

Morgan Lewis

The Foreign Corrupt Practices Act (FCPA) & The Dodd-Frank Act

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Topics of Discussion

- Overview of the FCPA
- The Rise of SEC Enforcement
- The Dodd-Frank Act Whistleblower Bounty Provisions
- The SEC Whistleblower Program
- The Impact on Compliance Programs & the Decision to Self-Disclose

Overview of the FCPA

FCPA's Two Prongs

ANTIBRIBERY PROVISIONS

Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage

BOOKS & RECORDS PROVISIONS

Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls

Antibribery Provisions

- It is unlawful for
 - an issuer, domestic concern, or anyone acting within the jurisdiction of the United States
 - with “corrupt intent”
 - directly or indirectly
 - to offer, pay, promise to pay, or authorize payment
 - of “anything of value”
 - to a “foreign official”
 - for the purpose of obtaining or retaining business or securing any improper business advantage

To Whom Do the Antibribery Provisions Apply?

- Any **issuer** that files reports to the SEC or trades equity or debt on a U.S. exchange
- Any **domestic concern**
- Any **person** including an organization, wherever located, that, while in the territory of the United States, does any act in furtherance of the prohibited conduct

Books & Records Provisions

- Books and records
 - Must be in reasonable detail that accurately and fully reflect transactions
 - Payments, gifts, and entertainment
- Effective internal accounting controls
 - company policies and procedures
 - documentation (e.g., expense forms)
 - reporting
 - certifications
 - corrective actions
- Apply to issuers

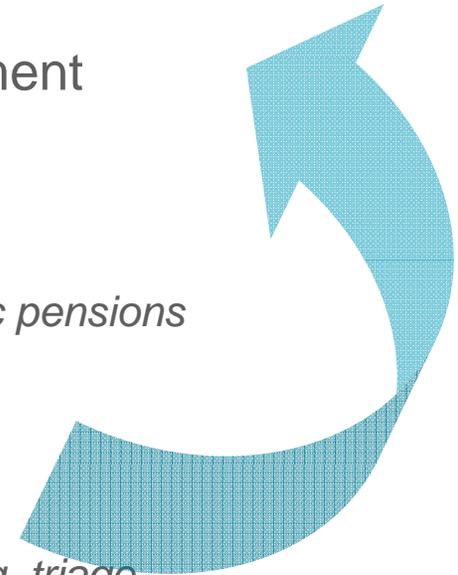
Books & Records Provisions

- Improper payments to a foreign official to obtain or retain business may result in charges under both prongs
 - Improper payments falsely characterized on a company's books and records as “miscellaneous” expenses, “commissions,” etc
 - Improper payments viewed as a consequence of ineffective internal controls
- Violations of the Books & Records Provisions are not contingent on Antibribery Provisions Violations

The Rise of SEC Enforcement

The Rise of SEC Enforcement

- Fundamental reorganization of the SEC Enforcement Division and expansion of investigative tools
 - National specialized enforcement units
 - *Asset management, market abuse, structured and new products, FCPA, municipal securities, and public pensions*
 - Increased focus on individual liability
 - New cooperation tools
 - Office of Market Intelligence
 - *Responsible for the collection, analysis, risk-weighting, triage, referral, and monitoring of tips, complaints, and referrals*
 - *Responsible for harvesting that intelligence to better inform the SEC's investigative focus and priorities*
- Dodd-Frank Act Whistleblower Provisions



Specialized SEC FCPA Enforcement Unit

- Better capability to detect emerging fraud and misconduct
- Greater capability to file cases with “strike-force speed”
- Increase in enforcement division expertise
- Broader array of cooperation and intelligence tools

