

Recent FCPA Prosecutions and the DOJ's Enforcement Plan Highlight Third-Party Intermediary Exposures

Part One of a Two-Part Article

By Mehreen Zaman

Companies doing business abroad often partner with third-party intermediaries — such as consultants, agents, brokers or distributors — to help navigate the challenges of language, local culture and bureaucracy, market structure, and compliance with local laws. While partnership abroad may be essential to business success, it creates significant risk under the Foreign Corrupt Practices Act (FCPA), the government's primary weapon against bribery of foreign officials. Recent FCPA prosecutions by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) illustrate the risks for companies that fail to adequately vet and monitor third-party intermediaries. As illustrated by the DOJ's April 2016 FCPA Enforcement Plan, efforts to prosecute FCPA violations are intensifying.

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FCPA BASICS

Under the FCPA's anti-bribery provisions, it is illegal for a domestic business or a publicly traded company, and its employees or agents, to offer or provide, either directly or indirectly, anything of value to a foreign government official for the purpose of obtaining or retaining business. Under the FCPA's accounting provisions, publicly traded companies must maintain accurate books and records with sufficient internal controls, and those that fail to do so are subject to civil and possibly criminal liability.

Pursuant to the FCPA's anti-bribery provision, a company can be held liable for a third party's actions when those actions are taken on behalf of the company. Per the DOJ and SEC's FCPA Resource Guide: "The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability." The FCPA prohibits 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," to a foreign official. "Knowing" does not require the company to have actual knowledge that the payment will be used improperly. This element

is satisfied if the company is aware of a "high probability" or "substantial certainty" that the payment will be used improperly, or by a conscious disregard that the payment will be used improperly. 15 U.S.C. § 78dd-1f(2)(A).

RECENT FCPA PROSECUTIONS INVOLVING THIRD-PARTY INTERMEDIARIES

In November 2015, the DOJ announced the largest criminal foreign bribery fine it has collected to date — \$772 million — in an FCPA prosecution against Alstom Holdings S.A., a French power and transportation company. Alstom pleaded guilty to FCPA violations regarding power, grid and transportation projects for state-owned entities. Seventy-five million dollars in alleged bribes helped the company secure more than \$4 billion in projects.

As part of the bribery scheme, Alstom's subsidiaries allegedly hired third-party "consultants," who were ostensibly to perform legitimate consulting services. Allegedly, these consultants paid bribes to foreign officials to influence the awarding of contracts. Alstom's guilty plea reflected a parent company's culpability for the FCPA violations of its subsidiaries' third-party

intermediaries. See *U.S. v. Alstom S.A.*, 3:14-cr-00246-JBA, Doc. 5 (D. Conn. Dec. 22, 2014).

Individual executives of a parent company can also be ensnared in the FCPA violations of third-party intermediaries. In *U.S. v. Hoskins*, 73 F. Supp. 3d 154 (D. Conn. 2014), the government charged a former Senior Vice President at Alstom with FCPA violations in connection with his alleged participation in a bribery scheme by an Alstom subsidiary. Allegedly, the executive approved the selection of, and authorized payments to, third-party consultants retained by the subsidiary to make illegal payments to Indonesian government officials.

In his motion to dismiss the indictment, the defendant argued that, as an employee of the parent company — a French company that was not a “domestic” business for purposes of the FCPA’s anti-bribery prohibition — he was not an “agent” of the domestic subsidiary that hired the bribe-making third party. The court denied the defendant’s motion, holding that, notwithstanding his official employment with the parent company, the question of whether he nevertheless acted as an agent for the domestic subsidiary for purposes of the FCPA was a question of fact for the jury to decide. Although it remains to be seen how this case will play out — trial is currently set for later this year — it is a sobering indicator of the government’s willingness to bring criminal charges against executives of parent companies whose subsidiaries violate the FCPA.

Avon Products, Inc., was also recently held responsible for the misdeeds of its subsidiary and the third-party consultant hired by the subsidiary. In December 2014, Avon entered into a deferred prosecution agreement and agreed to pay criminal and regulatory penalties in ex-

cess of \$135 million, all related to an alleged scheme by its Chinese subsidiary to bribe government officials. The Chinese subsidiary pleaded guilty to conspiring to violate the FCPA’s accounting provisions.

Pertinently, Avon’s Chinese subsidiary hired a third-party “consulting” company, supposedly to provide legitimate crisis management and government relations services. Allegedly, this consulting company — which was not vetted pursuant to Avon’s Code of Conduct — made improper payments to Chinese officials. Although Avon neither approved the bribes nor had contemporaneous knowledge of them, the government claimed that when the company eventually learned of these payments, it failed to halt the practice and discipline the culpable individuals, and took steps to conceal the concerns raised about the accuracy of the subsidiary’s book and records. See *U.S. v. Avon Products, Inc.*, 1:14-cr-00828-GBD, Doc. 4 (S.D.N.Y. Dec. 17, 2014).

In December 2013, Alfred C. Toepfer International Ukraine Ltd. (ACTI Ukraine), a subsidiary of Archer Daniels Midland Company (ADM), pleaded guilty to conspiring to violate the anti-bribery provisions of the FCPA. ACTI Ukraine, a trader and seller of commodities, allegedly paid \$22 million in bribes to government officials in the Ukraine in order to gain \$100 million in tax refunds, by hiring local vendors to pass the bribes on to government officials.

Although there was no allegation that the parent company knew about or blessed the third party’s bribes, ADM entered into a non-prosecution agreement with the government in connection with its failure to implement sufficient policies and procedures to prevent the FCPA violations. ADM also agreed to disgorge \$36.5 million to resolve a parallel SEC investigation, bringing the total amount

of criminal and regulatory penalties to more than \$54 million. See *U.S. v. Alfred C. Toepfer International (Ukraine) Ltd.*, 2:13-cr-20062-MPM-DGB, Doc. 9 (C.D. Ill. Dec. 23, 2013).

Finally, a recent FCPA action filed by the SEC involved the South African subsidiary of Hitachi, a Japanese company, which sought government contracts to build two power stations. In order to gain preferential bidding status, the subsidiary allegedly paid “success fees” to a third party “consulting” company that actually fronted for South Africa’s ruling political party. Hitachi’s subsidiary inaccurately recorded these payments as “consulting fees” despite the fact they were allegedly paid to have political influence exerted on its behalf. The subsidiary’s inaccurate accounting rolled up into the financial statements of the parent Hitachi, thus creating an FCPA “records” case. See *SEC v. Hitachi, Ltd.*, 2015 U.S. Dist. LEXIS 158428 (D.D.C. Nov. 24, 2015). The SEC did not allege that Hitachi was actually aware, or approved, of the payments that its subsidiary made.

Hitachi settled the matter by entering a consent decree that included a \$19 million civil fine. In its press release announcing the resolution, the SEC stated that “Hitachi’s lax internal control environment enabled its subsidiary to pay millions of dollars to a politically-connected front company for the ANC to win contracts with the South African government.”

Next month we will look at the DOJ’s new pilot FCPA enforcement plan, and at some measures that companies can take to mitigate the risk of running afoul of the FCPA through third parties.

