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Third party liability in global transactions in light of the FCPA

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Multinational companies initiate business transactions in different parts of the globe, dealing with different business cultures and rules. In order to diligently pursue business in these foreign business environments, multinational companies often retain the services of third party agents such as consultants, distributors, agents, lawyers and joint venture partners. However, the actions of business partners may lead to significant risks under the Foreign Corrupt Practices Act (FCPA) for the relevant companies. This is because the FCPA explicitly prohibits any payments made to intermediaries with the knowledge that such payment will be channeled to foreign public officials (and other persons prohibited by the FCPA) for corrupt purposes. The knowledge requirement includes not only cases of active awareness where the company knew the corrupt acts of its third party agents, but also situations where the company should have known the relevant acts. Therefore, companies are advised to periodically conduct thorough due diligence procedures regarding their business relationships with third party agents.

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The due diligence process

The first step in third party due diligence is finding out: (i) the expertise of the business partner in the field the company will retain its services; (ii) the business reputation of the third party; and (iii) whether the business partner has any relationship with government officials. The Securities and Exchange Commission (SEC) or the Department of Justice (DoJ) could consider as conscious disregard or willful blindness commencing a business relationship with a business partner that has: (i) little expertise in the area in which the services are being retained; (ii) a questionable reputation; or (iii) close ties to public officials in the country where it will provide services.

The following step of the due diligence process is the scrutiny over the terms of the relationship between the company and its business partner. The company should first determine whether it needs to employ a third party for the transaction at hand, the reasons for employing the third party, and the services this business partner will be performing. In fact, the agreement executed between the company and the business partner should clearly and explicitly define the services the third party will perform. Additionally, the company should also be vigilant about the payment terms specified in the agreement. Here, it is important to investigate whether the payment conditions requested by the third party are common to the relevant industry, such as the payment amount, payment method and account details (whether the payments will be realised to an already existing account or to an offshore account, etc.). Once the company performs the due diligence steps mentioned above, it is also significant for the company to control if the business partner is actually performing the relevant services which are explicitly stipulated in the agreement.

Even though the third party may come out clean from the abovementioned steps, it is still necessary for the company to continuously monitor its business partner. The terms of the agreement should provide the company or its agents with periodical audit rights in order for the company to be able to perform this continuous monitoring step. With regard to compliance policies, the DoJ and the SEC both consider in a positive light the inclusion in the agreement of terms obliging third parties to abide by the compliance policies of the company.

Red flags

If ignored, the red flags mentioned below could constitute severe FCPA risks for the company. A company should increase its scrutiny of the third party once the company encounters one of the situations outlined below. As closer scrutiny exposes more red flag situations, the company should evaluate whether to retain the services of the third party at all. To that end, a non-exhaustive list of FCPA red flags would be: (i) excessive commission given to third party agents or consultants; (ii) unreasonably large discounts provided to the third party; (iii) third party consulting agreements in which the services are not, or are only vaguely, described; (iv) when the consultant has little or no experience in the field she is hired for; (v) association of the third party with an official of the country in which the company is conducting business transactions; (vi) the business partner becoming a party to the deal with the explicit request of the public official of the transaction country; (vii) the third party is a shell company; (viii) the third party requests payment to be made to offshore accounts; (ix) the third party apparently lacks the resources to realise the transaction; or (x) the jurisdiction where the business transaction is being conducted has a suspicious reputation.

Conscious disregard / willful blindness

The knowledge standard in the FCPA was created so as to overcome the 'head in the sand' situation. Accordingly, the FCPA seeks to prevent companies from excluding FCPA responsibility by putting a barrier (a third party) between themselves and conscious knowledge of an FCPA breach through retaining third parties. Section 78dd-1 (f) (2) of the FCPA provides that "knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believed that such circumstance does not exist".

An example

In 2001 and 2002, Parker Drilling hired a company to take care of its customs compliance in Nigeria. The company paid bribes to customs officers, in order to render the customs process less expensive for Parker. In order to investigate the corruption allegations in its customs processes, the Nigerian government formed an investigation panel which discovered Parker's actions. In order to defend itself, Parker hired a third party agent known for his influence with the Nigerian government. The agent's resume did not contain any prior dealings in the customs sector. Subsequent to several suspicious payments by Parker executives to the outside agent, the panel, without any explanation, reduced the \$3.8m penalty to \$750,000. The payments made to the outside agents were listed as entertainment expenses for Nigerian officials. Subsequently, in 2013, Parker agreed to pay a \$4m fine to settle SEC charges claiming it authorised business partners to make corrupt payments to Nigerian officials. Parker further executed a deferred prosecution agreement with the DoJ agreeing to pay \$11.76m in fines.

Conclusion

It is common practice for companies to retain business partners when conducting businesses overseas. Nevertheless, this commonplace business practice may generate colossal risks for the company if the business partner was not vetted diligently. The Parker Drilling case above suggests that when it comes to the FCPA liability, the SEC and the DoJ do not accept an "It was not me" or "I did not know" scenario regarding the company's third party agents if red flags have been raised before them and the company had simply *looked the other way*. Accordingly, companies should be vigilant when it comes to business partners and cease their business relationships if further scrutiny of such partners exposes more red flags. ■