.

After the announcement of the Muslim refugee ban, the market rally, led by those who thought Trump might well be good for businesses, stopped dead in tracks. Moreover, stating the obvious, Morgenson wrote, "What makes this period especially difficult for investors is Mr. Trump's apparent willingness to make big decisions without weighing the far-reaching and longer-term consequences." Obviously, the tech industry is very troubled by the visa ban and can clearly see the

writing on the wall. I wrote earlier about the negative impact on the energy industry. The US travel industry could well be devastated if Trump moves his ban forward to other countries or religions and continues his verbal assaults on countries which send a large number of tourists to America.

Morgenson also wrote about other industries that could be negatively impacted by the ban and one not immediately apparent – higher learning. She said that it will impact not only those foreign students who want to come to the US to study but also US students as foreign students pay not only more than US students but they are becoming a larger part of the US collegiate student body. She said, "International students contribute mightily to the revenues at educational institutions; as such, they help subsidize other students who are unable to cover the cost of college, including those from the United States."

These few examples and the stock market in general point to the chaos which will continue under the Trump administration. After all, he is running the Presidency exactly as he ran his campaign and exactly as he said he would do so. Do not expect any change.

Last week I wrote about forecasting as part of your compliance risk management strategy. While your business may not ever to be fully able to forecast the *Trump effect* on your company, there are steps you can engage in to prevent a catastrophe. Simon Kuper, writing in his Financial Times (FT) Open shot column, in a piece entitled "*How to avert a catastrophe*", suggested that considering the past to forecast a catastrophe can be fraught with peril. He cited to the well-known forecasting, done annually by Mr. Turkey who gets fed more and more through the summer and early fall, which leads the analysts to make the following forecast "based on past trends, he will keep getting fatter. Then, just before Thanksgiving….."

Kuper looked to Nassim Taleb, author of "*The Black Swan: The Impact of the Highly Improbable"* for guidance on how to be better prepared for a catastrophe. Given the pronouncements via Twitter of Trump and his Executive Order, it may well serve you to incorporate these points into your forecasting and risk assessment going forward, which I have adapted for the business leader or Chief Compliance Officer. The first is the most straight forward: catastrophes will occur and they will be in different form to prior catastrophes. Be ready to mobilize. Next "don't follow the noise" and "ignore banalities"; meaning some catastrophes unfold silently and are not covered as TV events or even stories. He advises "We now need to stretch and bore ourselves with important stuff."

The next few suggestions are quite useful as they require the business leader, CCO or compliance practitioner to focus internally. The first is to focus on and strengthen the internal controls to give you an earlier warning that something is amiss. Review your corporate infrastructure, or as Kuper writes, "Strengthen the boring, neglected bits of the state that can either prevent or cause catastrophe."

Kuper cited a chilling example from Eric Schlosser, author of *Command and Control*, who wrote that in 2013, “the general overseeing the Minuteman III intercontinental ballistic missiles “was removed from duty after going on a drunken bender” in Russia, where his exploits included “asking repeatedly if he could sing with a Beatles cover band at a Mexican restaurant in Moscow, and insulting his military hosts”. A year later, nearly 100 Minuteman launch officers were caught cheating on their proficiency exams. Then a launch officer was jailed for 25 years for running a violent street gang. These people have the keys to launch nukes. A check-up may be in order.”

If you are an international company doing business in a predominately Muslim country, now, rather later, should be the time to check your sales channels, supply chain and even such banalities as how you will move personnel safely in and out of the country in the age of Trump. What about the location of your primary customers? If it’s the EU, how do you plan to get your data out with the imminent death of Privacy Shield and Trump’s drumbeat against not only our largest trading partner bloc but some of the US’ closest allies? Have you focused your long-term growth strategy at China (in particular) or the Far East in general? You may want to look at how your company will continue to sustain growth with the death of TTP, the rise of China as the regional power in east Asia and a not-too-distant trade war in the offing with China.

Kuper ended his piece with two items of very good advice. His penultimate piece of advice is listen to folks who have gone through a catastrophe. While the potential catastrophes under Trump may well be of both a different quality and quantity; seek out their guidance for the process through which they weathered the catastrophe. For it is the process which determines your response. If you have a process in place and are ready to go, you at least have a fighting chance.

Finally, I will simply quote Kuper’s final thoughts in full as I found them to be powerful and, indeed, spot on. He wrote, “Be conservative. Many Americans hope Trump will “shake things up”. As Noam Chomsky says, the risk is that he will. Often, it’s smarter to maintain a flawed status quo. In Taleb’s words: “Don’t mess with complex systems, because we don’t understand them.””

D. The Business Response

The first few weeks of the Trump administration have as certainly been a chaotic start, with a raft of announcements, Executive Orders and social media postings which have kept the business community in turmoil. While the market certainly reacted with a pro-business rally since the presidential election, the reality of the full scope the new administration seems to have taken hold. One question businesses and business leaders have struggled with is how to respond; engage or stand back?

Many in the business community felt that having a shot at comprehensive tax reform, reduced regulatory requirements, infrastructure spending or other ideas was worth some of the other baggage the new administration brought along. Moreover, many business leaders would rightly expect that the new administration would seek out their guidance on issues of great interest to the business community.

Gillian Tett, writing in her Financial Times column Finance, in a piece entitled "*Businesses wrestle with a Trump dilemma*", said that companies and their Chief Executive Officers do need to be involved "because the crucial thing to realize is that nobody really knows where his team will end up on policy." Steve Bannon and his crowd could take US businesses down one path and Secretary of State Rex Tillerson and the Goldman Sachs alums in the administration could take the economy down quite a different path.

One approach was detailed by Andrew Ross Sorkin in his Dealb%k column in the New York Times, in a piece entitled "*A Quiet Giant of Investing Weighs In on Trump*", where he discussed a letter by Seth A. Klarman, the 59-year-old value investor who runs Baupost Group. In this letter, "Klarman sets forth a countervailing view to the euphoria that has buoyed the stock market since Mr. Trump took office, describing "perilously high valuations."" Exuberant investors have focused on the potential benefits of stimulative tax cuts, while mostly ignoring the risks from America-first protectionism and the erection of new trade barriers," he wrote."

Sorkin writes, "Klarman appears to believe that investors have become hypnotized by all the talk of pro-growth policies, without considering the full ramifications. He worries, for example, that Mr. Trump's stimulus efforts "could prove quite inflationary, which would likely shock investors."" The reason is that while, "President Trump may be able to temporarily hold off the sweep of automation and globalization by cajoling companies to keep jobs at home, but bolstering inefficient and uncompetitive enterprises is likely to only temporarily stave off market forces" and that "While they might be popular, the reason the U.S. long ago abandoned protectionist trade policies is because they not only don't work, they actually leave society worse off.""

Klarman is an example of what Tett says are business people who use their voice powerfully, do not act simply as a sycophant but offer precise, hard-hitting, constructive criticism of the administrations ideas which they find objectionable from a business perspective. Moreover, she notes that it "is reasonable to support some of Mr Trump's ideas – such as deregulation - but hate the xenophobia, and then be willing to fight that."

This latter approach was discussed by Henry Graber, writing in Slate article, entitled "*The Corporate Resistance to Trump Is Hardening*", where he described the amicus brief filed by over 100 tech firms in the ongoing Muslim immigration ban litigation. Graber wrote, "The 20-page argument, submitted by lawyers from Mayer Brown, makes the business case against the Trump order, noting the crucial role of

immigrants in U.S. enterprises, including their overrepresentation among American Nobel prizewinners and patent holders. The brief also points out how the order harms U.S. companies' competitiveness abroad, by injecting "severe uncertainty" into every level of international partnerships, from diplomacy to visas to the actual entry process at American airports." While the brief did cite the legal basis for their position, it was primarily focused on the business impact.

Graber ends his article by stating, "But what has begun in public relations, for the moment, appears to have a more substantive backbone. The amicus brief points toward a quieter, more important epiphany in American boardrooms: that stopping Trump isn't just good PR, but good for business as well. At least until he and House Speaker Paul Ryan cut the corporate tax rate."

Jay Rosen, in a piece entitled "*Where Do Politics End and Ethics and Compliance Begin?*", challenged the compliance profession to consider "this is a question that determines where the rubber hits the road. I am not sure that one can actually separate the two domains as politics is often looked down upon for recent decades". I would only broaden this to a business context. While the need to speak truth to power has long existed and is a hallmark of the compliance discipline, working with the current administration would be a way to continue to have influence.

Tett ends her piece by stating there is one powerful tool, which is, in many ways, the simplest and is always available to chief executives. It is, of course, resignation if your "worst fears turn out to be correct."

