

*Dodd-Frank's Whistleblower Provisions:
Impacts on FCPA Compliance Efforts*

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Dodd-Frank's Whistleblower Provisions: in Brief

Dodd-Frank Section 922: Exchange Act Section 21F

- SEC enforcement action with sanctions over \$1 million
- SEC must pay 10 to 30 percent of recovery
 - To any eligible whistleblower
 - Who has voluntarily provided the SEC with
 - Original information about a possible violation of the federal securities laws
 - Applies to violations of the FCPA Exchange Act provisions applicable to “issuers”
 - Anti-bribery
 - Books and records / internal controls
 - Does not apply to violations of parallel FCPA provisions applicable to “domestic concerns”

Who can be an eligible whistleblower?

- Almost anyone
 - Reports can be made anonymously
 - Wrongdoers are eligible for awards, unless they are criminally convicted
 - But no amnesty for whistleblowers
 - Illegally obtained information can provide the basis for an award, unless the whistleblower is convicted of a crime for obtaining it
- Lawyers and independent public accountants generally cannot qualify for an awards by providing information in violation of their professional obligations

Anti-retaliation provisions

- Broad anti-retaliation protection for whistleblowers
 - Employer may not discharge, demote, threaten or discriminate against whistleblower
 - SEC can bring enforcement action against the employer for retaliation
 - Whistleblower also has federal right of action to enforce this provision



Key issues for FCPA compliance efforts

Tension with Corporate Compliance Efforts

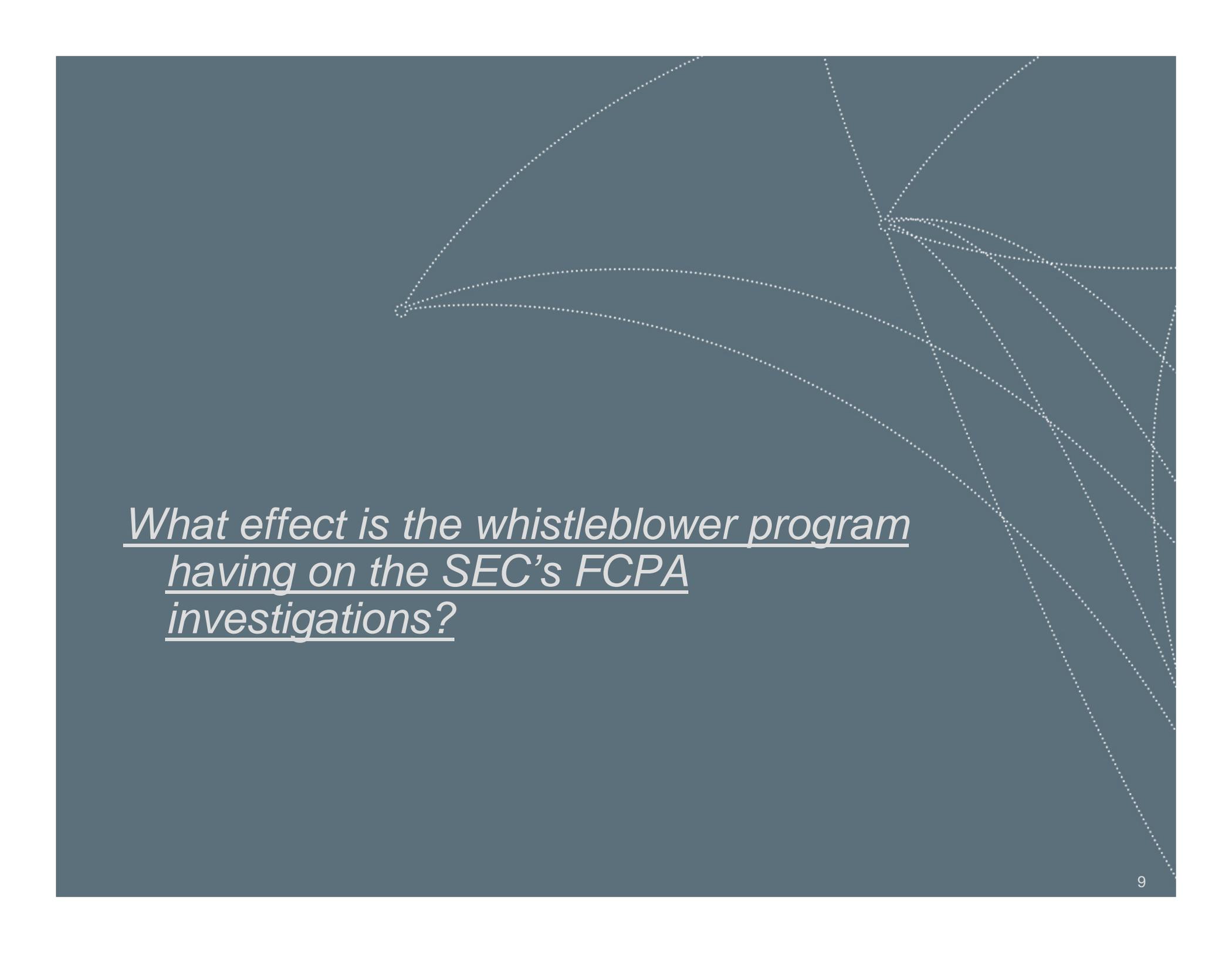
- Dodd-Frank program may incentivize employees to report to the SEC rather than internally
- No requirement that employees report concerns internally in the first instance – or ever
 - SEC rule seeks to “not discourage” employees from first reporting to the company
 - SEC is required to consider higher percentage awards for those who first report internally
 - SEC is required to consider lower awards for those who interfere with internal reporting systems

