ROLE OF EMPLOYEE DISCIPLINE IN FCPA SETTLEMENTS: BALANCING COMPETING CONSIDERATIONS

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Remediation is a significant factor the government considers in settling enforcement actions with companies alleged to have engaged in Foreign Corrupt Practices Act (FCPA) violations. Recent FCPA settlements demonstrate the importance of disciplining employees who engaged in misconduct, including senior-level employees who were aware, or should have been aware, of the misconduct. Companies that have taken disciplinary actions against culpable employees have been rewarded with mitigation credit, while companies that have failed to discipline wrongdoers have endured increased monetary penalties. This Article reviews guidance on disciplinary measures from the Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) and discusses the impact of disciplinary actions on settlement outcomes in recent FCPA matters. The Article then provides guidance on setting up and implementing disciplinary policies and procedures while contending with issues such as local labor laws and privilege considerations. The Article also provides suggestions for conducting internal investigations with a focus on disciplinary measures. The Article concludes by discussing the link between execution of disciplinary measures and effectiveness of compliance programs, and stresses the importance of involvement by senior executives in cultivating a company's compliance culture.

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I. Introduction

When deciding whether to open an investigation or bring charges against a company for Foreign Corrupt Practices Act (FCPA) -related misconduct, the Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ) consider a number of factors, such as the nature and seriousness of the offense, the level of the company's cooperation, the existence and effectiveness of the company's compliance program, voluntary disclosure of the misconduct, and timely and appropriate remediation—including discipline of wrongdoers.[1] In recent years, regulators have focused increasingly on disciplinary measures undertaken by companies against employees responsible for misconduct, especially senior employees who were either involved in the misconduct, were otherwise aware of the misconduct, or supervised lower level employees engaged in the misconduct. Companies that have failed to discipline employees responsible for misconduct have suffered increased monetary penalties when settling enforcement actions. Interestingly, companies that have disciplined lower level employees who engaged in misconduct—but failed to take any action against more senior employees who were either involved in the misconduct, were aware of the misconduct, or ignored red flags which would have alerted them to the misconduct—have been punished by not receiving full credit for remediation, costing them millions of dollars in additional penalties.

In light of the government's scrutiny of disciplinary measures when determining how much credit to award companies for remediation, to achieve maximum credit when settling enforcement actions, companies should (1) take steps to identify and evaluate all potential wrongdoers, including individuals up the chain of command who had or should have had knowledge of the misconduct, and (2) enforce disciplinary processes and procedures in an evenhanded way across all employees regardless of seniority. At the same time, companies should be

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1. *See, e.g.*, Criminal Div. of U.S. Dep't of Justice & Enf't Div. of U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 52-60 (2012) [hereinafter FCPA Resource Guide], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (describing criteria used by the DOJ and SEC when opening an investigation and bringing charges against a company).

cognizant of data privacy issues, privilege considerations, and local labor laws. These may make it difficult to adequately discipline employees suspected of misconduct and could present conflicting incentives to promptly discipline wrongdoing, but also to preserve access to witnesses and cooperate with the government's ongoing investigation. While confronting these issues, companies should also proactively reassess their compliance programs to promote a strong ethical culture and commitment to compliance from senior executives.

This Article first examines the government's consideration of disciplinary measures when settling enforcement actions. It provides an overview of relevant guidance, statements, and policies from the SEC and DOJ concerning disciplinary actions in the FCPA context, and a detailed discussion of certain key enforcement actions from the past two years, highlighting the significance of disciplinary measures. The Article then provides guidance on formulating and enforcing disciplinary processes, conducting internal investigations with an eye towards identifying and appropriately disciplining culpable actors, and taking into account varying local labor laws and data privacy issues that may have a bearing on the timing and extent of disciplinary actions. The Article concludes by discussing the correlation between consistent enforcement of disciplinary measures and effective compliance programs, and the role of senior management in cultivating a strong ethical culture and setting the right tone for anti-corruption compliance.

II. SEC and DOJ Guidance on Disciplinary Measures

Over the years, the SEC and DOJ have articulated the importance of adequate disciplinary measures in deciding whether to open an investigation and in negotiating settlement outcomes. Careful consideration given to disciplinary actions may impact a company's negotiating stance and the ultimate resolution of an FCPA matter. The SEC's primary guidance regarding the criteria it considers in deciding whether to bring charges against a company and how much credit to award the company for self-disclosure, cooperation, and remediation is set forth in the SEABOARD REPORT.[2] Two factors

2. U.S. SEC. & EXCH. COMM'N, EXCHANGE ACT RELEASE NO. 44969, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF

outlined in the SEABOARD REPORT hone in on disciplinary measures:

> 3. Where in the organization did the misconduct occur? How high up in the chain of command was knowledge of, or participation in, the misconduct? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct? . . .
> 8. What steps did the company take upon learning of the misconduct? . . . Are persons responsible for any misconduct still with the company? If so, are they still in the same positions?[3]

As for the DOJ, whether and how it chooses to resolve an FCPA matter against a company is largely driven by the factors set forth in the Principles of Federal Prosecution of Business Organizations, which is part of the U.S. ATTORNEYS' MANUAL.[4] One of the factors the DOJ considers in determining how to resolve an FCPA matter highlights the importance of disciplinary measures: "7. the corporation's remedial actions, including any efforts . . . to replace responsible management, to discipline or terminate wrongdoers . . . ."[5] When calculating penalties in connection with the resolution of FCPA actions, the DOJ relies on the U.S. Sentencing Guidelines (USSG). Disciplinary measures figure into the calculation of applicable fines via the culpability score. This score can significantly increase the base fine if "an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense; or . . . tolerance of the offense by substantial authority personnel was pervasive throughout such unit."[6]

Under the DOJ's new FCPA Corporate Enforcement Policy announced in November 2017, which expands upon the pre-existing FCPA Pilot Program and has been incorporated into the U.S. ATTORNEYS' MANUAL, additional mitigation credit may be available to companies for timely and appropriate

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COOPERATION TO AGENCY ENFORCEMENT DECISIONS (2001) [hereinafter SEABOARD REPORT], https://www.sec.gov/litigation/investreport/34-44969.htm.

3. *Id.*

4. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.300 (2015) [hereinafter U.S. ATTORNEYS' MANUAL].

