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Managing Intermediary Risk under the FCPA

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What is an Intermediary?

You are an intermediary if you are an:

- Agent
- Distributor
- Joint Venture Partner
- Supplier
- Subcontractor
- Professional Advisor
- Acquisition Target

You have an intermediary if:

- part of your business model relies on sales agents.
- local law requires your business to use a distributor.
- you have a local representative who is helping you to establish a presence prior to setting up.
- someone is helping you apply for permits or qualify products for sale.
- you have a customs agent or a freight forwarder.
- you have a lawyer or an accountant.

You cannot do through an intermediary what you cannot do by yourself

- FCPA Anti-Bribery Provision: Unlawful to bribe (or offer to bribe) foreign officials for the purpose of obtaining or retaining business, or for directing business to any person, or to influence an official act or decision.
- FCPA prohibits not only direct payments to foreign officials, but any payment to a third party while knowing that all or a portion of the payment will go **directly or indirectly** to a foreign official.



When you know, you know

- FCPA prohibits not only direct payments to foreign officials, but any payment to a third party while **knowing** that all or a portion of the payment will go directly or indirectly to a foreign official.

Knowledge includes:

- Actual knowledge
- Awareness or suspicion that an event is likely to occur
- Cannot avoid knowledge of corrupt acts through willful blindness



If you are a principal: Non-Compliance is bad for business

Company	Violation	Combined Fine
GSK	Company colluded with travel agencies to funnel money to government doctors using fraudulent invoices.	Ongoing
Parker Drilling	Local sales agent without significant industry qualifications used to make corrupt payments.	\$15.85 million
Ralph Lauren	Customs clearance agency used to make corrupt payments.	\$1.6 million
Total S.A.	<p>Corrupt payments made through a Swiss bank employee and a British Virgin Islands company that was directed by an Iranian government official.</p> <p><i>Total failed to maintain an adequate system for the selection and approval of consultants; failed to conduct adequate audits of payments to consultants; performed no due diligence on the consultants; lacked controls to provide reasonable assurance that the consulting agreements complied with applicable laws.</i></p>	\$398.2 million

If you are a principal: Non-Compliance is bad for business

Company	Violation	Combined Fine
Stryker	Company used outside counsel to pay bribes by invoicing the Stryker for legal services which were never rendered.	\$13.2 million
Weatherford	<ul style="list-style-type: none">▪ Weatherford's local joint venture partner did not contribute capital, expertise or labour to the joint venture, and Weatherford did not investigate why the local entities were involved in the joint venture. The sole purpose of their involvement was to direct hundreds of thousands of dollars in payments to foreign officials via payment of "dividends".▪ Weatherford also provided bribes for a renewal of an oil services contract via a consulting contract with a freight forwarding agent.▪ Weatherford gave volume discounts to a distributor to create a \$15 million fund for bribe payments.	\$152 million

How much will an FCPA violation cost you?

- Corporations

- \$2 million or more (if the gain (fines can be tens of millions of dollars))
- Fines up to 10% of the corporation's gross revenue
- Disgorgement of the corporation's profits
- Expenses of the corporation
- Terrible reputational damage

- Individuals

- Up to 5 years (in recent cases, jail terms have been even higher due to multiple violations)
- Up to US\$100,000 fine for each violation



the gain (fines can be tens of millions of dollars))