Intensified pressure to make a rapid decision about voluntary disclosure

- Potential race to the SEC
 - Only the first person to report information to the SEC will be eligible for a bounty
 - Companies may seek to report first to obtain cooperation credit
- Internal review may provoke additional risk that a whistleblower will approach the SEC
 - Company personnel who learn of a potential FCPA issue as a result of being questioned in an internal review can qualify for the bounty
- *Changes the calculus of the self-reporting decision*
 - Greater chance that FCPA violations will come to SEC attention
 - Greater risk that whistleblower will report FCPA violations before the company does

Pressure to complete internal reviews within 120 days

- Compliance and internal audit personnel are precluded from qualifying for an award by providing information that they learn in connection with their responsibilities
 - Unless:
 - **Company doesn't self-report within 120 days**, or
 - “Reasonable basis to believe” that:
 - Company is engaged in conduct that will impede an investigation of the misconduct; or
 - Disclosure is necessary to prevent substantial injury to company or shareholders



*What effect is the whistleblower program
having on the SEC's FCPA
investigations?*

New or Improved Sources of FCPA Investigations

- Whistleblowers
- Revamped centralized tips, complaints, & referrals system
- Enhanced cooperation with international authorities
- Proactive approaches
 - Risk-based focus on companies doing business in countries and industries of significant concern
 - Industry sweeps
 - Scrutiny of tainted programs and corrupt actors