This would appear to be where the greater business community finds itself. Sometimes we will agree with the administration, sometimes we will disagree privately and sometimes we will disagree publicly. I do think the approach now is to be engaged, with the administration and other arms of the government as some actions which may be done for simple showboating may have longer term negative consequences for American business. If we do not speak up, there may not be an opportunity later.

Chapter II - DOJ Views on the FCPA at 40

A. Evolution in Rationale in the Fight Against Bribery and Corruption

In a speech at the Anti-Corruption, Export Controls & Sanctions (ACES) 10th Compliance Summit (the "DC speech") in April, Department of Justice Acting Principal Assistant Attorney General Trevor McFadden addressed multiple topics and issues around the Foreign Corrupt Practices Act (FCPA). While most of the remarks echoed earlier DOJ officials, we have rarely seen such a comprehensive set of statements about the evolution in purpose for the FCPA, how businesses should comply with the FCPA and FCPA enforcement going forward into the Trump administration.

The purposes of the FCPA were written into the Preamble to the original 1977 legislation. In it, Congress set out three clear policy goals for the enactment of the FCPA. First, was the public revelation that over 400 US companies had paid over $300 million to bribe foreign governments, public officials and political parties. Such payments were not only "unethical" but also "counter to the moral expectations and values of the American public". Second was that the revelation of bribery, tended "to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations". Third was by enacting such resolute legislation, US companies would be in a better position to resist demands to pay bribes made by corrupt foreign governments, their agents and representatives.

Each of the above provide mechanisms to escape liability, rather than the affirmative actions to prevent bribery and corruption. Yet early in his DC speech, McFadden brought up the concept of Corporate Social Responsibility (CSR) and articulated "at the very least it must mean that a company rejects bribery of government officials as a means to get ahead." This is a very far cry from the business world of 1977, when the FCPA was enacted when "bribing foreign officials in order to gain business advantages abroad was often considered a routine business expense." McFadden said that he had personally seen companies "give up potentially lucrative business opportunities or forgo entry into certain markets because they valued their brand reputations over additional profits made under dubious circumstances." Neither CSR nor brand reputation were reasons for the original passage of the FCPA yet today they are at the forefront of corporate compliance with the law.

The harm caused by bribery and corruption has also seen a shift since 1977. The connection between bribery and corruption and terrorism has been well-documented since 9/11. However, McFadden identified several other reasons for robust enforcement of the FCPA. Corruption "impedes free competition" as it allows companies which provide substandard products and services to be awarded

contracts by foreign governments and state-owned enterprises. Of course, the real losers are the citizens of those countries where contracts are awarded based on bribery and corruption. For not only do they receive suboptimal products and services under bribe-induced agreements but "these bribes actually impede economic growth, undermine democratic values and public accountability and weaken the rule of law."

Economic growth is impeded through the diversion of funds which should be paid to a country, lining of the pockets of its officials. The country does not receive the benefit, in goods or services, that it paid for. Here one only needs to consider the words of King Abdullah of Saudi Arabia, who told then Secretary of Defense Robert Gates, he wanted to purchase arms from America, rather than from Russia or France because he did "he wanted all the Saudi money to go toward military equipment, not into Swiss bank accounts." You might also consider how much stronger, better run and more efficient both Petrobras and Brazil would be today if the company had not allowed bribery to be the clear market differentiator, rather than quality and pricing, before Operation Car Wash.

Yet corruption damages more than the citizens of the countries where it occurs. In an area rarely discussed by the DOJ, McFadden correctly noted the damage it afflicts on businesses which engage in such behavior. The first area he highlighted was that because of the uncertainty corruption brings to a transaction, it increases, not decreases the cost of doing business. Simply put, once you pay a bribe, you are identified as a business which is willing to break the law and you can essentially be blackmailed into an ongoing stream of business corruption.

McFadden also pointed out the effect of companies engaging in illegal conduct on their own employees. There are not many employees, in any company anywhere in the world, who want to be known as legal scofflaws. Beyond this attitude, McFadden looked at corruption from more of a Human Resource (HR) perspective when he said, "Bribery has destructive effects within businesses as well, undermining employee confidence in a company's management." Allowing a culture of bribery and corruption to thrive within an organization also fosters a "permissive atmosphere for other kinds of corporate misconduct, such as employee self-dealing, embezzlement, financial fraud and anti-competitive behavior."

While McFadden laid out the above reasons that bribery and corruption is against a business's long term interest, he added another, which the DOJ does not often discuss. Bribery and corruption is not in "the best interests" of a company's shareholders and investors. There are two parts to the FCPA: (1) the anti-bribery provisions and (2) the accounting provisions. Companies which engage in bribery and corruption never correctly record bribes paid as bribes, at least not in their publicly available books and records. This means investors are prevented from obtaining a true and accurate picture of a company's legal value.

I conclude by noting that the FCPA has made a positive impact in fighting this global scourge. Moreover, the leaders in this fight are companies and businesses which comply with anti-corruption laws such as the FCPA. McFadden stated, "we are heading in the right direction. And this is in large part thanks to our allies in the private sector - people like you – who are leading the way in CSR and anti-corruption compliance efforts."

The remarks by McFadden on the invidiousness of bribery and corruption demonstrate the FCPA is not captive to the underlying reasons for its passage in 1977. Application of laws evolve as businesses, society and the global community evolves. Even if the Congress which passed the law some 40 years ago did not understand, appreciate or even consider the reasons that McFadden articulated in the DC speech, they are important in today's world.

B. Corporate Responsibility for Compliance

One of the clear exports from McFadden's speeches is that the DOJ views businesses as leading the fight against bribery and corruption and as partners with the DOJ in this campaign. In the NYC speech he said, "We recognize that business organizations are our partner in the fight against corruption, because they are in the best position to detect risk, to take preventative measures and to educate those who act on its behalf on best practices." The DOJ clearly expects an evolution from the corporate side on best practices. Also, an area that is important to them is the education on best practices going forward. This would seem to be not only mean internal company training but more broadly to have companies educate those up and down their contracting chain to make sure there is a concerted anti-corruption effort going forward.

McFadden emphasized that through "this cooperative effort, we can reduce corruption with effective compliance programs that prevent nefarious conduct from happening and through effective prosecutions to resolve violations in a way that punishes the conduct and deters similar future misconduct."

At several points in the DC speech, McFadden brought forward that it is the private sector which leads the fight against bribery and corruption. This is important for several reasons. First, the government's role should be to enforce the law and encourage compliance with the FCPA. It is up to the companies doing business across the globe to not violate the law. But as McFadden noted, "compliance requires more than good intentions" as businesses must actually *do* compliance. Put in the language of the Evaluation of Corporate Compliance Programs (Evaluation), released in February, a company must *operationalize* compliance.

Even today, there are companies which still think they do not need to have a compliance program in place because they would not countenance bribery and corruption. While admittedly they are most probably not readers of this blog, they

still exist. McFadden emphasized once again the mandate to have a functioning compliance program in place.

McFadden went on to provide some key elements companies must implement or utilize to do compliance. A compliance program must be a living breathing way of doing business. Companies "must ensure that their compliance policies go beyond ink on paper and become a part of a company's culture." Once again, operationalization is the key. He touched on "an appropriate system" which should be implemented to "ensure corporate expectations are followed."

He focused specifically on high-risk environments reflecting the mandate that as your risk increases, the management of that risk should increase as well. Obviously, there are multiple measures to accomplish this requirement but going through the full risk management process and documenting each step you have taken will aid in that process. McFadden specifically mentioned companies which expand either organically into new markets or through the symbiosis of acquisition. On the latter score, this is one of the reasons the DOJ has continually discussed mergers and acquisitions (M&A) in the context of a best practices compliance program.

It is this final point, which also leads to the well-worn DOJ (and Securities and Exchange Commission) maxim that "no one size fits all". Not only is each company's compliance risk unique but that risk can change based on new products or services, new geographic territories, new partners or through M&A. McFadden stated, "a compliance program that worked for a domestic company of 500 employees will rarely be appropriate if that company triples in size or enters foreign markets." This makes clear that a company must assess each risk as its size increases. Of course, to do so requires compliance to have a seat at the table to know when a business is expanding either organically or symbiotically.

McFadden also touched on responsibility of companies to take actions if they sustain a FCPA violation. Drawing from the four prongs of the FCPA Pilot Program, he stated, "the department regularly takes into consideration voluntary self-disclosures, cooperation and remedial efforts when making charging decisions involving business organizations." This speaks to need to be ready to move and move quickly if evidence of a potential violation arises so a company can decide on self-disclosure.

McFadden's remarks also re-emphasize the importance of the new areas of query in the Evaluation around root cause analysis. Companies must quickly and accurately determine the cause of a violation and remedy it going forward. If the company's actions line up with the requirements of the FCPA Pilot Program, an entity could well be in line for declination from the DOJ. When McFadden's speech is coupled with the Evaluation, it is clear the reason for the operationalization requirement of a corporate compliance program. It is through this operationalization that businesses will actually *do* compliance and serve up more than simply "good intentions" which usually translates into no active compliance program.

