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Managing Third-Party Relationships in Light of the US Government's Continuing Commitment to Investigate and Prosecute Foreign Corruption: The Best Defense is a Good Offense

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In deze Engelstalige bijdrage gaan de auteurs in op compliance en enkele Amerikaanse ontwikkelingen.

1. Introduction

In recent years, government regulators worldwide have demonstrated a seemingly ever-growing readiness to investigate and prosecute corporate crime, including overseas corruption. In the United States, where both the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) have long enforced the Foreign Corrupt Practices Act (FCPA), it is essential that companies have in place compliance programs that effectively work to help detect and prevent potential bribery and corruption. The clear messaging from the DOJ and SEC is that companies that fail to do so will face an increased risk of prosecution, along with such sanctions as substantial penalties and fines, and severe reputational harm.

One of the more well-traveled roads of prosecution and enforcement by the DOJ and SEC involves the use of third parties in relation to the company's business. To be sure, US regulators recognize that third parties (including, but not limited to, agents, distributors, consultants, resellers, vendors, local partners, and other intermediaries) are often legitimate and valuable aspects of a company's overseas business operations. But these regulators also recognize that the use of such third parties, particularly in venues where local custom argues that bribery and corruption is part of the normal course of business, or where a company has limited visibility and oversight into the third party's operations, is fraught with corruption risk. Companies can, and frequently have been, held liable for the misdeeds of third parties acting on the company's behalf. Thus, how a company crafts its compliance program to manage its third-party relationships is of critical importance in mitigating its corruption risk.

2. Continuing Emphasis on Compliance and Fighting Corruption in the US

Contrary to some expectations, the advent of the Trump Administration has not dampened the appetite of the DOJ or SEC for pursuing foreign corruption which falls within US jurisdiction. Speaking at the Ethics and Compliance Initiative Annual Conference on April 24, 2017, US Attorney General Jeff Sessions underscored that the DOJ would "continue to strongly enforce the FCPA and other anti-corruption laws," asserting that corruption "harms free competition, distorts prices, and often leads to substandard products and services coming into the [US]."[2] Sessions emphasized that the DOJ will continue to hold both companies and individuals accountable for corporate misconduct and other misdeeds and will work closely with its law enforcement partners globally to bring bad actors to heel. As Sessions noted, "strong cultures of compliance … deter illegal and unethical conduct" and he pledged that the DOJ will continue "to reward effective compliance programs."

DOJ Acting Principal Deputy Assistant Attorney General Trevor McFadden reiterated Sessions' sentiments in his remarks at the American Conference Institute's 7th Brazil Summit on Anti-Corruption a month later.[3] McFadden also highlighted the recent increase in international cooperation amongst foreign prosecutors and the rise in multi-jurisdictional investigations and prosecutions, particularly in areas such as bribery and corruption. "Fighting corruption leads to a robust and transparent marketplace," McFadden stated. "[T]he Criminal Division will continue to do its part to punish and deter crime – including corruption – with international implications."

This focus on the US government's continued pursuit of foreign corruption within its jurisdiction was further underscored on September 21, 2017, when it was announced that Stockholm-based Telia Company AB, an international telecommunications company, and its Uzbek subsidiary, Coscom LLC, would pay a combined total penalty of more than $965 million to US, Dutch and Swedish authorities to resolve charges arising out of a scheme to pay bribes in Uzbekistan. In announcing what has been called one of the largest criminal corporate bribery and corruption resolutions to date, Acting Assistant Attorney General Kenneth Blanco stated that "[t]his resolution underscores the Department's continued and unwavering commitment to robust FCPA and white-collar criminal enforcement. It also demonstrates the Department's cooperative posture with its foreign counterparts to stamp out international corruption and to reach fair, appropriate and coordinated resolutions."[4] Likewise, Stephanie Avakian, Co-Director of the SEC's Enforcement Division, highlighted the SEC's continued focus on pursuing corruption charges in the SEC press release. "Corporate bribery is not just unfair and illegal, it has terribly corrosive effects on business, government and society. As this global settlement demonstrates, the SEC continues to work closely with our counterparts at home and abroad to expose and pursue such corruption."[5]

