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The New Realities of Third-Party Due Diligence with Limited Resources: The Top Five Newest, Most Effective Strategies for Vetting Your Business Partners, Their Partners and More

Moderated by Martin J. Weinstein

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Overview of Panel

- How Did Third Party Due Diligence Become So Important?
- Recent DOJ Guidance On Due Diligence
- How Has COVID Impacted Due Diligence?
- Panel Discussion
  - Due Diligence and Internal Investigations Pre-COVID
  - Adjustments Based on COVID
  - The Future of Due Diligence

How Did Third Party Due Diligence Become So Important?

- Third Parties are a major source of potential FCPA liability for companies
  - Out of 297 FCPA matters initiated since the passage of the FCPA, 267 of them—or 90%—have included allegations of bribery schemes involving third parties, including agents, consultants, or contractors
  - Most commonly, the implicated third parties are agents, consultants, or brokers (79%); shell companies (17%); and contractors and sub-contractors (4%)

Source: http://fcpa.stanford.edu/statistics-analytics.html?tab=4

How Did Third Party Due Diligence Become So Important?

- FCPA investigations can be incredibly costly to companies
  - According to Stanford, the monthly costs of an investigation to a company can range from under **$100,000** per month to an astonishing **$50,000,000** per month*
  - Only 10% of investigations incur costs of under $100,000/month
  - The average monthly cost of an investigation to a company is **$1,824,304**
  - The average FCPA related investigations lasts **38 months**
- And the ultimate resolution can be costly, even with an NPA/DPA
- The strength of a due diligence program may be a mitigating factor if a company faces DOJ or SEC scrutiny

** Note: The figures on this slide only include resolved investigations with reasonably complete disclosures regarding investigation costs. Source: http://fcpa.stanford.edu/statistics-analytics.html?tab=2*

The 2020 FCPA Guide & ECCP

- Recognizing the crucial role of third parties, the DOJ recently issued new guidance addressing (among other things) third party compliance programs
  - June – revised “Evaluation of Corporate Compliance Programs” (“ECCP”)
    - ECCP provides guidance to DOJ prosecutors on how to evaluate compliance programs in the context of charging and penalty decisions
    - The 2020 ECCP reflects a meaningful shift in the DOJ’s approach to third parties from onboarding to “third party management” for the life of the relationship
  - July – 2020 FCPA Guide
- Both publications reflect a focus on ongoing monitoring and data analytics
  - “Does the company engage in risk management of third parties ***throughout the lifespan of the relationship***, or primarily during the onboarding process?” (ECCP)
- The issuance of the revised FCPA Guide and the revised ECCP during the pandemic and related economic upheaval is not an accident
  - The message: Even (and perhaps especially) in times like these, compliance should not be compromised

"Root Causes" of Third Party Problems

- While 90% of alleged bribery schemes involved third parties, the third parties are not acting in a vacuum: employee complicity is a major concern
  - For example, 13 out of the 17 enforcement actions initiated and resolved so far in 2020 involved bad acts by employees, often through third-party distributors
  - These employees often include senior management (e.g., *In the Matter of The Goldman Sachs Group, Inc.)* and/or high ranking executives (e.g., *U.S. v. Beam Suntory Inc.*)
- How to design a compliance program that accounts for this risk?

Source: http://fcpa.stanford.edu/enforcement-actions.html?page=1

Due Diligence & Investigations in the COVID Era

- How do you continue due diligence efforts, including internal investigations, during COVID?
- How to encourage use of internal reporting mechanisms when you lack face-to-face communications? How to maintain company culture?
  - Whistleblowers may report directly to SEC instead of internally
  - In October 2020, the SEC awarded a whistleblower $114 million, a record-shattering amount the replaced the previous $83 million record (2018 award)
- As part of internal investigations, the pandemic likely necessitates remote interviews of some employees, which raises novel issues
  - Video interviews/platform selection
    - Interviewee may record or screenshot interview; may feign technical difficulties to avoid answering; may communicate with others during the interview
  - Consider the legal implications, particularly in cross-border remote interviews
  - Remote interviews heighten risk that the witness will break privilege/confidentiality
- To postpone or delay investigation?