The basics for FCPA compliance were set long ago, yet this has not stopped innovation in compliance programs which continues up to this day. It is both right and appropriate that this innovation continue as business continue to become more efficient in the business process of compliance. Indeed, it is through this evolution of corporate compliance programs that US companies have come to lead the world in both Corporate Social Responsibility and compliance standards.

C. DOJ Enforcement and the International Fight Against Bribery

Finally, I want to consider McFadden's remarks and what they may portend for both FCPA enforcement and more broadly, international anti-corruption enforcement going forward. He began the final section of his remarks by reiterating the DOJ's commitment to the concepts articulated in the Yates Memo. The DOJ wants to hold individuals accountable for corporate misconduct, as it is individuals not corporations who engage in actions. He also reiterated support for the concepts behind the FCPA Pilot Program stating, "the department regularly takes into consideration voluntary self-disclosures, cooperation and remedial efforts when making charging decisions involving business organizations."

He next turned to the speed and length of FCPA investigations. McFadden said the DOJ is committed to moving forward "expeditiously" to investigate and bring investigations to a conclusion. However, to do so, companies must be prepared to meet this need for speed with prompt and thorough investigations. It also means there must be extensive cooperation, including companies working with the DOJ, to "prioritize internal investigations and to respond to Fraud Section requests promptly to ensure there are no unnecessary delays."

McFadden believes this new, speedier resolution process will "be good for cooperating companies. No executive wants to deal with a lingering government investigation or the associated costs and distraction from the company's mission." Both the Fraud Section leadership and McFadden are focused on wrapping up old investigations, with no unnecessary delays. McFadden concluded this section by stating "My intent is for our FCPA investigations to be measured in months, not years."

McFadden then moved on to how the DOJ will consider decisions to bring enforcement actions. Intoning that prosecutors will always follow the facts, there are times when this means the DOJ will "stop and close an investigation." There may also be times "When we do not have evidence of the requisite criminal intent, there is no justification for a Criminal Division resolution, and we will defer to our regulatory colleagues to handle the matter" and the Securities and Exchange Commission (SEC) may pursue civil charges under the FCPA. Finally, there will be times when a criminal prosecution is warranted. McFadden made clear the DOJ will continue to use the full panoply of tools available to them.

McFadden then turned to international investigations and enforcement in the global fight against bribery and corruption. Similar to the efforts of US companies in leading the business response to compliance standards, the DOJ (and SEC) has lead the globe's legal enforcement effort against corruption. Yet there is a growing international consensus against corruption reflected in both the passage of new and stronger of anti-bribery laws. Countries such as "UK, Brazil, the Netherlands and others who are taking new strides to fight corporate corruption at home and around the world" by increasingly prioritized anti-corruption prosecutions. All largely in concert with the DOJ and SEC.

The DOJ will share evidence of violations of foreign law with "international law enforcement partners where we do not have jurisdiction over the wrongdoers" as well as offering other assistance. He noted, "This is all part of our effort to ensure that companies and individuals subject to the jurisdiction of the FCPA are not disadvantaged as compared to other companies." Both investigations and enforcement actions are increasingly international in scope and the DOJ seeks "to reach global resolutions that apportion penalties between the relevant jurisdictions so that companies that want to accept responsibility for misconduct are not unfairly penalized by multiple agencies." McFadden specifically cautioned that the DOJ's "willingness to apportion or credit penalties based on resolutions with other regulators assumes that the company cooperated with our investigation and did not engage in forum shopping to avoid department involvement in the matter."

McFadden's penultimate remarks dealt with transparency and information made available by the DOJ through declinations and other initiatives such as the Pilot Program. He noted the differences in declinations where there was insufficient evidence of corporate misconduct "where we would have brought criminal cases but for the companies' voluntary self-disclosure, full cooperation, and comprehensive remediation." He then went to specifically reiterate the importance of transparency in enforcement policies and practices, noting the Pilot Program had brought a large measure of transparency. The Pilot Program will continue pending a full assessment of it going forward.

What does it all mean for the compliance practitioner? DOJ speakers have articulated many of these concepts previously, however, McFadden emphasized a new drive towards more expeditious resolution, one way or the other, on FCPA investigations. That can certainly be good news for companies. However, this speedier process will put much more pressure on corporate compliance programs and compliance practitioners to address issues that rise to potential FCPA violations promptly to get the investigations completed quickly and correctly. It will then put more pressure on the assessment and timing of a decision to self-disclose. Companies will also be required to provide more and probably higher quality evidence of culpability of employees and pointing the DOJ in directions they may not have considered.

These remarks also made clear the DOJ is committed to the international fight against bribery and corruption. It will work with its investigative and prosecutorial counterparts across the globe to not only share information but aggressively prosecute corruption scofflaws. This continues the initiatives begun by McFadden's predecessors at the DOJ and others such as Kara Brockmeyer, recently retired from the SEC; to bring more and greater resources to bear across the globe to fight bribery and corruption. This too will also put more pressure on corporate compliance programs to get compliance right going forward. Just as the only hope for a company to receive a declination and not be prosecuted under the FCPA is to have an effective compliance program, fully operationalized, in place.

For those who thought that Trump would do away with the FCPA or his minions would work to weaken it, McFadden's two speeches should be of comfort that the DOJ understands not only the value of the FCPA to the US as a country but also the US business community. Striving for a level playing field in the business world will always work to the advantage of US companies. Indeed, more anti-corruption enforcement across the globe should also benefit American companies by even greater leveling of the playing field. McFadden's remarks make clear that the FCPA is a positive for businesses and its continued enforcement will remain a top priority in the current DOJ.

Chapter III - Regulatory Issues (and a few others)

By Matt Kelly

A. Compliance in Trump Era: More Markers Placed

Compliance officers trying to figure out how your job will or won't change during the Trump Administration, look at two events that happened. First, Jeff Sessions was confirmed as attorney general. Second, the Trump Administration and its henchmen put the Conflict Minerals Rule in their sites.

Within those two things are all the implications an ethics & compliance officer needs to consider for your program and the compliance function's place in Corporate America.

Sessions embodies everything compliance officers need to contemplate for enforcement under the Trump Administration. He has a long history as a prosecutor, at the state and federal levels. He is going to prosecute crimes, including the Foreign Corrupt Practices Act and export-control law. Compliance with those laws was a priority for compliance officers before Donald Trump, and compliance will be a priority for you still.

The change will be about which targets Sessions wants to pursue: more individuals, fewer companies.

My guess is that this will mean a sharper need for compliance programs to demonstrate effectiveness. If you can, the Justice Department under Sessions won't just let you off with a deferred-prosecution agreement and minor penalties; my guess is that the Sessions Justice Department will let most companies avoid punishment entirely.

That idea is just the FCPA Pilot Program taken to its logical conclusion. The Pilot Program offers companies steep discounts on potential penalties, provided that companies report violations voluntarily, provide evidence to help prosecutors target individual offenders, and remediate problems in their compliance efforts.

1. Attorney General Jeff Session

Well, if the Pilot Program were to promise no penalties if a company meets all those requirements—that fits what Sessions has said before. The program is up for renewal in April, and I'll die of shock if Sessions doesn't expand and enshrine its principles as Justice Department policy somehow.

So, compliance officers need to start thinking: how can you trick out your compliance program so that it meets those principles easily? That is, when you do

discover an FCPA violation, how does your compliance program need to operate so you can call up the Fraud Section and say, "We have a problem, here's everything you need wrapped in a bow, so can we get to the no-penalty part please?"

For starters, compliance programs will need be sure their e-discovery and document retention policies are strong, so you can cooperate with prosecutors effectively. You'll need effective systems to identify improper payments. You'll need effective due diligence programs.

This is probably the point where you start thinking, tell me something I don't know—but that's precisely my point. Companies are still going to need FCPA compliance programs. Regardless of whether FCPA enforcement is mostly a stick to punish offenders (the Obama Administration) or mostly a carrot to entice cooperation (the Trump Administration), the common denominator is the existence of a compliance program. How the program works will change around the edges, but it won't change in substance.

2. Conflict Minerals Rule, Farewell

More interesting was the Trump Administration's decision to put a target on the back of the Conflict Minerals Rule. First, acting SEC Chairman Michael Piwowar announced a plan to "reconsider" the Conflict Minerals Rule, under the theory that it has not produced the benefits Congress had hoped to see. Then on Wednesday came news that Trump is planning to issue an executive order that would suspend the rule for two years.

Let's not mince words. Republicans are going to kill the Conflict Minerals Rule. Exactly how and when, we don't know. Probably Trump will suspend it long enough for the SEC to re-propose a new rule watered down to the point of toothlessness. Regardless, it's a dead man walking.

