Recent FCPA Prosecutions Highlight the Continuing Perils of Using Intermediaries in High-Risk Regions

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PRACTICES Foreign Corrupt Practices Act FCPA

Over the past two months, the Justice Department (DOJ) and Securities and Exchange Commission (SEC) settled three Foreign Corrupt Practices Act (FCPA) matters involving payments to foreign officials via third-parties. The FCPA actions against LATAM Airlines Group S.A., Key Energy Services, Inc., and AstraZeneca PLC—all publicly traded companies listed on the NYSE—reinforce the need for companies using intermediaries in foreign countries to implement and maintain sufficient accounting controls that will ensure that third-parties are providing legitimate services. Each of the companies was alleged to have violated the books and records and internal controls provisions of the FCPA for failing to properly account for and disclose the improper payments. The Chief of the SEC Enforcement Division's FCPA Unit, Kara Brockmeyer, emphasized that "public companies and their executives must be truthful and forthcoming about [their] overseas consulting agreements or otherwise pay the consequences."

The FCPA prohibits U.S. persons or businesses, entities registered with the SEC, and foreign companies or persons while in U.S. territory from making payments to a foreign official to gain a business advantage. 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3. This expressly includes prohibiting companies from deploying "agents" to accomplish the same. *Id.* Further, 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. *Id.* A recurring prosecutorial strategy, indeed the one employed in the prosecutions of LATAM Airlines, Key Energy, and AstraZeneca, is to bypass the FCPA's anti-bribery provisions in favor of employing the FCPA's accounting provisions, which require companies to keep accurate books and records and to devise and maintain accounting controls sufficient to prevent and detect improper payments. *See id.* at § 78m(b)(2)(A)–(B).

On July 25, 2016, 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 an intermediary to quell labor unrest. Shortly thereafter, Houston-based Key Energy agreed on August 11, to pay $5 million in disgorgement to settle SEC allegations that it made payments to Mexico's state-owned oil company Petroleos Mexicanos through a consulting firm to win contracts. And on August 30, the SEC accepted London-based AstraZeneca's offer to pay $5.5 million in penalties to settle allegations that it made payments through third-party contractors to state-owned health care providers in China and Russia to motivate the purchase of its products. The DOJ did not bring actions against Key Energy or AstraZeneca.

The SEC and DOJ concluded that LATAM Airlines' predecessor-in-interest failed to conduct the due diligence necessary to reveal that (i) a $1.15 million arrangement with a consultant to undertake a study of Argentine airline routes was a "sham" because no such study would ever take place and that (ii) the consultant would be funneling the $1.15 million to Argentine labor union officials to influence difficult labor negotiations in favor of the airline. Similarly, the SEC found that if Key Energy had enforced its own FCPA compliance policies, it would have (i) never permitted its

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Mexican subsidiary to engage a consultant for vague expert advice about Petroleos Mexicanos (Pemex) regulations, (ii) prohibited the subsidiary from continuing a business relationship with the consultant without a written agreement, and (iii) investigated how the consultant had gained inside information regarding Pemex contracts, which would have uncovered over $229,000 in improper payments from the consultant to Pemex officials. Finally, the SEC's cease-and-desist order in the AstraZeneca matter highlighted that the company "did not employ reasonable due diligence and monitoring of third-party contractors engaged by its China and Russia subsidiaries, such as travel vendors who provided false invoices to the subsidiaries' employees that facilitated [and concealed] the unauthorized use of corporate funds to improperly incentivize [state-owned healthcare providers]."

Companies that use intermediaries for overseas business purposes, including channel partners, distributors, consultants, and agents, continue to incur a substantial risk of committing FCPA violations. Because the government consistently rejects the defense that a company was unaware of a third party's improper business practices, companies should take meaningful measures to reduce their exposure by, among other things,

- conducting effective due diligence of prospective foreign third parties, such as learning about the market value of their services and their proximity to foreign officials, understanding their ownership and qualifications, evaluating the business rationale for retaining them in the first place, and screening them for negative reputational history;
- insisting on various compliance mechanisms in contractual agreements, including a description of the FCPA and associated risks, FCPA and general compliance training requirements, the right to frequent audits, a termination clause connected to compliance violations, and an obligation to notify the company about any potential FCPA violations; and
- implementing comprehensive enforcement procedures to oversee third parties' compliance with those contractual obligations.

1. https://www.justice.gov/opa/file/878806/download
2. https://www.sec.gov/litigation/admin/2016/34-78402.pdf
3. https://www.sec.gov/litigation/admin/2016/34-78558.pdf
4. https://www.sec.gov/litigation/admin/2016/34-78730.pdf

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