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Big Brother is Watching: Increasing Worldwide Vigilance Under the Foreign Corrupt Practices Act

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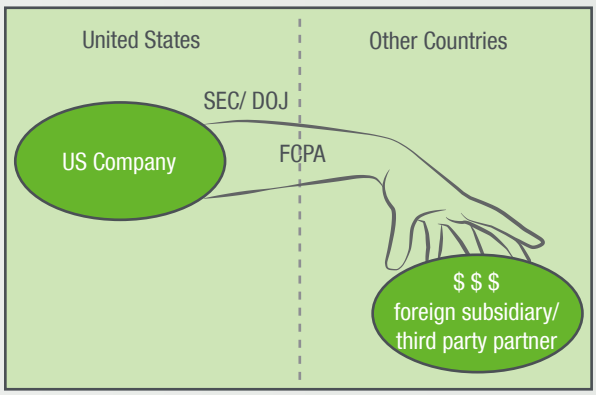
In August 2015, the Securities and Exchange Commission (US) imposed a fine of USD 14.8 million on The Bank of New York Mellon Corporation (BNY Mellon) in order to settle charges alleging violation of the Foreign Corrupt Practices Act (FCPA). According to the SEC, BNY Mellon violated the FCPA when it hired relatives of foreign government officials as interns in exchange for doing business with a foreign wealth fund. The SEC's argument was that BNY Mellon did not follow their usual internal guidelines for hiring interns, such as evaluating and hiring the interns through BNY Mellon's established internship program, interviewing the interns and doing a legal and compliance background check of potential violations prior to hiring them.

The FCPA consists of two components: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions prohibit payments, offers, promises to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, paid or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of such official's lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person. The accounting provisions, which work in tandem with the bribery provisions, require that a company keep accurate books and records as well as devise and maintain an adequate system of internal accounting.

This recent action by the SEC against BNY Mellon is part of an increasing trend by the SEC to pursue alleged violations and impose significant fines on companies as well as individuals. In doing so, the SEC has increased its efforts to pursue violations on a worldwide basis. In the past few years, the SEC has sought to enforce the FCPA not only against US companies but also foreign subsidiaries of US companies. In addition, the SEC has also prosecuted foreign third party partners and intermediaries engaged by US companies, such as consultants, agents and other professional service providers. As a result, companies that are active internationally and not only in the US should also take particular care when monitoring their foreign subsidiaries and hiring third party partners and intermediaries.



Please note that the FCPA does not make a parent corporation explicitly liable for violations by a foreign subsidiary. However, the SEC and the US Department of Justice (DOJ) will use other legal theories in order to find a parent company liable for its subsidiary's violations under the FCPA. Legal theories that may be applied by the SEC and DOJ are the FCPA accounting provisions or respondeat superior, a doctrine that allows the illegal activities of an employee, who acted within the scope of his duties and for the benefit of the corporation, to be attributed to its employer. It is therefore vital that a subsidiary undertake the same compliance measures as its parent company in order to minimize the risk of the parent company being held liable for its foreign subsidiary's violations of the FCPA.

When making a decision to hire a third party partner or intermediary to conduct business on behalf of a company, that is subject to the FCPA, outside of the US, such company (as well as any foreign subsidiary) should undertake a thorough risk-based due diligence of the third party partner/intermediary. This due diligence should ideally be undertaken in accordance with the company's policy that provides guidelines related to anti-bribery and anti-corruption laws, including the

FCPA. In fact, the DOJ and the SEC stated in their FCPA guidance document published in 2012, A Resource Guide to the U.S. Foreign Corrupt Practices Act, that a company's anti-bribery and anti-corruption policy should form an important part of such company's larger corporate compliance program to prevent, identify, confront, remedy and report violations.

A company's anti-bribery and anti-corruption policy may vary based on the industry, country, size and nature of the transaction as well as the parties' previous business relationship. However, the SEC and DOJ have pointed out that the following guiding principles should generally apply when conducting a due diligence:

- The company should undertake a background check of its third party partners/intermediaries by researching and understanding the qualifications, expertise and experience of its third party partners/intermediaries.
- The past and current associations of such third party partners/intermediaries with foreign officials should be researched.
- The company should review and understand the business rationale of the transaction with the third party partner/intermediary.
- The role of and need for the third party partner/intermediary should be clarified.
- The contract terms should specifically describe the services to be provided by the third party partner/intermediary.
- Payment terms should be considered as well as compared to typical terms in the industry and country.
- The timing of the third party partner's introduction to the business should be taken into account.
- The company should monitor and document the work performance of its third party partner/intermediary and whether the payments to the third party partner/intermediary are reasonable and commensurate with the work provided. In connection therewith, all invoices and expenses of the third party partner/intermediary should be carefully reviewed.
- The company should also monitor its relationships with all of its third party partners/intermediaries on an ongoing basis. This may include due diligence updates, auditing of documents, training of employees and annual compliance certificates by the third party partner/intermediary.
- If any red flags are raised during the due diligence or ongoing monitoring, the company should increase its level of scrutiny.
- The company should also inform third parties of its compliance program and, if appropriate, seek assurances from such third parties confirming that it also has a similar commitment to compliance.

Please note that once information has been uncovered that activities or payments may have been undertaken or will be undertaken in violation of the FCPA, a company cannot turn a blind eye and willfully disregard such information. In fact, knowledge of such violation will be implied if there is a high probability that circumstances violate or could possibly violate the FCPA (A Resource Guide to the U.S. Foreign Corrupt Practices Act, page 22). A company and its employees will not be allowed to avoid liability by putting their "head in the sand".

As stated above, a company's anti-bribery and anti-corruption policy is only part of such company's total compliance program. According to the SEC and the DOJ, the compliance program should also include an internal mechanism that allows employees to report violations, including any suspicion thereof, of the company's anti-bribery and anti-corruption policy on a confidential basis and without retaliation. Once an actual violation or suspicion of a violation has been reported, an efficient and reliable investigative process should be triggered in order to determine which measures are to be taken in this instance. Employees should also undergo appropriate training to familiarize themselves with the company's policies/program and to recognize any red flags.

Finally, it should be ensured that the compliance program, including the anti-bribery and anti-corruption policy and due diligence, are continuously tested, updated and adapted to the changing circumstances of the company's business and industry. Companies should be on the lookout proactively for new risk areas and seek continuous improvements and sustainability.

It should be pointed out that maintaining and enforcing a compliance program will not shield a company completely from liability, enforcement and penalties for violations of the FCPA. However, a compliance program will have a mitigating effect for the SEC and the DOJ when considering whether to pursue a company or individual for violations under the FCPA, and when deciding on whether to impose penalties, and if so, the degree thereof. In summary, a company's FCPA compliance program functions as an important, if not essential, risk management tool.

The BNY Mellon case proves that internal procedures and documentation are key. We would be pleased to assist your firm in preparing and implementing an adequate and effective compliance program and/or anti-bribery and anti-corruption policy.

be in touch: If you have any questions, please do not hesitate to contact us!

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