5. *Id.*

6. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(b) (U.S. SENTENCING COMM'N 2016).

remediation, beyond the fine reductions provided for by the USSG.[7] Timely and appropriate remediation includes the following criteria, which directly relate to disciplinary measures: "the company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated" and "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred. . . ."[8] Companies that voluntarily self-disclose misconduct, fully cooperate, and timely and appropriately remediate under the new policy, qualify for a presumption of declination absent certain aggravating circumstances.[9] One of these aggravating circumstances includes "involvement by executive management of the company in the misconduct,"[10] further highlighting the significance of disciplinary measures. Additional guidance released by the DOJ in February 2017 relating to compliance programs includes disciplinary measures as one factor relevant to assessing the overall effectiveness of a company's compliance program: "What disciplinary actions did the company take in response to the misconduct and when did they occur? Were managers held accountable for misconduct that occurred under their supervision? Did the company's response consider disciplinary actions for supervisors' failure in oversight?"[11]

The FCPA RESOURCE GUIDE, jointly issued guidance from the SEC and DOJ, reinforces the same principles and criteria relating to disciplinary measures independently considered by the SEC and DOJ in settling FCPA matters and offers additional guidance. The FCPA RESOURCE GUIDE stresses that "[a] company's remedial measures should be meaningful and illustrate its recognition of the seriousness of the misconduct, for example, by taking steps to implement the personnel, operational, and organizational changes necessary to establish an

7. U.S. ATTORNEYS' MANUAL, *supra* note 4, § 9-47.120 (2017).

8. *Id.*

9. *Id.*

10. *Id.*

11. FRAUD SECTION, U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 6 (2017), https://www.justice.gov/criminal-fraud/page/file/937501/download.

awareness among employees that criminal conduct will not be tolerated."[12] Further, the FCPA RESOURCE GUIDE indicates that the "DOJ and SEC will thus consider whether . . . a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation."[13] Former Assistant Attorney General Leslie Caldwell emphasized the importance of consistently applying disciplinary measures throughout an organization in her remarks at a compliance conference in November 2015: "The department does not look favorably on situations in which low-level employees who may have engaged in misconduct are terminated, but the more senior people who either directed or deliberately turned a blind eye to the conduct suffer no consequences."[14] As is clear from the guidance offered by the agencies over the years, a company's careful consideration and execution of disciplinary measures in response to misconduct is an important factor the government weighs in charging decisions and settlement discussions.

III. RECENT FCPA ENFORCEMENT ACTIONS HIGHLIGHTING THE IMPORTANCE OF DISCIPLINARY MEASURES[15]

In recent years, the SEC and DOJ have emphasized disciplinary measures when settling FCPA enforcement actions. The SEC and DOJ have also shown a particular interest in remedial actions taken against supervisory employees and senior executives who themselves took part in misconduct or were aware, or should have been aware, of the misconduct. Companies that the SEC and DOJ determined to have failed to timely and appropriately discipline employees who engaged in wrongdoing suffered increased monetary penalties. In some

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12. FCPA RESOURCE GUIDE, *supra* note 1, at 54.

13. *Id.* at 59.

14. *Assistant Attorney General Leslie R. Caldwell Speaks at SIFMA Compliance and Legal Society New York Regional Seminar*, U.S. DEP'T OF JUSTICE (Nov. 2, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-sifma-compliance-and-legal-society.

15. See Appendix for a chart comparing a select sample of FCPA enforcement matters from 2016 and 2017, including ones discussed in this section, on the basis of (a) disciplinary measures undertaken in those cases, (b) recognition by the SEC and DOJ of those actions, and (c) corresponding credit attributable to disciplinary measures.

cases, companies that exercised disciplinary measures against low-level employees, but overlooked the knowledge and/or involvement of senior-level employees did not get maximum credit for remediation. In certain instances, these companies were even required to engage a compliance monitor for a number of years as the failure to discipline high-level employees signaled a breakdown in the disciplinary process and overall credibility of the company's compliance program. A common misconception of FCPA cases is that the underlying violations stem from the actions of rogue low-level employees seeking to profit at the company's expense. In reality, however, statistics show that senior-level employees are implicated in the majority of FCPA cases. A 2014 OECD study found that fifty-three percent of bribery-related enforcement actions worldwide concluded between 1999 and 2014 involved management-level employees and CEOs.[16]

DOJ press releases and settlement documents provide valuable insight into the mitigation credit available to companies for undertaking timely and appropriate disciplinary measures against responsible employees and allow for the quantification of these benefits in some instances. The amount of mitigation credit available from the SEC for remediation is more difficult to quantify as the calculation of fines and penalties is not typically articulated in SEC settlement documents as clearly it is in DOJ documents. Recent cases demonstrate that companies which, in the SEC and DOJ's view, do not adequately discipline employees found to have engaged in wrongdoing, or those who turned a blind eye to red flags and/or were responsible for supervising those engaged in wrongdoing, may subject themselves to several millions of dollars in additional penalties and risk the imposition of a monitor. Additionally, failure to discipline employees involved in misconduct, whether it be low-level employees or senior executives, may lead to recidivism and perpetuate a company culture that emphasizes profits over compliance, potentially resulting in repeat interactions with the SEC and DOJ and negative reputational effects for the company.

16. Org. for Econ. Co-operation & Dev. [OECD], *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, at 22-23 (2014), https://www.oecd-ilibrary.org/governance/oecd-foreign-bribery-report_9789264226616-en.

One of the more recent enforcement actions addressing the impact of disciplinary measures on settlement outcomes is the Telia matter. Telia, a Swedish telecommunications company, together with its Uzbek subsidiary, was charged with violating the FCPA by funneling over $330 million between 2007 and 2010 to an Uzbek government official who influenced decisions made by the telecommunications regulator in Uzbekistan.[17] Payments to the Uzbek government official were made via a shell company that certain Telia executives knew was beneficially controlled by the official. The payments were made in exchange for the official's assistance in helping Telia acquire a subsidiary in Uzbekistan, obtain telecom assets outside of the usual procurement process, enter into and continue to operate in the Uzbek telecommunications market, and expand its share of the telecommunications market in Uzbekistan.[18] Altogether, the bribes paid to the Uzbek government official resulted in business generating over $2.5 billion in revenues for Telia.[19] Various Telia executives and employees, all the way up to the CEO, were either directly involved in the bribery scheme, had knowledge of the arrangements with the government official, or were aware of red flags that should have alerted them to the misconduct.

The facts outlined in the SEC's cease-and-desist order against Telia and the statement of facts attached to Telia's deferred prosecution agreement (DPA) with the DOJ are riddled with references to awareness by high-level executives of red

17. Press Release, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017) [hereinafter DOJ Press Release re Telia], https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965; Press Release, U.S. Sec. & Exch. Comm'n, Telecommunications Company Paying $965 Million for FCPA Violations (Sept. 21, 2017) [hereinafter SEC Press Release re Telia], https://www.sec.gov/news/press-release/2017-171.

18. Deferred Prosecution Agreement at A-3 to A-6, United States v. Telia Co. AB, No. 17-CR-581-GBD (S.D.N.Y. Sept. 21, 2017) [hereinafter Telia DPA]; Telia Co. AB, No. 3-18195, at 4-7 (U.S. Sec. & Exch. Comm'n Sept. 21, 2017) [hereinafter Telia Cease-and-Desist Order], https://www.sec.gov/litigation/admin/2017/34-81669.pdf (order instituting cease-and-desist proceedings); DOJ Press Release re Telia, *supra* note 17; SEC Press Release re Telia, *supra* note 17.

