

# The Foreign Corrupt Practices Act: Know Your Risks and Minimize Your Exposure



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# Two Main Parts to the FCPA

- The Anti-Bribery Provisions
  - Don't bribe foreign officials!
- The Accounting Provisions
  - Keep accurate records and have suitable controls

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*"This might not be ethical. Is that a problem for anybody?"*

# FCPA Case Study

- Company is constructing subsea oil equipment in Nigeria
- Company authorizes an international freight forwarding and customs clearing company (Agent) to pay processing fees to Nigerian customs officials
- Each processing fee is about \$5,000
- During three years, Agent makes 378 payments totaling over \$2 million

# FCPA Case Study

- In 2007, Vetco Gray waived indictment and plead guilty to violating the FCPA
- DOJ learned of payments through Vetco's voluntary disclosure
- Vetco attorneys conducted an extensive investigation of corporate operations
- Despite credit for cooperation, combined criminal fine was \$26 million
- DOJ required Vetco to engage an independent monitor for three years

# Effective Compliance

- Recent plea and deferred prosecution agreements provide guidance as to SEC/DOJ expectations
- Companies must adopt rigorous anti-bribery compliance procedures to detect and deter violations
- Procedures must cover third parties (business/joint venture partners, agents, consultants) in addition to directors, officers and employees

# Effective Compliance

- Communicate procedures to all directors, officers, employees, agents and business partners
- Set tone and responsibility at the top
- Provide regular training
  - In person and on-line
  - Use case studies and real scenarios
  - Require and maintain annual certifications

# Effective Compliance

- Conduct due diligence prior to engaging third party representatives, consultants, distributors, joint venture and business partners
- Include in agreements:
  - Anti-bribery representations and undertakings
  - Right to audit books and records
  - Right to terminate for breach
- Monitor third parties after engaging them



# Effective Compliance

- Establish internal accounting controls and monitoring mechanisms, including:
  - Internal audit review of books and records of foreign affiliates
  - Confirm that payments to third parties are made in accordance with contract terms
- Create a reporting system, including 24-hour hotline
- Establish disciplinary procedures

# Investigating Red Flags

- Mark Mendelsohn – Deputy Chief, Fraud Section, US DOJ
  - “If you have an effective, robust compliance program, you ought to be finding violations if you are doing business globally.”

*If you find violations, they must be adequately investigated*

# Investigating Red Flags

- Improper payments may be made in numerous ways but will always be either:
  - On book
  - Off book
- Under the FCPA if you have off book payments or if you misclassify a payment in the books and records you already have a books and records violation

# Illegal Payments through “On Book” Transactions

- Properly Classified Illegal Payments
  - Trigger violation of anti-bribery provisions
  - Certain accounts traditionally used for recording
- Misclassified or Hidden Illegal Payments
  - True nature not easily ascertainable
  - Trigger violation of anti-bribery and books and records provisions
  - Certain accounts traditionally used for recording
- Larger payments more likely to be on book

# Illegal Payments through “Off Book” Transactions

- Difficult to find due to no entry in the books of record
- Consider methods to create access to off book funds
- Very difficult to determine what happened to the assets once off book and regain access to the company assets
- Trigger violations of anti-bribery and books and records provisions

