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Government Contractors:

**Current and Emerging
Ethics and Compliance Issues**



September 18, 2024

Today's presenters



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Agenda

- Part I: The geopolitical landscape
- Part II: DOJ policy updates
- Part II: Privilege and ethics issues
- Part III: Emerging compliance risk areas

Part I: The Geopolitical Landscape

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Introduction

- Reemergence of a world with borders
- Checks on movement of goods, technology, and capital
- U.S. / China (strategic) competition
- War in Ukraine / Western sanctions against Russia
- Trends towards regionalization / localization / blocs

Geopolitical trends driving policy changes:

- Sanctions (“the new FCPA”)
- Export controls
- Foreign investment reviews
- Supply chain and cybersecurity
- Industrial policy



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View from Washington, DC

- What's driving U.S. policy?
- **Imperatives:**
 - Military superiority
 - Technological superiority
 - Preeminence of U.S. dollar
 - Supply chain security
 - Preservation of superpower position
- **Very strong** domestic political consensus in favor of these priorities



View from Washington, DC

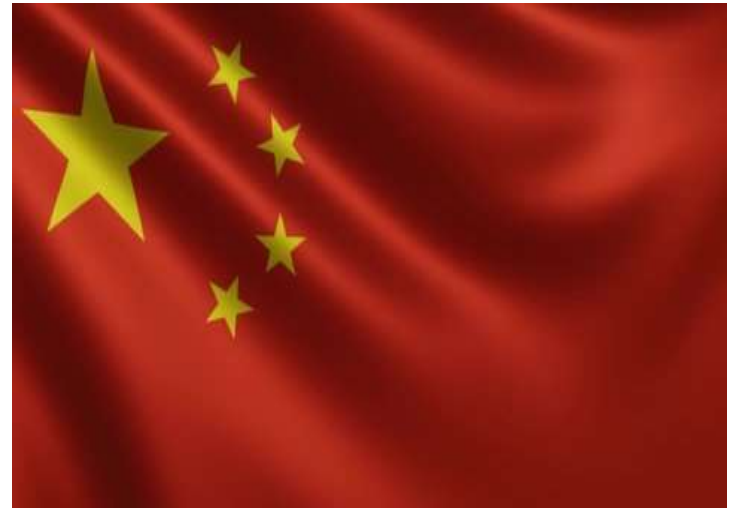


- “Competition for what comes next” (White House)
- Most policymakers seem to want to avoid a Cold War
- **But**, the U.S. is prepared to exert **maximum effort** (peacefully) to:
 - Preserve its military and technological superiority
 - Counter the rise of “revisionist powers”
- Prevent diversion of tech to China / Russia; secure tech supply chain
- **Biden Administration**: Expanded Trump policies re China; trying to convince partners to join; focus on reshoring (CHIPS Act, IRA)
- **Harris campaign**: says the U.S., not China, “wins the competition for the 21st century”
- **Trump campaign**: Universal baseline tariffs on China; phase out imports of “essential goods” from China within four years; strip China of “most favored nation” trading status

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View from China

- What is China's view of the U.S.-led world order?
- The existing order interferes with China's objectives:
 - Freedom to develop
 - Regional sphere of influence
 - Territorial integrity / territorial claims
- Pre-eminence of U.S. dollar / technology exposes China to sanctions risk
- China willing to take measures to challenge U.S.:
 - Support for Russia (within limits)
 - Brokering of Saudi Arabia-Iran deal
 - Development of digital yuan to challenge USD
 - Legal countermeasures