19. Telia Cease-and-Desist Order, *supra* note 18, at 2.

flags suggesting misconduct, actual knowledge by high-level executives of improprieties, and active participation by high-level executives in the bribery scheme. According to Telia's DPA with the DOJ, "certain management and employees within Telia and affiliated entities . . . understood that they had to regularly pay the [f]oreign [o]fficial millions of dollars in order to enter the Uzbek telecommunications market and continue to operate there."[20] To effectuate the payments, "[c]ertain TELIA management negotiated the terms of the corrupt partnership with [the intermediary], who represented the [f]oreign [o]fficial . . . [and] entered into a cooperation agreement"[21] and various share purchase and debt transfer agreements with the intermediary on behalf of Telia for the purpose of transferring money to the government official.[22] The DPA also states that Telia executives and management on numerous occasions directly "authorized . . . corrupt bribe payment[s]"[23] amounting to hundreds of millions of dollars to be made to the government official and even traveled to Uzbekistan to participate in meetings with the government official's representative.[24] Additionally, the DPA notes that Telia's board was made aware of the need to secure a "strong local partner,"[25] received updates from Telia management on the status of the local partnership agreement, and ultimately signed off on the arrangement.[26] Similarly, the cease-and-desist order from the SEC states that "Telia's then-senior managers, including its then-chief executive officer, approved the agreements with [the] [g]overnment [o]fficial."[27]

Under the terms of Telia's DPA with the DOJ, Telia was required to pay total monetary penalties in the amount of $548,603,972—to be offset by payments made to Dutch authorities.[28] Telia further agreed to pay $457,000,000 in disgorgement to the SEC, also to be offset by any payments made

20. Telia DPA, *supra* note 18, at A-3 to A-4.
21. *Id.* at A-4.
22. *Id.* at A-12 to A-13, A-17.
23. *Id.* at A-4.
24. *Id.* at A-4 to A-5, A-9.
25. *Id.* at A-7.
26. *Id.* at A-7 to A-10.
27. Telia Cease-and-Desist Order, *supra* note 18, at 6.
28. Telia DPA, *supra* note 18, at 8.

to Dutch or Swedish authorities.[29] Notably, neither the DOJ nor the SEC required Telia to engage a compliance monitor. Telia's DPA with the DOJ states that Telia received a discount of twenty-five percent off of the bottom of the USSG fine range for its "extensive remedial measures" and cooperation with the government's investigation.[30] Specifically with respect to disciplinary measures, the DPA notes that the company "terminat[ed] all individuals involved in the misconduct; terminat[ed] all individuals who had a supervisory role over those engaged in the misconduct, including every member of the Company's board who took part in the decision to enter Uzbekistan, or failed to detect the corrupt conduct . . . ."[31] The DPA further states that the DOJ's decision not to impose a compliance monitor was "based on the Company's remediation and the state of its compliance program . . . ."[32] Relatedly, the SEC's cease-and-desist order explicitly states that the SEC credited Telia's remedial acts, "including replacing all relevant members of its board and senior management," in deciding not to impose any civil monetary penalties or require the installation of a monitor.[33]

Telia avoided civil monetary penalties from the SEC and received the maximum mitigation credit available absent voluntary self-disclosure—a twenty-five percent reduction off of the bottom of the USSG range—from the DOJ by fully cooperating and timely and appropriately remediating. By taking decisive and expansive disciplinary measures against employees directly involved in the misconduct as well as those with supervisory roles over those engaged in misconduct and those who disregarded red flags, Telia potentially saved itself over $180 million in criminal penalties and tens of millions of dollars in additional compliance-related costs by avoiding a compliance monitor. Some portion of the reduced penalty figure is also attributable to Telia's cooperation in the government's investigation. The Telia matter illustrates the considerable financial benefits that may inure to a company for executing swift and comprehensive disciplinary measures against employees, in-

29. Telia Cease-and-Desist Order, *supra* note 18, at 8.
30. Telia DPA, *supra* note 18, at 3.
31. *Id.* at 3-4.
32. *Id.* at 4.
33. Telia Cease-and-Desist Order, *supra* note 18, at 7.

cluding the CEO and board members if necessary, responsible for facilitating misconduct, failing to fulfill their supervisory duties with respect to those engaged in misconduct, or failing to recognize red flags which would have alerted them to wrongdoing.

The SQM matter is another settled enforcement action in which the SEC and DOJ viewed the company as having taken appropriate disciplinary measures against culpable employees, and accordingly rewarded the company for doing so. SQM involved the use of a discretionary fund established for the company's CEO for the purpose of covering expenses relating to travel, publicity, and consulting and advisory services. This fund was instead used to funnel money to Chilean politicians, political candidates, and individuals associated with those individuals (politically exposed persons or PEPs) who had influence over key segments of SQM's business.[34] SQM made approximately $14.75 million in improper payments to Chilean PEPs from 2008 to 2015, nearly all of which were directed and authorized by the company's CEO.[35] Most of these payments were made pursuant to fictitious contracts and invoices with sham vendors associated with the PEPs for services that were not actually rendered.[36] SQM also made improper payments to PEPs through donations to foundations controlled or supported by the PEPs.[37]

The primary actors involved in the scheme to pay PEPs included the CEO, employees who assisted the CEO by generating and paying fictitious invoices to sham vendors as well as falsely recording these payments in SQM's books and records, and SQM personnel who became aware of internal controls failures relating to the use of the CEO's discretionary fund but did not take any action. SQM's DPA with the DOJ and cease-and-desist order from the SEC detail the awareness of and involvement in the scheme by these individuals. For example,

34. Deferred Prosecution Agreement at A-2 to A-3, United States v. Sociedad Química y Minera de Chile, S.A., No. 1:17-cr-00013-TSC (D.D.C. Jan. 13, 2017) [hereinafter SQM DPA]; Sociedad Química y Minera de Chile, S.A., No. 3-17774, at 2-3 (U.S. Sec. & Exch. Comm'n Jan. 13, 2017) [hereinafter SQM Cease-and-Desist Order], https://www.sec.gov/litigation/admin/2017/34-79795.pdf (order instituting cease-and-desist proceedings).

35. SQM Cease-and-Desist Order, *supra* note 34, at 2.

36. *Id.* at 3.

