

SCHLUMBERGER AND THE MANAGEMENT OF A FOREIGN BUSINESS PARTNER UNDER THE FCPA

I. Schlumberger and Agent in Yemen

On Friday the Wall Street Journal, (WSJ) reported that the US Department of Justice (DOJ) was investigating allegations of possible bribery in Yemen by Schlumberger Ltd., in connect with Schlumberger's 2002 agreement with the Yemen government to create a national exploration data-bank for the country's oil industry. The allegations involve a foreign business representative, Zonic Invest Ltd., which became involved in the 2002 Data Bank Development Project between Schlumberger and Yemen's national oil company, the Petroleum Exploration and Production Authority. Zonic's General Director is the nephew of the then and current President of Yemen, Ali Abdullah Saleh. From the WSJ article, it was not clear the precise business relationship between Schlumberger and Zonic, for instance: whether Zonic was an agent of Schlumberger, a joint venture partner or simply a contractor.

In the WSJ article there were several reported allegations which stand out as classic Red Flags in Foreign Corrupt Practices Act (FCPA) compliance policies. Initially, Petroleum Exploration and Production Authority had urged Schlumberger to hire Zonic as a go-between at or near the time the contractual negotiations were nearing conclusion. Second the data-bank project went forward after Schlumberger "agreed to hire and pay Zonic a \$500,000 signing bonus" then the contract between Schlumberger and the Petroleum Exploration and Production Authority was concluded. Indeed the General Director of Zonic was quoted as saying, "If it wasn't for Zonic, there would have been no data-bank project." Lastly, the WSJ article does not reference that any written contract was executed between Schlumberger and Zonic for this \$500,000 payment.

The many Red Flags that may be raised in the WSJ report of the actions and statements that transpired before the contract for the data-bank project was concluded between Schlumberger and the Petroleum Exploration and Production Authority, there were several raised thereafter. After the contract for was concluded, WSJ reported that internal Schlumberger documents revealed that "Zonic wanted a roughly 20% cut of Schlumberger's profits from the project." While Schlumberger did not agree to pay such percentage of profits outright, it was noted that Schlumberger documents stated that the Yemen country manager had "suggested that those amounts could be compensated [to Zonic] through services." These services were said to include providing personnel to the project, networking, furniture and computer hardware. Payments for such services were made, even though there was no contract between Schlumberger and Zonic, from 2002 to 2004. A contractual relationship between the parties was established in 2004 and lasted

until at least 2007. The total amount paid by Schlumberger to Zonic was reported to be \$1.38 from 2003 to 2007. However, with regards to the services and products supplied by Zonic to Schlumberger, the WSJ noted that some were “above market rate” and others were unnecessary; specifically noting that over \$200,000 was paid for certain computer hardware, “although Schlumberger itself was among the leading providers of such hardware.” The Daily Finance Blog reported, in an October 8, 2010 posting, that Zonic did not provide some of the services for which it was paid.

In 2008, the parties had some type of falling out leading to a breach of contract lawsuit by Zonic against Schlumberger. The Schlumberger compliance function did not become aware of Zonic matter until 2008; thereafter the company performed an internal investigation. Interestingly, this internal Schlumberger investigation concluded that “no one had violated its [Schlumberger’s] anti-corruption policy. Apparently, based on this conclusion that no Schlumberger employee had violated the company’s anti-corruption policy, the internal investigation was closed, as noted by the WSJ , “without any significant disciplinary action” of Schlumberger employees.

While this scenario, as reported in the WSJ, has numerous facts which could be the subject of several different training sessions on the FCPA, this post will focus on the actions which occurred after the conclusion of the contract for the National Data-Bank Project and subsequent actions after the inking of a written contract between Schlumberger and Zonic.

II. Management of a Foreign Business Relationship

Most companies understand the obligations to perform due diligence on foreign business partners. However such a step is only one of several steps a company should take when managing such a relationship going forward.

A. DPA Guidance

1. Monsanto

In its Deferred Prosecution Agreement (DPA) with the Monsanto Company for their FCPA violations, the DOJ provided some guidance on the continuing obligation to monitor foreign business partners. In the DPA, the DOJ agreed, after the initial due diligence and appropriate review were completed on foreign business partners, for Monsanto to implement certain post contract procedures. These requirements to Monsanto can be used as guidelines as to what the DOJ will look for from other

companies who have entered into relationships with foreign business partners; especially in the area of monitoring said partner.

A company should, on a periodic basis of not less than every three years, conduct rigorous compliance audits of its operations with the foreign business partners. This monitoring would include, but not be limited to, detailed audits of the unit's books and records, with specific attention to payments and commissions to agents, consultants, contractors, and subcontractors with responsibilities that include interactions with foreign officials and contributions to joint ventures. The compliance audit should include interviews with employees, consultants, agents, contractors, subcontractors and joint venture partners. Lastly, a review of the FCPA compliance training provided to the foreign business partner should be included.

2. *Universal*

In August, 2010 the DOJ announced an enforcement action involving Universal Corporation. As reported by the FCPA Professor, Universal took specific remedial steps during the pendency of its FCPA investigation process which were incorporated into the company's DPA as a best-practices going forward. One of the steps implemented by Universal involved the creation of a Compliance Committee comprised of the Chief Financial Officer; General Counsel; Head of Internal Audit; Treasurer; Controller and the Principle Sales Director, which meets on a monthly basis to review and evaluate Universal's compliance programs and training. Universal also revised and enhanced its payment approval policy which now requires an 'approving officer' to review all supporting documentation for a payment and to understand the purpose of the payment prior to approval. The 'approving officer' must certify that he or she has reviewed the existing documentation and obtained an understanding of the legitimate business purpose of the payment. The policy also requires that employees investigate any questionable payments and determine that they are legal, legitimate, and appropriate prior to approving the payment. Lastly Universal, created the position of "Relationship Officer" who was specifically tasked with managing the foreign business partner relationship both pre and post contract signing.

B. Ongoing Oversight

In addition to the DOJ guidance provided in the Monsanto and Universal DPAs, it is recommended that there be substantial involvement not only by the business unit most closely involved with the foreign business partner, but also by Legal; Compliance and other departments which would assist in completing the functions as outlined by the both DPAs. The most significant reason for maintaining a post-contract relationship is to

ensure the business units remain engaged in the process. This involvement can also include some of the following participation, the senior business Vice President for the region where the foreign business partner operates should annually call upon the partner, in-person, to review all of the prospective business proposals and concluded business transactions that the foreign business partner has engaged in. This annual VP review must not take the place of a legal or compliance review but should focus on the relationship from the business perspective.

Managing the risk of a relationship with a foreign business partner is one of the most critical aspects of a FCPA compliance program. The documented risk for the potential violation of the FCPA by a foreign business partner to a company is quite high. To engage a foreign business partner, in a manner that properly assesses and manages the risk to, and for, a company, requires a committee of time, money and substantial effort. However, with a compliance based risk management procedure in place, the risk can be properly managed and a foreign business relationship can be successful for all parties.

The facts reported to date in the matter of Schlumberger and its (now former) foreign business partner, Zonic, demonstrate how ongoing oversight of an agent after a contract is signed is a critical component of a robust, best-practices FCPA compliance program. Even a foreign business partner, which may have raised Red Flags, enters into a contractual relationship with a company, such a relationship can be managed going forward. A Foreign Business Relationship Oversight Committee and a Relationship Manager provide additional levels of review which can be utilized to demonstrate ongoing compliance. These concepts should be incorporated into any current FCPA compliance program to assist in fulfilling the overall goals of any company's program.

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