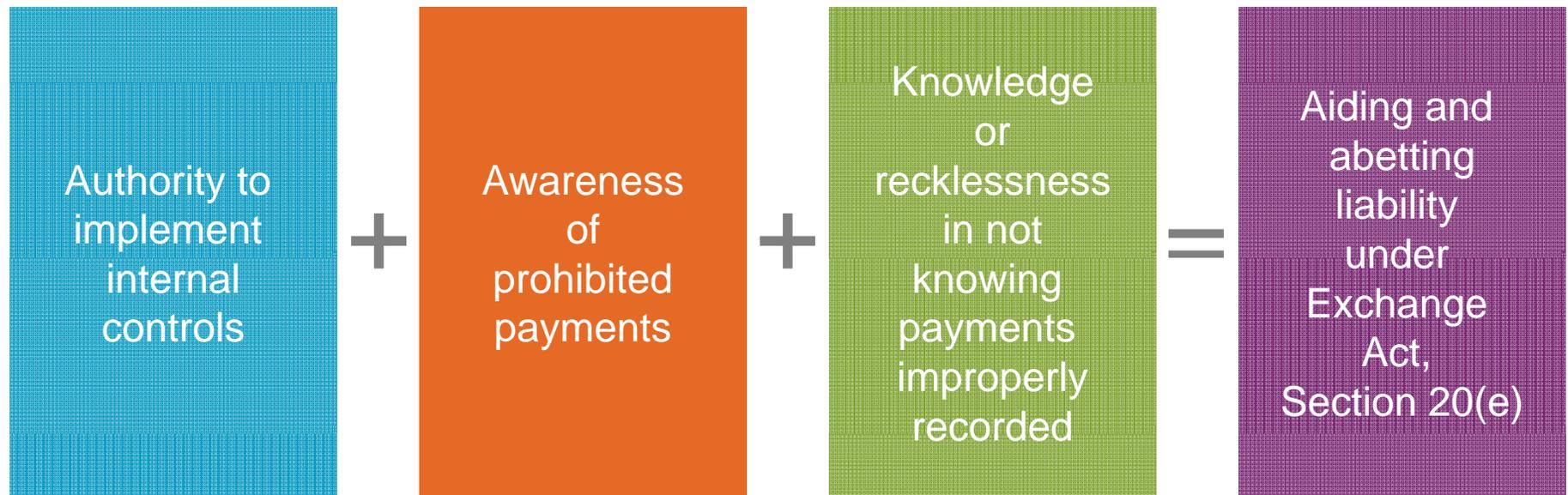
New Cooperation Tools

- Cooperation Agreements
 - Source can receive credit for information provided
- Deferred prosecution and nonprosecution agreements
 - Agreement not to pursue enforcement action
- Proffer agreements
 - Agreement not to use individual's statement in subsequent proceedings
- SEC rules amended to allow the Director of Enforcement to seek immunity order from DOJ

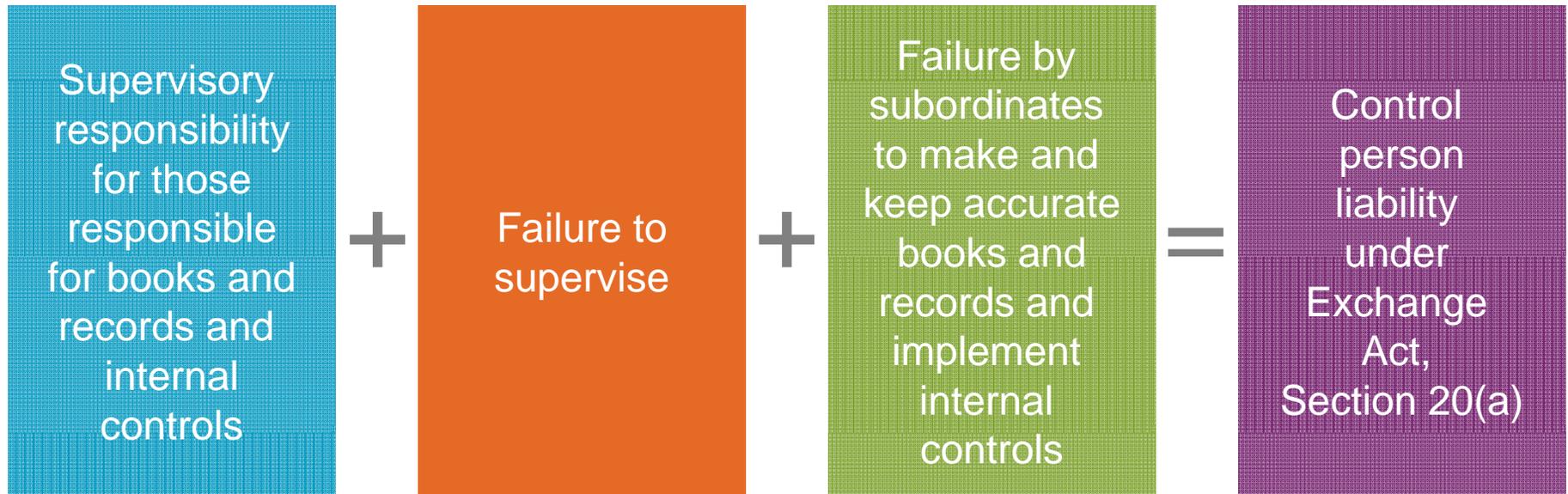
An Increased Focus on Individual Liability