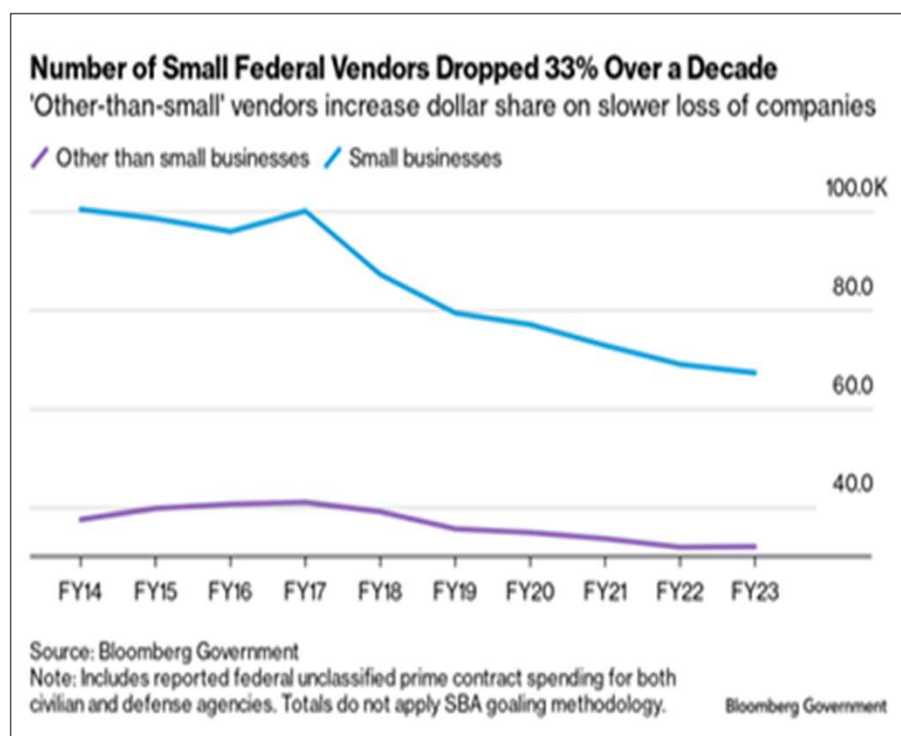
View from China



- Legal countermeasures:
 - Anti-Foreign Sanctions Law
 - Blocking Rules
 - Unreliable Entity List
 - Export Control Law (specialty metals/minerals)
 - Data Security Law
 - Law on Guarding State Secrets
 - National Intelligence Law
 - Law on International Criminal Judicial Assistance
 - Anti-Espionage Law

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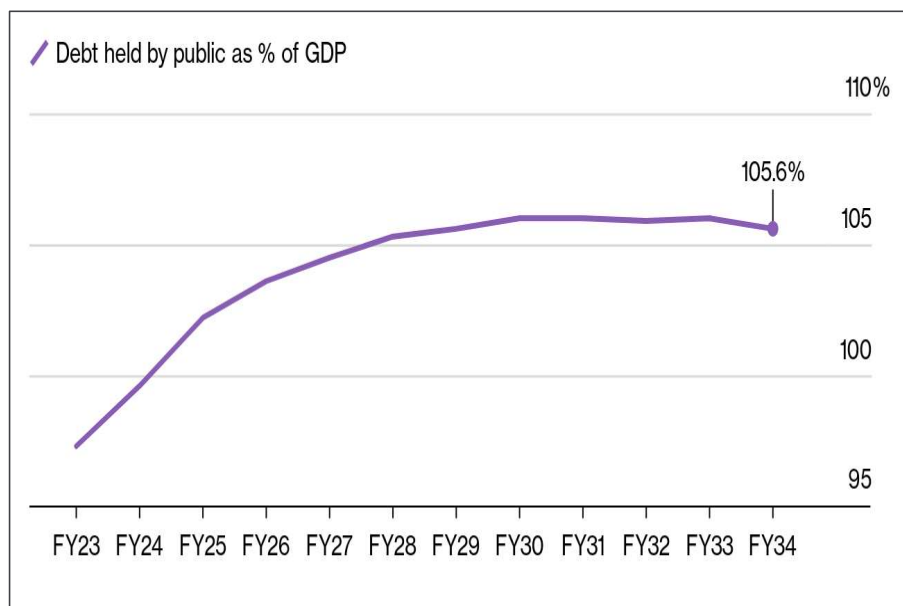
Challenges: declining DIB Participation



