

Seton Hall University
Latin America Healthcare Compliance Program

**ASSESSING THIRD PARTY RISK
CASE STUDY**

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Please note: opinions showcased here are the presenters' own and not those of their respective employers.

What do they have in common?

HALLIBURTON

Halliburton (July 2017)

Engage local supplier in Angola with ties to government officials with authority to approved business deals.



Orthofix (January 2017)

Used high discounts and improper payments through commercial rep and distributors to induce doctors under government employment to use Orthofix products

Sociedad Quimica y Minera de Chile

Improper payments to Chilean political figures and others connected to them through entities posing as legitimate SQM vendors



Cadbury (January 2017)

Subsidiary paid a consultant to obtain government licenses and approvals for a chocolate factory in India

Biomet

In connection with its second FCPA violation in 5 years.

Biomet continue to interact and improperly records with a known prohibited distributor in Brazil , and used a 3rd party broker in Mexico to pay bribes to customs officials



2017 FCPA CASES INVOLVING 3rd PARTIES INTERMEDIARIES

FCPA – Anti bribery provision & Third Party Relationships

The FCPA prohibits knowingly making corrupt payments through third parties, agents and intermediaries, including subsidiaries and joint venture partners

- **“Knowing”** includes conscious disregard, willful blindness and deliberate ignorance
- **“Knowledge”** exists where one is aware of a high probability a bribe would be offered or paid.

Requirement is “due diligence” in dealing with third parties and knowledge of red-flags

We cannot live without them...

Use of third party intermediaries is a business necessity

Between a rock and a hard place...

Business needs:

- Speed the decision
- Low cost risk management process
- Timely and efficient process support



Regulatory requirements:

- Risk assessment and vet third parties pre contract
- Remediate identified risks
- Monitor third parties for compliance

Challenges:

- Size and diversity of the third party network
- Complexity of internal third party governance
- Limited compliance resources to be shared among competing priorities

Third party Relationships: Assessment of Risk

“Risk based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company’s compliance program”.

DOJ FCPA Resource Guide (Nov 2012)

But... what do regulators expect to see:

- Reasonable Risk Based approach
- Higher the risk = Higher level of due diligence
- Consistent application of processes
- Documentation
- Periodic review





Third Party Management Case Studies



The Basics

- You are reviewing the due diligence dossier compiled for “NIVA”, a prospective Sales Intermediary in the country of Parador
- NIVA has been selected based on its successful track record in launching new products that require extensive patient support
- The agreement with NIVA will be key to advancing new oncology therapies to patients in that country (not to mention reaching regional sales goals)

Third Party Management Case Studies



The Findings

- While reviewing the due diligence dossier for NIVA you quickly notice that there was an adverse media finding for one of the company's shareholders (who also happens to be the company's general manager). His name was found on a database released by WIKILEAKS with thousands of other individuals allegedly maintaining off-shore accounts in Panama.
 - In filling out your company's due diligence questionnaire NIVA did not mention any specific issues involving its shareholders;
- Being a smart, well-educated Compliance Officer, you suspect that one of the shareholders' last names is precisely that of a former President (democratically elected) of Parador;
 - In filling out your company's due diligence questionnaire NIVA did not mention any family connections with current or former government officials;
- Last but not least, while searching for court cases involving NIVA you find that the company was investigated and is now being prosecuted for allegedly defrauding the National School Lunch Program (NSLP) in Parador
 - In filling out your company's due diligence questionnaire NIVA did not mention any specific investigations when prompted to do so;

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The Red Flags



Potential involvement in Money Laundering activities



Family connection with Politically Exposed Person



Allegations of involvement in a case of fraud, corruption

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The Response (I)

- While reviewing the due diligence dossier you quickly notice that there was an adverse media finding for one of NIVA's shareholders (who also happens to be the company's general manager). His name was found on a database released by WIKILEAKS with the names of thousands of individuals maintaining off-shore accounts in Panama.
 - After reaching out to NIVA and asking why this was not mentioned during due diligence, you receive the following email from the company's general manager:

