



PROGRAM MATERIALS
Program #30256
November 6, 2020

FCPA Anti-Bribery Compliance in the Age of Covid-19

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FCPA Compliance and Effective Third-Party Risk Management Today

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November 6, 2020 1:00pm Eastern

Why You May Need a Local Third Party

Overseas Business Development and Marketing without prior local knowledge or business experience could result in a costly and unsuccessful new market entry

Success often depends on having an experienced local business partner, agent, or consultant to help explain and navigate local procedures and rules, and timely identify opportunities

Some countries have laws that effectively require foreign companies to use a local third party in business ventures in the country, particularly involving local country public contracts

Local Third Parties Sometimes Bring Good and Bad Local Practices and Customs

What DOJ Expects Companies To Know About a Local Third Party

- the business rationale for needing the third party in the transaction
- the risks posed by third-party
- the third-party partners' reputation, including any relationship with foreign officials

DOJ/SEC FCPA *Resource Guide* identifies several “red flags” or high-risk items that may be indicative of a third party engaged in making corrupt payments to foreign government officials

Excessive commissions paid to third party agents or consultants

Unreasonably large discounts to third party distributors

Third party consulting agreements with vaguely described services

Third party consultant is in a different line of business than that for which it has been engaged

Third party is related to or closely associated with the foreign official

FCPA *Resource Guide* has also identified other high risk or “red flag” situations

Third party became part of the transaction at the express request or insistence of the foreign official

The third party is a shell company incorporated in an offshore jurisdiction

The third party requests payment or offshore bank accounts

Other “red flag” situations

Third party has public reputation for unethical conduct or dishonest business practices

Third party has been (or is) under investigation for corrupt payments

Third party has official, non-public, confidential documents related to tender specifications

Know Your Third Party, Agent, Consultant involves

Knowledge of country corruption risks

- [TI index available at: [<https://www.transparency.org/en/cpi/2019/results>]

Vetting of Third Party commensurate with risks posed

- Third party questionnaire with identification of contacts, licenses, ownership/principals, business formation history, projects, and references, criminal/regulatory, foreign government official relationships
- Verification of information in questionnaire
- US and local media internet searches (English and local language)
- Business extracts (Dunn & Bradstreet, Bloomberg, atVantage, etc)
- Local licensing, registration, operating permissions/authorizations
- Litigation searches (US and local country, when feasible)
- Business Reference checks; Vendor/supplier; local Chamber of Commerce
- OFAC screenings at: <http://sanctionssearch.ofac.treas.gov/>
- US Department of Commerce ICP
- In-person interviews, when practical

Managing Your Third Party, Agent, Consultant involves

Offering only **reasonable and market-based**, written contract terms

- Documenting the **business justification** for the third-party fees, commissions, payments as though you or your business team may have to commercially defend those fees to DOJ/SEC or local anticorruption officials
 - A member of the business team should provide the commercial justification for the fees and be the contact for that issue

Including robust anticorruption compliance provisions commensurate with the level of risk in the project or activity involving the third party

Obtaining a compliance certification that broadly covers the type of anti-bribery compliance risk most prevalent in the project, and periodically renewing it

Training the third party, depending on the level of engagement

Monitoring the Third party for “red flags” and compliance gaps

Managing Your Third Party, Agent, Consultant involves

Timely addressing “red flags” when they are presented

- No “head in the sand” excuses
 - Actual knowledge of third-party plans to bribe is not required
 - Reckless disregard and wilful ignorance of red flags creates liability
- You and your company could be liable under the FCPA for failing to stop a payment because you did not ask enough questions, or require adequate documentation and payment justification, or you authorized a payment that was simply too high under the circumstances

Documenting all compliance, due diligence, and vetting of third parties, and **any actions** taken to address red flags

Company XYZ, a Chicago-based company, is pursuing a huge manufacturing and supply contract for hospital grade Personal Protective Equipment (PPE) with a hospital system in the UAE

XYZ does not have any current sales in the UAE, even though XYZ's Kuwaiti-based subsidiary has negotiated numerous hospital supply contracts over the years in other Gulf countries in the Middle East

A retired U.S. State Department official visiting the UAE from Kuwait with diplomatic contacts in the region can make introductions for XYZ's Vice President of International and members of XYZ's team to a local UAE agent with close ties to the Ministry of Health team members who will be awarding the PPE contract