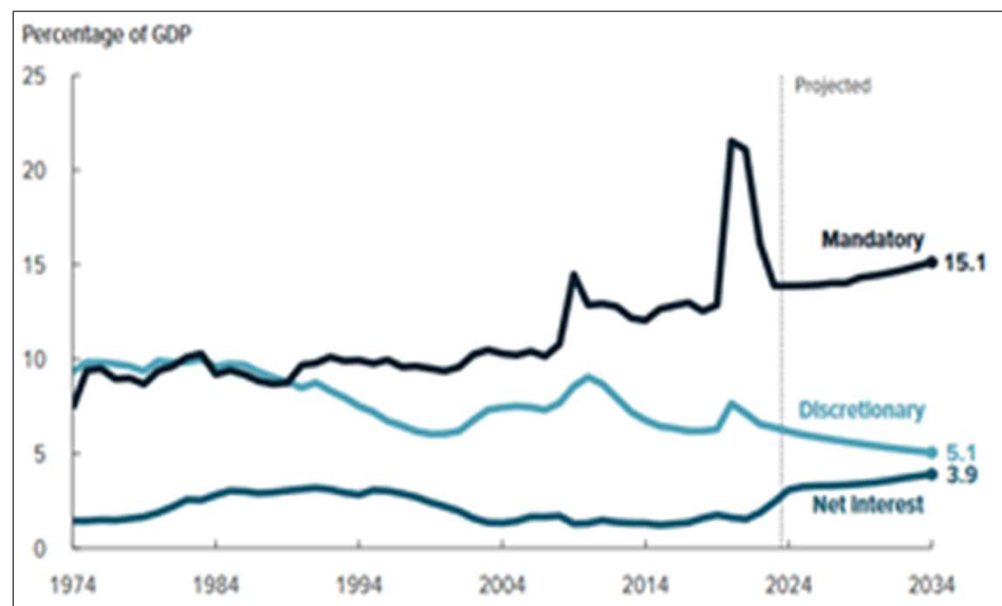
- No. of federal contractors dropped 2% in FY23
- Over last 10 years, the number of small business federal contractors dropped from ~100,000 to ~67,000

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Challenges: competing fiscal and policy interests



Source: FY2025 budget request



Source: CBO

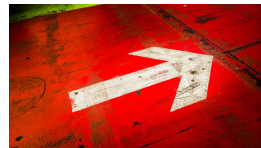
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Part II: DOJ Policy Updates

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DoJ's Evaluation of Corporate Compliance Programs (a look back...)

- First published by DoJ's Fraud Section in **February 2017**
- Memorialized **11 factors** relating to compliance program evaluations
- ***“Neither a checklist, nor a formula”***
- **So what does it mean in practice?**



1. Analysis and remediation
2. Management commitment
3. Autonomy and resources
4. Policies (design and operation)
5. Risk assessment
6. Training and comms
7. Confidential reporting and investigation
8. Incentives and disciplinary measures
9. Continuous improvement
10. 3rd party management
11. M&A

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ECCP Guidance History

- **Apr. 2019** – revision broadened reach with 3 core q’s:
 - 1) is program well-designed?
 - 2) is it being implemented effectively?
 - 3) does it actually work in practice?
- **Jun. 2020** – adds guidance on use of data analytics, m&a integration, and program resourcing
- **Sep. 2022** – “Monaco Memo” - previews future revisions re: compensation clawbacks and personal devices

Notable recent DOJ compliance policy developments

- [Feb. 2023 Voluntary Self-Disclosure Policy for USAOs](#):
 - USAOs to consider ECCP guidance in independent monitor decisions
- [Mar. 2023 remarks from AAG Polite](#) previewed guidance on changes
- **[Two major updates](#)** in [Mar. 2023 revision](#):
 - 1) new guidance re: communications and messaging apps
 - 2) expanded guidance re: compensation policy/clawbacks
- [2024 DOJ Whistleblower Pilot Program](#)

The New Frontier: Ephemeral Messaging Apps (EMAs)

- **The rise of EMAs & collaboration tools**
 - Slack: 30+ million daily users
 - Signal: 40 million monthly users
 - Snapchat: 375 million users
 - What's App: 2+ billion users
- **How is ephemeral messaging different?**
 - **Automated disposition of message content on the sender's application, and that of recipient**
 - End-to-end (E2E) encryption functionality
- **Benefits?**
 - Communication security
 - Compliance with privacy laws (GDPR)
 - Reduced storage expenses/burdens



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Preservation considerations for EMAs



*"Hey, don't blame me. I don't make the laws
— I just circumvent them."*

Theme: data may not be so “ephemeral”