3. Recent US Regulatory Guidance Regarding Corporate Compliance Programs

Protecting against corporate misconduct, fraud and corruption requires companies to have strong policies and controls to prevent, detect and mitigate against such misdeeds. A key control is a company's compliance program. For example, when determining what, if any, action to take against a company under investigation, the DOJ weighs the adequacy of a company's compliance program, in addition to other factors such as the company's cooperation and other remediation efforts.[6] The DOJ has been clear that its view of the compliance program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA), as well as the length of any DPA, NPA or corporate probation.[7] In addition, the sufficiency of the compliance program may also impact the DOJ's determination of the penalty amount and their view of the need for the appointment of a corporate monitor.[8]
What then do US regulators look for in assessing the sufficiency of a company's compliance program? Earlier this year, the DOJ published an Evaluation of Corporate Compliance Programs (Evaluation Guidance) that provides valuable insights into the DOJ's current thought process when evaluating companies' compliance programs, suggests several "best practices" and provides a useful primer on how to talk about compliance issues with both the DOJ and the SEC.[9] The Evaluation Guidance outlines 11 key compliance topics with a corresponding set of questions that the DOJ considers relevant to evaluating the appropriateness of compliance programs in the context of a criminal investigation. While the Evaluation Guidance is careful to note that these topics and questions are "neither a checklist nor a formula," compliance professionals are wise to use the Evaluation Guidance as a template to assist with the design and assessment of compliance functions and controls.

4. Corporate Compliance and Third-Party Management

In particular, the Evaluation Guidance includes a section devoted to an area that increasingly gives companies' compliance professionals heartburn: the management of third-party relationships. The Evaluation Guidance provides, among other things, that the DOJ will assess the following in relation to such third-party management[10]:

- How a company's third-party management process corresponds to the nature and level of the enterprise risk identified by the company.
- The business rationale employed by the company in determining the need to use a third party.
- The mechanisms employed by the company to ensure that the contract terms are accurate, the payment terms are appropriate, the contractual services are provided and the compensation provided is commensurate with the services rendered.
- The appropriateness of the due diligence conducted, whether any red flags were identified during due diligence and how any identified red flags were resolved.
- How the company has considered and analyzed the third parties' incentive model against compliance risks;
- How the company incentivizes compliance and ethical behavior by third parties and the consequences to third parties involved in misconduct.
- How the company has trained relationship managers regarding applicable compliance risks, how to identify those risks and how to manage them.
- The company's ongoing monitoring of third parties.

5. Practical Application

The Evaluation Guidance underscores what US regulators have long emphasized – namely, a key component of an effective compliance program is whether or not the company has instituted an appropriate, risk-based third-party management and due diligence process.[11] "Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program."[12] While the degree of appropriate due diligence will vary from company to company, risk-based third-party relationship management and due diligence should always include an understanding of the qualifications and associations of the company's third-party vendors, the business rationale for using the third-party vendor, and ongoing monitoring of the third-party relationship.[13]
As a point of departure, a risk-based approach to third-party management necessarily requires the company to conduct an assessment of its third-party relationships to determine which relationships may pose a "higher risk" of compliance failures and require heightened due diligence before the company engages them. This risk assessment should be based upon parameters that help maximize the chances that higher risk relationships will be identified for further evaluation. While these parameters will differ by company, they should be considered and drafted in the context of such factors as the industry, the location of the relationship, the nature of the relationship and the scope of services to be provided, the background and

experience of the third party, the third party's connection to or interaction with government officials or entities, the third party's reliance on subcontractors and other intermediaries, and the proposed compensation structure, among other things. The risk parameters should also take into account the specific laws and regulations, both foreign and domestic, that impact the company and its third-party relationships and the potential effect of such laws.