One week prior to XYZ's public meeting with the UAE Ministry officials to learn about the PPE requirements with other competitors, an XYZ engineer visiting from Kuwait observes the retired State Department official and a member of XYZ's team enter a private room in a restaurant for dinner with a local diplomatic contact

The XYZ engineer learns through local sources that the local diplomatic contact dinner attendee is the brother-in-law to the UAE's Deputy Minister of Health

The former US diplomat who arranged the dinner has not yet been formally engaged as a consultant or representative to XYZ for UAE business sales

The former US diplomat is now requesting a consultant agreement with XYZ, and intends to rely upon work by the local diplomatic contact in the UAE to act as his partner in a PPE consulting firm to be locally formed and named “PPE TODAY LLC”

XYZ’s Vice President for International coincidentally receives by email 2 resumes from the local UAE diplomat requesting an XYZ internship for 2 relatives

PPE TODAY LLC sent the XYZ UAE project team leader a draft consultant agreement containing

a generic business development scope of work

a requirement for a commission of 22% for any PPE-related contract work awarded to XYZ resulting from the efforts of PPE TODAY; and

Containing no provision for compliance with anti-bribery laws or the FCPA.

XYZ's Chief Compliance Officer learns of all of these developments in a cell phone call from XYZ engineer during a break while conducting virtual FCPA/UK Bribery Act anticorruption training

No consulting agreements have been signed with anyone

No offers have been made for XYZ internships to the two candidates whose resumes were sent by the local UAE diplomat

Official UAE PPE tender documents will be made available to all bidders in the UAE in 1 week

XYZ is well equipped to meet the supply demands for hospital grade, sophisticated PPE at issue and really hopes to finally make inroads into the UAE hospital systems with this project

XYZ's Chief Compliance Officer reports to the XYZ General Counsel, but has not yet mentioned the situation in the UAE

Quitting the compliance job is not an option but you should ask for a raise if you are dealing with these types of issues

What should the Compliance Officer do?

What are some of the issues raised?

The Compliance Officer briefs the General Counsel; and everyone agrees that the Law Department and Compliance should

“think out of the box” and really come up with a strategy that

- does not offend UAE Health Ministry officials
- preserves XYZ’s eligibility to bid for the PPE contract
- but neutralizes FCPA and anticorruption risks and potential liability, if any

Consult with outside counsel

Consult with the project business team leads on ultimate goals and objectives for the UAE and the specific PPE deal

Determine if there is support for the resources needed to get the compliance vetting and due diligence done in a timely and effective manner

Determine if PPE TODAY LLC is properly formed for the purpose of assisting foreign businesses in the UAE with government PPE and other medical equipment supplies under local UAE law

Prepare questionnaire for the former US diplomat eliciting usual third-party professional background information, including whether his ethics letter from the US government permits him to engage in such consulting activities with a current local diplomat in a country that he had prior responsibility for when he served in the US State Department

Prepare questionnaire for current local diplomat as to government official relationships (i.e., Deputy Health Minister), possible nominee ownership in consultancy, etc

Obtain local law opinion for UAE on whether local contact is permitted to work in a private consultancy for profit unrelated to his diplomatic duties, but involving the Ministry of a relative with authority to award PPE contracts

Confidentially contact US Embassy to learn more about the Deputy Health Minister, the local diplomatic contact, and whether they have any insights on the former US diplomat acting in the UAE in the past

Conduct other third- party due diligence on both PPE principals, as previously described, including OFAC screenings

Urgently advise the Vice President to forward the internship resumes to the GC and tell the VP that he should take NO ACTION on the resumes at all

If questioned by the local diplomat about the status of the resumes the VP should deflect or say he is required to refer them for normal HR review, evaluation, and processing

If the VP knows that XYZ has no internships to offer, he should seek guidance from the Compliance Officer or the Law Department on how to respond to any questions about the status of the resumes

Document all local law opinions, due diligence results, raw reports, and advice in electronic due diligence file

Evaluate all information and determine if there are any red flags for follow up and document how you followed up, or the rationale for limited follow up, if any

Make separate findings as to each based on the reviews

Identify scope of reviews, methodologies, actions taken, legal standards, and specifically who conducted the reviews