37. *Id.*; SQM DPA, *supra* note 34, at A-3 to A-4.

the DPA states that SQM employees issued payments to sham vendors and foundations associated with PEPs "at [the] SQM [CEO's] direction"[38] and that the "SQM [CEO] sought and received assistance from SQM employees to disguise . . . and falsely record some of the payments in SQM's books and ledgers."[39] Further, the DPA states that the "SQM [CEO] signed financial certifications as part of SQM's securities filings that he knew to be false."[40] The CEO and others were aware of red flags and failed to act with respect to internal controls failures. The DPA notes that "SQM personnel responsible for implementing and maintaining SQM's internal accounting controls, including SQM [CEO] and another high-level executive, became aware of control failures relating to payments from the CEO's discretionary fund to vendors associated with PEPs but nevertheless failed to take adequate steps to prevent further such payments."[41] The cease-and-desist order from the SEC similarly emphasizes that "[v]irtually all of the improper payments to PEPs were directed and authorized by a senior SQM executive,"[42] and that:

> SQM's senior management and board did not conduct adequate review and oversight of expenditures of the CEO Account . . . management gave complete deference to SQM [CEO's] discretion of how to spend funds allocated to the CEO Account . . . [and] SQM staff members arranged and executed the payments without oversight of those assignments by other senior management.[43]

SQM entered into parallel settlements with the SEC and DOJ under which it was required to pay a criminal penalty in the amount of $15,487,500 and a civil penalty in the amount of $15,000,000.[44] SQM also agreed to retain a compliance monitor for two years and to self-report for one year thereafter.[45] The DOJ awarded SQM a discount of twenty-five percent off of

38. SQM DPA, *supra* note 34, at A-4.
39. *Id.* at A-2.
40. *Id.* at A-6.
41. *Id.*
42. SQM Cease-and-Desist Order, *supra* note 34, at 2.
43. *Id.* at 5.
44. *Id.* at 8; SQM DPA, *supra* note 34, at 8.
45. SQM DPA, *supra* note 34, at 4; SQM Cease-and-Desist Order, *supra* note 34, at 6-7.

the bottom of the USSG fine range on account of its full cooperation and "substantial and ongoing remediation,"[46] which included the following:

> disciplining the employees involved in the improper payments and false books and records . . . including terminating the employment of a senior officer of the Company—and demoting another employee; and . . . providing in-depth anti-corruption and compliance training and consultations with outside compliance and internal controls experts to an employee who failed to take appropriate steps in response to red flags regarding the misconduct.[47]

As SQM did not self-disclose the misconduct at issue, it received the maximum mitigation credit available from the DOJ absent voluntary self-disclosure—twenty-five percent.[48] This saved the company up to $5,162,500 (note that some portion of this amount is due to SQM's cooperation with the DOJ's investigation). The SEC similarly credited SQM for "remedial measures, including: terminating SQM Executive."[49] Unlike in Telia, the SEC and DOJ required SQM to engage a compliance monitor because the company's compliance enhancements were fairly recent and not subjected to sufficient testing, but shortened the length of the monitor's term from three to two years.

Additional examples of FCPA enforcement actions in which the government credited and explicitly recognized disciplinary measures undertaken by companies in resolution documents include all seven declinations awarded by the DOJ under the FCPA Pilot Program in 2016 and 2017. Each of the seven declinations highlights remedial measures taken against high-level executives and others who served in a supervisory capacity over low-level employees engaged in misconduct and who should have taken steps to detect and prevent the viola-

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46. Press Release, U.S. Dep't of Justice, Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 13, 2017) [hereinafter DOJ Press Release re SQM], https://www.justice.gov/opa/pr/chilean-chemicals-and-mining-company-agrees-pay-more-15-million-resolve-foreign-corrupt.

47. SQM DPA, *supra* note 34, at 4.

48. *Id.* at 5.

49. SQM Cease-and-Desist Order, *supra* note 34, at 5.

tions. For example, in the DOJ's declination letter to Nortek, Inc., the DOJ states that its decision to close its inquiry was based in part on "the Company's full remediation . . . including terminating the employment of all five individuals involved in the China misconduct, which included two high-level executives . . . ."[50] The DOJ's declination letter to Akamai Technologies, Inc. similarly credits the company's "full remediation (including promptly suspending at the start of the investigation the individual involved in the China misconduct . . . and disciplining five other employees who should have prevented other violations of the Company's policies) . . . ."[51] The declination letter to NCH Corporation states that the DOJ's decision to close its investigation was due in part to "NCH's full remediation (including terminating and/or taking disciplinary action against the employees involved in the misconduct, including senior managers and lower-level employees involved in the misconduct, as well as high-level executives at NCH's headquarters in the United States who oversaw the subsidiary in which the China misconduct occurred)."[52]

50. Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, to Luke Cadigan, Esq. (June 3, 2016) [hereinafter DOJ Declination Letter to Nortek], https://www.justice.gov/criminal-fraud/file/865406/download.

51. Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, to Josh Levy, Esq. (June 6, 2016) [hereinafter DOJ Declination Letter to Akamai], https://www.justice.gov/criminal-fraud/file/865411/download.

52. Letter from Laura N. Perkins, Assistant Chief, U.S. Dep't of Justice, to Paul E. Coggins, Esq. (Sept. 29, 2016) [hereinafter DOJ Declination Letter to NCH], https://www.justice.gov/criminal-fraud/file/899121/download. *See also* Letter from Daniel Kahn, Deputy Chief, U.S. Dep't of Justice, to Jay Holtmeier, Esq. (June 21, 2016) [hereinafter DOJ Declination Letter to Johnson Controls], https://www.justice.gov/criminal-fraud/file/874566/download ("[F]ull remediation (including separating from the Company all 16 employees found to be involved in the misconduct, including high-level executives at the Chinese subsidiary) . . . ."); Letter from Lorinda Laryea, Trial Attorney, U.S. Dep't of Justice, to Steven A. Tyrrell, Esq. (Sept. 29, 2016) [hereinafter DOJ Declination Letter to HMT], https://www.justice.gov/criminal-fraud/file/899116/download ("[F]ull remediation . . . including terminating eight employees – including two regional managers and a director of business development – involved in the conduct, sanctioning ten employees through suspensions, pay freezes, bonus suspensions, and reductions of responsibilities . . . ."); Letter from Laura N. Perkins, Assistant Chief, U.S. Dep't of Justice, to Lucinda Low, Esq. (June 16, 2017) [hereinafter DOJ Declination Letter to Linde], https://www.justice.gov/criminal-fraud/file/974516/download ("[F]ull remediation . . . including terminating and/or taking disciplinary action against the employees involved in the

While the DOJ declinations and Telia and SQM matters demonstrate the positive effects on settlement outcomes of full remediation, the Embraer and LATAM matters serve as representative examples of the consequences that may result from the failure to adequately discipline employees engaged in or aware of misconduct.

In the Embraer matter, Embraer was charged with violating the FCPA for paying nearly $6 million in bribes between 2008 and 2011, both directly and indirectly, through intermediaries to government officials in the Dominican Republic, Saudi Arabia, and Mozambique via sham agency agreements in exchange for aircraft purchases by state-owned entities in those countries.[53] Additionally, Embraer was charged with engaging in an illicit accounting scheme in India through which it paid an agent $5.76 million in connection with a contract with the Indian Air Force pursuant to a false agency agreement and then concealed the transaction in its books.[54] Several senior executives at Embraer were either directly involved in the scheme to pay and conceal bribes or were aware of or recklessly ignored red flags suggesting that improper payments were being funneled to government officials via sham agency agreements.[55] These executives included individuals who were responsible for ensuring that Embraer maintained

misconduct, including the Spectra Executives and lower-level employees involved in the misconduct . . . ."); Letter from Nicola J. Mrazek, Senior Litig. Counsel, U.S. Dep't of Justice, to Nathaniel B. Edmonds, Esq. (June 21, 2017) [hereinafter DOJ Declination Letter to CDM Smith], https://www.justice.gov/criminal-fraud/page/file/976976/download ("[F]ull remediation, including but not limited to terminating all of the executives and employees who were involved in or directed the misconduct.").