What we think about the rule itself is irrelevant. Where Sessions' arrival at the Justice Department tells us a lot about the future of enforcement, how the SEC will handle this rule tells compliance officers a lot about the future of disclosure.

The SEC, Republicans in Congress, and the Trump Administration are going to mount a full-court press to repeal all sorts of disclosure rules. Piwowar has already also re-opened the CEO Pay Ratio Disclosure Rule for more comment. Republicans killed the Extractive Payments Disclosure Rule last week.

3. Conflict Minerals in Africa

The Conflict Minerals Rule stands apart from the others because lots companies have already invested considerable time and resources to root out conflict minerals from their supply chain. Intel, for example, has a whole mini-website dedicated to its

conflict minerals program. A cottage industry now exists devoted to the eradication of the conflict minerals trade.

The compliance community has always said that good ethical conduct gives companies a competitive edge. Well, now is our big chance to prove it, because as requirements for good ethical conduct start falling by the wayside—the only reason companies will keep undertaking these efforts is if they do provide a competitive advantage.

We're going to see more debates like this in the future. As Republicans repeal rules intended to drive social policy by public disclosure, they will always be able to say, "If shareholders feel so passionate about Issue X, they can always adopt a by-law requiring the company to disclose X anyway."

Then will come battles with investor groups that do care about those issues. For example, the Corporate Human Rights Benchmark is an effort by institutional investor to steer corporate behavior on human rights, and that benchmark depends on just the sort of disclosure the Conflict Minerals Rule required. How will the CHRB continue to squeeze those disclosures out of corporations when they're no longer required? With some pointed conversations and social media campaigns, I'm sure. (Plus, let's remember, conflict minerals disclosure still exists in the European Union.)

In other words, as Washington peels back "social policy disclosure rules," things that had been compliance headaches may evolve into investor relations and governance headaches. What will your role be in helping the board ease those pains? Every company and board will answer that in its own way. But it's a question compliance officers should contemplate.

B. Trump Admin Whacks Telco Firm for $892 Million

Compliance officers wondering whether the Trump Administration would still enforce egregious corporate misconduct with big fines, here's one answer: the administration today whacked a Chinese telecom firm with nearly $900 million in fines and penalties for export control violations.

The firm is ZTE Corp., which pleaded guilty to re-exporting sensitive communications technology to Iran without proper licenses from the U.S. Office of Foreign Assets Control. In total, ZTE will pay $892 million in penalties, in an announcement made by Tuesday by newly minted Commerce Secretary Wilbur Ross.

Whoa.

For a while now, the message has been building that if companies self-report misconduct and cooperate with investigators, they're likely to win significant concessions from the Trump Administration on penalties—but pervasive and egregious misconduct would still be punished severely. I had my doubts about that second part, and clearly, much of this investigation was completed during the Obama Administration.

Still, if Ross and Attorney General Jeff Sessions had wanted to pause and revisit the wisdom of this settlement, they could have done so. They did not. That says something.

Sessions singled out ZTE's misconduct during the investigation as a one reason why the penalties were so steep. ZTE executives lied to prosecutors, outside counsel, and even their own internal investigations team, trying to cover up their misconduct. ZTE even resumed sending prohibited goods to Iran after the investigation was underway. On a certain aesthetic level, you have to admire behavior that shameless.

In addition to the $892 million in penalties, the company agreed to a compliance monitor for three years to oversee its export compliance program, and to cooperate fully with future investigation work. The Commerce Department's Bureau of Industry and Security also suspended another $300 million in penalties, to be imposed if ZTE violates its settlement agreement with that agency.

1. **The Misconduct**

According to court documents, ZTE engaged in a six-year scheme to acquire sensitive telecommunication equipment from U.S. manufacturers, repackage that gear with other ZTE equipment, and then sell the final product to Iranian customers under the ZTE label. The sales ran from 2010 into 2016, and involved roughly $32 million worth of U.S.-origin goods.

ZTE executives knew from the start that those sales violated the International Emergency Economic Powers Act. By 2011 the company had even formed a special team to devise new ways around the law. They recommended "isolation companies" that would do the dirty work, and supposedly protect ZTE itself from the export control risks.

Everything went public in 2012, after a Reuters article exposed the operation. ZTE briefly halted sales to Iran, but resumed them in 2013—and resumed the export-control misconduct in 2014, while investigators hither and yon were already looking into the matter.

The settlement itself is not a surprise. As early as November, rumors of a deal were swirling, and ZTE appointed a chief export compliance officer. (Matt Bell, formerly of Kellogg, Brown & Root, who also serves as chief corporate compliance officer for ZTE's U.S. operations.)

2. The Message

Since Donald Trump's election, compliance officers have heard many pronouncements from his law enforcement team that corporations don't commit misconduct, people do. Therefore, prosecution should focus more on individual wrongdoers than corporations.

That's generally true, and we should still expect to see many more instances of corporate misconduct settled with fewer charges and smaller fines—but it's only generally true. Sometimes corporations do engage in elaborate, deliberate plans to break the law. ZTE's misconduct fits that profile, and this is the result. ZTE's annual revenue is only around $15 billion, so a fine of $892 million is going to hurt.

Compliance officers trying to interpret today's sanction should revisit the principles of the FCPA Pilot Program. The program launched last year, and promised significant discounts on monetary policies if companies did three things: disclose the misconduct voluntarily; cooperate fully with investigators trying to identify responsible individuals; and mitigate their policies, procedures, and controls to ensure the misconduct doesn't happen again.

ZTE failed on all three prongs of that test. Worst of all, it misled investigators during their investigation.

3. What's Next

ZTE is the first big enforcement action under the Trump Administration, but by no means is it the last. I'm still waiting for final resolution in the long-running investigation into Wal-Mart, and allegations that it violated the Foreign Corrupt Practices Act with business practices in Latin America and other parts of the world.

Wal-Mart reports its 2016 earnings sometime around the end of this month. If a settlement is looming, it could well be disclosed then. If a settlement isn't looming, we can still expect another update from Wal-Mart in its annual report about what's going on.

When we last left the Wal-Mart saga (now in its fifth year) a few months ago, rumor was that prosecutors had offered to settle the case for $600 million in penalties. Wal-Mart balked at that, and talks also stalled over concerns that Wal-Mart might lose eligibility to participate in federal food stamp programs.

Lots of the original hysteria over possible bribery at Walmart has fizzled away. The company has done a remarkable job investing in better compliance, and spent more than $820 million on compliance since the FCPA allegations first surfaced in 2012.

If the Trump Administration wants to send another message about corporate misconduct, one that tells companies cooperation and remediation will be rewarded, a light touch with Walmart would do it.

Will we see one? Who knows. But ZTE alone is message enough for today.

C. Drone Industry Pans Trump Regulatory Plan

Many thanks to the unmanned drone industry, which last week said the obvious about Donald Trump's idea for government agencies to repeal two existing regulations for every new rule they want to adopt: it's a simplistic notion that could actually harm new industries more than it helps them.

The Commercial Drone Alliance sent a letter to the Office of Information and Regulatory Affairs on Feb. 9, asking that any new rule the FAA proposes to encourage the unmanned drone industry be counted as a "deregulatory action," and therefore exempt from the regulatory repeal order Trump signed on Jan. 30.

Why? Because the FAA's existing rules—which are extensive—were adopted long before drones started peeping into our backyards and interfering with commercial aviation. So a new rule that accommodates drones is really cleaning up the thicket of old rules that don't.

Or, as the CDA diplomatically phrased it, "The general goal is to encourage the FAA to implement regulations that repeal aspects of the Federal Aviation Regulations that hold the drone industry back in ways that are nonsensical."

The drone people are one example of the broader point that Trump's 2-for-1 regulatory kill order is a blunt instrument. New businesses and new products practices sometimes require new regulation as they grow. It does not logically follow that old businesses therefore suddenly become risk-free, and we can discard old regulation to make way for the new.

Yes, we should always be hunting for unnecessary regulation that can go into the dustbin. We can do cost-benefit analyses. We can have vigorous arguments about what regulations really are necessary for a new product or industry.

But all that is the process of smart regulation (as tortured as that process may be). What Trump proposes is regulation by auto-pilot. The world doesn't work that way. Just imagine a teenager insisting that for every new rule you impose on his behavior, you have to repeal two prior rules. You'd laugh and ignore him. Behaviors change and get more sophisticated over time; teens need nuanced, intelligent rules that can keep up and foster responsibility. The same is true of businesses.

About That 2-for-1 Kill Order

Thankfully, Trump's executive order acknowledges this reality in oblique ways. Foremost for compliance officers, his executive order does not cover the Securities & Exchange Commission, the Public Company Accounting Oversight Board, or the Financial Accounting Standards Board. They are all defined by law as independent agencies, which are exempt from Trump's fancy proclamations behind fancy desks.