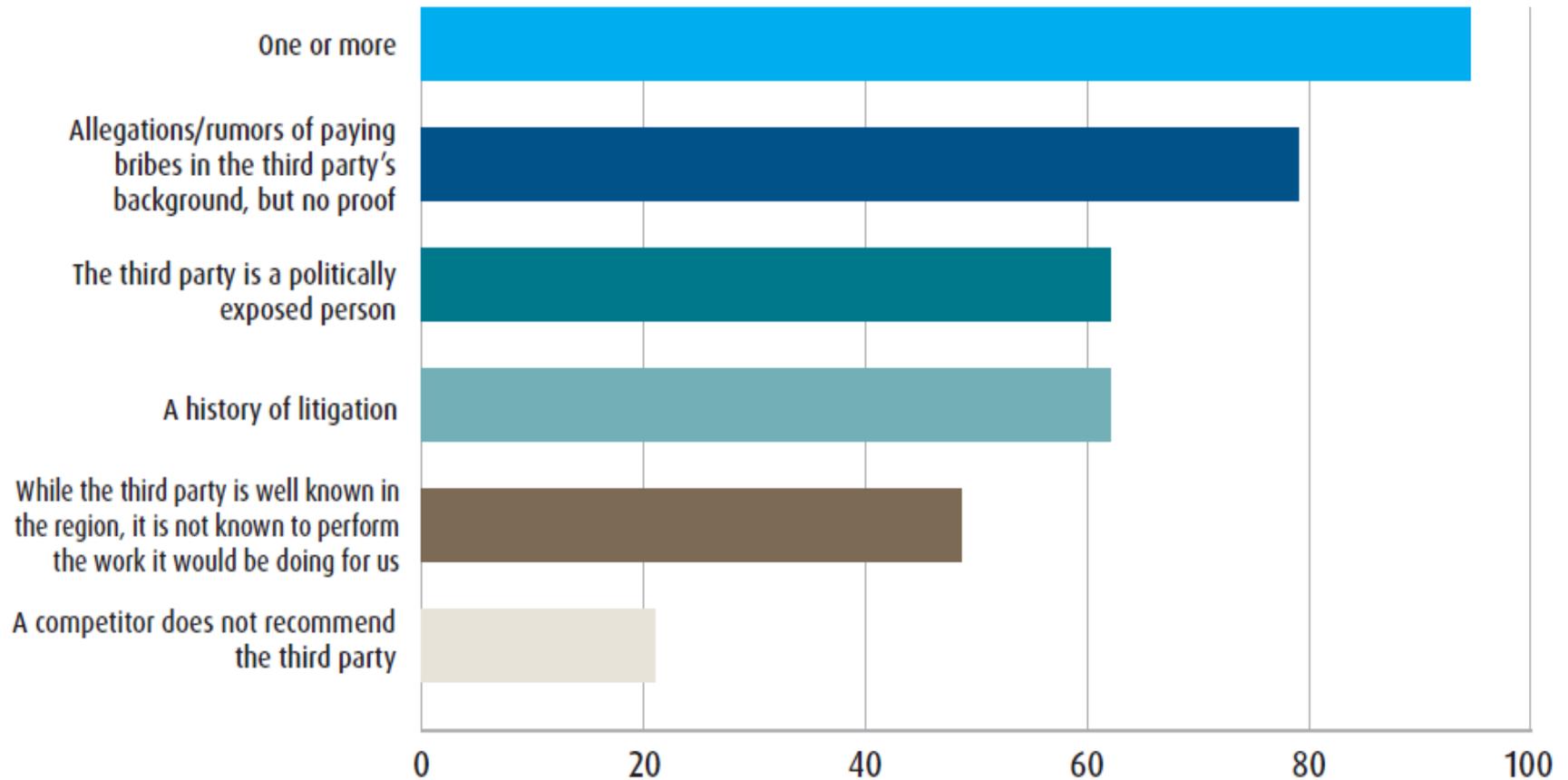
accounting provisions

less



in recent cases, jail terms

Which factors would influence your decision not to work with a particular third party?



Source: 2013 Anti-Bribery and Corruption Benchmarking Report

(Published by Kroll & Compliance Week)

If you are an intermediary: Compliance is good for business

- Set yourself apart from the competition:

15% of respondents surveyed said their companies have pulled out of acquisition deals because of possible corruption at the target.

AlixPartners Annual Global Anti-Corruption Survey, First Quarter 2014

- Demonstrates credibility and projects strength.
- Opportunity to develop a long term business relationship.

Risk Management

- If you are not managing your third parties, you are vulnerable:

Less than half (43%) of respondents surveyed said they regularly conduct due diligence on third party agents.

AlixPartners Annual Global Anti-Corruption Survey, First Quarter 2014

- Kara Brockmeyer, Chief of the SEC's FCPA Unit: *more than 60% of the SEC's cases in the last two years involved third party intermediaries.*

If you are a principal: Plan, Do, Review

- Business Justification
- Risk Assessment
- Due Diligence
- Contract
- Maintenance

If you are a principal: Business Justification and Risk Assessment

- Business Justification
 - Why do we need a third party?
 - Why do we need this third party?
- Risk Assessment
 - Who is this third party?
 - Can they do what they say they will do?