- *Columbia Pics v. Bunnell* (CD Cal. 2007):
 - RAM “stored” under FRCP, even if briefly
- 2014 SnapChat/FTC settlement
 - Re: claims messages “disappeared forever”
- *FTC v Noland*
 - Officers used WhatsApp/iOS
 - Then changed to Signal (“auto-delete”)
 - Deleted apps before production
 - = **adverse inference**

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The regulator's (evolving) view re: EMAs

- **2017:** Early DOJ Guidance disfavored EMAs
 - “Prohibit EMAs, or don’t get credit”
- **2019:** EMAs okay, with safeguards
- **2022:** DOJ directs study of best practices re: personal devices and third-party messaging, including EMAs
- **2022:** SEC imposes **\$1.1B** in penalties against financial institutions for control failures over business-related comm’s
- Comparable efforts abroad (UK, EU, etc.)

Comparison of Initial Policy vs Revised Policy

Policy in November 2017	Revised Policy in March 2019
"Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communication."	"Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately retain business records or communications or otherwise comply with the company's document retention policies or legal obligations"

Current Guidance (March 2023)

- EMAs *may* serve business growth and communication goals
- *But* compliance practices are key:
 - **Policies and procedures**
 - **Risk profile and business needs**
 - **Whether data is available to “the greatest extent possible”**

U.S. Department of Justice
Criminal Division
Evaluation of Corporate Compliance Programs
(Updated March 2023)

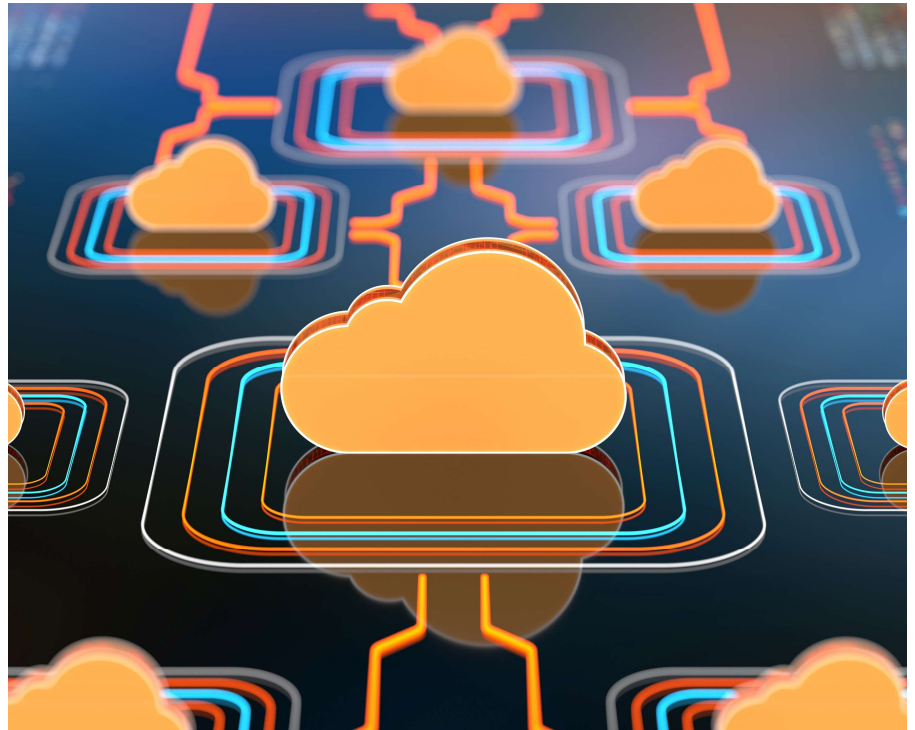
Introduction

The “Principles of Federal Prosecution of Business Organizations” in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.” JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, Criminal Division policies on monitor selection instruct prosecutors to consider, at the time of the resolution, whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems and whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future to determine whether a monitor is appropriate.