- Direct liability
- Aiding and abetting liability
- Control person liability

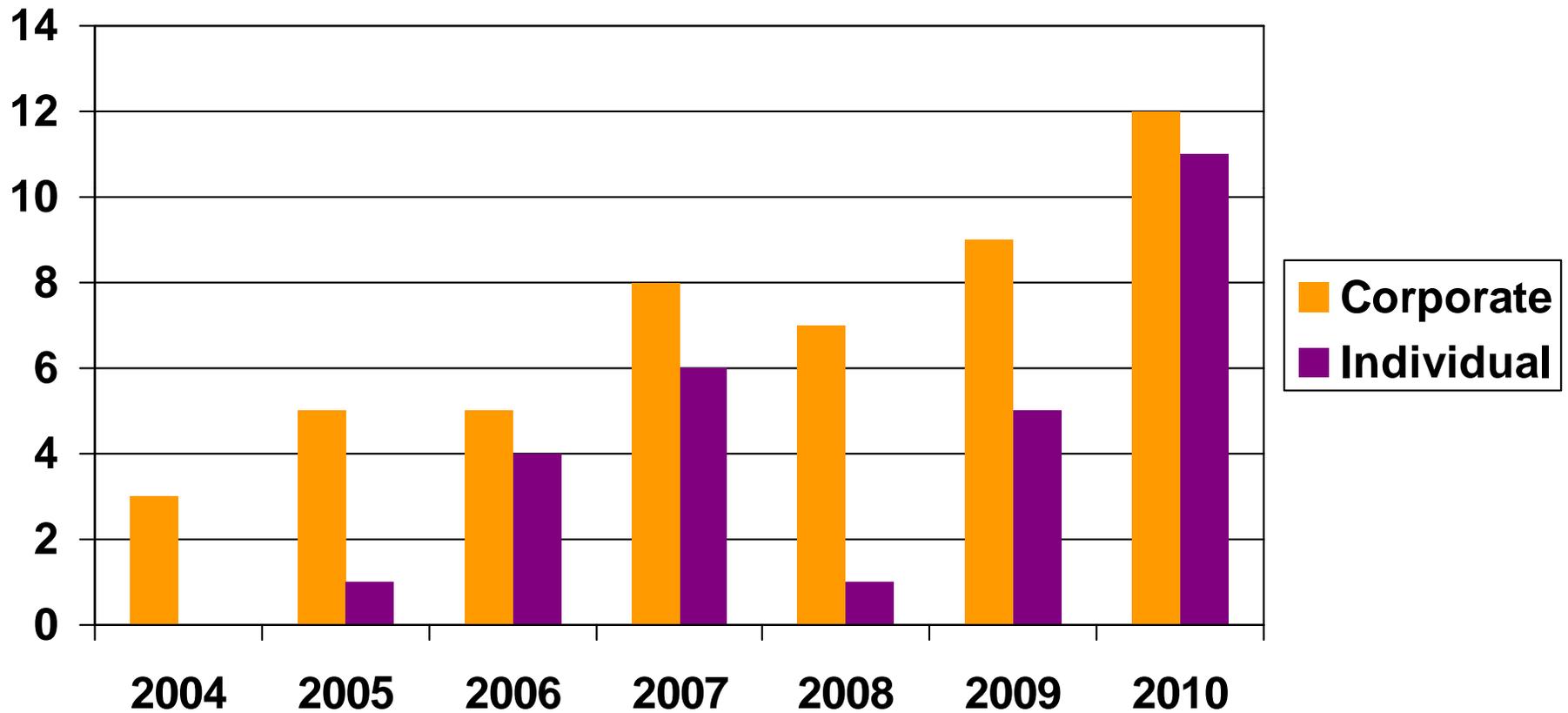
Aiding and Abetting Liability



Control Person Liability



The SEC's Upward Enforcement Trend



The Dodd-Frank Act Whistleblower's Bounty Provisions

The Whistleblower's Bounty: Eligibility Requirements

- The SEC will pay an award to one or more whistleblowers who:
 - Voluntarily provide the SEC
 - With original information
 - That leads to the successful enforcement by the SEC in a federal court or administrative action
 - In which the SEC obtains monetary sanctions totaling more than \$1,000,000

What is a Whistleblower?