SEC Treatment of Whistleblower Complaints

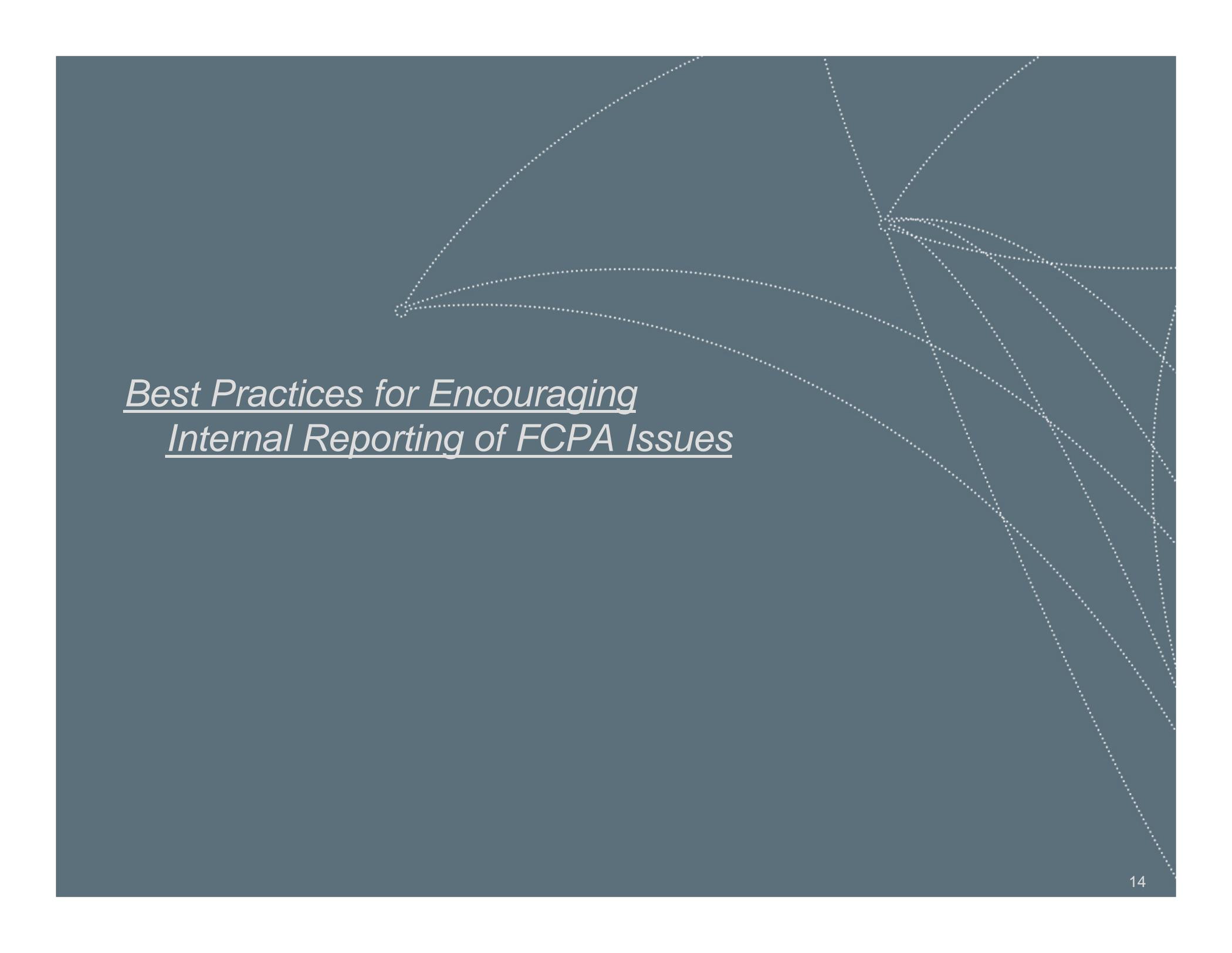
- A blessing and a curse for the SEC
- SEC makes initial assessment as to whether claim has substance
- Given past criticism, SEC takes all whistleblower claims seriously
- Claims generally given disproportionate attention and resources
- Claimant, often represented by counsel, has monetary interest in success of investigation
- Claims present difficult matters to close
- Looking for cases to bring attention to the program

Interactions with the Company

- So long as it serves the SEC's purposes, it will keep secret the involvement of the whistleblower and the nature of the allegations
 - SEC need not tell company counsel that it is talking with the whistleblower, even if a current employee
- Gives the government an opportunity to assess the extent of the company's cooperation
- Can be in the government's best interests to keep the company guessing
- The company will eventually get opportunity to respond to allegations but what record will exist by then?

