CLIENT MEMORANDUM

SEC's First FCPA Enforcement Action in 2017 Highlights the Importance of Third Party and Transaction-Related Anticorruption Due Diligence

February 1, 2017

AUTHORS

Martin J. Weinstein | Robert J. Meyer | Jeffrey D. Clark | William J. Stellmach

On January 6, 2017, the SEC announced its first enforcement action of the year, settling Foreign Corrupt Practices Act ("FCPA") charges against Mondelēz International, Inc. ("Mondelēz"), and its subsidiary, Cadbury Limited ("Cadbury"). The charges relate to alleged improper payments made by a third party to Indian government officials on behalf of Cadbury's Indian subsidiary, Mondelēz India Foods Private Limited ("Cadbury India").[1] Without admitting or denying the allegations, Mondelēz agreed to pay a $13 million civil penalty to settle the SEC's claims against it and Cadbury under the FCPA's books and records and internal controls provisions (the "Order").

Background

According to the facts set out in the Order, Cadbury India decided in 2008 to increase production capacity at an existing chocolate factory in Baddi, India. It estimated it would need over 30 different licenses and approvals to do so. In November 2009, Cadbury India decided to obtain outside assistance to secure the licenses and approvals and, in January 2010, employees of Cadbury India met with a local tile and marble vendor ("Agent 1") to discuss retaining Agent 1 to

1 *In re Cadbury Ltd. & Mondelēz Int'l*, Release No. 79753, Jan. 6, 2017, Order Instituting Cease-and Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Cease-and-Desist Orders and a Civil Penalty.

obtain the licenses and approvals and negotiate prices for Agent 1's services. Agent 1 subsequently issued to Cadbury India two quotations with a fee schedule to obtain each license and approval. With no further due diligence, in late January 2010, Cadbury India's management approved the hiring of Agent 1, which began its work shortly thereafter. On February 23, 2010, Cadbury India executed a letter authorizing Agent 1 to represent it before government bodies. Two days after this letter, Agent 1 opened a bank account for its new business, which Agent 1 had formed on January 1, 2010 as a sole proprietorship at the same address as its marble and tile business.

Over the next five months, Agent 1 submitted five invoices totaling over $110,000 to Cadbury India. Each invoice described the services rendered in connection with specific licenses as "providing consultation, arrange statutory/government prescribed formats of applications to be filed for the various statutory clearances, documentation, preparation of files and submitted of the same with govt. authorities." Other than these invoices, Agent 1 did not submit, and Cadbury India did not have, any further documentation to substantiate the services performed by Agent 1. According to the Order, it was employees of Cadbury India, not Agent 1, who prepared the license applications. Cadbury India ultimately paid Agent 1 over $90,000, which Agent 1 withdrew in cash from its bank account after each payment. The Indian government subsequently granted certain of Cadbury India's licensing applications, including one de-amalgamation approval to designate the new unit as legally distinct from the existing entity. Press reports (but not the SEC's Order) indicate that the de-amalgamation approval could have entitled Cadbury India to a $90 million tax exemption.[2]

In early February 2010, while Cadbury India's relationship with Agent 1 was ongoing, Mondelēz (formerly known as Kraft Foods Inc.), an "issuer" with shares listed on the NASDAQ, completed its acquisition of Cadbury, which, although based in London, also was an "issuer" for purposes of the FCPA because it listed American Depository Receipts on the New York Stock Exchange. Without explanation, the Order states that Mondelēz was unable to conduct pre-acquisition anti-corruption due diligence on Cadbury. Instead, after the acquisition was completed, Mondelēz undertook "substantial, risk-based post-acquisition compliance-related due diligence reviews" of Cadbury's foreign subsidiaries, including Cadbury India. The Order states that Mondelēz's post-acquisition due diligence failed to identify Cadbury India's relationship with Agent 1, but does not indicate how the relationship came to light. According to a report of Mondelēz's internal investigation, which was leaked to the Department of Justice, the SEC, and *The Wall Street Journal* in early 2015, the payments to Agent 1 surfaced after a former company contractor reported in October 2010 to a Cadbury security officer that Cadbury India had made improper payments to Indian government officials.[3] The Order states that Mondelēz hired outside counsel and forensic accountants to conduct an internal investigation and ultimately required Cadbury India to sever its relationship with Agent 1.

