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Common Foreign Corrupt Practices Act Issues

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As our previous posts illustrate, violations of the Foreign Corrupt Practices Act ("FCPA") can carry a hefty cost. Two issues are commonly the impetus for FCPA violations and, practically speaking, pose significant FCPA compliance challenges. Manufacturers which conduct international business should be particularly sensitive to (1) providing gifts, meals, and entertainment to potential and existing customers, and (2) using third-parties abroad.

Gifts, Meals, and Entertainment

Business meetings commonly occur over a meal, and one party may pick up the tab as a business courtesy or marketing expense. Moreover, in many cultures, to forego gift giving would offend the sensibilities of potential customers. Unfortunately, these practices create a "grey area" in which it is difficult to understand what violates the FCPA and what does not.

In short, manufacturers may provide meals and entertainment, if in good faith, without corrupt intent, and with no expectation of a favor. However, as mentioned in our post regarding FCPA defenses, meals, gifts, and entertainment must be (1) directly related to a legitimate business purpose and (2) reasonable in value. Consider the following best practices to avoid providing improper meals, gifts, or entertainment:

- Cash, or its equivalents, should never be provided to government officials.
- Company personnel should always be in attendance at the meal or event.
- Meals, gifts, and entertainment should be provided only in accordance with generally accepted business standards.
- Meals, gifts, and entertainment expenses need to be properly documented and recorded.

Problems with gifts, meals, and entertainment often arise in the context of customer visits. Manufacturers may pay for a customer's legitimate expenses incurred to visit a production facility or a product demonstration. But, if that customer is a "foreign official" as defined by the FCPA, the manufacturer should carefully analyze the scope of expenses incurred. For example, the manufacturer may not cover the expenses of a foreign official's spouse, unless there is a legitimate business reason for doing so (*i.e.* that person is also a decision maker). Similarly, the manufacturer may not pay for the foreign official to spend a few days sightseeing, such as at Disneyland, while that foreign official is in the United States. Moreover, the manufacturer must avoid reimbursing the foreign

official directly for expenses incurred. Instead, the manufacturer should pay the expenses directly to the vendors and service providers.

These practices may complicate logistics, but properly handling gifts, meals, and entertainment will substantially reduce the chances of an FCPA violation.

Third-Parties

FCPA violations are also frequently attributable to the practices of third-party agents. Accordingly, manufacturers should evaluate third-party contractors through a risk-based approach. In other words, a manufacturer need not spend $200,000 on due diligence for a contract of the same value. Below are examples of the types of due diligence to consider when dealing with third-parties:

- Conduct background checks;
- Perform thorough investigations of the third-party and its principals;
- Require the third-party to take FCPA training and certify they have taken such training;
- Require the third-party to certify they will comply with anti-corruption laws and the FCPA;
- Require the third-party to fill out questionnaires, requesting references and detailed information about their business, attached to an FCPA policy;
- Incorporate contractual representations and warranties that (1) the foreign third-party agent is not owned or controlled by a foreign government and (2) no foreign official holds an ownership interest in the third-party agent; and
- Require the third-party agent to annually certify compliance with the FCPA.

Under a risk-based approach, the manufacturer should weigh the anticipated value of the contracts sought via a particular third-party versus the costs of due diligence and compliance efforts. So, when engaging a third-party agent to procure a $50,000 contract, background checks and contractual representations may be sufficient. However, if that same third-party agent procures a $1,000,000 contract, the manufacturer's contract with the third-party agent should require more elaborate due diligence, including a thorough background investigation, training and annual certifications.

Even if a manufacturer is unaware of a third-party's wrongful conduct, that manufacturer could still face FCPA liability. The government may claim the manufacturer turned a blind eye and therefore should be held accountable for the third-party's actions. In past investigations and enforcement actions, prosecutors have pursued manufacturers that failed to identify "red flags," such as the following:

- Excessive commissions charged by the third-party;
- Unreasonably large discounts promised by the third-party;
- Vaguely-described services in third-party consulting agreements;
- Third-party operating in different capacity than that for which it was engaged;
- Third-party related to or closely tied to government officials;
- Third-party became involved at the express request of the foreign official;
- Third-party is a shell corporation incorporated in an offshore jurisdiction; and
- Third-party requests payments to offshore bank accounts.

Regardless, relationships with third-parties should be memorialized in writing and explicitly address the FCPA-related requirements. In addition, payment mechanisms should be transparent and traceable, and commissions/payments should be reasonable and customary.

Of course, FCPA analyses depend on specific facts and circumstances, but manufacturers should be mindful of the foregoing guidelines.

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