The Very Early Self-Report

- Internal investigations can prompt reports to the SEC
- If someone comes forward during the pendency of the investigation, the company may not get the benefit of being able to claim that it self-reported
- The government has been encouraging companies to make early self-reports of potential FCPA violations where appropriate
 - Risk attendant to government scrutiny before company has all the facts
 - Once you self-report, you cannot do it half-way
- Reporting to the Regional FCPA Units in Boston, Los Angeles, Miami, Salt Lake City, San Francisco and Fort Worth



*Best Practices for Encouraging
Internal Reporting of FCPA Issues*

What Has Not Changed

- Dodd-Frank's whistleblower provisions do not require public companies or regulated entities to adopt any new compliance program provisions.
 - Unlike other recent regulations, this rule does not require companies to implement new policies and procedures
- At the same time, any company involved in **activities that might be subject to the federal securities laws** may want to assure that they have done all that they can to encourage internal reporting of potential wrongdoing

The Goal – Get Ahead of the Issue

- Proactive vs. reactive approaches
 - If a company is not the first to learn of potential FCPA violations, the chances now seem very much increased that the SEC will learn of the issues from a whistleblower
 - This will have an impact on both FCPA internal investigations and voluntary disclosure decisions

Encouraging internal reporting

- Seek to maximize the possibility that the company will be the first to know of potential wrongdoing
- Consider a stand-alone internal reporting policy to send a clear message to company personnel
- Promote the expectation that the company wants to know about potential wrongdoing
 - Appeal to shared values, like integrity
 - Remind personnel of the risks posed by illegal conduct
 - Explain the company's need to know of employee concerns

Encouraging internal reporting

- Require internal reporting in corporate policies
- Actively encourage reporting of genuine concerns – even if they turn out to be mistaken.
 - Provide clear instructions on how to report
 - Offer alternative ways to report
 - Describe what the company will do with reports
 - As appropriate: prompt investigation by independent personnel
- Make clear that retaliation of any kind will not be tolerated
 - Provide point of contact for persons who believe they have been subjected to retaliation

Be prepared to respond to SEC Enforcement

- SEC Enforcement Staff may contact companies in response to whistleblower reports
 - Regardless of whether SEC identifies source of inquiry, assume there is a whistleblower
 - Company has an opportunity to maximize its ability to influence the situation by demonstrating cooperation, credibility, and competence to staff
 - Staff expectations of cooperation are extremely high
- Advance planning can position company to make an appropriate response
 - Be prepared to undertake a prompt internal review
 - Consider establishing a protocol setting out how reviews will be conducted
 - Identify circumstances in which Company may seek to have independent counsel conduct the review

Be prepared to respond to internal reports

- Act quickly on reports of potential wrongdoing
 - As appropriate, undertake an internal investigation of the issue
 - Consider having an independent third party conduct the investigation
 - What is the potential magnitude of the issue?
 - Might senior personnel be implicated?
 - Report findings up the chain
 - Consider ability to report back to the whistleblower regarding the results of the investigation and any corrective action taken

