

Mitigating Anti-Corruption Risks in Emerging Markets

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With the execution of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the increasing enforcement of the US Foreign Corrupt Practices Act (“FCPA”), multinational companies are more aware of the consequences of corrupt behavior than ever. Due to historically high fines imposed for corrupt behavior, compliance is of crucial concern for companies. This becomes an even bigger issue when a company begins to conduct business in emerging markets. This is because emerging markets may be more risky for anti-corruption risks due to the difference in anti-corruption laws and perceptions. Therefore, the adoption of a compliance program and engaging in rigorous third party due diligence as a part of this compliance program becomes mandatory for multinational companies active in emerging markets.

A compliance program is an internal control tool to detect and deter anti-corruption violations. Adopting compliance programs becomes indispensable for companies falling under the FCPA jurisdiction because the Department of Justice (“DoJ”) and Securities and Exchange Commission (“SEC”) evaluate the existence, enforcement and the effectiveness of such compliance programs when they are determining which action, if any, to take against an alleged violation. The main components of an effective compliance program include: (i) the existence of a clear anti-corruption policy and the top management’s commitment to this policy; (ii) the existence of a company code of conduct and compliance/ethics documents; (iii) the compliance program should be enforced by an autonomous manager, who has at his/her disposal sufficient resources; (iv) a risk assessment procedure that is repeated periodically and for each jurisdiction and sector; (v) strengthening of the compliance culture through trainings, (vi) implementation of the compliance program through incentives and disciplinary measures; (vii) exercising scrutiny over third parties through due diligence procedures; (viii) employing confidential reporting mechanisms and internal investigations, where necessary, in order to effectuate the “detect” function of the compliance program; (ix) periodically reviewing and updating the compliance program; (x) engaging in due diligence during merger and acquisition processes.

For companies active in emerging markets, the issue of third party due diligence becomes more important as multinational companies use third parties extensively in their dealings in emerging markets. Hence it is important to exercise close scrutiny over third party partners and any red flags they might raise not only before hiring them but also during their terms of service. Third party partners could include sales agents, consultants, lawyers, distributors etc. Some of the notorious red flags to be wary of when hiring and working with third parties are: (i) whether the third parties have any prior experience in the field they are hired in, (ii) whether the third party requires the payment to be made to offshore accounts and (iv) whether

the third party is closely affiliated with public officials of the country the contract is secured in. Hence when such red flags are raised in relation to certain third parties, companies should carefully evaluate whether or not they should engage in commercial relationships with them.

According to the US Sentencing Guidelines, SEC and DoJ consider (i) having effective compliance programs and (ii) disclosing violations and cooperating with the authorities during an investigation as mitigating factors while determining the amount of the fine to be imposed on companies. Therefore, aside from maintaining a robust compliance program, a company should also carefully evaluate the option of disclosing an FCPA violation once it becomes aware of it.

One of the most recent and comprehensive FCPA enforcement actions that took place in December 2014 with record fine amounts serves as a benchmark case for (i) how DoJ determines the amount of fines and (ii) what the companies active in emerging markets should be wary of. In December 2014, Alstom S.A. (“Alstom”), a French power and transportation company, and its group companies were sentenced to pay a \$772 million fine for FCPA violations. This is the largest fine imposed by the DoJ and the second largest fine overall, combining the DoJ and SEC imposed fines. In addition to being one of the largest FCPA settlements in history, the Alstom enforcement action sets out the crucial importance of maintaining comprehensive compliance programs, engaging in thorough third party due diligence, disclosing violations to the authorities once the company becomes aware of them and cooperating with the authorities during the course of the investigation. The Alstom enforcement action also demonstrates how an FCPA investigation can expand over jurisdictions, which is another matter of concern to multinational companies active in emerging markets.

