THIRD PARTY DUE DILIGENCE POST-UNAOIL

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February 1, 2017

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UNAOIL

- Monaco-based middleman that facilitated oil contracts in the Middle East on behalf of large oil and gas companies
- Deep-dive due diligence, memorialized in a 50+ page report, performed by a reputable law firm did not uncover evidence of bribery and cleared Unaoil as a business partner
- The entity that conducted the due diligence, as well as others who learned of it, relied on the positive findings
- A reputable third party preparer of due diligence reports "certified" Unaoil after its own deep dive due diligence – it too did not find evidence of bribery
- Issue broke because sources provided the media with hundreds of thousands of internal Unaoil emails

THIRD PARTIES

- Anyone who is not an employee
  - JV Partners
  - Suppliers
  - Customs Agents
    - Including UPS, FedEx, DHL, etc. if they are interacting with customs officials on your behalf, warehousing and distributing your product, etc.
  - Lawyers
  - Auditors

- Level of due diligence still depends on the risk, but keep in mind every third party when categorizing for risk

RISK RANKING FACTORS

- Location
- Types of services provided
- Amount and manner of payment
- Importance of services to the company
- Government connections
- Use of subagents
- Experience
- Reputation, including in media
- Company’s history with the third party
- Existence of a compliance program
- Internal controls – at the company and the third party

INFORMATION GATHERING

- Reliability of the source
  - Independence of the information
  - Verifiability of the information
  - On-the-ground market data

- Multiplicity of sources, both within and outside the relevant market
  - Risk of relying on diligence a competitor allegedly conducted

- Type of information needed depends not just on who the third party is, what they are doing for you, or where they are performing services, but **HOW** they are performing services
  - Limited cost due diligence but often presents answers companies don't want to know
    - Willful blindness
  - Performance under the contract/Management of the relationship

SOURCES OF INFORMATION

- Public records searches, i.e. internet, State Department, Commerce Department, Panama Papers, etc.
- References
- Third party due diligence report, but ask for the methodology
- In-market information gathering
- Visiting third parties
- Performing unannounced audits after the contract is entered

IDENTIFYING BENEFICIAL OWNERS

- Need to pull back the curtain and delve into the reality of the business
  - Know Your Client obligations
  - Government official ownership

- Challenging in countries where public databases are sparse or no requirement exists for companies to identify beneficial owners
  - Need to undertake and document the effort of trying to gather this information
  - Use public records searches, database solutions, in-market inquiries, due diligence questionnaires, and interviews – depending on the risk factors
  - Require certificates or other evidence of ownership

- Have established and documented policies and procedures related to the retention and relationship with third parties
- Assess risks based on the nature of the proposed relationship and the services to be performed
- Understand and document the business rationale for establishing a relationship
- Require a written agreement that includes a description of the services to be performed and compliance obligations
- Conduct meaningful due diligence that identifies potential risks associated with the third party and follow-up as necessary

EVOLVING STRATEGIES AND BEST PRACTICES FOR ENGAGING AND INTERACTING WITH THIRD PARTIES

- Require involvement and responsibility for the compliance of the third party for the business sponsor
- On a risk basis, monitor ongoing third party relationships
- Consider using, certifications, re-engagement, and exercising third-party audit rights
- Periodically update due diligence
- Maintain a consistent approach globally and monitor its effectiveness

HOW TO IDENTIFY AND CONTROL FOR RISKS RELATING TO UNCONVENTIONAL THIRD PARTIES

- Use a risk-based approach to identify non-conventional and high risk third parties, and allocate sufficient resources to focus on these parties
  - ❑ Gather information about potential risks
  - ❑ Assign risk categories and/or ratings to different third parties
  - ❑ Prepare a plan/process for identifying and mitigating risks
- Conduct periodic enhanced due diligence for non-conventional and/or high risk third parties using databases, public records, and sanction and watch lists
- Monitor the third parties on a risk-based periodic basis and conduct site visits when appropriate
- Encourage and require business sponsors to consider and discuss third party compliance risks

DEALING WITH THIRD PARTIES

Consider the following when seeking to engage a third party:

- *What is the business justification for the engagement?*
- *What services will be provided?*
- *Are the services to be provided customary within the industry?*
- *Is the third party a Public Official? Does it have contact with Public Officials?*
- *Is the third party qualified to perform the services for which retained?*
- *Was the third party recommended by a Public Official?*
- *Is the fee reasonable and reflective of fair market value?*
- *Will fees be disclosed to clients?*
- *Will the third party need to delegate any duties to other persons/entities?*
- *Has the third party been subject to due diligence?*
- *Is the agreement/fee structure transparent and does it contain appropriate anti-bribery/corruption representations?*

RED FLAGS

"Red Flags" include *but are not limited to:*

- Excessive commissions, unusual payment arrangements
- Close government affiliations
- Business partners who use shell companies and offshore bank accounts
- Refusal to disclose owners, partners, principals
- Third party firm appears unqualified or understaffed
- Refusal to include ABC reps/warranties in agreement
- Excessive gifts and entertainment (3rd Parties and/or Public Officials)
- Requests for payments to be made to 3rd country bank/third party name
- Requests by Public Official to hire relative in return for business
- Requests for "grease" payments to obtain license