53. Press Release, U.S. Dep't of Justice, Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016) [hereinafter DOJ Press Release re Embraer], https://www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges; Press Release, U.S. Sec. & Exch. Comm'n, Embraer Paying $205 Million to Settle FCPA Charges (Oct. 24, 2016) [hereinafter SEC Press Release re Embraer], https://www.sec.gov/news/pressrelease/2016-224.html.

54. DOJ Press Release re Embraer, *supra* note 53.

55. Complaint at 1, Securities and Exchange Commission v. Embraer, S.A., No. 0:16-CV-62501 (S.D. Fla. Oct. 24, 2016) [hereinafter Embraer Complaint]; Deferred Prosecution Agreement at A-4, United States v. Embraer S.A., No. 0:16-cr-60294- JIC (S.D. Fla. Oct. 24, 2016) [hereinafter Embraer DPA].

an adequate system of internal accounting controls and who knowingly failed to address these control deficiencies.[56] As a result of the foregoing bribe payments, Embraer made nearly $84 million in profits.[57]

Embraer's DPA with the DOJ, the SEC's complaint, and the press release issued by the DOJ are littered with references to high-level executives being directly involved in the scheme, authorizing the misconduct, having knowledge of the misconduct, or being aware of red flags suggesting misconduct and failing to take any action. The settlement documents indicate that Embraer executives participated in meetings and negotiations with government officials and crafted the structures by which they would be paid. For instance, the DPA states that an "Embraer Executive . . . agreed to pay Dominican Official 3.7% of the value of the contract . . . ." and "agreed that the payment . . . would be paid to three separate Dominican shell entities . . . ."[58] The DPA also states that "Embraer Executive . . . met with Saudi Arabia Official in London. . . . Embraer Executive . . . devised a plan to conceal the payments to Saudi Arabia Official by funneling them through Agent B, which had no experience in the aircraft industry or in Saudi Arabia."[59]

Apparently, even members of the company's legal department were involved in and had knowledge of the scheme. On this point, the DPA states that "an executive in EMBRAER's legal department provided senior EMBRAER managers with guidance on how to make those payments in a manner that would conceal their true purpose."[60] Additionally, the SEC's complaint notes that "[a] senior Embraer legal executive at the time signed Dominican Agent D's agreement on behalf of Embraer RL."[61] Further, the DPA and complaint highlight the fact that Embraer executives signed off on the various sham agency agreements and fictitious invoices issued in connection with the bribery scheme and ignored red flags suggesting that payments through these arrangements would be funneled to government officials. The DPA states that "[e]xecutives at EM-

56. Embraer DPA, *supra* note 55, at A-18; Embraer Complaint, *supra* note 55, at 20.
57. DOJ Press Release re Embraer, *supra* note 53.
58. Embraer DPA, *supra* note 55, at A-5.
59. *Id.* at A-9.
60. *Id.* at A-6.
61. Embraer Complaint, *supra* note 55, at 9.

BRAER approved paying the [agent] invoices."[62] The complaint asserts that "[t]hese bribes were authorized by senior executives . . . while knowing or recklessly ignoring red flags which indicated a high probability that such payments were intended for, or would be passed to, foreign officials."[63] The DPA adds:

> Many of the[se] high-level executives . . . had the authority and responsibility to ensure that EMBRAER devised and maintained an adequate system of internal accounting controls, knew that EMBRAER's then-existing internal accounting controls failed . . . and willfully failed to implement adequate internal accounting controls to address the known weaknesses . . . .[64]

Embraer reached settlements with the SEC and DOJ under which it was required to pay a criminal penalty amounting to $107,285,090 and over $98 million in disgorgement and prejudgment interest.[65] Additionally, Embraer was required to retain an independent compliance monitor for three years.[66] The DOJ press release indicates that Embraer did not receive the maximum credit available for full cooperation and remediation (absent voluntary self-disclosure)[67]—twenty-five percent below the low end of the USSG range—because it did not fully remediate. Specifically, the press release states:

> [Embraer] disciplined a number of company employees and executives engaged in the misconduct, but did not discipline a senior executive who was aware of bribery discussions in emails in 2004 and had oversight responsibility for the employees engaged in those discussions. As a result, the criminal penalty in this case is 20 percent below the bottom of the applicable range under the [USSG], a discount that re-

62. Embraer DPA, *supra* note 55, at A-11.

63. Embraer Complaint, *supra* note 55, at 1.

64. Embraer DPA, *supra* note 55, at A-18.

65. *Id.* at 8; SEC Press Release re Embraer, *supra* note 53.

66. DOJ Press Release re Embraer, *supra* note 53; SEC Press Release re Embraer, *supra* note 53.

67. Embraer did not self-disclose. Embraer DPA, *supra* note 55, at 3.

flects Embraer's full cooperation but incomplete remediation.[68]

According to statements made in the DOJ press release and DPA, had Embraer disciplined that one senior executive, it would have received an additional discount of five percent off of the bottom of the USSG fine range and saved itself $6,705,318 in penalties. Embraer's settlement with the DOJ exemplifies the government's focus on employee discipline in FCPA actions, and specifically disciplinary measures taken with respect to senior-level employees. The settlement also quantifies the consequences for failure to adequately scrutinize those employees who were aware of or should have been aware of misconduct.

The LATAM matter serves as another example of the consequences that may result from failing to take disciplinary actions against employees involved in or aware of misconduct. In the LATAM case, senior-level employees executed a scheme by which $1.15 million was paid to an advisor to the Secretary of Argentina's Ministry of Transportation pursuant to a sham consulting agreement for the purpose of funneling money to labor union officials in connection with ongoing disputes relating to wages and other work conditions.[69] LATAM's CEO authorized the improper payments to the consultant and was aware of the possibility that this money would be passed on to labor union officials in order to resolve the wage disputes.[70] LATAM received an estimated benefit of over $6.7 million as a result of the improper payments to the consultant.[71]

68. DOJ Press Release re Embraer, *supra* note 53.

69. Press Release, U.S. Dep't of Justice, LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $12.75 Million Criminal Penalty (July 25, 2016) [hereinafter DOJ Press Release re LATAM], https://www.justice.gov/opa/pr/latam-airlines-group-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-1275; Press Release, U.S. Sec. & Exch. Comm'n, LAN Airlines Settles FCPA Charges (July 25, 2016) [hereinafter SEC Press Release re LATAM], https://www.sec.gov/news/press-release/2016-151.html.

70. LAN Airlines S.A., No. 3-17357, at 2 (U.S. Sec. & Exch. Comm'n July 25, 2016) [hereinafter LATAM Cease-and-Desist Order], https://www.sec.gov/litigation/admin/2016/34-78402.pdf (order instituting cease-and-desist proceedings).