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Nexus to other document retention policy issues

- **“Data minimization” trend**
 - Combating over-collection of PII
 - Manage risk and storage \$\$\$
- **FAR retention periods (Part 4.7)**
 - *Douleshot, Inc.*, ASBCA No. 61691
 - Contractor need not keep records past retention periods
- **How to balance in practice?**



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Compensation and Management Policies

- Then: *“Incentives and Disciplinary Measures”*
- Now: *“Compensation Structures and Consequence Management”*
- **Offer financial “carrots and sticks”**
 - Delaying or reducing comp/bonus for misconduct
 - Have compliance function play role in designing financial incentives
- **Measuring effectiveness**
 - Track metrics for hotline reports (substantiation rates, time to investigate)
 - Peer benchmarking
 - Root cause assessments
 - Clawback tracking and assessment



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2023 DOJ Compensation Pilot Program

- 3-year initiative
- In Criminal Division resolutions, DOJ to:
 - (1) reduce criminal fines if companies make good faith attempts to claw back wrongdoer comp
 - (2) require comp-related measures in resolutions (e.g., comp and bonus system tied to compliance-promoting measures)
- [Albemarle resolution](#) in Sept. 2023 the first use case
 - Reduction of ~\$760k in penalty to account for bonuses withheld
 - DoJ also noted cooperation, remedial and disciplinary measures, and workforce actions

Compensation policy in focus

“Companies, their boards, and their compliance officers should be addressing how their compensation policies promote compliance today and should be assessing whether their clawback programs are fit for purpose and ready for deployment”

Deputy Attorney General Lisa Monaco, Oct. 4, 2023

Remarks as Prepared for Delivery at the Society of Corporate Compliance and Ethics' 22nd Annual Compliance & Ethics Institute

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New DoJ Whistleblower Reward Pilot Program policy

- Mar. 24 – DOJ announced [new initiative to be rolled out late 2024](#)
- Aug. 24 – [Guidance issued](#)
- Covers allegations not covered by other whistleblower/incentive programs
- Only reward for information unknown to the USG and who are not involved in the alleged criminal activity
- Companies advised to scrutinize tracking of reports, outcomes, and days to close
- **Practical impact on ADG industry??**



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Part III: Privilege and Ethics Issues

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Much on the menu....



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Rules governing privilege and E-discovery practice

- ABA Model Rules of Professional Conduct
- State Bar Rules ([Virginia Rules of Professional Conduct](#))
- Ethics opinions (e.g., ABA Committee on Ethics and PR)
- Federal Rules of Procedure
- Justice Manual
- Statutes
- Case Law



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Generative AI

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Generative AI use: a snapshot

Thomson Reuters Institute: 2024 Generative AI in Prof. Services

- Global survey of corporate and professional services firms
- 85% of legal industry respondents said GenAI can be useful
- 54% said GenAI should be a part of regular job functions
- **Pros:** improvements in output, speed, and quality
- **Cons:** limits on quantitative data analysis, actionable strategic recommendations, and accuracy concerns

Importance of diligence re: emerging technologies

- **Model Rule 1.1 (competence)**
- **Va. R. Sup. Ct. 1.1 (competence)**
- Lawyers must understand the benefits and risks associated with use of technologies used to deliver legal services
- Can provide adequate representation in novel field **through study**
- Competent representation can also be provided through the association of a lawyer of established competence in the field

Privilege considerations relating to use of AI

“Some legal scholars have raised concerns about whether entering confidential information into an AI tool might compromise later attempts to invoke legal privileges.”

Chief Justice John Roberts

[2023 Year-End Report on the Federal Judiciary](#)

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Ethical considerations relating to use of AI

“To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.”

American Bar Association Standing Committee on PR
[Formal Opinion 512](#), July 29, 2024

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Ethics rules relating to use of AI

- Confidentiality key: [Va. R. Sup. Ct. 1.6](#); Model Rule 1.6
 - *A lawyer cannot knowingly reveal confidential information, or use confidential information to the disadvantage of the client, or to the advantage of the lawyer or a third person*
- Public-facing AI models pose risk to confidential information
- Use of models with walls
- Expectations of confidentiality?
- 3rd party vetting crucial



Other ethics rules re: attorney oversight of AI use

- Rule 1.3 (diligence)
- Rule 1.4 (communication)
- Rule 5.1 (supervisory obligations)
- Rule 5.3 (responsibilities re: non-lawyers)
- Rule 5.5 (unauthorized practice of law)
- Rule 8.4 (candor)

3rd party diligence

1. What types of tools are being used?
2. What type of information is used in the tool?
3. How is it stored?
4. Who has access rights?
5. How is data anonymized?
6. What security controls are in place?