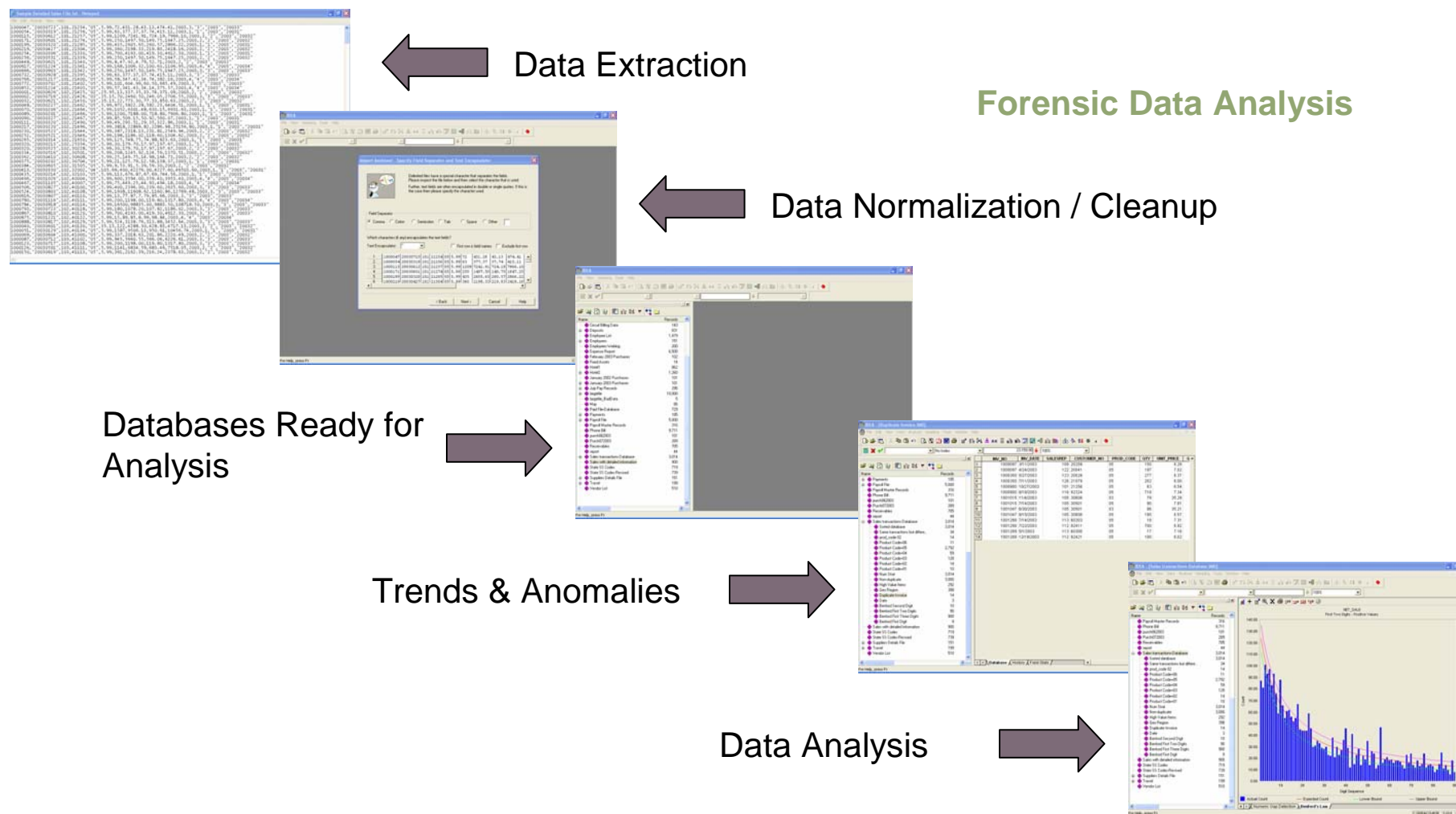
# Investigations

- Overseen by the Audit Committee and comprised solely of independent directors
- Undertaken by reputable law firm with no ties to management
- May include forensic accountants
- Investigators given sufficient latitude
- Disclosed to outside auditor at the outset and auditor kept informed
- Consider the need for voluntary disclosure
- Take timely and appropriate remedial action

# Role of Forensic Accountants

- Analyze books and records
- Determine if transactions are properly recorded
- Accounting/restatement implications
- Evaluate impact on internal controls
- Interviews
- Review electronic evidence
- Forensic Data Analysis, journal entry review

# Data Analytics





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