- A ***whistleblower*** is an individual who provides the SEC with “information relating to a potential violation of the securities laws”

Information Provided Voluntarily

- Information is provided *voluntarily* if it is provided before the government, a self-regulatory organization, or the Public Company Accounting Oversight Board asks for it.

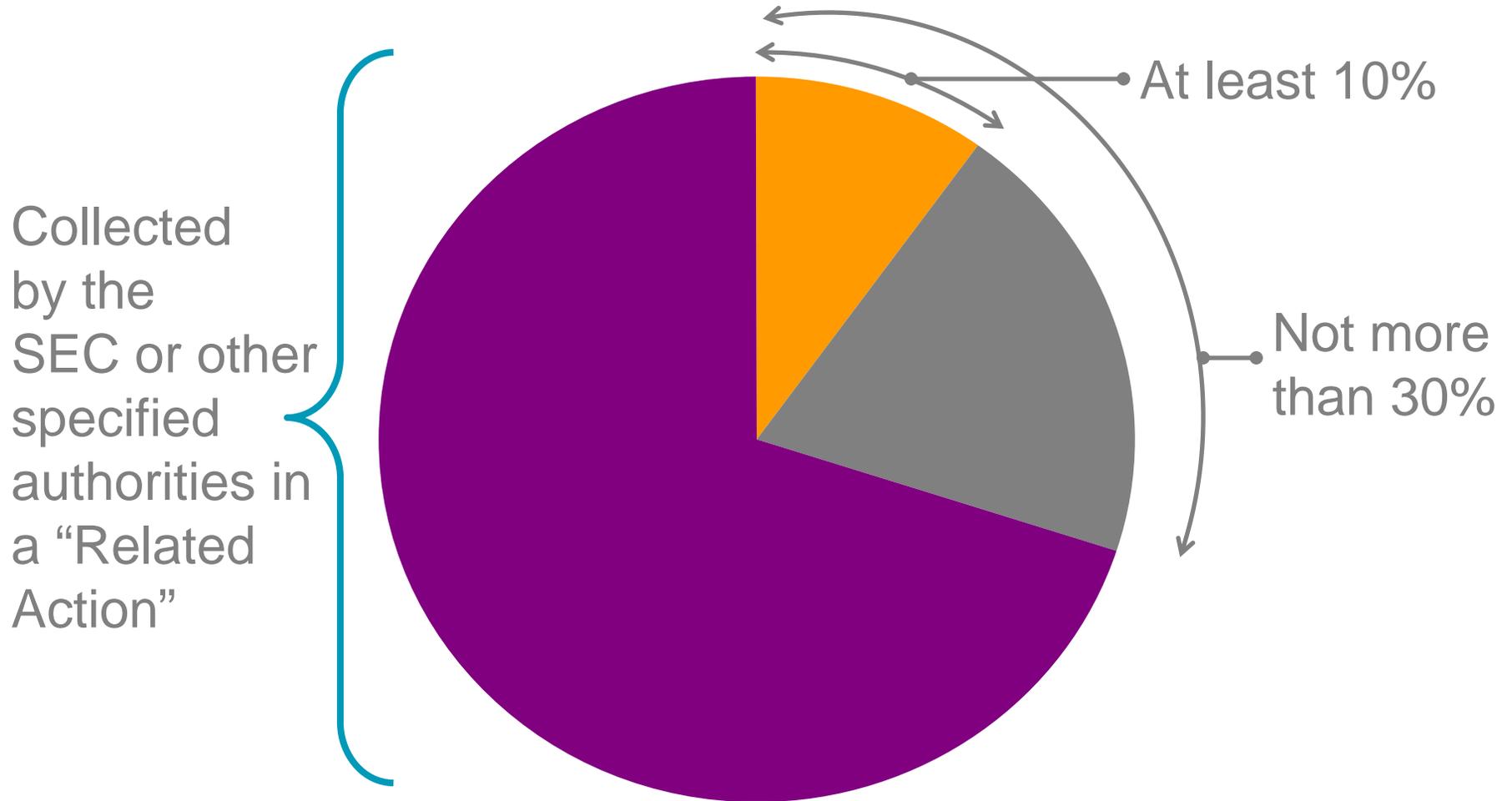
Original Information

- **Original Information** is information based upon the whistleblower's independent knowledge or independent analysis that is not already known to the SEC and not exclusively derived from an allegation in a judicial or administrative hearing, government report, hearing, audit, investigation or news media
 - **Independent knowledge:** can come from “experiences, communications and observations in your business or social interactions”
 - **Independent analysis:** is the “examination and evaluation of information that may be generally available, but which reveals information that is not generally known to the public”

Leading to a Successful Enforcement Action

- Information will be considered as having led to a **successful enforcement action** if:
 - it caused the SEC to commence a new examination or investigation and significantly contributes to the success of a resulting enforcement action; or
 - the conduct was already under investigation when the information was submitted, but the information is essential to the success of the action and would not have otherwise been obtained.