Describe information on the former US diplomat’s reputation, competence, and qualifications

Describe the local diplomat’s reputation, competence, family ties to government officials, and lawfulness of private business role, etc

Also Determine

Whether PPE TODAY is lawfully formed for the intended purposes under UAE law

What is the basis/source for the commercial reasonableness of the amount of the consultancy commission (22%) and fees

Determine if internship candidates are qualified and suitable – but HOLD on any offers

Assess through interviews whether any XYZ employees have received any non-public confidential information regarding the PPE contract project from third parties or government officials

Review XYZ expense reports and payments related to the UAE and the PPE project for any irregularities or “red flag” payments or charges

Maintain raw electronic backup file of all actions taken and activities on due diligence

Reporting to GC/Board/Senior Management

Verbally

Verbally with summarized chart results or high level powerpoint

Written Executive Summary Report (3-4 pages or less of conclusions)

Detailed written report with all findings, recommendations/exhibits

Report(s) should include RECOMMENDATIONS for anticorruption contract terms, training, enhanced monitoring, periodic certifications, reporting suspected misconduct, etc.

Consult With Outside Counsel on Whether To Obtain A DOJ FCPA Advisory Opinion Procedure

Siemens : \$1.6 billion in fines, penalties, and disgorgement (2009) to DOJ, SEC, and German agencies for bribery across several countries involving foreign agents

VimpelCom: \$795 million settlement, including fines, penalties and disgorgement to DOJ, SEC and Dutch anticorruption authorities for bribes made to relative of Uzbek official responsible for awarding business (2016)

Airbus: UK Serious Fraud Office announced bribery and corruption investigation of Airbus involving consultant's improper payments to officials in Middle East and other locations for plane sales (August/2016)

Alcatel Lucent: \$92 million in criminal penalties for failure of responsible executive to conduct appropriate due diligence on third-party representatives and consultants before approving payments to third parties, who, in turn, made illegal payments to foreign officials for business (2010)

DOJ found FCPA liability because executive was “at best, deliberately ignorant of the true purpose behind the retention of and payment to many of the third-party consultants”

Odebrecht/Braskem: \$3.5 billion to US, Brazilian and Swiss authorities for guilty plea and settlement for construction firm and petrochem company paying hundreds of millions in bribes to officials via a bribery department and third party agents to win contracts around the world (2016)

JP Morgan : \$200 million settlement to resolve FCPA criminal and civil matters for its practice of hiring sons and daughters of foreign government officials in Asia in exchange for business, and without following proper procedures (2016)

BNY Mellon: \$14.8 million to settle FCPA abuses related to hiring relatives of foreign government officials for internships without following hiring procedures and ensuring qualifications in order to expand business in Middle East (2015)

Rolls Royce: \$800+ million in fines to US, UK and Brazilian authorities for bribery conspiracy; some bribes were paid using third-parties in Brazil, Kazakhstan and Angola (2016)

Weatherford: \$152+ million FCPA settlement involving due diligence failures for third parties, among other systemic failings

Why Purchase or Partner With A Foreign Entity Today?

Rate of continued growth may depend upon international expansion

Local country law may require company to use local subsidiary or local party in venture or business operations in country

Target company may have foreign subsidiaries and affiliated companies

Non-US target company may have critical assets necessary to achieve your company's long-term strategic goals

Project may be so large that you need another operational partner for a joint venture

Project capital requirements may warrant having a partner with financial capacity and local knowledge

Travel Restrictions limit employee foreign activities

M & A Targets have subsidiaries and affiliated companies, that sometimes engage in misconduct that would be illegal under US law (if subject to US jurisdiction), as well as local country laws

The M & A Purchaser must always be mindful of successor liability

DOJ/SEC FCPA *Resource Guide* recognizes that when a company merges with or acquires another company, the successor company can assume the predecessor company's liabilities

Successor liability can apply to civil and criminal liabilities, such as FCPA violations

FCPA *Resource Guide* highlights the expectation by the DOJ and the SEC that acquiring companies include reasonable pre-acquisition anti-corruption due diligence for target companies (as well as prospective joint venture partners)

Should be part of the deal team's regular processes

Should commence early in the transaction (include requirement for pre-acquisition anti-corruption compliance due diligence in MOU if necessary)

