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FCPA

FCPA Guidance for Companies Using Intermediaries in High-Risk Regions



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Historically, most Foreign Corrupt Practices Act (FCPA) enforcement actions have involved interactions between companies and foreign intermediaries. Companies have generally responded by improving compliance, yet the use of third parties to facilitate overseas business continues to create substantial FCPA risks.

Since July 2016, the Justice Department (DOJ) and Securities and Exchange Commission (SEC) have settled at least eight FCPA matters involving payments to foreign officials via third parties, including actions against LATAM Airlines Group SA, Key Energy Services Inc., Anheuser-Busch InBev SA/NV, Och-Ziff Capital Management Group, and Embraer SA. Each of those companies allegedly violated the books and records and internal controls provisions of the FCPA for failing to properly account for and disclose the improper payments.

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In the SEC press release for the Och-Ziff settlement, Kara Brockmeyer, chief of the SEC Enforcement Division's FCPA Unit, reminded businesses that they ''will be held accountable for their misconduct no matter how they might structure complex transactions or attempt to insulate themselves from the conduct of their employees or agents.''

The latest FCPA prosecutions are a fresh reminder that companies should continue vetting their relationships with third parties—particularly in high-risk regions—and should implement and maintain accounting controls sufficient to ensure that intermediaries are providing legitimate services.

The FCPA's anti-bribery provisions (15 U.S.C. § § 78dd-1, *et seq.*) expressly prohibit U.S. persons or companies, entities registered with the SEC, and foreign businesses or persons while in U.S. territory from deploying ''agents'' to make payments to a foreign official, political party, or candidate for political office to gain a business advantage. Moreover, the government may rely on a constructive knowledge standard—evidence of awareness or conscious avoidance of the ''high probability'' or ''substantial[] certain[ty]'' that a bribe will be offered and paid—to hold companies accountable for FCPA violations based on their agents' misconduct.

As the recent actions show, even if there is insufficient evidence to proceed with bribery charges, the SEC (and the DOJ, albeit less likely) may bring an action alleging that a company violated the FCPA's books and records and internal controls provisions (15 U.S.C.

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§ 78m(b)). These provisions require companies with securities registered on a national securities exchange to keep books and records that accurately and fairly reflect the purposes of all payments in ''reasonable detail'' and to devise and maintain accounting controls sufficient to prevent and detect improper payments to foreign officials.

Over the past several months, the DOJ and SEC have brought a number of actions against companies alleged to have violated the FCPA's accounting provisions for failing to conduct reasonable due diligence of their intermediaries. These prosecutions should remind companies to continue to be vigilant when they use third parties overseas, especially in high-risk regions.

SEC FCPA Unit Chief Kara Brockmeyer recently emphasized that "public companies and their executives must be truthful and forthcoming about [their] overseas consulting agreements or otherwise pay the consequences."

On July 25, the DOJ and SEC announced settlement agreements with Chilean-based LATAM Airlines, wherein the company agreed to pay over $22 million in penalties for making payments to Argentine union officials through a consultant to quell labor unrest. The SEC and DOJ concluded that LATAM Airlines' predecessor-in-interest failed to conduct the due diligence necessary to reveal that a $1.15 million arrangement with the consultant to study Argentine airline routes was a ''sham'' because the consultant never intended to undertake any such study.

Then, on Aug. 11, American-based Key Energy agreed to pay $5 million in disgorgement to settle SEC allegations that its foreign subsidiary made payments to Mexico's state-owned oil company Petróleos Mexicanos (Pemex) through a consulting firm to win contracts. The SEC concluded that Key Energy failed to enforce its own FCPA compliance policies by allowing its subsidiary to engage the consulting firm for vague expert advice on Pemex regulations without a written contract and by overlooking how the subsidiary gained inside information concerning Pemex contracts.

Six weeks later, on Sept. 28, Belgian-based Anheuser-Busch InBev agreed to pay $6 million to settle SEC allegations that its internal controls were inadequate to detect and prevent improper payments to government officials in India through third-party sales promoters. The SEC alleged that Anheuser-Busch InBev's Indian subsidiaries paid promoters excessive commissions with no executed contract in place and failed to rectify many FCPA issues identified in a 2010 audit prompted by an internal complaint.