Preservation of Evidence

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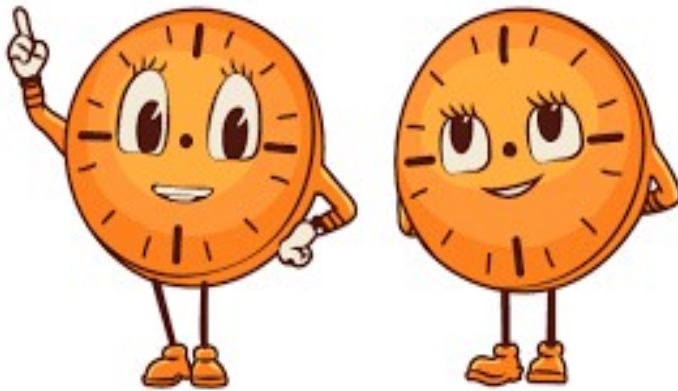
Hypothetical 1 (Preservation of Evidence)

- **TopFlight** manufactures high-performance optical assemblies for U.S. Government and commercial customers
- Working late one night, **Connor Compliance** receives an anonymous hotline report through a 3rd party hotline
- The reporter advises that recent shipments of electronic components may be counterfeits, and that the program manager - **Emily Engineer** - has information in a Slack channel showing management knew about the issue
- The allegations resemble recent news reports about state actors seeking access to the U.S. supply chain
- **Connor** walks down the hall to advise **Gene General Counsel** about the report

Question: Preservation of Evidence

- As part of a corporate efficiency initiative, **Top Flight's** default Slack retention period was recently set to 3 months (after which messages are deleted). Should **Connor** recommend that the Company suspend this practice?
- Yes
- No

When the Duty to Preserve is Triggered



- 1. “Reasonable anticipation of litigation”**
 - *Zubulake v. UBS Warburg*, 220 FRD 212 (SDNY 2003)
- 2. Key question:**
 - A “credible probability” of litigation/investigation?
- 3. Ethical foundation in [Va. R. Sup. Ct. 3.4](#) (and Model Rule 3.4):**
 - Prohibits unlawful obstruction of access to evidence
 - Cmt 2 – right to get evidence via discovery or subpoena, including computerized info

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Five Preservation Principles

1. Reasonable, good faith analysis
2. Specificity of statements regarding allegations
3. Beliefs and credibility of employees and officers
4. Corporate compliance policy and past practices
5. Industry-wide investigations/trends

Preservation Pitfalls

- **Sarbanes-Oxley (18 U.S.C. § 1519)**
 - Criminal liability for document destruction in contemplation of federal investigations (see *U.S. v. Fumo*, 628 F. Supp. 2d 573 (ED Pa. 2007))
- **Nexus to litigation**
 - *Sanofi-Aventis v. Glenmark*, 748 F.3d 1354 (Fed. Cir. 2014) (work-product)
- **Discovery sanctions**
 - *U.S. ex rel. Baker v. Community Health*, Civ. No. 05-279 (D. NM. Aug. 31, 2012)
- **Loss of cooperation credit**
- **Loss of exculpatory evidence**

Hypothetical 2 (A/C Privilege)

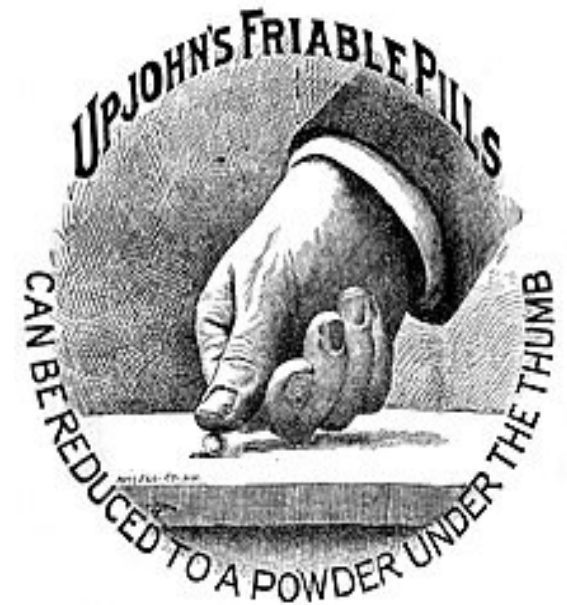
- After discussing the hotline report with **Connor Compliance**, **Gene General Counsel** decides to initiate an internal investigation
- **Gene** calls **Ilene Investigator** and asks her to look into the hotline report, interview **Emily Engineer** and others as needed, and provide a report per the Company's ***Code of Conduct and Investigations Policy***
- **Ilene** gives **Emily** an *Upjohn* instruction, but does not tell **Emily** that the purpose of the interview is to provide legal advice to **TopFlight**
- **Ilene** is not an attorney