Should be more robust and engaged commensurate with the activities and number of high-risk country foreign subsidiaries or affiliates involved

Should be adequate based on the industry involved and the business model, particularly where third parties participated in Target's business development, sales, licensing, or operational authorizations

Halliburton DOJ FCPA Opinion Procedure (2008)

Sought to acquire capital share of UK company but foreign consortium had already submitted first bid (unconditional) for UK company

UK bidding process restrictions provided insufficient time and inadequate access to information for Halliburton to do a robust FCPA and antibribery - due diligence

- Target only legally obliged to give Halliburton the same information it had given to the foreign consortium
- Halliburton contractually bound not to disclose to DOJ whether any FCPA or anticorruption violations occurred
- Halliburton had to wait until closing to conduct proper due diligence

Halliburton sought DOJ opinion on lawfulness of proposed transaction and post-closing due diligence proposal, to which **DOJ responded:**

- Circumstances of proposed transaction not unlawful under FCPA
- Due to UK bidding law restrictions, DOJ would take no enforcement action against the pre-acquisition target if conduct is disclosed to DOJ during the 180-day period following the closing, and Halliburton implemented its compliance post-closing plan and remediation
- DOJ would take no enforcement action against Halliburton for the target 's post-closing actions if Halliburton disclosed to DOJ within 180 days and remediated the conduct as soon as reasonable.
- All remediation had to be completed within 1 year of closing
- DOJ reserved right to take enforcement action for undisclosed misconduct or misconduct of Halliburton employees, among other conduct

Details of Halliburton Post-Closing Proposal

Exceptional plan for unusual and complex transaction

Involved only prospective transaction and actions, to include

- **Disclosure to DOJ** of pre-closing internal controls, accounting issues uncovered during early due diligence of target
- **W/I 10 days** - Present due diligence workplan (with agent assessments)
- **W/I 90 days** - results of high-risk due diligence (and supplements)
- **W/I 120 days** - results of medium risk due diligence (and periodic reports)
- **W/I 180 days** - results of low risk due diligence (and periodic reporting)
- **Post-180 days** - complete remaining due diligence and provide periodic reports
- **Remediation and due diligence** concluded within 1 year; retain counsel and accountants and conduct rigorous reviews; new contracts for agents
- Code of conduct adopted for target at closing; training w/I 60 days; retain subsidiary during investigation, etc.

Examples of Pre-Closing Actions Today

In-country reviews with less skilled in-country personnel

Virtual, online, and database reviews; virtual interviews; reference checks

Questionnaires and electronic document reviews

Payment reviews

Online or virtual training, live webcasts

Electronic screening and monitoring

Contract provisions, certifications, policies/ procedures, etc.

Pre-Acquisition Compliance Actions Are Critical For Avoiding Successor Liability And Receiving Helpful Guidance From DOJ And The SEC To Progress An Acquisition To Closing

Due Diligence Is Required To Be Commensurate With Level Of Risk And Operational Model And Ownership Levels

Compliance Due Diligence Action Plan Should Be Devised Before Commencing Due Diligence, including

- Baseline due diligence regarding third parties

- Reviews of target's compliance programs and internal financial controls and procedures

- Reviews of key third party contracts, terms and payments

- Use of Technology and Virtual Platforms due to travel restrictions

Compliance Due Diligence Action Plan (cont'd)

Reviews of minutes of meeting of board of director

Reviews of audit reports and recommendations

Determinations on regulatory, tax, or criminal enforcement actions, settlements, or investigations

Reviews of charitable donations and vetting

Reviews of gifts, business entertainment, and travel for third parties

Reviews of marketing sponsorships and political contributions, if any

Reviews of licensing, permitting, inspections, visas, and survey activities

Determinations on direct or indirect ownership interests of government officials

Identification of red flags for follow-up

Compliance Due Diligence Action Plan (cont'd)

Interviews of target's management team and financial officers, including internal and external auditors

Reviews of target's compliance provisions, certifications, and reps and warranties of historical third party agreements

Assessment of target's compliance training, monitoring and discipline of employees (and third parties, if relevant)

Determination of any target compliance gaps for pre- and post closing remediation

Identification of employees who have engaged in misconduct or compliance violations for future disciplinary action or separation from target in post-acquisition company

