Managing the Most Difficult and Most Important Anti-Corruption Due Diligence Projects

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Introductions

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International Anti-Corruption Enforcement Trends

UNITED STATES, UK, NETHERLANDS, FRANCE, BRAZIL

Largest Corporate FCPA Settlements
(Combined Penalties, Disgorgements, and Interest)

Note: Updated through January 7, 2020. Where a matter involved more than one action brought against a particular company and its subsidiaries and affiliates, those actions are "combined" and counted as one. Each company's country of origin is listed below its name.
Continued Enforcement - Trump Administration

Top 10 Largest Resolutions in 2019

Note: Updated through December 12, 2019. These figures reflect amounts recovered by U.S. enforcement authorities and do not include offsets or credits to foreign jurisdictions.

Enforcement Trend:
High-Cost, Multi-Jurisdictional Settlements

Ten Largest Global Resolutions Involving the U.S. FCPA

Note: Updated through August 26, 2019. These statistics count the 10 largest global resolutions by penalty size involving the U.S. FCPA. This chart includes both "coordinated" global settlements, as well as related follow-on settlements.

*This figure incorporates U.S. authorities' analysis of Odebrecht's "ability to pay."

**This figure is subject to change based on offsets for penalties under civil litigation and enforcement in Brazil.

†This figure includes U.K. SFO investigation costs.

‡This figure includes legal fees paid to Nigerian authorities.
Due Diligence Requirements

- **United States**
  - Not statutorily required, but see FCPA’s accounting provisions for publicly-listed companies
  - An essential part of an effective compliance program, and therefore relevant for purposes of applying the Justice Manual and Sentencing Guidelines in determining whether and how to enforce violations

- **France**
  - Sapin II measures when developing a compliance program – Third Party Due Diligence, which must be assessed on another measure – “Risk Mapping”
  - Guidelines are “not legally binding,” but essential to the anti-corruption framework “applicable to all organizations”
  - Third Party Due Diligence Procedures in the French Guidelines are extremely detailed, including recommendations on the content that should be collected, how long due diligence records should be kept, and auditing the due diligence process

- **U.K.**
  - UK Bribery Act: Violation for failure to prevent a bribe
  - Affirmative defense: Adequate procedures

- **Brazil**
  - CGU guidance, for purposes of negotiating leniency agreements

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**Scenarios for Discussion**
SCENARIO #1
Unknown Beneficial Ownership

- The business is conducting third party due diligence on an important third party, drawing intense interest from senior management and board (e.g., JV partner, local partner, sales agent, government relations team). There is also significant time pressure.

- The company requested ultimate beneficial ownership as part of the due diligence, but the target provides information leading to either (a) a BVI entity with no further information; or (b) a Cyprus entity with an individual listed as a shareholder, but this person is believed to be a nominee shareholder.

SCENARIO #2
“Known” Beneficial Owner – Government Official’s Relative

- The business is entering a new market and has identified the best available office space in the capital city where the national headquarters is to be located.

- In the due diligence process, your team has identified a chain of ownership for the landlord and identified three individuals – a child of the president, a cousin of the president, and a longtime friend of the president.
SCENARIO #3
Beneficial Owners – Confirmed Government Officials

- The business has a large tax dispute.
- There is one proposal to retain an individual as an attorney who is the most knowledgeable about these issues.
- In the due diligence process, you learn that she is a part-time elected official in the national parliament.
- At the same time, they also want to obtain a former high-ranking government official as a GR/tax advisor to dispute the tax finding.
- The due diligence confirms that the proposed advisor is also still a current government official in his role as professor at a state-funded university.

SCENARIO #4
Offshore Payments/Fixed Fees

- Scenario A: A customs broker has passed due diligence and has a best-in-class reputation in the relevant region. But during the contract negotiations, the customs broker insists on splitting the payments to entities in the market at issue and offshore, for tax reasons.
- Scenario B: A law firm is being retained to disclose and resolve regulatory issues after the discovery of hazardous materials being mishandled. The firm has a good reputation and a decent resume for the work. The contract calls for a fixed fee of $40,000. Given the urgency after the discovery, the engagement is being handled outside the normal procurement procedures.
- Scenario C: Your business is conducting due diligence on a start-up company that is growing quickly. The target company has engaged a GR consultant for numerous issues across the Middle East region, using a contract that provides compensation based on success fees.
SCENARIO #5
Contract Renegotiations

- Scenario A: Renegotiating a Commission
  - Sales agent is retained, and due diligence was easy – the sales agent is certified by an international organization and has recommendations from numerous other household name companies with mature compliance programs.
  - The original contract calls for a commission within the range set by your company as acceptable.
  - Months later, you learn that the business is renegotiating the commission, through a contract addendum, adding several percentage points to the commission.

- Scenario B: Renegotiating Scope of Work
  - A law firm is retained to advise on a government dispute. The due diligence form indicates that the engagement is limited to counseling the business and that there will not be any interactions with the government.
  - As the dispute escalates, the business would like to engage the law firm on behalf of the business in direct negotiations with the government.

SCENARIO #6
“Other” Issues

- The business is examining a potential JV partner for entering a new market, with knowledge in the market.
- The UBOs are clear, the JV partner’s track record is well-established, the entity is growing and healthy.
- However, the UBO holding the largest stake (but still minority shareholder) has had numerous issues – personal financial problems and sexual assault allegations are pending in court.
SCENARIO #7
Selling Shares in Joint Venture

• The business is proposing to sell additional shares in a venture-specific local company to the business partner, which is a state-owned entity.
• The business proposes to use the same share price that was used three years ago, when the business partner initially acquired a stake.
• Under the current due diligence policy, this transaction and the business partner are not subject to due diligence. You know about it from conversations with your colleagues.

SCENARIO #8
Required Local Partner

• The business is expanding into a new market.
• As part of the market entry, the business is required to retain two local companies.
  – One local partner is a locally-owned company that will partner with the business to meet local content requirements for government contracts.
  – The other local partner is a distributor appointed by a multi-national supplier under the global contract your company has concluded with the multi-national supplier.
Conclusion

- The use of technology in conducting due diligence and ongoing monitoring for third parties
- Regional differences to keep in mind during due diligence processes
  - Middle East
  - Sub-Saharan Africa
  - China/East Asia
  - Indian subcontinent
  - Europe-Caucasus-Asia
  - The Americas
- Other concluding thoughts