

Hiding in Plain Sight: Managing FCPA Risks Associated With Third Parties

Authored by Justin V. Shur and Joel M. Melendez*, MoloLamken LLP

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Third parties of every variety serve critical roles in the international marketplace. Companies often rely on third parties to help navigate the business environment, particularly when entering unfamiliar markets. However, the risks under the Foreign Corrupt Practices Act that arise when working with third parties can be significant and are not necessarily intuitive.

The use of third parties is the single most common source of FCPA risk. In the last two years alone, almost 90% of the reported FCPA enforcement actions—including the two largest settlements reached in 2013—involved improper payments made through intermediaries.

This enforcement trend is certain to continue. In fact, DOJ recently opened an investigation into the conduct of third party placement agents retained by financial firms to identify investors and raise funds overseas. And the Chief of the SEC's FCPA Enforcement Unit recently highlighted third-party intermediaries as a high-risk area. Therefore, it is important that companies and their employees understand the FCPA risks associated with the use of third parties and how to mitigate them.

Liability for Third Party Conduct

The FCPA prohibits offering or making a corrupt payment to a foreign official for the purpose of obtaining or retaining business, regardless of whether the payment is made directly or indirectly. Thus, a company and its employees can be held liable for a bribe paid by another person or entity working with or acting on behalf of the company as if the company's employees paid the bribe themselves.

But perhaps the most alarming feature of the FPCA is that a company and its employees can be held liable for a bribe offered or paid by a third party even if they had no actual knowledge of it. Liability can be triggered where a company's employee has a well-founded suspicion of a third-party agent's illicit conduct yet fails to investigate. This is of particular concern as the consequences for violating the FCPA can be severe, including millions of dollars in fines, jail time, disgorgement of profits, private lawsuits, and irreparable damage to a company's reputation.

Tips to Prevent or Mitigate Liability

To reduce the risk of liability, companies need to be vigilant in selecting and monitoring intermediaries that act on their behalf. This means developing and implementing policies, as part of an overall anti-corruption compliance program, to identify, mitigate, and respond to problems associated with the use of third parties. While these policies need to be tailored to a company's particular needs, below are a few suggested practices to mitigate risk in this area.

Risk-Based Due Diligence

Anti-corruption due diligence of third parties is a critical step. This is a risk-based review which varies according to the risks specific to the proposed engagement. At a minimum, companies should understand and assess the business rationale for hiring the third party; the market and industry-specific corruption risks; the type of government interactions likely to be pursued by the third party; and the third party's qualifications, reputation and relationships, if any, with foreign officials. It is also important to ensure the payment terms are appropriate for the market, industry, and services provided. If any red flags surface during the review, the company should endeavor to understand all the relevant facts and circumstances and resolve any issues before proceeding with the relationship.

Contractual Provisions

When negotiating with a third party, companies should consider incorporating FCPA-related representations and warranties into the contract and other relevant documents. While contract negotiations may differ based on the proposed relationship, companies should generally consider provisions that:

- Expressly prohibit any form of bribery or corruption;
- Provide the company with rights to conduct audits of the third party's books and records and require the third party's cooperation with any investigation
- Allow the company to terminate the agreement upon evidence of a violation; and
- Provide the company with indemnification for any liability stemming from the third party's conduct.

Ongoing Monitoring

Once the relationship is in place, companies should undertake some form of ongoing monitoring. The monitoring should reflect the risk assessment of the engagement. This may include, where appropriate, updating due diligence, renewing certificates of compliance with the FCPA and other applicable anti-corruption laws, and exercising audit rights.

It is important for companies to remain vigilant in identifying and investigating possible signs of FCPA violations. If a violation occurs, federal authorities will consider a company's history of finding and fixing problems when deciding what, if any, enforcement action is appropriate. Thus, while no system is foolproof, by taking reasonable steps to prevent, detect, and remediate problems, a company can effectively manage third-party FCPA risks, assist its employees, and protect its business.

**Justin V. Shur is a partner and Joel M. Melendez is an associate in the national litigation boutique, MoloLamken LLP.*