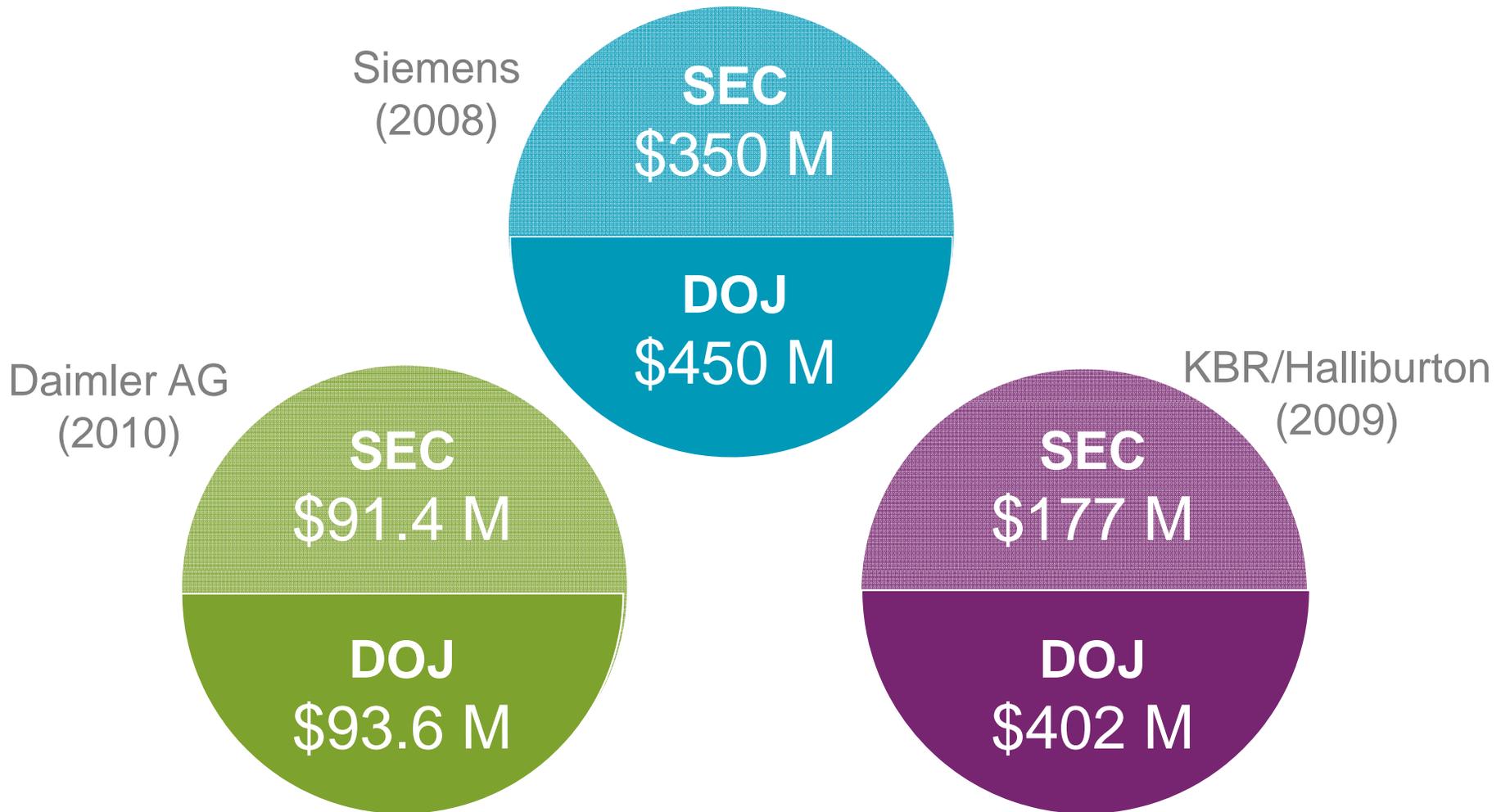
Amount of Award



A “Related Action”

- A judicial or administrative action:
 - brought by the Attorney General of the United States, an appropriate regulatory authority, a self-regulatory organization, or a state Attorney General in connection with any criminal investigation
 - that is based on the same original information that the whistleblower voluntarily provided to the SEC, and that led the SEC to obtain monetary sanctions totaling more than \$1,000,000.

Recent FCPA Fines/Recoveries



Award Amount Criteria

- If all award eligibility criteria are met, the SEC will decide the amount of the award based on the:
 - significance of the whistleblower’s information to the success of the SEC’s action;
 - degree of assistance provided by the whistleblower;
 - programmatic interest of the SEC in deterring violations; and