According to the plea agreements and the deferred prosecution agreements entered into by the DoJ, Alstom and its subsidiaries, Alstom and its subsidiaries engaged in corrupt dealings for more than a decade in various jurisdictions around the world, such as Indonesia, Egypt, Saudi Arabia, the Bahamas and Taiwan, in order to retain energy projects for state owned enterprises. More specifically, at various instances Alstom and its subsidiaries paid bribes to government officials through third parties hired as consultants. Even though these third parties had raised various red flags Alstom had failed to engage in due diligence and maintain scrutiny over the consultants. For example, in one instance the consultant had no experience in the field s/he was hired to work in; in fact the third party was experienced in the wholesale sector and was hired as a consultant for the transport sector. In another instance, the bank account to which the consultant fee was being transferred was in a different country than the country the project was based in. Alstom executives had also directly paid bribes to governmental officials. In yet another instance, Alstom paid over \$2 million to a charity associated with a foreign official. Overall, Alstom and its subsidiaries had paid more than \$75 million to secure \$4 billion in contracts, with a profit margin of approximately \$300 million.

Although the company's own internal policies articulated the aforementioned third party red flags, Alstom, in breach of these policies, had failed to act accordingly. DoJ also recognized that Alstom did not have a comprehensive compliance program at the time of the breaches. Alstom had also failed to disclose the breaches to the relevant authorities, even though it was aware of the misconduct itself, in addition to not cooperating with the authorities up to a certain stage of the investigation.

According to the DoJ's press release, the Alstom enforcement action is emblematic of how the DoJ will prosecute FCPA breaches. The DoJ accounts for the record fine imposed on Alstom through the following facts:

- (i) The prolongation and the size of the corruption scheme
- (ii) The lack of an effective compliance program at the time of the breaches
- (iii) Alstom's initial refusal to cooperate with the authorities during the investigation
- (iv) Alstom's failure to disclose the violations, even though it was aware of them and
- (v) Alstom's prior corrupt misconduct

Hence, through the Alstom enforcement action, the DoJ encourages companies to disclose violations once they become aware of them, cooperate with the authorities during the course of the investigation, adopt robust compliance programs ready to detect and deter violations and enforce these compliance programs.

Among other points, the Alstom case is relevant for companies active in emerging markets because it demonstrates that once a corrupt conduct is discovered by any jurisdiction, the anti-corruption investigation spreads to many other jurisdictions the company is active in, due to the inter-jurisdictional character of foreign bribery cases. The anti-corruption investigation on Alstom was triggered by a Swiss anti-money laundering investigation initiated in 2004. This triggered several investigations against Alstom in Brazil, Mexico and Zambia in addition to the US and UK investigations. An investigation was also launched against a consortium partner of Alstom, Marubeni Corporation. In relation to the Indonesian bribery scheme, Marubeni Corporation also pleaded guilty and entered into a plea agreement with the DoJ, agreeing to pay a \$88 fine. During the course of these investigations, an Indonesian member of parliament was also sentenced to 3 years of imprisonment.

The Alstom enforcement action is especially important for companies active in emerging markets, due to the rampant anti-corruption risks in these jurisdictions. To be able to make the right decision and not lapse into the pitfalls present in these jurisdictions, multinational companies not only need to adopt compliance programs, but also need to grow a compliance culture. The business decisions to be taken within the ambits of this compliance program especially affect a company's relationship with its third party partners. Hence companies are

urged to engage in third party due diligence and maintain a higher scrutiny over them once red flags are identified. Companies should also evaluate the critical issues of disclosure of violations, along with cooperation with authorities during the investigation through the compliance culture lens.

If all these issues are neglected and the company does not make its decisions in a timely and diligent manner, then a company might easily find itself facing record fines enforced due to the FCPA. Therefore, multinational companies active in emerging markets should keep in mind what the DoJ uttered in their press release about the Alstom enforcement action— that the DoJ will not wait for the companies to act responsibly and that with or without cooperation the DoJ will identify the criminal activity and investigate the conduct themselves, using all of their resources, employing every law enforcement tool and considering all possible actions, including charges against both corporations and individuals.

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