Honestly, I wondered if Trump understood that when he drafted the order; it seems just the sort of loophole that would send his authoritarian self into orbit. But eventually the Office of Management & Budget did confirm that the SEC and its brethren are exempt.

Clearly Republicans running the SEC will try to achieve the spirit of the 2-for-1 kill order anyway. But it's not a requirement.

Second, even for agencies where Trump's executive order does apply, the order itself has several crucial escape clauses. Regulations relevant to military, national security, or foreign policy are exempt. Each agency will get a budget for new regulatory costs from the Office of Management and Budget—but new regulations required by law won't be subject to that cap. Emergencies that address health, safety, or financial matters can get a waiver from the order. (Recall those hastily drafted financial rules in the summer of 2008; or emergency inspection of mines after the Massey Energy disaster that killed 29 miners in 2010.)

And regardless of those caveats, when agencies do propose the required two deregulatory actions, those suggested repeals still go through the standard propose-and-comment process. Which, as any compliance officer knows, can take forever.

In other words, like most of the Trump presidency so far, the regulatory kill order is lots of bluster and little substance. In due time, as Trump's Cabinet members finally take office, we may see their anti-regulation zeal start to bite.

Let's just hope that they follow the drone industry's suggestion, and bite thoughtfully.

D. 'Trump Risk' Disclosures Start Rolling In

When we last left disclosure of "Trump risk" just after the November 8 presidential election, only a few brave filers mentioned the victory of Donald Trump in their risk factors. Prompt as they were, those disclosures were predictably vague because nobody knew what a Trump Administration might portend.

Now fourth-quarter 2016 reports are hitting the streets, with many more citing the arrival of Trump and what that might mean for their businesses. Have no fear: the disclosures are still vague.

First, the numbers.

According to Calcbench, nine companies cited Trump as a risk factor in their third-quarter 2016 statements. The first post-election disclosure came from TPI Composites, a manufacturer of components for wind power generation. TPI filed its third-quarter report at 4:41 p.m. on Wednesday, Nov. 9.

By February 27 companies mentioned Trump in their risk factors in their fourth quarter reports—and we are only just beginning to see those reports arrive. As more companies file their fourth-quarter reports, that number will climb much higher. (None of this should be confused with the surge in Trump talk on earnings calls, but we'll leave that headache for the investor relations department.)

Most of the disclosures talk about possible consequences of tax reform or trade policy. Healthcare and pharmaceutical companies mention healthcare reform; energy companies cite possible loss of support for renewable energy or relaxation of environmental rules. Here's a sampling.

Kansas City Southern, in its Form 10-K filed on Jan. 27, warned about trade policy:

U.S. President Donald J. Trump, certain members of the U.S. House of Representatives, and key U.S. administrative officials and policy makers have suggested renegotiation of NAFTA and the implementation of tariffs, border taxes or other measures that could impact the level of trade between the U.S. and Mexico. Any such proposal or measure could negatively impact KCS customers and the volume of rail shipments, and could have a material adverse effect on KCS's consolidated financial statements.

Apollo Global Management, in its Form 10-K filed on Feb. 13, cited the risk that tax reform might cause it to lose valuable talent among its investment executives:

Legislation has been proposed in the U.S. Congress to treat portions of incentive income as ordinary income rather than as capital gain for U.S. Federal income tax purposes. Furthermore, President Trump expressed support for such legislation during his electoral campaign as it relates to certain management activities.

Amgen, in its Form 10-K filed on Feb. 14, cited reform to the Affordable Care Act:

U.S. President Donald Trump and other U.S. lawmakers have made statements about potentially repealing and/or replacing the ACA, although specific legislation for such a repeal or replacement has not yet been introduced. While we are unable to predict what changes may ultimately be enacted, to the extent that future changes affect how our products are paid for and reimbursed by government and private payers our business could be adversely impacted.

Lions Gate Entertainment cited tax reform, specifically the prospect that interest expenses might no longer be deductible. Varonis Systems named import-export regulations. CMS Energy said Trump's opposition to the Clean Power Program could harm future growth. You get the picture.

The Art of Disclosing Not Much

Reams of literature exist to help companies understand what they should disclose as a risk factor. The default, of course, is to be as non-specific as possible, and all the disclosures above certainly fit that spirit.

Trump Risk-Two of the more useful pieces of guidance are SEC Financial Reporting Release 36 (originally written in 1989), and Financial Reporting Release 72 (published in 2003). Both are intended more to help filers understand what to disclose in the Management Discussion & Analysis, but the principles at play are just as useful to weigh what you should disclose in your Risk Factors. You may want to give them a fresh read if you haven't filed your 10-K yet.

The chief obstacle for disclosure of Trump risk is this: Trump hasn't done much yet. Nor have Republicans in Congress, for that matter. We have no solid plans for tax reform, none for healthcare, none for trade policy, none for infrastructure investment. The only concrete action Trump has tried was his Muslim immigrant ban, which backfired and added even more uncertainty to many companies' economic plans.

When (if) Trump presents a coherent policy agenda, disclosures might change. The key is that the Trump Administration would need to provide enough of a plan for companies to anticipate how they might change course based on that plan. For example, a company might say something like, "Because of the Trump Administration's new infrastructure spending program, we expect to increase investment in capital equipment by an additional 5 to 10 percent in the next year." That's a good, useful disclosure.

Alas, Trump (and Congress) has done nothing to let companies provide anywhere near that dreamy level of detail. Yes, companies can disclose in the MD&A that they plan to invest more in capital equipment next year, but big deal—many companies would be doing that regardless of Trump.

Those on the downside of Trump risk—healthcare, pharmaceuticals, alternative energy companies—perhaps can disclose more now, albeit as a risk factor rather than an MD&A item. They may not know precise amounts of damage Trump's supposed policies might cause, but they can articulate that damage is likely. How they might respond to ensure future growth (that is, what they might put in the MD&A) would be speculation, and probably best left unaddressed.

Regardless, your outside counsel will presumably give you the recommended boilerplate. Those third-year associates must earn their $210,000 salary somehow, after all.

For now, we can close with one other Trump disclosure from Varonis:

It remains unclear what specifically President Trump would or would not do with respect to the initiatives he has raised and what support he would have to implement any such potential changes.

I suspect the whole country feels that way. Moscow too.

E. First SEC Whistleblower Award of Trump Era

Some lucky corporate whistleblower received $4 million from the Securities and Exchange Commission today, the first whistleblower award issued under the Trump Administration—with an added layer of mystery about whether the award was based on a sanction imposed by a non-financial regulator.

As usual, we don't know much about the case. According to the SEC's announcement, the whistleblower approached the agency "with detailed and specific information about serious misconduct," and then "provided additional assistance during the ensuing investigation, including industry-specific knowledge and expertise."

What does that mean? Unclear. One could speculate that if the SEC needed industry-specific knowledge that might mean the industry isn't broker-dealer or financial services, since the SEC has plenty of in-house expertise for those fields.

We do get a hint in the footnote to the SEC's order determining the $4 million amount. The award was derived from a sanction imposed, at least in part, by some governmental body other than the usual financial regulators.

Bear with me as we walk through SEC rules.

SEC whistleblower awards are typically 10 to 30 percent of the total sanction imposed on the company in question. To protect the whistleblower, the SEC doesn't identify what that exact sanction amount is. (If we do the math, this award of $4 million implies a total sanction against the company of $13 million to $40 million.)

In this case, the footnote said the $4 million was calculated from a sanction paid to "another governmental authority."

Rule 21F-3(b)(1) of the Exchange Act does allow the SEC to do that. It also identifies several types of authorities that qualify under the rule: the Justice Department;

other financial regulators; self-regulatory organizations, such as the New York Stock Exchange; or state attorneys general.

In this instance, however, the other governmental authority "is not one of the specifically enumerated authorities listed." Well, if this mystery authority isn't the Justice Department, a financial regulator, an SRO of some kind, or a state attorney general—then who are they?

As usual in the maddening world of SEC whistleblower rewards, we don't know. If it's an industry regulator like the Food & Drug Administration or the Nuclear Regulatory Commission (I picked them at random), that could explain why the SEC needed the 33whistleblower's "industry-specific knowledge expertise." I suppose the authority could even be a foreign government—although, again, that's just speculation. And how much of the award was based on this mystery regulator, rather than penalties the company might have paid to the SEC or a more traditional Dodd-Frank regulatory agency? Again, we don't know.

The SEC has claimed the power to calculate awards based on sanction from "other governmental authorities" before. It first did so in 2014, with an $875,000 award split between two whistleblowers. We don't know the identity of the other governmental authority in that case, either. Nothing in Rule 21F, which governs how whistleblower awards are doled out, says the SEC can't interpret the language of the rule expansively.