 - whether the award enhances the SEC’s ability to enforce securities laws, protect investors, and encourage submission of high-quality information by whistleblowers.

The Role of Whistleblower Counsel

- Act does not authorize qui tam actions, so potential whistleblowers need not establish a prima facie FCPA violation
- But whistleblowers who report anonymously must be represented by counsel
- Whistleblowers are not given immunity for their role in the reported conduct

The SEC Whistleblower Program

The Importance of Whistleblowers

“Whistleblowers can be a source of valuable firsthand information that may not otherwise come to light. These high-quality leads can be crucial to protecting investors and recovering ill-gotten gains from wrongdoers.”

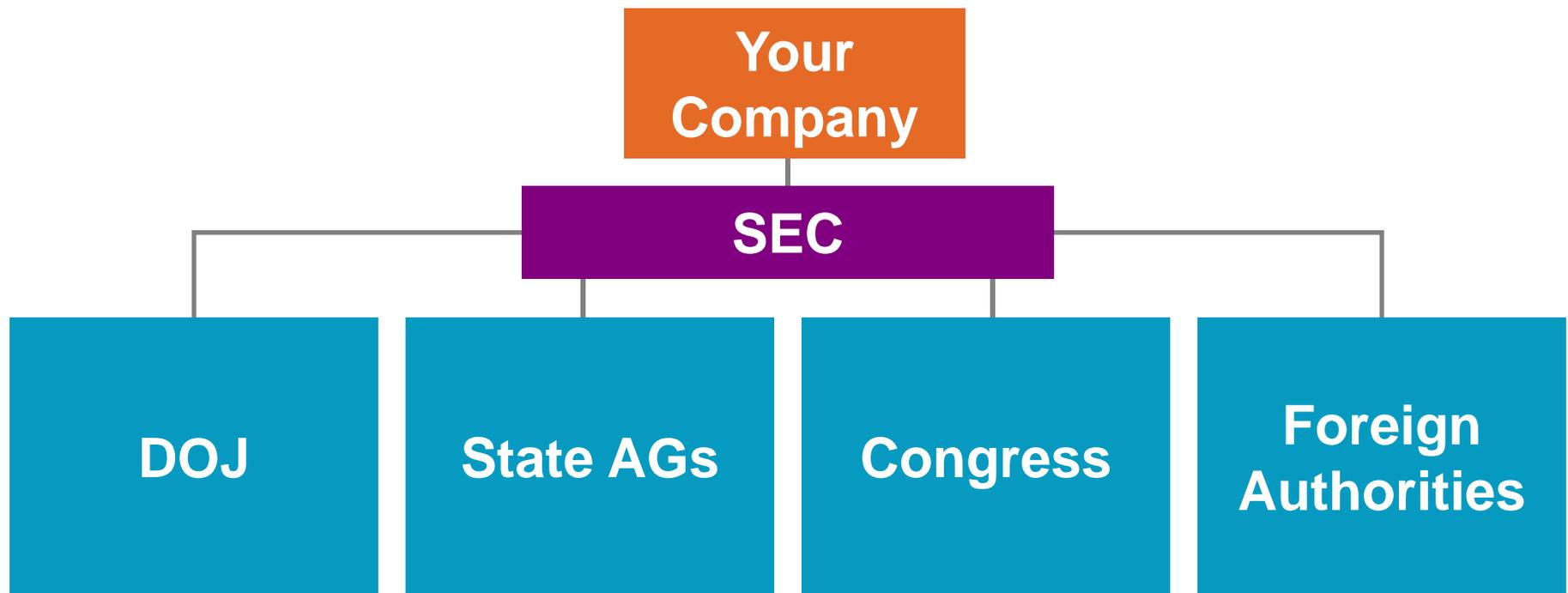
– SEC Chairman Mary L. Schapiro, November 3, 2010

