THE NATIONAL LAW JOURNAL

JANUARY 18, 2016

An ALM Publication

THE PRACTICE | Commentary and advice on developments in the law

# Anti-Corruption Law's Third-Party Perils

Clients can't rely on an "ostrich defense" to fight claims stemming from business associates' conduct.

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Most companies with an international footprint are already well versed in the dangers and compliance challenges presented by the Foreign Corrupt Practices Act. More than a decade of aggressive U.S. enforcement and massive fines are hard to miss.

But despite the attention that compliance departments have placed on anti-corruption and foreign bribery prevention, a nettlesome issue persists: How far must a company go to police third parties with whom the company conducts business? Around the globe, companies continue to wrestle with questions about what due diligence is required with respect to transnational joint venture partners, targets for acquisition, distributors, vendors and other third parties.

Although the legal requirements of the FCPA are clear, they do little to help answer the practical compliance question: How much due diligence is enough? The FCPA prohibits making or attempting to make payments to foreign officials for the purpose of obtaining or retaining business. This prohibition applies to both direct and indirect payments. In other words, a company can be liable for the conduct of its intermediaries or third parties. Indeed, the joint guidance provided by the U.S. Department of Justice and U.S. Securities and Exchange Commission makes clear that "the fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability."

It gets worse. Under the FCPA it is not a valid excuse if the company did not actually know about the improper payments made by third parties. "Knowing" does not require actual knowledge that the third party is going to make an improper payment. Instead, a company or individuals can be criminally or civilly liable if they consciously disregard a high probability that an improper payment will be made. The so-called "ostrich defense" is not available. This legal landscape has become even more imposing given the DOJ's recently announced policy to emphasize enforcement against individuals within a company. In addition, a recent trend of anti-corruption enforcement by countries outside the United States has emerged, each with its own legal requirements impacting due diligence.

The net result of the law and enforcement policy in this area is that a company's failure to engage in sufficient due diligence of third parties creates the risk that enforcement officials will find the company—or increasingly the key individuals within the company—in violation of the FCPA. With fines in the hundreds of millions of dollars and the specter of criminal conviction, the stakes are high.

The extent of third-party due diligence of course depends on the facts and circumstances of the company and its business profile. It also depends on the practical realities of whether the company has the ability to implement certain due diligence measures, such as whether the company holds a controlling interest in a joint venture or has business leverage over partners, vendors or distributors to obtain information, documents, and audit rights.

Companies often ask how the enforcement authorities would view the sufficiency of its due diligence efforts. Companies are well served to turn the question back on themselves: How would you explain to authorities what due diligence was conducted, why you deemed it to be sufficient based on your risk profile and other legitimate considerations, what due diligence was not able to be performed, and why?

## DEVELOPING A RISK PROFILE

Critical to adequate due diligence is developing a risk profile and identifying red flags for third-party entities. Here are some typical areas of focus with respect to third parties:

What is known about the third party? Who are the real owners and what are the identities of all related parties? Where does it do business? These seemingly straightforward questions are sometimes overlooked or more complicated than first surmised.

Why was the third party selected by the company? What experience does it have? Were other entities considered? Special scrutiny should be applied to third parties that are selected based upon their purported unique access to certain countries or regions.

Depending on the leverage or control of the third party, can the company require completion of a comprehensive due diligence questionnaire with audit rights? Such questionnaires often include disclosure of ownership structure, anti-corruption policies and training, and any prior incidents of investigation, enforcement or other legal issues.

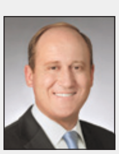
Has the company conducted a database review of the third party? Such review can include, for example, whether the company is affiliated with any politically exposed persons or appears on any restricted lists.

Will the third party provide detailed certifications of anti-corruption compliance and training, reps and warranties, or other documentation?

How transparent is the third party with respect to its business dealings, financials, and books and records? Does the entity have any history of large or vaguely described cash payments, adjustments, bonuses or other questionable expenditures?

Finally, with respect to any due diligence conducted, the company should ensure detailed documentation of all analysis and steps taken, to create a "report card" to combat any subsequent argument that red flags were ignored.

No single factor standing alone is dispositive and no amount of due diligence can be completely effective in eliminating improper conduct by third parties. But reasonable, documented procedures can greatly reduce the risk and help avoid liability for others' misdeeds.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