Question: A/C Privilege

- **In an ensuing civil False Claims Act litigation, the whistleblower seeks to compel the production of Ilene's report. Is the report protected by the attorney-client privilege?**
- **Yes**
- **No**

Privilege Principles in Investigations

- **FRE 501:** common law privilege in federal courts
- Applies to:
 1. a communication
 2. made in confidence
 3. between privileged persons
 4. made for the purpose of seeking, obtaining or providing legal advice
- *Upjohn* confirms a/c priv applies to corporations
- Special issues in government contracting industry



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Upjohn 449 U.S. 383 (1981)

- Compliance review after FCPA enacted (not internal investigation):
 - Upjohn GC sent written questionnaires to middle managers about possible payments to foreign governments; legal team interviewed employees
 - Upjohn voluntarily disclosed questionable payments to SEC and IRS, but did not provide questionnaires in response to government summons
 - IRS sought legal team interview memoranda
- 6th Circuit applied “control group” test – privilege only applied to communications with decision-makers
- SCOTUS rejected control group test – every employee is a constituent
- SCOTUS also held privilege only covers communications (not facts)

Basic *Upjohn* Elements

Derived from Model Rule 1.13(f) (Organizations as Client)

Also see [Va. R. Sup. Ct. 1.13](#) (Organization as Client)

1. Lawyer represents the company, not the employee
2. Substance of communication is protected by the attorney-client privilege and should be kept confidential
3. Privilege belongs to the company - which means it alone can decide whether (or not) to waive the privilege

Upjohn in practice

- Context and framework important (e.g., pending investigation? communication subject? relationship?)
- **Key question: the prospect that information might be shared outside the company**
- Always administer a full *Upjohn* warning when appropriate
- And memorialize record of instruction

Five Practices for Internal Investigations

1. Ensure oversight by internal or external counsel
2. Follow corporate investigations policy
3. Memorialize *Upjohn* instructions and mark documents
4. Pay attention to engagement letters, tasking memos, etc.
5. Limit written communications, and recipients

Dual purpose communications

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Hypothetical 3 (Waiver)

- **Gene General Counsel** reviews **Ilene Investigator's** findings and concludes he has credible evidence of a non-compliance that he needs to disclose to the Defense Department under the Mandatory Disclosure Rule
- **Gene** prepares a letter with a general summary of the investigation conclusions, witness interview summaries, and planned corrective actions, and submits it to the DoD IG and Contracting Officer

Question: Waiver

- In an ensuing False Claims Act litigation, the whistleblower's counsel moves to compel discovery of the interview materials relating to the disclosure. Has the Company waived the privilege over those documents?
- Yes
- No

Protecting the Privilege: Disclosure and Waiver

- Voluntary disclosure of priv info typically waives the privilege
- But parties may contract to limit this (see, e.g., FRE 502(e))
 - See *In re financialright GmbH*, 2017 WL 2879696 (SDNY)
 - See *In re: Grand Jury 16-3817 (16-4)*, 2018 WL 3156935
 - But selective waivers are generally disfavored
- DoJ says cooperation credit not contingent upon waiver
- But must provide: all individuals + all relevant facts

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A history lesson (MDR waiver cases)....