That last bit, in fact, might be the most telling detail of all. We now have a significant whistleblower award under President Trump, a man with fierce anti-regulatory views. (Yes, one award for $7 million was issued on Jan. 23, the first full working day of the Trump Administration. I don't count that one.) This award also came under the watch of Acting Chairman Michael Piwowar, a Republican who typically prefers strict interpretation of the rules.

Cynics would expect whistleblower awards like this no longer to happen, and perhaps in the future they won't—but one happened today. Which is a fact you can take to your CEO or audit committee the next time they start wondering whether you still need rigorous corporate compliance programs. Yes, you do.

F. Sessions Dodges, Weaves, Promises on FCPA

Attorney General Jeff Sessions promised yet again Monday to enforce the FCPA and other anti-corruption laws, in a wide-ranging speech meant to win over corporate compliance officers curious about how seriously the Trump Administration will take corporate misconduct.

Sessions spoke to an audience of several hundred at the Ethics & Compliance Initiative's annual conference in Washington. If we take his words at face value,

they're reassuring to compliance professionals in several ways. Yes, he said, enforcement of the FCPA will continue. No, he said, the Justice Department won't view every incident of an employee's misconduct as a big heap of criminal liability for the company itself.

Then again, Sessions also danced around the question of whether zealous U.S. enforcement of anti-corruption laws puts U.S. companies at a competitive disadvantage on the global stage. At one point in his speech, he praised anti-corruption enforcement as a vehicle to reward the many good companies out there that don't bribe their way to success.

AG Jeff Session

At another point, however, Sessions said: "The United States cannot allow its corporate community to be more vulnerable to unfair competition… we need to look at rules and procedures and laws that may be disadvantaging our companies, disadvantaging our ability to expand and increase our productivity. It was a big issue in this last election." He then said he welcomed input from Corporate America about how to navigate between those two poles. So your dues to the U.S. Chamber of Commerce are indeed being put to work.

And while Sessions did telegraph that the pillars of the FCPA Pilot Program (self-disclosure, cooperation, and remediation) will be mainstays of his approach to corporate misconduct generally, he shed no new light on how much cooperation companies will need to provide, or how closely prosecutors will review corporate compliance programs to deem them "effective."

All in all, the compliance community is still right where it was before Sessions took the stage Monday afternoon. We have a Justice Department that says it will maintain enforcement of the FCPA and another corporate misconduct statutes, with a more considerate (one might almost say forgiving) awareness that errant individuals do bad things at large corporations.

And we still have few specific examples of what that really means.

[More to come later.]

Chapter IV - Notes from the Conference Scene

By Jay Rosen

A. Still in the Enforcement Business and Evaluation of Corporate Compliance Programs

In March, I had the distinct pleasure of gathering with members of the ABA's White Collar Bar at their 31st Annual Institute on White Collar Crime in Miami Beach. On Tuesday, right before the conference started, the Department of Justice announced that ZTE Corporation entered a guilty plea for conspiring to violate the International Emergency Economic Powers Act (IEEPA) by illegally shipping U.S.-origin items to Iran, obstructing justice and making a material false statement.

"ZTE Corporation not only violated export controls that keep sensitive American technology out of the hands of hostile regimes like Iran's – they lied to federal investigators and even deceived their own counsel and internal investigators about their illegal acts," said Attorney General Jeff Sessions. "This plea agreement holds them accountable, and makes clear that our government will use every tool we have to punish companies who would violate our laws, obstruct justice and jeopardize our national security.

With this plea agreement, the DOJ confirmed that they are still (back) in the business of enforcing the nation's anti-corruption statutes.

DOJ's Criminal Division, Fraud Section Releases Evaluation of Corporate Compliance Programs

Last month, the DOJ quietly released the Evaluation of Corporate Compliance Programs which commences with the following note, "We recognize that each company's risk profile and solutions to reduce its risks warrant particularized valuation. Accordingly, we make an individualized determination in each case."

"There are, however, common questions that we may ask in making an individualized determination. This document provides some important topics and sample questions that the Fraud Section has frequently found relevant in evaluating a corporate compliance program."

The initial four questions posit if you have a problem, how do you diagnose it and what do you do? The document asks the following questions -- what does management do, does there exists resources to remediate and what policies and procedures are in place to correct the issue?

The questions fall under the categories of:

Analysis and Remediation of Underlying Misconduct
Senior and Middle Management
Autonomy and Resource
Policies and Procedures
The next section speaks to preventative measures.

Risk Assessment
Training and Communication
Confidential Reporting and Investigations
Incentives and Disciplinary Measures

Topics 9 through 11, speak to how do you weave ethics and compliance into your business moving forward? Here we look at Continuous Improvement, Periodic Testing and Review Third Party Management. The last group of questions looks at how to handle the Mergers and Acquisition process. Specifically looking at pre-acquisition Due Diligence, how compliance has been integrated into the M&A and integration process and finally the process of implementing compliance polices at the newly acquired entities.

This past week, in speaking with CCOs, compliance practitioners, and fellow solution providers, the conversation seemed to keep coming back to this Evaluation of Corporate Compliance Programs document and the feeling that there can no longer be any excuses of not knowing. This guidance further codifies the Government's expectations of what issues a reasonable compliance program should address and how it should be implemented.

So how does this change the conversation about a company's ethics and compliance duties as well as its culture? For those of us at the conference, the guidance was somewhat preaching to choir, but once we drilled down into conversations with present and former in-house counsel as well as members of the white-collar bar, the conversation became no longer “if” you do this, but moved directly to “when” and that “when” needs to be “now”.

Frequently issues kept coming up about due diligence, specifically within an M&A transaction. In a merger, there is such momentum from M&A attorneys and bankers driving the deal over the finish line that key due diligence of culture, having a robust ethics and compliance program as well as a credible 3rd Party Due Diligence program often seem to be afterthoughts or unfortunately are completely ignored during this crucial time.

In total, these thoughtful questions about ongoing monitoring, risk assessments and root cause analysis and the need for companies to explain how something might have fallen through the cracks, all argue for an enhanced ethics and compliance program.

It reminds me of the old Fram oil filter commercial (please see below) that used to say, "You can pay me NOW or you can pay me LATER."

From an ethics, compliance and culture perspective, we would much rather proactively help our clients implement and maintain a robust ethics and compliance self-assessment keeping them on the right path. Thus avoiding a situation where they potentially stumble and a settlement is negotiated, necessitating a multi-year monitor agreement.

B. "It Was the Best of Times, It was the Worst of Times," or "Ignorance is Strength"

"It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, …" This phrase is from the famous opening paragraph of Charles Dickens' novel, A Tale of Two Cities.

It tells a story of contrasts and comparisons between London and Paris during the French revolution.

This phrase points out a major conflict between family and love, hatred and oppression, good and evil, light and darkness, and wisdom and folly. Dickens begins this tale with a vision that human prosperity cannot be matched with human despair. He, in fact, tells about a class war between the rich and the poor. It also tells the time of despair and suffering on the one hand and joy and hope on the other.

Sound familiar?

On April 27th, at the Ethics & Compliance Initiative Annual Conference, AG Jeff sessions addressed the Ethics & Compliance community for the first time. He shared the following prepared remarks.

"First, I want to thank you for working so hard to ensure that your companies and clients do the right thing."

"The Department of Justice investigates and prosecutes people and companies that break the law – including laws that criminalize corporate misconduct. That is an incredibly important responsibility, and the men and women of our department take it seriously. Our work ensures that law-breaking is punished, and helps deter future bad behavior. I think I have the experience to properly evaluate a case. We will enforce the law and not back down to powerful forces – but we will be fair – equal justice to poor and rich."

"But each case we bring may be a sign that something has already gone wrong. That is what your work seeks to prevent, by building strong cultures of compliance

within your companies to deter illegal and unethical conduct. We applaud those efforts. Our department would much rather have people and companies obey the law and do the right thing, so we don't have to see them in court."

"Your good work makes our jobs easier, and it makes your companies and our country better. So far, so good. The E&C community is recognized for doing their job of helping companies follow their moral compass."

"The second message I want to make clear today is that under my leadership, the Department of Justice remains committed to enforcing all the laws. That includes laws regarding corporate misconduct, fraud, foreign corruption and other types of white-collar crime."

"I understand there can be some uncertainty when there is a new Administration or new leadership at the Justice Department. "

"As you are probably aware, I have spent my first weeks as Attorney General ensuring that our department strengthens its focus on some key issues. For example, we need to turn back the recent surge in violent crime and murder that is troubling many of our cities. We need to restore a lawful system of immigration that upholds the rule of law and keeps us safe. And we must disrupt the transnational cartels, gangs and human traffickers that are bringing drugs and violence into our communities and which threaten the integrity of legal systems and even nation states."

