Considerations for TMT Industry Compliance with the Foreign Corrupt Practices Act

Companies within the Technology, Media, and Telecom ("TMT") sector face significant corruption risk given the global nature of the industry and the control exerted by its complex governance structure. Four of the top ten highest FCPA penalties of all time were paid by TMT companies. Opportunities for corruption arise when TMT companies interact with foreign government officials—for example to acquire spectrum licenses and interconnection agreements, bid on government contracts, or satisfy customs requirements. Under the FCPA, TMT companies may also be liable for acts committed by their channel partners.

SETTLEMENT LESSONS

Recent corruption enforcement actions highlight the types of activity in the TMT sector that have attracted DOJ and SEC scrutiny.

- **Evading Internal Compliance Controls**
    - Funding gifts, hospitality and leisure trips to international vacation destinations using fake invoices from otherwise-approved third parties (e.g., travel companies).
    - Using personal email accounts to coordinate with product distributors, resellers, and other third parties about marketing expenses and customer promotional spending.
    - Avoiding third-party onboarding and diligence processes by submitting fees incurred by unapproved (or rejected) agents as costs incurred by approved agents.
    - Falsifying sub-certifications (e.g., SOX, 10-K) and internal controls-driven materials (e.g., hospitality approvals) that conflict with commercial documentation of the business rationale for funding decisions (e.g., allocating event-related hospitality to foreign officials based on perceived influence over current or future business).

- **Creating Off-Book Funding Sources**
    - Increasing product discounts to certain distributors and resellers who agreed to use the excess funds to influence customer purchasing decisions.
    - Abusing contract change orders to generate excess funds used for unapproved purposes (e.g., bribes to secure co-location construction permits).
    - Donating company funds to charitable foundations because they are controlled by persons targeted for influence (e.g., relative of foreign official controlling access to telecommunications market).
    - Supporting additional markups by channel partners to create excess funds used by the partner to provide cash and other inducements (e.g., gifts and entertainment) to employees of targeted customers.

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TIPS FOR FCPA COMPLIANCE

As law enforcement and regulators in the United States continue to look closely into TMT companies' international transactions, companies must build effective internal programs for detecting and preventing corruption risks.

Recent enforcement actions have shown the need for companies to:

- Implement robust internal audit and compliance monitoring functions, including financial monitoring for unexplained increases in discounts or approved vendor expenses and the periodic exercise of contractual audit rights.
- Conduct formalized due diligence on third-parties engaged to perform work on the companies' behalf, including channel partners.
- Institute enforceable gifts and entertainment policies. Such policies should set monetary spending limits and require detailed expense descriptions and supporting documentation for all submitted expenses.
- Train employees on antibribery policies and procedures, including in their native language where deemed necessary for understanding.
- Create internal mechanisms for employees to report any suspicious or illegal activities that conflict with anticorruption policies.
- Leverage acquisition diligence to identify corruption risks posed by a target company's operations so that: (i) the proposed transaction is valued appropriately; (ii) a decision can be made whether to force pre-acquisition disclosure to measure the regulatory consequences of the activities; and (iii) if the deal proceeds, immediate compliance changes can be made upon acquisition.