71. *Id.* at 7; Deferred Prosecution Agreement at A-7, United States v. LATAM Airlines Group S.A., No. 0:16-cr-60195-DTKH (S.D. Fla. July 25, 2016) [hereinafter LATAM DPA].

LATAM's cease-and-desist order from the SEC and the DPA with the DOJ detail the involvement by various senior executives—including the CEO, Vice President of Business Development, and General Manager of LATAM's subsidiary in Argentina—in the scheme to pay bribes to labor union officials. The cease-and-desist order states that "the current CEO of LAN[ ] authorized $1.15 million in improper payments to a third party consultant in Argentina . . . [and] understood that it was possible the consultant would pass some portion of the $1.15 million to union officials in Argentina."[72] The DPA adds that "LAN Cargo Executive negotiated the fictitious agreement with Consultant . . . [and] knew and intended that Consultant would use some of the money he received under the draft agreement to bribe union officials . . . ."[73] The DPA and cease-and-desist order also address the responsibility of LATAM's high-level executives to maintain adequate internal controls and their knowing and willful failure to do so.[74] Specifically, the cease-and-desist order states that "[h]igh level executives approved the payments to the consultant's company . . . and other executives and managers made the payments while overlooking numerous red flags."[75]

Under LATAM's settlements with the SEC and DOJ, LATAM was required to pay a $12.75 million criminal penalty and over $9.4 million in disgorgement and prejudgment interest, as well as to retain an independent compliance monitor for a term of twenty-seven months.[76] The DOJ press release and DPA acknowledge LATAM's full cooperation in the government's investigation, but indicate that LATAM did not receive a discounted criminal penalty because the company "failed to remediate adequately, including significantly by failing to discipline in any way the employees responsible for the criminal conduct . . . including misconduct by at least one high-level Company executive, and thus the ability of the compliance program to be effective in practice is compro-

72. LATAM Cease-and-Desist Order, *supra* note 70, at 2.

73. LATAM DPA, *supra* note 71, at A-4 to A-5.

74. *Id.* at A-8; LATAM Cease-and-Desist Order, *supra* note 70, at 7.

75. LATAM Cease-and-Desist Order, *supra* note 70, at 7.

76. *Id.* at 9-10; LATAM DPA, *supra* note 71, at 4, 8.

mised . . . ."[77] LATAM's failure to discipline employees involved in the misconduct, including the company's CEO, resulted in a penalty that was twenty-five percent *above* the low end of the USSG range.[78] It appears that the government's decision to require the imposition of a monitor was also due in part to the company's failure to execute adequate disciplinary measures. At a conference held in late 2016, Andrew Weissmann, then-Chief of the DOJ Criminal Division's Fraud Section, stated that "the company had left in place a senior employee that had participated in the criminal conduct and had taken no disciplinary action whatsoever," and explained that this resulted in the company receiving a penalty within the USSG fine range as well as a compliance monitor.[79]

IV. APPROACHING INTERNAL INVESTIGATIONS WITH DISCIPLINARY MEASURES IN MIND

How a company conducts an internal investigation into bribery allegations and the reasoning for the actions it takes in response to that investigation may have a bearing on whether the government decides to bring charges against the company, the extent of those charges, and the amount of mitigation credit awarded to the company in connection with the resolution of the matter. Over the course of an investigation, a company should actively work to identify and evaluate all potential wrongdoers and to lay the groundwork for potential disciplinary actions against those individuals. From the very beginning of an investigation, it is critical that the company focus on individuals. As recent enforcement actions show, this should include not only those who are directly implicated in the alleged misconduct, but also those individuals all the way up the chain of command who either knew or should have known about the alleged misconduct.

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77. LATAM DPA, *supra* note 71, at 4; *see also* DOJ Press Release re LATAM, *supra* note 69 (discussing LATAM's cooperation with the DOJ's investigation and its inadequate remediation).

78. LATAM DPA, *supra* note 71, at 4.

79. Megan Zwiebel, *Top FCPA Officials Encourage Strong Compliance Programs and Remediation, the Defense Bar Responds*, ANTI-CORRUPTION REP. (Dec. 21, 2016) [hereinafter Zwiebel, *Top FCPA Officials*], https://www.anti-corruption.com/article/2453.

Following a preliminary assessment of the facts and initial identification of individuals believed to be tied to the alleged wrongdoing, investigators should issue preservation notices and take steps to preserve and image laptops, mobile phones, tablets, and server data for those individuals as well as their immediate supervisors. Until it becomes clear how high up the chain of command knowledge of the alleged misconduct went, investigators should issue preservation notices to more senior supervisors who may have been aware of the alleged misconduct and consider whether to proceed with collecting and imaging data for these individuals as the investigation unfolds. If feasible, images of server data for these individuals should be taken shortly after they are identified in order to avoid the risk of any potentially relevant information being deleted. These images should be stored in a safe and secure location until a decision is made about whether to process, search, and review this data.

As the investigation proceeds and after the company has had an opportunity to review documents, get a handle on the substantive allegations, and come up with a tentative list of individuals potentially tied to the alleged misconduct, the company should move forward with witness interviews. The company will need to consider employees' rights under their employment agreements, any relevant company policies, and local labor and employment laws. For example, some company policies and/or employment agreements may require the company to provide separate counsel to employees requesting representation during the interview. If a witness interview takes place in a foreign jurisdiction, the company will also have to consider various local labor laws that may come into play. For example, local labor laws may impose restrictions on employee interviews and/or require the company to satisfy certain additional requirements, including providing advance notice in writing of the interview, conducting the interview in the interviewee's native language, and notifying and consulting local labor unions or works councils.[80] For witness interviews taking place in foreign jurisdictions, the company will also need to familiarize itself with the relevant privilege and work product rules in those jurisdictions. In any witness inter-

80. MARTIN WEINSTEIN ET AL., THE FOREIGN CORRUPT PRACTICES ACT: COMPLIANCE, INVESTIGATIONS AND ENFORCEMENT § 9.04[6] (5th ed. 2017).

view, counsel for the company should begin the interview with an *Upjohn* warning[81] to avoid any confusion as to who counsel represents and to preserve the company's privilege with respect to the contents of the interview.

Once an employee has been interviewed and the company has decided to take disciplinary action against that individual, the company should proceed carefully and continue to consider local labor laws, relevant provisions in the individual's employment agreement, implications on the government's investigation, and compliance with the company's disciplinary process and procedures. As soon as it becomes clear to the company that the investigation may lead to disciplinary actions, the company should involve human resources (HR) and consult with HR on employment issues as appropriate throughout the investigation.[82] The company should also consider retaining local counsel to help the company navigate local labor laws, data privacy obligations, and privilege and confidentiality issues that are particular to the relevant jurisdiction.