Reinforce the Message

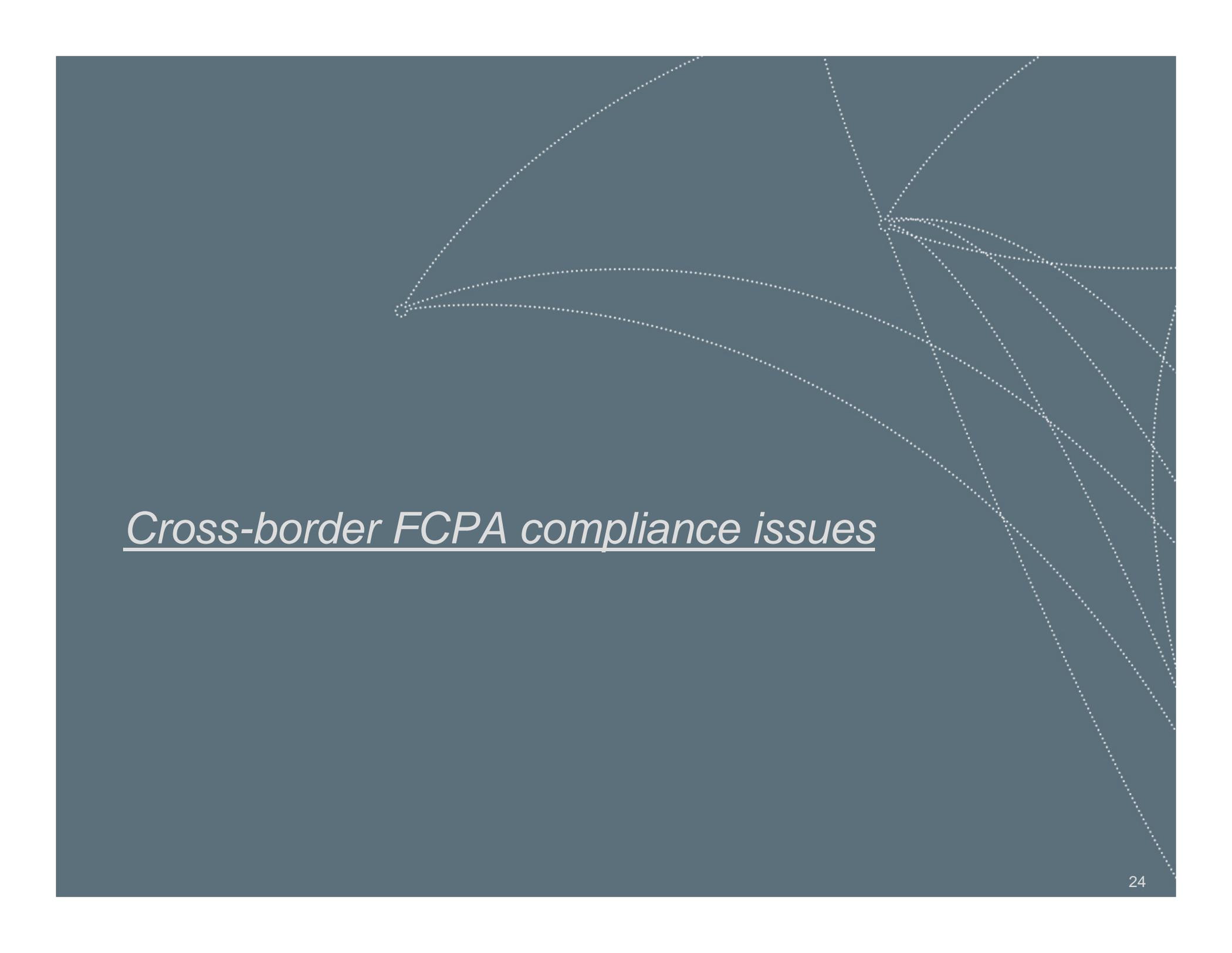
- Train rank and file and their supervisors to recognize and address potential issues
- Interview departing personnel
 - May be a last chance to get ahead of the issue
 - Consider local law issues
- Convince personnel that company really wants to hear these things
 - Particular challenges
 - Foreign jurisdictions
 - Integration of acquisitions

Enhance FCPA compliance systems

- Make systems more proactive / less passive
- Update periodically based on emerging risks and any changes in business model or geographic scope of operations
- Conduct periodic FCPA risk assessments
- Active monitoring of FCPA compliance by company and third-party agents
- Retrospective auditing of compliance (particularly following M&A transactions)

Reduce the risk of retaliation claims

- Limit the number of individuals aware of the identities of whistleblowers
- Do not seek to identify anonymous whistleblowers
- Provide training for managers at all levels
- Adhere to best practices for employee evaluations
 - Document fully and accurately
 - Review performance honestly and timely
- Exercise extra caution with employees who may use whistleblowing as an offensive strategy