Similarly, on Sept. 29, American-based hedge fund Och-Ziff agreed to pay over $400 million in penalties to settle DOJ and SEC allegations that it violated the FCPA's anti-bribery and accounting provisions by using intermediaries to funnel improper payments to government officials in Libya, Chad, Niger, and the Democratic Republic of the Congo. According to the SEC order, Och-Ziff entered into agreements with consultants and agents without conducting sufficient due diligence on the recipients of the funds or the roles played by those agents and consultants.

And on Oct. 24, Brazilian-based aircraft manufacturer Embraer agreed to pay more than $205 million to settle DOJ and SEC allegations that it funneled improper payments to government officials in the Dominican Republic, Saudi Arabia, and Mozambique through intermediaries with close ties to decision-makers in charge of awarding aircraft contracts. In one instance, the DOJ and SEC found that Embraer decided to engage a foreign agent after the company's legal department had labeled the consulting arrangement as ''high risk.'' The DOJ and SEC found that none of the agents had ''rendered any legitimate services.''

Companies that use intermediaries to facilitate overseas business continue to incur a substantial risk of committing FCPA violations. Brockmeyer recently emphasized that ''public companies and their executives must be truthful and forthcoming about [their] overseas consulting agreements or otherwise pay the consequences.''

Because the government consistently rejects the defense that a company was unaware of a third party's improper business practices, companies must evaluate their relationships with channel partners, distributors, consultants, and agents for potential FCPA exposure.

The following preliminary guidelines may help companies reduce their FCPA risk when retaining a foreign intermediary.

Preliminary FCPA Guidelines for Retaining a Foreign Intermediary
Business Rationale: Companies should evaluate and record the specific business rationale for retaining a third party in the first place by
■ defining the complete scope of the intermediary's role to force a meaningful evaluation of the legitimate business advantage that the intermediary would provide, if any; and ■ requiring managers to enumerate in writing the business justifications for hiring the intermediary as a further warning to employees that they are accountable for any corruption.
Due Diligence: Companies should conduct effective due diligence of prospective third parties and should consider heightened due diligence in business transactions involving state-operated entities because employees of such companies are ''foreign officials'' under the FCPA (15 U.S.C. § 78dd-1(f)(1)(A)). Through written questionnaires, independent investigations, and references from other companies and financial institutions, companies can tailor inquiries to learn about a third party's ownership structure, finances, reputation, domestic and foreign public records, travel itineraries, business transactional history, and relationships to foreign officials—areas that may lead to the discovery of red flags. Companies should investigate

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■ whether the intermediary holds or has held any governmental positions; ■ whether the intermediary has or had any familial, business, or other relationships with any foreign officials—the existence of which may lead to FCPA violations; ■ how the company was first introduced to the intermediary to ensure that the referral came through proper channels and not from a foreign official; ■ whether the intermediary is on the U.S. Treasury Department's Specially Designated Nationals List; ■ whether the services that the intermediary provides are priced above market rate, and if so, whether the excess translates to legitimate services; and ■ whether the intermediary requests a certain method of payment to avoid documentation and detection.
Compliance Mechanisms: Companies should insist on various compliance mechanisms in a written contractual agreement with the third party, including
■ a description of the FCPA, its associated risks, its exceptions, and its penalties; ■ a requirement to attend periodic FCPA training; ■ the right to frequent audits of the intermediary's books and records to ensure compliance with the company's accounting policies and procedures and Code of Business Ethics and Conduct; ■ an exhibit template for the expected format of invoices that details the who, what, when, where, and why of each transaction; ■ a termination clause connected to compliance violations and a continuing legal obligation to notify the company about any potential FCPA violations to communicate to the intermediary—and to the government should there be an FCPA investigation—that the company is committed to a culture of robust FCPA compliance; and ■ a periodic certification wherein the intermediary represents its full and ongoing compliance with the company's anti-corruption policies and procedures.

Notably, many companies who have been penalized for FCPA violations had proper policies and procedures in place during the relevant time periods to limit exposure to FCPA liability. But the DOJ and SEC have repeatedly warned that implementation is insufficient—companies must maintain ongoing monitoring of their agents and rectify any FCPA issues to ensure continual FCPA compliance.