Before taking any sort of definitive action against an employee determined to have engaged in wrongdoing, the company should also take into account whether and how disciplining the employee will impact the government's investigation. While there are many reasons to take swift disciplinary measures against employees found to have engaged in wrongdoing—namely, that the company no longer has sufficient trust in these individuals to allow them to continue doing their jobs, labor laws may require that disciplinary measures be undertaken within a certain timeframe from discovery of misconduct, and the company wants to secure maximum credit from the government for full remediation in future settlement discussions—it is also important to consider the consequences of such actions on the government's investigation. Terminating an employee before the government has had the opportunity to interview them may make it significantly harder for the government to obtain access to that individual. To improve its chances of securing maximum credit for full cooperation, the company should keep the government apprised of any antici-

81. Upjohn Co. v. United States, 449 U.S. 383 (1981).

82. Megan Zwiebel & Nicole Di Schino, *Balancing Employment Law Considerations During Corruption Investigations*, ANTI-CORRUPTION REP. (Sept. 20, 2017), https://www.anti-corruption.com/article/2631.

pated disciplinary measures and coordinate with the government regarding the timing and execution of these actions. Rather than immediately terminating employment, the company may consider placing the employee on a temporary paid administrative leave to make that individual available for further questioning by the company and the government. In situations where termination is unavoidable or where an employee decides to resign before the government has had an opportunity to speak to that individual, the company may include a provision in the employee's severance agreement requiring cooperation with the company's and government's investigations. As described above, there are many factors to consider when conducting an investigation and deciding on the type, timing, and execution of disciplinary measures. It is important to balance competing incentives to timely and appropriately remediate and to fully cooperate with the government's investigation.

V. Designing and Implementing Disciplinary Policies and Procedures to Achieve Maximum Impact

Even before imposing disciplinary measures in connection with an investigation, it is important that the company have in place clear and concise disciplinary policies and procedures outlining the process for handling investigations and imposing discipline. Of equal significance, the disciplinary process must be enforced consistently across all employees regardless of seniority for the policies to have any meaningful impact. The company's disciplinary policies and procedures should be formalized in writing, communicated to employees, and made easily accessible. In formulating the policy, the company should address certain basic elements such as the types of misconduct meriting discipline, forms of discipline, timing of discipline, and aggravating and mitigating factors the company will consider when making a disciplinary decision. Additionally, if the company operates in multiple countries, it will need to take into account local labor and employment laws which may impact the company's ability to impose certain types of discipline, the timeframes under which the company must make disciplinary decisions, and the standards by which the company must prove misconduct. The company's policy should be drafted in a way that is specific enough to give employees the information they need to understand how the disciplinary process works and the types of misconduct that will trigger the application of the policy, but also be flexible enough to allow for adjustments in the implementation of the policy based on differing local labor laws.[83]

Digging deeper into the key elements of a disciplinary process, the first thing the company's policy should cover is the types of misconduct meriting discipline—which may include anything from embezzling company funds to bribing government officials. While it is unnecessary and impractical to list every possible violation which may subject an employee to discipline, setting out various categories of violations with illustrative examples should be sufficient to provide employees with adequate notice of what constitutes acceptable versus unacceptable conduct. Next, the policy should set out a range of possible punishments for misconduct and the factors the company will consider in determining the appropriate level of punishment in a given situation. Forms of punishment may include termination, paid administrative leave, suspension without pay, verbal or written warnings, salary or bonus reductions, bonus clawbacks, demotion, negative performance reviews, remedial training, reassignment to a position with less responsibility, increased supervision, and more.[84]

There are many factors that a company may take into account in deciding whether to take disciplinary action against an employee and the appropriate form of discipline, and these should also be laid out in the company's disciplinary policy. These include whether the employee was found to have violated company policy or the law, the severity of the violation, the level of the employee's involvement in the misconduct, the employee's state of mind, whether the employee acted at the direction of a supervisor, the seniority of the employee, the

83. Megan Zwiebel, *Employee Discipline for Anti-Corruption Issues: Predictability and Consistency in the Face of Inconsistent Laws (Part One of Three)*, ANTI-CORRUPTION REP. (Nov. 1, 2017) [hereinafter Zwiebel, *Predictability and Consistency*], https://www.anti-corruption.com/article/2654.

84. WEINSTEIN ET AL., *supra* note 80, at § 9.07[2][b]; Megan Zwiebel, *Employee Discipline for Anti-Corruption Issues: Due Process for a Just and Effective System (Part Three of Three)*, ANTI-CORRUPTION REP. (Nov. 29, 2017) [hereinafter Zwiebel, *Due Process*], https://www.anti-corruption.com/article/2673.

employee's cooperation in the company's investigation, and the employee's past disciplinary record.[85]

Other key components of a disciplinary policy include timing and notice provisions and identification of the relevant decision-makers. The company's policy should make clear that discipline may be imposed during or at the completion of an investigation. The policy should also indicate that to the extent an employee is subject to disciplinary action, they will be given adequate notice, sufficient detail to understand the allegations against them, as well as an opportunity to respond before any final decisions are made.[86] Further, the policy should provide employees with assurances that investigations and any disciplinary actions resulting therefrom will be undertaken in a timely manner. As for who within the company will be responsible for making disciplinary decisions, hearing appeals of disciplinary decisions, and executing disciplinary measures, the company should decide whether the appropriate decision-makers include the HR department, compliance office, legal department, relevant country/region heads, relevant business unit heads, or some combination thereof, and clearly spell this out in the company's policy.[87] Individuals from the company involved in the disciplinary process should keep detailed records documenting the steps taken by the company in deciding to take disciplinary action, the type of discipline ultimately imposed, findings from the company's investigation supporting the decision, and consideration of any aggravating or mitigating factors for possible use in future employment suits or to respond to government inquiries.[88]

As the laws of some jurisdictions may prohibit certain types of discipline, require that disciplinary action be undertaken within a certain timeframe, or compel the company to satisfy varying standards of proof, there should be some flexibility built into the company's policy to allow for variation in the implementation of the policy based on these factors. While employees in the United States are generally employed at-will

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85. WEINSTEIN ET AL., *supra* note 80, at § 9.07[2][b]; Zwiebel, *Due Process*, *supra* note 84.

86. WEINSTEIN ET AL., *supra* note 80, at § 9.07[2][d]; Zwiebel, *Due Process*, *supra* note 84.

87. Zwiebel, *Due Process*, *supra* note 84.

88. WEINSTEIN ET AL., *supra* note 80, at § 9.07[2][e].

and may therefore be terminated with or without cause,[89] in France, for example, the company must demonstrate "real and serious grounds" before terminating an individual employed under an indefinite-term contract and "serious or gross misconduct" when terminating an employee pursuant to a fixed-term contract.[90] In South Korea, an employer may not dismiss or take any other disciplinary measures against an employee without establishing "just cause," which is a very difficult standard to meet—in part because it is not defined by Korean labor law.[91] In determining whether just cause exists in a particular situation, Korean courts and labor authorities look to the totality of the circumstances and make an assessment as to whether the alleged conduct is so significant that it would make it virtually impossible for the employer to continue the employment relationship.[92] As for notice requirements in foreign jurisdictions, employers in South Korea must provide thirty days advance notice before termination and specify in writing the reasons for and effective date of the dismissal.[93] French law requires that the process for disciplinary dismissal be initiated no later than two months after the company becomes aware of the facts underlying the misconduct.[94] This presents some complications when the company's internal investigation takes longer than two months to complete, which is likely to be the case when an investigation involves the review of tens of thousands of documents—potentially in a foreign

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89. Zwiebel & Di Schino, *supra* note 82.

