

Foreign Agents, Partners & Intermediaries: You Can Live With Them , but You Can't Live Without Them

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The Foreign Corrupt Practices Act (“FCPA”)

Anti-bribery provision: Makes it unlawful to offer or make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.

Books & Records provision: Requires corporations to:

- make and keep books and records that accurately reflect the transactions of the corporation; and
- to devise and maintain an adequate system of internal accounting controls.



Anti-Bribery Provision – Third Party Relationships

- The FCPA prohibits **knowingly making corrupt payments through third-parties, agents, and intermediaries**, including subsidiaries and joint venture partners.
 - “*Knowing*” includes conscious disregard, willful blindness, and deliberate ignorance.
 - “Knowledge” exists where one is aware of a *high probability* a bribe would be offered or paid.
- Requires “*due diligence*” in dealing with third-parties and knowledge of *red-flag* issues.

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FCPA Penalties

- Anti-Bribery Violations:
 - Individuals: Up to 5 years’ imprisonment and a fine of up to \$250,000 (or twice the benefit defendant sought to obtain).
 - Companies: fines of up to \$2 million per violation.
- Books & Records Violations:
 - Individuals: Up to 20 years’ imprisonment and a fine of up to \$5 million.
 - Companies: Fines of up to \$25 million per violation.
- Collateral Consequences:
 - Debarment from government contracts.
 - Ineligible to obtain export licenses.
 - Private cause of action for treble damages.

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Can't Live With Them . . .

- Companies face liability for third parties acting on their behalf
- 90%+ of reported FCPA cases involve third party intermediaries
- Recent Examples Involving Third Parties
 - Nortek, Inc. (June 3, 2016): Declination Per FCPA Pilot Program
 - Akamai Technologies, Inc. (June 6, 2016): Declination Per FCPA Pilot Program
 - Johnson Controls, Inc. (June 21, 2016): Declination Per FCPA Pilot Program
 - BK Medical ApS (June 21, 2016): Non-Prosecution Agreement
 - LATAM Airlines Group S.A. (July 26, 2016): Deferred Prosecution Agreement

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Can't Live Without Them!

- Use of third party intermediaries is a business necessity
- But CEB 2015 Third-Party Research suggests compliance challenges:
 - Low maturity of third party risk management
 - 40% of total compliance risk attributed to third parties
 - Median organization works with 5,000 third parties
 - Average of 17 business days to complete due diligence
 - Small minority of third parties are subject to compliance due diligence (1-25%)

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Discussion Scenarios

1 Only Show in Town

2 Mitigating Measures

3 Who's on First?

4 How Much Diligence is Enough?

5 Corruption History v. Mere Politics

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Only Show in Town

SCENARIO:

- Your company is bidding on a public contract in a high-risk emerging market.
- The law on public procurement consists of a single statute establishing a complex public bidding process plus a variety of government decrees, circulars, and official guidance letters.
- Due to the detailed and complex legal process, you determine the company needs assistance navigating the public procurement process.
- A local contact familiar with the process strongly recommends a specific consultant to help avoid problems commonly encountered by foreign companies.
- The local consultant seems established, has a reputation for “getting things done”, and appears to have a good relationship with the procuring agency’s procurement director.
- You have been unable to find any adverse information in public database or media searches.
- You cannot identify any other recommended consultants to use in that country.

Any concerns or red flags?

Recommendations to get comfortable?

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Mitigating Measures

SCENARIO:

- Your screening of a potential new reseller discovers media reports of an ongoing government corruption investigation involving a 15% owner of the reseller company.
- This 15% minority owner had other business dealings with the local government through a separate company, and is alleged to have conspired with government officials to purchase prime public land at below-market values.
- In addition to being a minority shareholder, the 15% owner is also one of the corporate directors of the reseller company.
- You are not sure what role that 15% owner has in directing or overseeing the reseller's business.

What further due diligence would be prudent to do, and on whom?

Are there any mitigating measures that might get you comfortable with doing business with the reseller company?

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Who's on First?

SCENARIO:

- You have been offered a deal in an emerging market with a joint venture company consisting of JV Partner #1 (the operating partner) and JV Partner #2 (the operating partner's funder).
- JV Partner #2 is a venture capitalist that JV Partner #1 (the operating partner) has declined to give you further information on, claiming they are a passive investor who insists on anonymity.
- Amounts owed to you by the joint venture will be paid to your U.S.-based bank through a special fund created by JV Partner #2 in their own local bank.
- JV Partner #2 will also directly pay other companies involved in the deal any amounts owed to them by the joint venture.
- JV Partner #1 (the operating partner) explains that JV Partner #2's anonymity and this payment arrangement are conditions of the funder's investment in the joint venture.
- No adverse information has been discovered on any of the identified companies, although this emerging market has a high risk CPI rating per Transparency International.

Do you need to know the full identify of JV Partner #2 (the funder)?

What other controls or measures, if any, can you take if you do not know who the funder is?

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How Much Diligence Is Enough?

SCENARIO:

- You have a potential distribution deal with a local partner in a high-risk emerging market where local law requires foreign businesses to partner with a local company.
- You have no experience with the potential new partner, so decide to conduct due diligence.
- Public database and media screening reveals commercial disputes by the partner's shareholders in other countries involving claims of counterfeiting by one claimant and breach of contract by another claimant.
- Enhanced due diligence reveals a complex ownership structure, with no single person or company owning the majority of the potential partner company.
- You learn that the potential partner company was only formed in this emerging market a year ago and does not have an established business history in this market.
- You learn that the potential partner has a local office in the country, a legal requirement for this type of business venture.

Is further “boots on the ground” diligence appropriate?

If so, what type of “boots on the ground” diligence would you recommend?

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Corruption History v. Mere Politics

SCENARIO:

- You discover that the principal of your strategic partner in a certain emerging market was convicted of “corruption against the people” and tax fraud several years ago.
- Your partner has a long history of conducting business with political opponents of the country's ruling party and claims the charges and conviction were politically motivated.
- The country's ruling party has been known to trump up charges against political opponents, but this country also is also considered high-risk for corruption.
- Your business leaders insist that the partner is trustworthy and is simply the victim of political fighting.

What can you do to help assess whether the past convictions were politically motivated or are evidence of actual corruption?

How can you manage situations where the local business leaders do not agree with your risk assessment? Who makes the final decision?

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Automating Third Party Due Diligence



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COMMENTS OR QUESTIONS?

