

# Use Caution: Foreign Agents Ahead

*Per the FCPA, third-party compliance with anti-bribery provisions is under scrutiny*

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In a recent case, a four-company joint venture used two agents – a British lawyer and a Japanese trading company – to bribe Nigerian government officials in order to win natural gas construction projects. Together, the four multinational corporations and the Japanese trading company paid a combined \$1.7 billion in civil and criminal sanctions on their bribery scheme. Many companies doing business in a foreign country retain a local individual or company to help them conduct business. But bribes paid by a third party do not eliminate the potential for criminal or civil liability under the U.S. Foreign Corrupt Practices Act (FCPA).<sup>1</sup>

The FCPA includes both anti-bribery and accounting provisions. The anti-bribery provisions prohibit bribery of foreign government or political officials for the purpose of retaining business. The accounting provisions require SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls. The FCPA expressly prohibits corrupt payments made through third parties or intermediaries. Specifically, the act covers payments made to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly.”<sup>2</sup>

The U.S. Congress anticipated the use of third-party agents in bribery schemes and as such defined the term “knowing” in a way that prevents individuals and businesses from avoiding liability. Congress has made clear that it wants to impose liability not only on those with actual knowledge of wrongdoing but those who purposely avoid actual knowledge. Liability attaches when a company or its employees authorize, or have knowledge of, corrupt payments by third parties, including in these roles:

- Consultants
- Agents or brokers
- Distributors
- Vendors
- Charities
- Foreign subsidiaries
- Business partners or joint ventures

Examples of red flags associated with third parties include these situations:

- A region known for corrupt activities
- Requests made for payments in cash
- Excessive commissions paid to third-party agents or consultants
- A consulting agreement containing vaguely described services
- A third party is part of the transaction at the request of a foreign official
- A third party requests payment to an offshore bank account
- Overinvoicing or underinvoicing is present
- Requests made for substantial upfront payments

## Reduce Risk

Businesses may reduce the FCPA risks associated with third-party agents by implementing an effective compliance program, which includes due diligence of any prospective foreign agents. Businesses, when conducting their FCPA due diligence, must also keep the following questions in mind:

- Does the company have enough resources allocated to performing such due diligence?
- How are risks examined at the vendor, agent or third-party level?
- Has the company recently merged with a company that does business internationally?

Risk-based due diligence is especially important with third parties. Companies should understand the qualifications and associations of third-party partners, including any relationship with foreign officials. Companies should also have an understanding for the need and the role of the third party in a particular transaction and ensure that contract terms describe the services to be performed. Additionally, payment terms and how such payments terms compare with those typically made in an industry, as well as the timing of a third party’s introduction to a business, are important factors to consider.

Businesses must have an anti-corruption risk assessment that includes testing for bribes made by agents or third parties. Data analysis can often be used to detect these transactions. Examples of such testing and monitoring can include the following activities:

- Identifying transactions to entities or individuals in high-risk countries
- Analyzing commissions paid to third-party agents
- Analyzing unreasonably large discounts paid to third-party distributors
- Identifying transactions that involve such descriptions as “cash” or “gift”
- Tracing payments to offshore bank accounts
- Comparing invoice amounts to purchase order amounts
- Testing high-risk activities, such as payments to agents or vendors

## Potential Penalties

The failure to prevent and detect bribery can result in large penalties and prison time. Companies have an obligation to investigate red flags for bribery by either conducting their own investigation or hiring an independent third party, such as a forensic accountant. Forensic accountants are experienced in conducting interviews and testing transactions and electronic data to determine potential outliers and red flags.

The DOJ and SEC also recommend that companies inform third parties of their compliance program and their commitment to lawful business practices and, where appropriate, whether they have sought assurances from third parties or reciprocal commitments. The consequences for not doing so, for both companies and agents or third parties, can be potentially severe, as can be seen most notably in the Petrobras, Walmart and FIFA cases.

To review the footnotes to this article, visit <http://www.metrocorpocounsel.com>



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