90. Joël Grangé, *Employment and Employee Benefits in France: Overview*, *in* EMPLOYMENT AND EMPLOYEE BENEFITS GLOBAL GUIDE 15, 17 (2017), https://content.next.westlaw.com/0-503-0054?transitionType=default&firstPage=true&bhcp=1&contextData=(sc.Default).

91. Jeong Han Lee & Anthony Chang, *Employment and Employee Benefits in South Korea: Overview*, *in* EMPLOYMENT AND EMPLOYEE BENEFITS GLOBAL GUIDE (2015), https://content.next.westlaw.com/6-508-2342?transitionType=Default&contextData=(sc.Default)&__lrTS=2; Sang-Hoon Lee et al., *South Korea: Employment & Labour Law*, *in* THE LEGAL 500 & THE IN-HOUSE LAWYER: COMPARATIVE LEGAL GUIDE (2018), http://www.inhouselawyer.co.uk/practice-areas/employment-labour-law/south-korea-employment-labour-law/?pdf=11392.

92. Lee et al., *supra* note 91.

93. *Id.*; Lee & Chang, *supra* note 91.

94. Jean Martinez & Julien Boucaud-Maitre, *France: Employment & Labour Law*, *in* THE LEGAL 500 & THE IN-HOUSE LAWYER: COMPARATIVE LEGAL GUIDE (2018), http://www.inhouselawyer.co.uk/practice-areas/employment-labour-law/france-employment-labour-law/?pdf=10457.

language—and interviews of several witnesses. Employers in France must also satisfy elaborate notice procedures including an initial notification letter to the employee describing the grounds for dismissal, arrangement of a preliminary meeting at which the employer informs the employee of the reasons for dismissal and provides the employee with an opportunity to respond, and an official dismissal letter to be issued no earlier than two working days after the preliminary meeting with the employee.[95]

In addition to putting in place a clear and comprehensive, yet flexible, disciplinary policy, it is critical that the company enforce the policy uniformly across all employees regardless of seniority. Failure to discipline senior employees involved in or aware of misconduct signals a breakdown in the company's disciplinary process and overall compliance program, prevents employees from coming forward to report misconduct which would allow the company an opportunity to address and remedy it before a whistleblower notifies the government, and sends the wrong message to employees and regulators that the company will not forego business opportunities and sales goals in favor of compliance. In the words of the FCPA RESOURCE GUIDE, "[a] compliance program should apply from the board room to the supply room—no one should be beyond its reach. . . . No executive should be above compliance, no employee below compliance, and no person within an organization deemed too valuable to be disciplined, if warranted."[96] Uniform enforcement of a company's disciplinary policy encourages employees to work hard and conduct business in an ethical way, further boosting the compliance culture at the company.

VI. ENFORCEMENT OF DISCIPLINARY MEASURES AND EFFECTIVENESS OF COMPLIANCE PROGRAMS

When a company enforces disciplinary measures against employees determined to have been engaged in or aware of misconduct, and does so in a consistent way across all employees irrespective of seniority, this signals to the government that the company is serious about compliance and lends credibility

95. *Id.*; Grangé, *supra* note 90, at 16.
96. FCPA RESOURCE GUIDE, *supra* note 1, at 59-60.

to the company's compliance program. How a company addresses misconduct is a direct reflection of the effectiveness of its disciplinary policies and overall compliance program, and has the ability to influence the ultimate resolution the company reaches with the government.

High-performing compliance programs perpetuate a company culture driven by ethical behavior and hold all employees, from the bottom to the top, accountable for compliance. A recent study performed by the Legal Research Network measuring the effectiveness of ethics and compliance programs found that companies with high-performing compliance programs are much more likely to hold senior leaders accountable for ethical behavior and are also more likely to actively involve middle managers in supporting compliance efforts.[97] Specifically, eighty-five percent of respondents from companies with high-performing compliance programs reported that their C-suites hold leaders accountable for ethical behavior, compared to only fifty-three percent of respondents from companies with low-performing programs.[98] Additionally, eighty-three percent of respondents from companies with high-performing compliance programs reported awareness by middle managers of their responsibility to actively support the company's compliance program, relative to only sixty-three percent of respondents from companies with low-performing programs.[99]

In addition to putting in place and consistently enforcing disciplinary policies designed to punish and prevent FCPA violations, companies should encourage senior executives to lead by example and reinforce a culture of compliance in order to ensure the integrity and success of the company's compliance program. As statistics from enforcement matters over the past two decades show, corporate managers have, in a number of instances, endorsed bribery and even been at the root of bribery violations in certain cases.[100] For this reason, it is even more important that senior-level employees play a prominent

97. LEGAL RESEARCH NETWORK, ETHICS AND COMPLIANCE: PROGRAM EFFECTIVENESS REPORT 11 (2016), https://cdn2.hubspot.net/hubfs/319387/PEI%20Report%202016_interactive_2.6.pdf?t=1488382370944.

98. *Id.*

99. *Id.*

100. Org. for Econ. Co-operation & Dev., *supra* note 16, at 22-23.

role in facilitating implementation of the company's compliance program by strictly adhering to the company's anti-corruption policies, clearly and regularly communicating support for the company's commitment to compliance, and reminding employees of the expectation to forego business opportunities secured through improper means. Active support of the company's compliance program and disciplinary process by senior-level employees trickles down to middle managers and low-level employees, encouraging employees throughout the company's organizational structure to uphold the company's standards for compliance and promote a strong ethical culture.[101]

VII. Conclusion

As recent enforcement actions demonstrate, when awarding credit for remediation in the settlement context, there has been a heightened focus by regulators on the quality and extent of disciplinary measures undertaken in response to findings of misconduct. It is therefore critical for companies to adopt and uniformly enforce comprehensive disciplinary policies designed to adequately inform employees of the consequences of misconduct, deter employees from engaging in wrongdoing, and foster an ethical culture of compliance throughout the organization, with reinforcement from senior executives. The establishment and implementation of robust disciplinary policies and procedures, coupled with thorough investigations of allegations of misconduct and swift disciplinary actions taken in response to those investigations, as well as careful consideration of complicating factors such as protective local labor and data privacy laws and cooperation with the government's investigation, have the potential to significantly impact mitigation credit awarded to companies for remediation. Even more importantly, adoption and enforcement of a well-designed disciplinary policy serves as the foundation for a strong ethical tone of compliance for the company, making any instances of misconduct the exception to the rule and helping insulate the company from substantial fines and penalties resulting from the failure to have proper structures in place to prevent corruption.

101. FCPA Resource Guide, *supra* note 1, at 57.