Establishing protocols for notification to Management on target "red flags" requiring remediation and possible disclosure to DOJ/SEC

Compliance Due Diligence Action Plan (cont'd)

Develop protocol for disclosure to Target of “red flags” or suspected violations that might require DOJ/SEC disclosure

- Include contract contingency for price reduction depending on extent of violation and delays caused by “red flag” resolution/remediation

Create process for Management and Board determination on continued interest in purchasing target after learning of existence of “red flags” or suspected violations uncovered during due diligence

Establish protocol with Management for timing, scope, objective and all potential consequences of disclosure of suspected violations to DOJ/SEC, in coordination with target, as target may prefer not to sell in light of uncovered misconduct

Expand role of ZOOM, Video, Blue Jeans, & Conference Calls

DOJ FCPA Advisory Opinion Procedure requires detailed written information on transaction, parties, compliance actions and procedures, “red flags” and remediation, as well as proposed disciplinary action and post-closing follow up and reporting

Most DOJ/SEC guidance for M & A transaction can be obtained without seeking a formal, written advisory opinion

- Particularly if the parties disclose before the transaction is consummated or progresses too far after important red flags or suspected violations are detected pre-closing
- *FCPA Resource Guide* heavily emphasizes how companies routinely avoid successor liability by voluntarily disclosing and remediating conduct prior to the merger
 - Must stop the misconduct after acquisition
 - Acquirer cannot participate in misconduct at any time

In complex transactions, a written report best documents due diligence reviews, findings, and remediation efforts

Level of detail included should be sufficient to demonstrate the integrity of findings, adequacy of investigation methodology, scope of reviews, source/sufficiency of evidence relied upon, as well as legal standards applied

- A detailed PowerPoint may suffice
- A shorter executive summary (3 pages) along with a chart of specific relevant data could be adequate
- A long, narrative, detailed report with all sources referenced, and all documents reviewed cited may be required

For shorter, simpler transactions, a verbal report may suffice with the data file maintained should specific details be required

Verbal reports are sometimes preferred because some companies do not want to create a road map of the illegal conduct

Verbal details can be misinterpreted, “mis-heard”, and “mis-remembered”

Institutional knowledge could be lost and the relevant due diligence efforts, remediation, training, compliance program updates required, and follow up could be misinterpreted by others who were not present or involved at the time of the original due diligence

Failure to do a written report of some type could make a company vulnerable, without documentation, to a whistleblower action that is uninformed of the compliance and remediation role that a company seeks to play during a proposed transaction

Speculation and unsubstantiated rumors could trigger an investigation

The report should also reflect the compliance due diligence action plan’s specific recommendations on

the conduct of the due diligence

FCPA transaction withdrawal protocols and whether they were invoked

post-closing compliance transaction tasks

whether the target company and employees are largely amenable to meeting the purchaser’s compliance standards with proper training, oversight, and monitoring

Other Report Considerations Today?

Technology Alternatives to Traditional Procedures

Confidentiality Agreements

Basis for Going Forward With High Risk Transaction

Public statements about reasons why a transaction did not close without revealing suspected violations of FCPA or other illegal conduct

“Need to know” only for “red flag” remediation

Reviving transaction after walking away for uncovered compliance gaps or violations

Consultation with Enforcement Agencies on Adequacy of Vetting

**For more information: FCPA Resource Guide available
on DOJ and SEC websites, or contact:**

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Considerations in Conducting Effective Investigations during COVID-19

Remote work arrangements, travel restrictions and other adjustments to business as normal require balancing need to maintain functioning compliance program with current realities

Prompt investigations still need to be conducted

- Improper conduct may be ongoing and needs to be stopped
- Evidence may be lost and needs to be preserved
- Legal obligations and government investigations continue

Remote investigations can be effective alternative to traditional investigations

- Triage investigation work based on risk and consider range of remote investigation issues

Remote investigation practices to consider

Evidence Collection & Preservation

- Coordinate through local contacts device preservation & hard copy collection
- Use “virtual presence” when data pulled

Videoconferencing

- Choosing a technology
- Setting expectations
- Sharing documents
- Local counsel, if needed
- Back-up plan when tech fails

Other

- A-C privilege and waiver
- Cybersecurity
- Confidentiality and privacy
- Disciplining remote employees