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2023 ACI FCPA Conference – Key Takeaways

Global regulatory bodies, counsel and forensic practitioners attending the ACI's 40th Annual Foreign Corrupt Practices Act (FCPA) Conference held on November 29 – 30, 2023 provided insights on recent regulatory developments focusing on compliance. Key takeaways are detailed below.


 **COMPLIANCE:** Elements of compliance programs that organizations are encouraged to adopt include creating incentives for employee compliance through compensation programs and the preservation of electronic business records, which can be a challenge due to third party messaging applications and strict data privacy laws.


CLAWBACK: The Department of Justice's (DOJ's) three-year clawback pilot program announced in March 2023 details requirements companies need to consider when entering corporate resolutions regarding the correlation of the company's compliance program and compensation or incentives. The DOJ program is broken out into two components: compliance enhancements and deferred fine reduction.


- Compliance enhancement: This component requires companies to have compliance-related criteria in their compensation and business systems and to report to the Criminal Division about the implementation of such criteria during the resolution process.
- Deferred fine reduction: This component aims to incentivize companies to recoup compensation from wrongdoers by offering a potential fine reduction for such actions.

The pilot program leaves open various forms of compensation recoupment. The criteria for the program is not prescriptive and not one size fits all.

DEVICES: Ephemeral communication applications continue to pose significant risks as they may cause violations of document retention requirements. If employees are using ephemeral applications, employers should be able to effectively answer how the company is approaching ephemeral messaging, how they are supporting documentation related to transactions entered in these applications, and how they are complying with data retention policies. Companies should understand how a device policy compares to their data retention or other policies and should ensure business activities are conducted on approved devices and applications.

 **DATA ANALYTICS:** The DOJ emphasized the use of sophisticated data analytics tools to analyze and synthesize large volumes of data, particularly in financial records. Companies are encouraged to engage in proactive analytics and to use the data available to them to identify and mitigate potential risks.

 **MONITORS:** To avoid a monitorship, companies must demonstrate an effective working compliance program that has been designed, implemented, and tested. The compliance culture should be integrated across the company with functional buy-in on the company's own compliance responsibilities through established policies. The DOJ's Fraud Section's new Corporate Enforcement, Compliance, and Policy Unit is intended to work with, and offer guidance to, teams on the components of resolutions, evaluate compliance programs to assess if an independent monitor should be enforced as part of a resolution, and supervise the post-resolution period. When entering a monitorship, it is important to start the relationship in the right way and leverage outside counsel to liaise with the monitor. Counsel establishes the framework of what will happen during the monitorship.

 **VOLUNTARY DISCLOSURE:** DOJ representatives emphasized the importance to companies of voluntary disclosure, collaboration with the government, and addressing issues through remediation. Early disclosure allows evidence to be preserved and interviews can take place when details are fresh. Timely voluntary disclosure may lead DOJ to consider granting credits.



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For further information and discussion on these points or other enforcement updates, please contact us.



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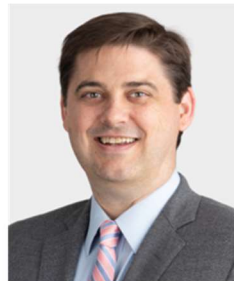
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