From: [REDACTED]
To: Katie Walsh [COMPLIANCE]
Subject: Due Diligence findings

Hellow Katie , in Parador is legal have off shore,
In My case in this moment y don't have any off shore in activity beacose in Parador we have a good moment to return the money whit beneficie of tax. I aplicate to this oportunity and return the money to my country. I don' t have legal problem whit Panamá Papers beacouse my money is product to my bussiness and my Job.
I don't have problem whit the gouvernement , and any ilegal situcions. If you have call me y don't have problems, my phone Numbers is 978546615.

Thanks for contact me


[REDACTED]

Third Party Management Case Studies



The Response (II)

- Being a smart, well-educated Compliance Officer, you realize that one of the shareholders' last names is precisely that of a former President (democratically elected) of Parador;
 - You find a Wikipedia entry for the former President you had thought of. Wikipedia lists the name of his brothers and sisters, one of them being precisely the general manager of NIVA;
 - After bringing this up to NIVA's attention, the company clarifies that Mr. Daccache (the former president) is an aging man undergoing several health issues, whose political party has lost the last two national elections and is thus unlikely to exert any undue influence on NIVA's (or anyone else's!) behalf.

JUAN PABLO DACCACHE	
	
44th President of Parador	
In office	
August 15, 1993 – August 15, 1998	
Vice President	Roberto Suárez
Preceded by	Andrés Dapena
Succeeded by	Eduardo Laconde
Personal details	
Born	December 15, 1938 (age 79) Salinas , Parador
Political party	Nacionalista Party

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The Response (III)

- Last but not least, while searching for court cases involving NIVA you find that the company was investigated and is now being prosecuted for allegedly defrauding the National School Lunch Program (NSLP) in Parador
 - After expressing surprise that this information was actually picked up by your due diligence process, NIVA's attorney's responded with a detailing memorandum summarizing the case, NIVA's defense and reasons why the company believes it will prevail in court;

PARADOR	Ministerio de Economía	Organismo Supervisor de las Contrataciones del Estado	Tribunal de Contrataciones del Estado
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Resolución N° 9737-2018-TCS-K9

Sumilla:

"El análisis que efectúe este Tribunal debe tener como premisa que la finalidad de la normativa de contrataciones públicas no es otra que las Entidades adquieran bienes, servicios y obras, maximizando el valor de los recursos públicos que se invierten bajo el enfoque de gestión por resultados".

Aragón, 7 MAR. 2018

VISTO en sesión de fecha 7 de marzo de 2018 de la Primera Sala del Tribunal de Contrataciones del Estado, el Expediente N° **A291/2018.TCS**, sobre el recurso de apelación

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Resolution Path + Lessons Learned

- How should we consider each of the red flags?
- After carefully reviewing due diligence results, the agreement with NIVA should be



Remember: your decision should be justified

Some further discussions....



Scenario:

You have a potential distributor deal with a local partner in a *high risk emerging market*, where the **local law** requires foreign businesses to **partner with a local company**.

You have no experience with the potential new partner, so decide to conduct due diligence.

Public database and media screening reveals **commercial disputes** by the partner's shareholder in other countries including claims by counterfeiting by one claimant and breach of contract by another claimant.

Enhance due diligence reveals a complex ownership structure, with no single person owning the majority of the potential partner company.

You learnt that the potential partner company was only formed in this emerging market one year ago and **does not have a established business** history in the market

You learn that the potential partner has a local office in the country, a legal requirement for this type of business venture



How much due diligence is enough?

- *How would you described a risk based due diligence approach?*
- *How much to invest in due diligence? How do you manage this discussion with the business?*
- *Importance of continuing monitoring. How would you implement an effective monitoring 3rd party procedure?*



Questions? Comments?