- *Barko* - 756 F.3d 754 (D.C. Cir. 2014)
 - Involved internal investigation for both legal (*e.g.*, to obtain legal advice) *and* business reasons (*e.g.*, to comply with MDR and corporate Code of Business Conduct)
- Circuit found these factors did not limit a/c privilege:
 - Lack of consultation with outside counsel
 - Use of non-attorney investigators
 - Interviewees not “expressly informed” that interview to get legal advice
 - Confidentiality agreement did not mention purpose to get legal advice
- **Key: DoD regs mandating compliance programs and investigations**

Past as prologue: *Anderson*

803 Fed. Appx. 697 (2020)

- Contractor made voluntary disclosure under MDR:
 - Company concluded employee improperly disclosed non-public information to, and pursued contracts with, vendor
 - Potential \$\$\$ impact = labor charged to contract during bad acts
- EDVA ordered production of internal investigation files
 - Statements were “legal conclusions”
 - Report communicated info in a way revealing A/C communications

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Anderson (cont'd)

- **4th Circuit: No waiver under Rule 502**
- Court will not infer a waiver merely because a party's disclosure covers "the same topic" on which it sought legal advice
- Contrast with *In re Martin Marietta*, 856 F.2d 619 (4th Cir. 1988):
 - Company waived privilege over protected internal audit interviews because disclosure quoted from the interviews
 - Company waived privilege over protected internal notes and memoranda because it summarized the substance and format of interview results
- **Court emphasized policy concerns underlying A/C privilege and MDR**

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A/C Privilege returns to SCOTUS!

- *In re: Grand Jury*, 23 F. 4th 1088 (9th Cir. 2022) (tax case)
- At issue: what test applies to “dual purpose” - i.e., legal + business - communications
 - 9th Cir: legal must be “the primary purpose” (majority rule)
 - D.C. Cir: legal may be “a significant purpose” (minority rule)
 - 7th Cir: priv doesn’t apply to dual purpose tax disclosures
- 9th Cir. – noted “merit” in reasoning of D.C. Cir. *Barko* decision that involved internal investigation/MDR

In re: Grand Jury: Can you “DIG” it?



- SCOTUS dismissed
- Cert “improvidently granted”
- Oral argument raised questions about practical impact of different tests
- Justice Kagan: *“if it ain’t broke, don’t fix it”*

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A Cautionary Tale?

B.L. Schuhmann, 2020 WL 6293582 (WD Ky 2020)

- Docs re: investigation into police misconduct not privileged
- *Despite* law firm engagement letter and use of *Upjohn* warnings
- Engagement letter found akin to a policy assessment, not legal advice
- And Court noted, use of *Upjohn* must be viewed in context

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A Cautionary Tale 2

U.S. v. Coburn, 2022 WL 35217 (D. NJ 2022)

- FCPA investigation
- D's subpoenaed former employer for docs re: investigation
- Company had given investigation summary to DOJ
- Summary included details re: 42 interviews of 19 employees
- Court found **voluntary production waived the privilege as to all memos, notes, and interview records, as well as related documents considered and referenced in the disclosures**

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Some Best Practices for Disclosures

- Balancing benefits of cooperation with collateral impact of waiver
- When sharing information, focus on “pure” facts
 - Look for non-privileged sourcing outside of witness interviews
 - Paraphrase content, and avoid recount of interviews
 - Provide list of witness, rather than attributions
- Consider alternative approaches:
 - Confidentiality agreements?
 - Ask for a subpoena (to obtain FRE 502 order, or evidence of USG compulsion)
 - Oral briefings based on general impressions
 - Negotiate limited scope of any intended waiver

Part IV: Emerging compliance risk areas

What's Next?

- **Substance:**

- “[T]he tectonic plates of corporate crime have shifted”
- National security in focus (sanctions the “new FCPA”)
- Supply chain and cybersecurity key enforcement areas

- **Process:**

- Use of AI and data analytics
- Emphasis on voluntary disclosures
- Focus on ephemeral messaging/communications
- Importance of compliance and compensation policies



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Legal Risk Matrix

Legal Risk	Practical Impact
Sanctions	Sales / operations / sourcing from certain countries
Export controls	<ul style="list-style-type: none"> • Major Significant China restrictions (MEUs, AI chips, etc) • R&D (cross-border or sharing with foreign nationals)
Cyber and technology supply chain (ICTS)	<ul style="list-style-type: none"> • CMMC • Sourcing IT / comms / connected apps from China
Inbound foreign investment review	Government investment review
Outbound investment review	Review of outbound U.S. investments in China/linked companies
Human rights / import restrictions / supply chain	Sourcing content from certain regions; human trafficking
Industrial policy / localization / regionalization	<ul style="list-style-type: none"> • Manufacturing / domestic preferences • Sourcing of content

Questions?

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