



What Are the Risks? Business Types Facing Increased Scrutiny

White-Collar Crash Course

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Presented by



David J. Marck

Associate

dmarck@ebglaw.com

Tel: 973-848-7735

The Foreign Corrupt Practices Act



- The DOJ has used the Foreign Corrupt Practices Act (FCPA) to secure over **\$5 billion** in settlements over the past 5 years.
- Designed for two primary purposes:
 - 1) Prevent US companies from engaging in **bribery of foreign officials**; and
 - 2) Requires companies who issue securities in the US (both US and foreign companies) to meet the SEC's **books and records and internal controls provisions**:
 - i. maintain books and records which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets (**the books and records provision**); and
 - ii. devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly authorized, recorded, and accounted for by the issuer (**the internal controls provision**).

A company be liable under the FCPA for activity which solely occurred in the US



- **Counter-intuitively, liability under the FCPA's books and records and internal controls provisions can arise when the alleged misconduct occurred solely within the United States**
- These provisions do not have a foreign conduct requirement and do not require that the violation be linked to any foreign bribe
- Moreover, no proof of intent is required to establish a civil violation under the books and records and internal controls provisions
 - In fact, a company can be civilly liable for the violations of a majority owned subsidiary regardless of the controlling entity's lack of knowledge of the conduct that constituted the violation

Exemplar Matter



- The SEC's 2016 Settlement with United Airlines
- United reinstated a defunct and money losing route to a location in South Carolina that was near the home of the Chairman of the Port Authority of New York/New Jersey in exchange for the approval of a terminal lease at Newark Airport
- This route was reinstated by United's CEO in a manner that bypassed United's normal review processes
- The SEC accused United of violating the FCPA's accounting and internal controls provisions

Exemplar Matter (cont'd)



- The SEC described the violation as follows:

“United violated Section 13(b)(2)(B) of the Exchange Act because, despite the significant potential corruption risks surrounding its dealings with public officials, United failed to design and maintain a system of internal accounting controls that was sufficient to prevent its officers from approving the use of United’s assets in connection with the South Carolina Route in violation of United’s Policies, which prohibited the use of assets for corrupt purposes.”

CEO was able to approve the South Carolina Route outside United’s normal process because United lacked adequate controls to reasonably ensure that prior to authorization of the Transaction, an exception was obtained from the Director of Ethics and Compliance or United’s Board of Directors as required by United’s Policies. [Internal Controls Provision Violation]

The failure to seek such prior authorization of the Transaction—which required a written submission and any approval to be in writing—also caused United to violate Section 13(b)(2)(A) of the Exchange Act because its books and records did not, in reasonable detail, accurately or fairly reflect the South Carolina Route Transaction.” [Books and Records Provision Violation]

- Lesson
 - A US company can violate the FCPA when it disregards an internal policy to gain a competitive advantage

Risks to the Home Health Industry



HHS has made fraud in the home health care industry a priority

- Home Health Care Industry Defined
 - Medicare/Medicaid Context
 - Skilled Nursing Care
 - Home-Based Assistance
 - Therapeutic Services for Home-Bound Individuals
 - Home Health Care is a Significant Part of Medicare/Medicaid Programs
 - Medicare Reimbursements in 2015 were over \$18 billion
 - 11,000 Home Health Agencies
 - CMS Estimated in 2015 that nearly \$10 billion (of \$18 billion) was improper
- 2011-2015
 - OIG home health care investigations resulted in more than 350 criminal and civil actions and over \$975 million in restitution and fines.

2016 Nationwide Analysis of Home Health Care Fraud by HHS OIG



- Identified more than 500 home health agencies and 4,500 physicians that displayed multiple characteristics of home health fraud
- Identified 27 geographic areas in 12 States as hotspots for home health fraud

Five Warning Signs to the OIG and CMS Auditors

- 1) High percentage of episodes for which the beneficiary had no recent visits with the supervising physician
- 2) High percentage of episodes that were not preceded by a hospital or nursing home stay
- 3) High percentage of episodes with a primary diagnosis of diabetes or hypertension
- 4) High percentage of beneficiaries with claims from multiple HHAs
- 5) High percentage of beneficiaries with multiple home health readmissions in a short period of time

Penalties for Fraud in this Area are Extreme



■ Exemplar Case from Dallas, Texas — 2016

- Nurse solicited patients from a homeless shelter; paid recruiters \$50/per recruit
- Nurse and co-conspirators falsified medical documents to make it appear patient qualified for home health care that was not medically necessary
- A physician co-conspirator certified the fraudulent Plan of Care prepared by the nurse co-conspirators
- Depending on the patient, services billed for were not provided, or medically unnecessary services were provided and billed
- This scheme included over 11,000 patients and cost the Government over \$375 million
- US Attorney noted that each conspiracy and health care fraud count carried a maximum statutory penalty of 10 years in federal prison and a \$250,000 fine.
- The lead nurse co-conspirator was sentenced to 48 months in prison and ordered to pay 397,294.51 in restitution
- The lead physician co-conspirator was sentenced to 420 months in prison and ordered to pay \$268 million in restitution

Are you a vendor to the federal government? Avoiding procurement fraud



- Government Procurement Fraud and the False Claims Act (FCA)
 - During the course of the bidding, negotiation and performance of a Government contract, vendors are frequently required to submit certifications and affidavits that, if false, can become the basis for a False Claims Act
 - The penalties for violating the FCA include substantial civil penalties and violators are frequently suspended or barred from doing further business with the Government
 - The FCA also includes a treble damages provision
 - Risk of *Qui Tam* Cases, especially from disgruntled employees

Four Main Types of Procurement Fraud the Government is Watching For



1. Progress Payment Fraud

- Contractor applies for payment during the course of a contract and fraudulently certifies that he has incurred costs that are eligible for reimbursement

2. Fraud regarding nonconforming materials

- Contractor falsifies documentation that all materials meet the contract specification

3. Cost mischarging

- Government is charged for costs not allowable under the contract,
- Government is charged for costs relating to a separate contract, or
- Government is simply overcharged

4. Defective pricing

- Falsification or inaccurate submission of information by the contractor or its agent regarding costs or prices

Best Practices for Preventing Procurement Fraud



- Establish Clear Policies and Procedures that Communicate to Employees that Fraud will Not be Tolerated
- Create a Robust Internal Whistleblower Program to Detect Any Violations Early
 - Anonymous Hotline
 - Retaliation Free
- Constantly Monitor/Audit Government Contracts

Questions?



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Upcoming Webinars

White Collar Crash Course Series



- **Criminalization of Health Care**
Tuesday, October 24 at 2:00 – 2:15 p.m. ET
Presenter: Jack Wenik
- **Signs You May Have a Problem**
Tuesday, October 31 at 2:00 – 2:15 p.m. ET
Presenter: Richard W. Westling

To register, please visit: <http://www.ebglaw.com/events/>

Thank you.