Whistleblower Office

- Responsible for handling tips, working with whistleblowers, helping SEC determine award amounts
- SEC announcement, February 18, 2011 – Office to be headed by Sean McKessy, former Corporate Secretary for Altria Group, Inc. and AOL, Inc. and former Securities Counsel for Caterpillar, Inc.
- SEC FY2012 budget calls for creation of 43 new positions for the Whistleblower Program

Cooperation with Other Enforcement Authorities

SEC authorized to share whistleblower-provided information with enumerated federal, state, and foreign enforcement authorities



The Impact on Compliance Programs & the Decision to Self-Disclose

Components of an Effective Compliance Program Remain the Same

- Establish an effective code of ethics
- Designate specific high-level personnel with direct responsibility for overseeing compliance who have direct access to the CEO and board of directors
- Appoint a compliance officer with responsibility for independently investigating and acting on matters related to compliance
- Inform employees of the existence and details of the company's compliance program
- Arrange for regular reports to the board concerning internal investigations
- Establish effective methods of monitoring, auditing or reporting on compliance, including, without limitation, establishing an anonymous hotline and providing protection for whistleblowers
- Implement systems to ensure reasonable steps to respond to or investigate reported violations
- Consistently enforce the company's policies and procedures through corrective action

How Dodd-Frank Could Undermine Internal Reporting

No requirement to report through an internal compliance program

No financial incentive for reporting internally

Plaintiffs' counsel are actively recruiting whistleblowers

Impact of Dodd-Frank on Internal Reporting

- Proposed rules seek to discourage the bypassing of internal compliance programs by:
 - Preserving whistleblower’s “place in line” by designating date of report as day reported internally (provided a report is made to the SEC within 90 days)
 - Considering higher percentage awards for those who first report information through an internal compliance program

Impact of Dodd-Frank on Internal Reporting

- Barring certain individuals from award eligibility, including:
 - *Individuals who obtain the information because s/he is a person with legal, compliance, etc. (e.g., a CCO) responsibility and the information was conveyed with reasonable expectation that the individual would cause the entity to respond appropriately to the violation, **unless the entity did not disclose the information to the SEC within a reasonable time or proceeded in bad faith***
 - *Individuals who obtain the information through audits required under federal securities laws*
 - *Individuals with a legal or contractual duty to report the information*

Strengthen Internal Reporting Mechanisms

- Maintain an effective system for:
 - Providing advice on an urgent basis
 - Encouraging internal and, where possible, confidential reporting
 - Protecting those who report internally
 - Responding to requests and reports
- Consider anonymous hotlines and intranet portals
- Consider incentives for internal reporting
 - performance and compensation reviews
 - BUT do not penalize for failure to internally report – antiretaliation provisions

More and Better Internal Investigations

- Conduct prompt and effective internal investigation
 - Ensure adequate resources (legal, compliance, internal audit, outside counsel)
 - Take steps to maintain the attorney-client privilege
 - Determine the scope of the wrongdoing across employees, agents, business units
 - Determine whether conduct is ongoing

The Impact of Dodd-Frank on Whether & When To Self-Report



Q&A



international presence

Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine
London Los Angeles Miami New York Palo Alto Paris Philadelphia
Pittsburgh Princeton San Francisco Tokyo Washington Wilmington