"These are important priorities for our department. But focusing on these challenges does not mean we will reduce our efforts in other areas."

On April 20th, Acting Principal Deputy Assistant Attorney General Trevor McFadden addressed the ACI's 19th Annual Conference on Foreign Corrupt Practices Act.

He commenced his remarks by saying, "I would like to address the suggestions from some that the Department of Justice no longer is interested in prosecuting white collar crime. I intend to dispel that myth. While we are boosting our focus on violent crime prosecutions, the Criminal Division is fully engaged in combatting crime in all its forms, and no matter what color collar its perpetrators wear. "

Later in his remarks, he said, "…motivated as ever by the importance of ensuring a fair playing field for honest corporations doing business abroad, the department continues to vigorously enforce the FCPA. The department is committed to enforcing the FCPA and to prosecuting fraud and corruption more generally. The department does not make the law, but it is responsible for enforcing the law, and we will continue to do so. We also continue to prioritize prosecutions of individuals who have willfully and corruptly violated the FCPA – Attorney General Sessions has stressed the importance of individual accountability for corporate misconduct. Finally, the department continues to work with business organizations and their

counsel and regularly takes into consideration voluntary self-disclosures, cooperation, and remedial efforts when making charging decisions."

Earlier in the month on April 18th -- Acting Principal Deputy Assistant Attorney General Trevor McFadden similarly pledged support for FCPA enforcement a week earlier at the Anti-Corruption, Export Controls & Sanctions 10th Compliance Summit.

"My fellow prosecutors and I at the Justice Department are intent on creating an even playing field for honest businesses," McFadden remarked. "Corruption introduces significant uncertainty into business transactions, and it actually increases the cost of doing business."

So, if you are keeping score at home, three speeches and three definitive statements that the DOJ is still in FCPA and White Collar Crime prosecution mode.

Let's see what the numbers say. According to the FCPABlog, during the first calendar quarter, there were six corporate FCPA enforcement actions and one individual resolution.

The six settling companies paid a total of $256.5 million for the resolutions. All six were announced in January.

For comparison, in Q1 2016 there were eight corporate FCPA resolutions and three involving individuals.

Mondelēz International, Inc. (January 9) paid the SEC $13 million to resolve FCPA offenses related to payments by its Cadbury unit in India. The SEC said both Cadbury India and Mondelēz violated the internal controls and books-and-records provisions of the FCPA. Mondelēz, formerly known as Kraft Foods, Inc., acquired Cadbury Limited and its subsidiaries in February 2010.

Zimmer Biomet Holdings Inc. (January 12) agreed to pay more than $30 million to resolve DOJ and SEC investigations into the company's "repeat" violations of the Foreign Corrupt Practices Act. The medical device maker paid a criminal fine of $17.46 million and civil penalties and disgorgement of $13 million. Biomet previously resolved FCPA offenses in 2012 when it paid the DOJ and SEC nearly $23 million. Zimmer bought Biomet in 2015.

Sociedad Química y Minera de Chile SA (January 13) paid $30.5 million to resolve criminal and civil Foreign Corrupt Practices Act offenses for bribes to Chilean politicians. SQM paid a criminal penalty to the DOJ of nearly $15.5 million and a civil penalty to the SEC of $15 million. The SEC said, "virtually all of the improper payments to [Politically Exposed Persons] were directed and authorized by a senior SQM executive."

Rolls-Royce plc (January 17) agreed to pay the United States a criminal penalty of $170 million for a global conspiracy to violate the Foreign Corrupt Practices Act. The DOJ action was part of an $800 million resolution of investigations by U.S., UK, and Brazilian authorities. The DOJ filed a criminal information and deferred prosecution in federal court in Columbus, Ohio on December 20. The documents were under seal until January 17.

Orthofix International (January 18) paid the SEC more than $6 million in disgorgement and penalties to settle FCPA charges related to illegal payments to doctors at government hospitals in Brazil. Orthofix was involved in another FCPA enforcement action in 2012 for illegal payments to doctors at government hospitals in Mexico. It paid $7.4 million to the DOJ and SEC to resolve the earlier FCPA offenses.

Las Vegas Sands Corp. (January 19) paid a criminal fine of nearly $7 million for Foreign Corrupt Practices Act offenses in China and Macau. The casino and resort operator admitted paying $5.8 million to a China consultant "without any discernable legitimate business purpose." A Sands finance department employee and an outside auditor warned the company that some of the money paid to the consultant couldn't be accounted for, but the payments continued.

Tamas Morvai (February 13), a Hungarian citizen who was an executive of Magyar Telekom, agreed to pay the SEC a $60,000 penalty. The SEC alleged he violated or aided and abetted violations of the FCPA by using sham consultancy contracts with a Greek intermediary to pay €4.875 million ($5.2 million) that was passed on to Macedonian officials. Morvai didn't admit or deny the charges.

It is interesting to note that 5 out of these 6 enforcement actions occurred before January 20th.

So, what has the current DOJ administration accomplished from an FCPA enforcement perspective and where are they going? Those two thoughts are being contemplated by the global business community, the FCPA bar as well as practitioners and solutions providers. It seems to be more of a wait and see game, but I am heartened at the response and presentations I attended at the ECI Annual Conference.

From global food and consumer goods providers to healthcare and culture companies, there seems to be an overwhelming response to tying organizations' business culture and values with operational controls and concurrently educating employees by giving them the tools they need to “do the right thing”. In this lull of FCPA enforcement, we can take solace in the fact that many companies who take E&C seriously continue to talk the talk and walk the walk.

But the more problematic issue may be the “broken windows” theory that the DOJ's focus seems to be split by verbal promises to continue to enforce the FCPA while at

the same time giving their attention to combatting a recent surge in violent crime and murder; restoring a lawful system of immigration and disrupting the transnational cartels, gangs, and human traffickers.

I would like to bookend, (pun intended) my thoughts and reference George Orwell's 1984. The book explains the concept of perpetual war and the true meanings of the slogans "War is peace", "Freedom is slavery", and "Ignorance is strength".

The novel is set in Airstrip One (formerly known as Great Britain), a province of the superstate Oceania in a world of perpetual war, omnipresent government surveillance, and public manipulation.

The superstate is under the control of the privileged elite of the Inner Party, a party and government that persecutes individualism and independent thinking as "thoughtcrime", which is enforced by the "Thought Police".

From an FCPA perspective – with an ode to Charles Dickens -- "It is the Best of Times (The current administration is professing its unwavering support for FCPA enforcement), It is the worst of times (no noteworthy DOJ FCPA enforcements in Q1 2017) and we may be suffering from a brain and experience drain by not having enough prosecutorial resources to move forward on resolving the backlog of cases in FCPA queue.

On the other hand, like "Newspeak," the government's invented language in 1984, we seem to be playing and are distracted by a word game between "Fake News," "the Deep State" and other politically motivated euphemisms. So maybe George Orwell was right -- "War is peace", "Freedom is slavery", and from an FCPA perspective with an administration avowing a tacit desire to support existing policy, while at the same time promising to speed up FCPA investigations, perhaps the scales of justice right now are tipping a bit more towards the side of "Ignorance is strength".

Lip service is fine, but until we see some teeth, I am less than sanguine on the direction FCPA enforcement is taking in 2017.

Chapter V - View from Across the Pond

By Jonathan Armstrong

A. European Parliament agrees EU conflicts minerals compliance legislation

The European Parliament recently approved draft EU legislation concerning conflict minerals, which will impose compliance supply-chain due diligence requirements. We previously reported on this issue in 2016 here and in more detail in 2015 here.

The draft legislation consists of a framework for an EU Regulation to stop profits from trading minerals being used to fund armed conflicts. The draft rules build upon the existing "OECD Due Diligence Guidance for responsible mineral sourcing" – in the US similar rules exist in the Dodd-Frank Act (Section 1502), although there are likely to also be differences between the EU and US rules.

The aim of these rules is for EU companies to source tin, tantalum, tungsten and gold responsibly, which are used in a range of products including mobile phones, cars, and, jewelry.

The next step is for the EU Council to give its formal approval to the draft legislation, which is expected soon. Following that the legislation should come into effect as from 1 January 2021, when the due diligence, risk management, disclosure and other reporting obligations are supposed to become fully operational.

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Chapter VI - First Thing We Do Is Kill The Lawyers

By Mike Volkov

A. FCPA Pilot Program Motors On

No one was really surprised when Kenneth Blanco, Acting Assistant Attorney General for the Criminal Division, US Department of Justice, announced last week that DOJ was planning to continue the FCPA Pilot Program past April 5, 2017, the scheduled expiration date. Blanco stated in a speech given at the annual White Collar Crime Conference:

Before I conclude, I would be remiss if I did not comment on the Fraud Section "Pilot Program." Last year, the Fraud Section implemented a one-year "Pilot Program" for FCPA cases, to provide more transparency and consistency for our corporate resolutions. The "Pilot Program" provides our prosecutors, companies and the public clear metrics for what constitutes voluntary self-disclosure, full cooperation and full remediation. The one-year pilot period ends on April 5. At that time, we will begin the process of evaluating the utility and efficacy of the "Pilot Program," whether to extend it, and what revisions, if any, we should make to it. The program will continue in full force until we reach a final decision on those issues.