If you are a principal: Due Diligence

- Tailor level of due diligence to risk assessment
- Identify red flags and make recommendations based on results of due diligence review

Red Flags

•Background

- It does business in a country where there is widespread corruption or has a history of bribes and kickbacks.
- It does business in an industry where there is widespread corruption or has a history of bribes and kickbacks.
- It has been involved with any allegation, investigation or prosecution of corruption.
- Its service has been terminated by another under suspicious or inadequately explained circumstances.
- It has a history or reputation of making improper payments.

•Business model

- It does not have an office or any employees.
- It does not have significant experience.
- It insists on unusual or suspicious contracting procedures.
- It insists on keeping its identity confidential or refuses to divulge the identity of its owners.

•Money matters

- It requests payment in a jurisdiction outside its home country that has no relationship to the transaction or the entities involved with the transaction.
- It requests an unusual advance payment.
- It submits inflated or inaccurate invoices.
- Its fees or commission is unusually high.
- It requests cash or bearer instrument payments or other unusual payment mechanism.

•Connection with Public Officials

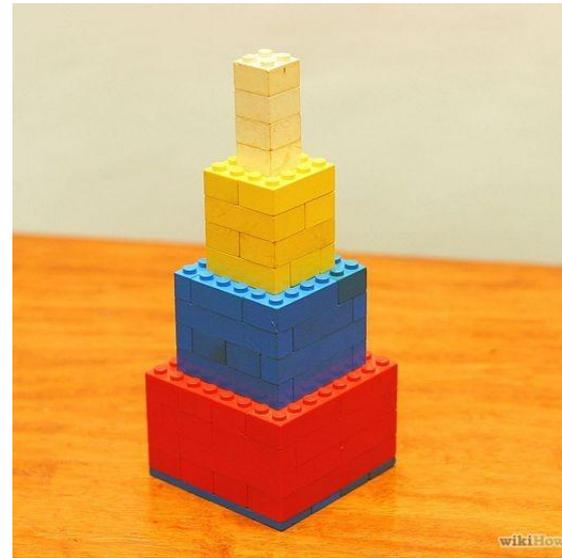
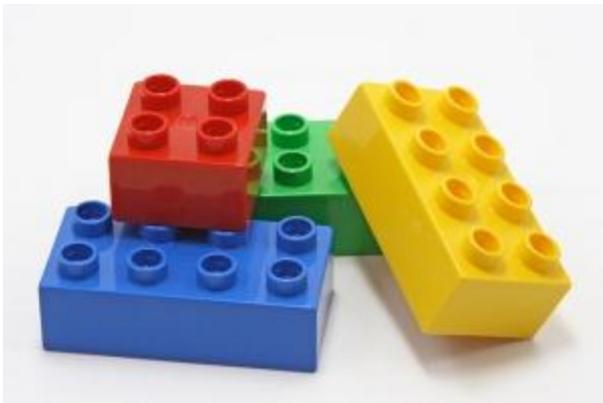
- It has a family or business relationship with Public Officials.
- It relies heavily on its contacts with Public Officials in its business.
- A government client or State-owned or controlled entity recommends or insists on the use of this third party.

If you are a principal: Contract

- Clear description of the services that will be provided.
- Payment terms
- Anti-corruption representations
- Indemnification
- Right to terminate the contract in case of breach of an anti-corruption law
- Training and Certification

If you are a principal: Maintenance

- Manage each relationship after the contract is signed
- Integrate relationship management into your overall corporate compliance program



If you are an intermediary:

- Be prepared
- Be proactive

Case study – Kickback Konsulting

You are hoping to conclude a large deal with a Corruptistani state owned hospital. The hospital approaches your sales team and suggests you hire Kickback Konsulting Co. to assist with the deal.

Your sales team will not be personally involved in the deal, but knows that Kickback plans to fly the hospital officials in charge of the deal negotiation to a resort for meetings and an all-expense paid three day golfing and gambling holiday.

You do some research and discover that Kickback was formed a year ago, and has only two employees. Neither employee has any health-care related experience.

What should you do?

Case study – Barkersons

You are a consulting company in Corruptistan retained by an offshore animal feed company, Barkersons, to obtain a product registration certificate for a particular brand of cat food that will be imported into Corruptistan. Barkersons tells you that they are concerned about limiting their FCPA risks in Corruptistan and ask you to provide more information about your compliance programs.

How can you demonstrate to Barkersons that you have a strong compliance program at your consultancy?



Final Thoughts

Take Action: If you could go back to your office this afternoon and do one thing to improve FCPA compliance in your department, what would it be?