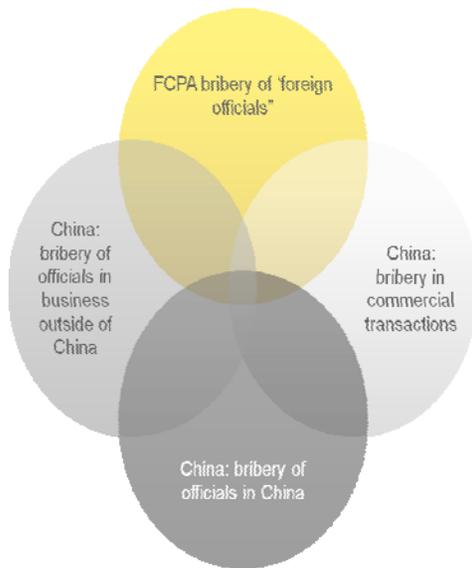


Cross-border FCPA compliance issues

What are the practical implications of the fact that privilege might not be recognized in all jurisdictions?

- Given US regulators' strong preference for cross-jurisdictional collaboration, approach SEC whistleblower inquiries with the assumption that SEC will attempt to approach counterparts in the locality where alleged wrongdoing occurred
- That's the 'bad news' – in case of China, the 'good news' is that antibribery enforcement is quite diffuse (as compared with the US) and that means it's currently not likely that an SEC report to Chinese authorities will in fact result in a PRC-based enforcement action

Non-US jurisdictions may have a more diffuse enforcement landscape



China agencies with potential jurisdiction include:

- Administration of Industry & Commerce (multiple levels)
- Procuratorate (could be in multiple provinces)
- State-owned Assets Supervision & Administration Commission
- Chinese Communist Party
- Industry-specific agencies (e.g., Ministry of Health)

Practical implications of the fact that privilege might not be recognized in all jurisdictions? (cont.)

- It's more likely a local PRC enforcement action will start independently and develop into a direction suggesting the advisability of disclosure to the SEC
- In responding to a local enforcement action, one must be mindful of maintaining attorney-client privilege under US law; whether that concept exists under local law must be determined
- China does not have a concept of attorney-client privilege

Practical implications of lack of privilege (cont.)

- The ‘good news’: currently Chinese enforcement actions tend to focus on in-person interviews and ‘self confession’ (not disclosure) rather than forensic-type demands for broad discovery
- If a local enforcement action is handled properly from the outset (a topic for its own discussion!), the absence of privilege is not likely to compromise the PRC-based investigation
- **Practice tip:** in a local enforcement action, determine early on whether privilege exists under local law and get local guidance on how to respond so as not to increase US risks

If you make a voluntary disclosure in one jurisdiction, do you also do it in the other affected jurisdictions?

- Again, making an initial assessment of pros/cons in that specific jurisdiction is vital in assessing how to proceed
- In China, you should assume that if your case is disclosed in US media, it will come to attention of PRC regulators through Chinese language media (and sometimes, the Chinese media may even report first! e.g., IBM case).

Voluntary disclosure (cont.)

- Voluntary disclosure not recognized practice in China...but new Art. 164 of the PRC Criminal Code ('China's FCPA') does allow for reduced/ waived penalties where violator self-discloses
- Probably fair to say that in China, most officials would find self-disclosure potentially awkward
 - Cases may implicate employees of state-owned enterprises - may not want to investigate them
 - Superior agencies may question whether the officials' lack of supervision/oversight led to the problem
- Decision whether to disclose should be informed by locally knowledgeable advisors

Employees outside the U.S. who refuse to cooperate with an investigation?

- In China, there are only limited grounds for termination/discipline
- Means your company must have its 'ducks in order' when forming an employment relationship or you won't be able to take effective action later when internal investigation/enforcement action arises
- Employment agreement, internal work rules and code of conduct must address access for investigations (mobile phone, computer), obligation to cooperate, whether labor arbitrations can be attended by outsiders

Questions?