DOJ will continue the Pilot Program because it has definitely improved the overall transparency of DOJ decision-making and resolution of FCPA cases. If you compare how DOJ explains its decisions, the reasons for its decisions, and the standards that it applies to DOJ FCPA settlements five years ago, it is apparent that companies and FCPA practitioners have additional data from the Pilot Program from which to provide meaningful guidance.

That does not mean, however, that the program cannot be improved. Two significant issues come to mind.

First, with respect to incentives, I have written that companies that meet the rigorous tests for voluntary disclosure, cooperation and remediation, as well as disgorgement, should receive a declination. To be sure, a 50 percent reduction from the bottom of the sentencing guideline range is a significant reduction but it is not a sufficient reward and incentive for companies to increase voluntary disclosures.

If a company meets the standards required by the Pilot Program, the costs of legal and accounting services, as well as compliance remediation, and payment of a disgorgement penalty, has to be offset by a significant benefit. We have seen many cases where the overall costs of earning a penalty reduction may be greater than the benefit. In other words, legal and accounting costs, coupled with compliance program investments, can easily exceed the amount of a fine reduction. This

calculation also does not even consider the reputational damage to the company and collateral litigation.

If DOJ is serious about encouraging increased voluntary disclosures, then the carrot must be increased. A full declination is the precise method to create such an incentive. However, DOJ must commit itself to a more aggressive approach, in practice, to punishing individual wrongdoers. It is one thing to give the company a pass based on its voluntary self-disclosure, cooperation and remediation; it is quite another to then go and give the responsible individuals a pass. If there is anything the Antitrust Division has taught the Criminal Division is how to use a company's cooperation and immunity status to build cases against individuals at other companies who participated in illegal cartel activities.

A second point that needs to be addressed in the Pilot Program extension is the need to update the remediation requirements. With the recent release of the Compliance Evaluation Guidance, DOJ has raised the bar once again for chief compliance officers to elevate their compliance programs. While the remediation requirements in the Pilot Program represented a significant improvement, DOJ has moved the bar yet again and should take the opportunity when announcing the continuation of the Pilot Program or adoption of the program as permanent to articulate current ethics and compliance program standards. When DOJ speaks, companies listen. CCOs need even more reasons to justify compliance enhancements, resources and empowerment within the corporate structure.

B. FCPA Remediation Focus on Supervisory Personnel

The Justice Department's FCPA enforcement and remediation focus on supervisory personnel is an interesting development.

On the one hand, DOJ has been slow to bring individual criminal enforcement actions for FCPA violations. At the same time, they are flirting with a potential new enforcement approach – a criminal prosecution for circumventing internal controls without proof of bribery. However, FCPA prosecutors appear to be gun-shy after some criminal trial defeats or difficulties, all of which are normal course when prosecuting white-collar criminals.

Notwithstanding the lack of individual criminal enforcement actions, the Justice Department is pressuring companies to hold supervisors and other senior officials accountable as part of corporate remediation plans during the FCPA settlement process.

Starting in 2016, DOJ require companies to discipline supervisors who either knew or should have known about employee misconduct resulting in FCPA violations. In the Embraer enforcement action for example, DOJ withheld remediation credit to Embraer because the company failed to discipline a senior executive who likely

knew or should have know about the ongoing bribery scheme. Embraer's failure to discipline this one senior executive cost Embraer millions of dollars in a fine reduction under DOJ's settlement standards.

Similarly, JP Morgan's settlement with DOJ for its hiring practices FCPA violations included credit for robust disciplinary actions against employees who engaged in misconduct; a supervisor responsible for oversight of an employee who engaged in misconduct; and a range of supervisors and employees who were responsible for oversight and monitoring the employees.

From an enforcement perspective, no one disagrees that a criminal prosecution of responsible actors will have a significant deterrent effect. DOJ appears to be embracing a strategy that forces companies to aggressively discipline its managers and employees to ensure that those who are responsible for supervising and monitoring employee conduct are held accountable.

There is no question that a company's disciplinary actions can have a significant impact on corporate behavior. If justice is meted out quickly and fairly across the company, employees will understand that organizational justice is important to the company. Trust in an internal justice system is critical to creating a culture of trust and integrity.

The Justice Department is appropriately advancing its interest in promoting effective disciplinary systems as an important element of an ethics and compliance program. The Justice Department has seen instances where whistleblowers are retaliated against for raising important issues, and they have observed unequal justice where senior officials are given a slap on the wrist while other employees who commit the same acts are fired.

The Justice Department's emphasis on an effective disciplinary system will force companies to impose strict discipline. Companies that impose tough disciplinary standards recognize that such actions are an important means to communicate accountability. The credibility of a compliance program depends on its willingness to hold leaders, managers and employees accountable.

Supervisors who know or should have known about misconduct should be held accountable. If supervising means monitoring your staff's conduct to ensure compliance, then, at a minimum, supervisors must take steps to ensure that their employees are complying with the law. No one can argue with that proposition.

C. Yates, AG Sessions and Individual Criminal Prosecutions

In recent speeches, the Attorney General and a Principal Deputy Assistant Attorney General in the Criminal Division reconfirmed DOJ's support for enforcement of the FCPA. No one should be surprised by their respective statements. As I have said all

along, the new administration will not make any significant changes in FCPA enforcement, except for tweaking the FCPA Pilot Program to increase possibilities for a declination.

Contrary to all the hand-wringers out there, the Justice Department and the FBI have lined up resources, ongoing investigations and international cooperation relationships directed toward continuing, and possibly increasing, FCPA enforcement.

In reassuring compliance professionals at his recent speech, Attorney General Sessions reiterated DOJ's continued focus on individual prosecutions. The Yates Memorandum, which was adopted in late 2015, requires cooperating companies to provide to the government all relevant information concerning culpable individuals to qualify for cooperation benefits.

The Yates Memorandum has had no appreciable impact on FCPA enforcement of culpable individuals. As many have pointed out, FCPA enforcement of individuals coupled with corporate prosecutions have not yet occurred. The PDVSA criminal prosecutions in Houston, Texas and the December 2016 enforcement against various individuals relating to aviation services between Texas and Mexico do not qualify under the Yates Memo requirements. The classic FCPA enforcement action involves a major corporate settlement after conducting a lengthy and intensive internal investigation. These are the cases that cry out for individual prosecutions.

When you look across the wreckage of corporate FCPA enforcement actions, there are numerous cases where individuals could have been prosecuted but for some reasons they were not (as of today). These include VimpelCom, Och-Ziff, Embraer, and one of the more outrageous cases from 2015, Avon.

Outside of the FCPA context, however, it is easier to spot the impact of the Yates Memorandum. The General Motors settlement for defective ignition switches did not include prosecution of any culpable individuals, even though several individuals could have been prosecuted. The General Motors case was resolved several weeks right after adoption of the Yates Memorandum.

In contrast to the General Motors case, the VW and Takata criminal cases brought by the Justice Department included prosecution of culpable individual officers. VW paid criminal and civil penalties totaling $4.3 billion. DOJ indicted six corporate officers as part of the alleged conspiracy to evade emission device testing.

In the Takata case, the company paid approximately $1 billion for a criminal conspiracy to hide airbag safety malfunctions. DOJ indicted three officers for criminal cases.

In the absence of the Yates Memorandum, it is questionable whether DOJ would have indicted the nine corporate officers charged in the VW and Takata cases. If

anything, the GM case, like the Takata case, resulted in death of innocent consumers who made the mistake of purchasing a vehicle with the ignition switch or airbag problems.

With the exception of FCPA prosecutions, the Yates Memorandum appears to have had an impact on the number of criminal prosecutions. A more careful calculation of criminal cases is needed to confirm what impact the Yates Memorandum has had. The objective of the Yates Memorandum makes sense – to maximize deterrence against criminal conduct by prosecuting individuals for such conduct and imposing significant punishment.

Some have challenged the Yates Memorandum as more show than real substance, suggesting that there has been no real impact in the number of criminal prosecutions. Critics have also suggested that imposing the burdens of the Yates Memorandum may chill corporate cooperation in criminal cases for fear of not meeting the high-bar for cooperation set by the Yates Memorandum.

Whether these criticisms are valid, DOJ needs to measure the impact of the Yates Memorandum and provide transparency on its efforts to increase accountability of criminally culpable individuals.