Due diligence of third-party relationships often involves such measures as the provision of detailed questionnaires designed to assess compliance risks and background checks and media and watch list searches. Higher risk relationships may more appropriately also be subjected to additional or enhanced diligence, which may include more thorough financial reviews, site visits, interviews of key personnel within the third party's organization and other measures that may more closely resemble traditional investigative measures than typical due diligence. At any level though, third-party due diligence should be pragmatic and commonsensical: if a particular relationship seems problematic, viewed in the context of a single factor or as a whole, a "red flag" should go up, indicating that there may be a cause for concern. Any red flags that do go up should be addressed and resolved through such steps as further information requests that resolve the red flag, or the implementation of appropriate controls designed to mitigate the risk posed by the red flag. Finally, it is imperative that the company document its due diligence efforts effectively, so it can demonstrate what steps it took to identify and mitigate against any risks its third-party relationships might pose should the need arise.

Furthermore, analysis of risk should not cease once a third party is engaged – rather, it should continue throughout the course of the relationship to determine the appropriate mechanisms and the level of ongoing monitoring the company should employ to ensure the third party continues to comply with the all applicable laws and regulations. Some mechanisms, such as anti-corruption clauses and certifications, should typically be applied to all third parties. Other mechanisms, such as third-party training or detailed financial audits, may be more appropriately limited to those relationships deemed to pose a higher compliance risk.

Both the DOJ and SEC recognize that even the best compliance programs may not detect or prevent every instance of misconduct. Nevertheless, meaningful credit will typically be given to a company that implements, in good faith, a high-quality, risk-based, third-party management program, even if the compliance program failed to prevent a violation in a low risk area because greater attention and resources were directed to higher risk areas.[14]

6. Key Takeaway

US regulators remain committed to investigating and prosecuting corporate misconduct, fraud and corruption. While there is no one-size-fits-all approach, the recent DOJ guidance makes it clear that companies can expect that, in the event of a violation, the adequacy of its compliance program will be scrutinized by the DOJ and SEC in determining what actions to take against the company. To meet the expectations of US regulators, and to give itself comfort that corruption risk is being appropriately mitigated, it is essential that a company doing business through the use of third parties conduct comprehensive and appropriate third-party due diligence reviews and assessments and monitor its third-party compliance on an ongoing basis.

Voetnoten

[1]
Jonathan D. King and Katrina A. Hausfeld, DLA Piper LLP (US).

[2]
US Attorney General Jeffrey Sessions, Remarks at Ethics and Compliance Initiative Annual Conference (Apr. 24, 2017) (remarks as prepared for delivery at www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual).

[3]
US Acting Dep. Asst. Attorney General Trevor N. McFadden, Remarks at American Conference Institute's 7th Brazil Summit on Anti-Corruption (remarks as prepare for delivery at www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-american).

[4]
Press Release, US Department of Justice, Office of Public Affairs, Teila Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $ 965 Million for Corrupt Payments in Uzbekistan (September 21, 2017) (as released by DOJ at www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965).

[5]
Press Release, US Securities and Exchange Commission, Telecommunications Company $ 965 Million for FCPA Violations (September 21, 2017) (as released by SEC at www.sec.gov/news/press-release/2017-171).

[6]
In a recent settlement with Mondelez International Inc., the SEC cited Mondelez's "extensive remedial actions", including a "comprehensive review" of its problematic subsidiary's relationships with third parties, in the cease and desist order settling the FCPA charges against the company and its subsidiary. *SeeIn re Matter of Cadbury Limited and Mondelez International, Inc.*, Administrative Proceeding File No. 3-17759,

www.sec.gov/litigation/admin/2017/34-79753.pdf at 4 (January 6, 2017).

[7]
The Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, *A Resource Guide to the US Foreign Corrupt Practices Act* at 56 (November 2012) ("FCPA Resource Guide").

[8]
Id.

[9]
The Criminal Division of the US Department of Justice, *Evaluation of Corporate Compliance Programs* at 7 (February 2017).

[10]
Evaluation Guidance, § 10.

[11]
FCPA Resource Guide, 60-61.

[12]
Id. at 60.

[13]
Id.

[14]
Id. at 59.