In describing Cadbury India's missteps, the SEC focused on its failure to conduct due diligence on or monitor the activities of Agent 1, memorialize the relationship in a written contract, and obtain appropriate documentary support to substantiate

---

[2] *See id.*; *SEC Prepares Civil Charges Against Mondelēz in Cadbury Probe*, WSJ, October 13, 2015, available *here*.

[3] *SEC Prepares Civil Charges Against Mondelēz in Cadbury Probe*, WSJ, October 13, 2015.

the services performed. The SEC also faulted Cadbury for not implementing adequate FCPA compliance controls at Cadbury India. The SEC concluded that these failures "created the risk that funds paid to Agent No. 1 could be used for improper or unauthorized purposes." The SEC contended Cadbury India's omissions violated Sections 13(b)(2)(A) and (B) of the Securities Exchange Act of 1934, which require issuers to (A) make and keep books, records, and accounts that accurately and fairly reflect the issuer's transactions and (B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly authorized and recorded to permit the preparation of financial statements and maintain accountability of the issuer's assets. The Order does not specify the records that the SEC contends are inaccurate, focusing instead on the lack of documentation respecting Cadbury India's relationship with and the services rendered by Agent 1.

The Order does not provide any detail respecting how the SEC arrived at the penalty of $13 million. Without elaboration, the SEC credited Mondelēz's post-acquisition due diligence of Cadbury's two dozen foreign subsidiaries, its internal investigation, and its cooperation with the SEC. It also acknowledged that Mondelēz had taken extensive remedial measures with respect to Cadbury, including implementing Mondelēz's global compliance program at Cadbury and conducting a comprehensive review of Cadbury India's use of third parties.

Conclusion

The FCPA enforcement action against Mondelēz and Cadbury highlights the significant FCPA risks that companies doing business internationally can face, including with respect to operations that appear to have little or no connection to the United States. The action reflects the SEC's continued focus on two particularly challenging areas of FCPA compliance: third-party and transaction-related due diligence. U.S. companies and non-U.S. companies with securities traded on U.S. exchanges should adopt written policies and procedures for vetting third-party agents, memorialize such relationships with written contracts that include anticorruption safeguards, and take steps to verify the services provided by third parties. Companies also should monitor the implementation and execution of their anticorruption policies and procedures by local subsidiaries, including through periodic compliance-focused audits.

With respect to mergers and acquisitions, U.S. regulators expect issuers to engage in substantial, risk-based transactional FCPA due diligence (pre-acquisition, unless the circumstances do not permit). The breadth and depth of that diligence should likewise be tailored to the target company and the risks of the acquisition. Relevant considerations include the nature of the target company's business and its reputation within the market; the industry and countries in which the target company operates; the extent to which the target company utilizes third parties as agents, distributors, dealers, and consultants; the extent to which the target company interacts with the local government, such as customers, regulators, representatives of customs, immigration, and tax authorities, the police, and the military; and, the strength of the target company's existing anticorruption compliance policies and internal controls. In addition, companies should include anticorruption representations and warranties in agreements with counterparties and implement any necessary changes to the target company's anticorruption compliance program without delay after the transaction closes.

If you have any questions regarding this memorandum, please contact Martin J. Weinstein (202-303-1122, mweinstein@willkie.com), Robert J. Meyer (202-303-1123, rmeyer@willkie.com), Jeffrey D. Clark (202-303-1139, jdclark@willkie.com), William J. Stellmach (202-303-1130, wstellmach@willkie.com) or the Willkie attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

February 1, 2017

Copyright © 2017 Willkie Farr & Gallagher LLP.

This memorandum is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum may be considered advertising under applicable state laws.