



## **Regulatory: 7 points to consider in regard to FCPA due diligence**

*Focus on the acts of joint venture partners and agents*

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The risks associated with Foreign Corrupt Practices Act (FCPA) liability for the actions of joint venture partners and agents have never been higher, with companies operating outside the U.S. facing significant pressure to conduct adequate due diligence to protect themselves from liability for the conduct and acts of their joint venture partners and foreign agents.

A March 30 order requiring Jeffrey Tesler, a former agent of Kellogg Brown & Root (KBR), to report to federal prison on April 17 to begin serving his 21-month sentence based on his guilty plea to violating the FCPA, is a stark reminder of the risks associated with failing to conduct adequate due diligence of joint venture partners and agents. Tesler's guilty plea, and subsequent sentence, is a reminder that companies operating outside the U.S. must carefully weigh the costs and benefits of conducting due diligence of their joint venture partners and foreign agents.

The FCPA applies to specified entities as well as their officers, directors, employees and agents. The bad acts on the part of a company's foreign subcontractors, joint venture partners or suppliers may be imputed to the company if these actors are deemed agents of the company. Given this potential liability and the continued focus on FCPA investigations by the DOJ and the SEC, companies should consider the level of due diligence that it should conduct when contracting with, or engaging, any joint venture partners or foreign agent (partner entity).

An understanding of the actions that led to Tesler's conviction and sentence are instructive. A four-company joint venture that included KBR, Snamprogetti, Technip S.A. and a Japanese company, hired Tesler to broker deals with Nigeria LNG Ltd., the Nigerian government's natural gas company. Under the guise of advisory and marketing services, Tesler was paid significant sums of money totaling \$132 million from 1995 to 2004, which was used to bribe Nigerian officials.

As a result of Tesler's actions, the joint venture obtained four contracts totaling \$6 billion. Ultimately, Tesler's actions resulted in FCPA liability for Tesler as well as the joint venture partners. In addition to Tesler, the former CEO of KBR, Albert Stanley, and a former VP of KBR, Wojciech Chodan, also were convicted and sentenced for their roles in the scheme.

Based on the foregoing, it is clear that companies need to conduct a risk assessment to identify whether the industries and countries they are operating in present potential risk for FCPA liability. If so, the companies should then consider the costs and benefits of increased compliance and due diligence efforts.

In order to minimize the risk of liability, companies should consider, among other things, conducting due diligence to determine:

- Ownership and management to determine, in part, whether there is any direct or indirect government ownership, interest or influence of the partner entity
- Whether any of the partner entity's officers or owners have ever been suspended or barred from doing business with a government entity
- The partner entity's reputation

Once the appropriate level of due diligence is completed, at the contracting stage companies should consider, among other things:

- Obtaining certifications of compliance with the FCPA and UK Bribery Act from the partner entity
- Requiring that the partner entity commit that it will not deal with any prohibited countries (e.g., Cuba, Iran)
- Including termination clauses that would allow for immediate, unilateral termination of the contract if the partner entity fails to comply with the FCPA or other anti-bribery and anti-corruption laws
- Contracting for ongoing audit rights in order to ensure the partner entity is complying with GAAP and to have transparency of any transactions with the foreign government

Finally, companies should consider requiring that the partner entity implement a rigorous code of business conduct and ethics.

In sum, companies should be proactive in evaluating their risk for potential FCPA violations and address any risks in their contracting and oversight of joint venture partners and agents. Given the ongoing government focus on the FCPA and severity of penalties, evaluating risk and robust contracting and compliance procedures aimed at preventing such risk are a best practice.

## About the Author



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