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DOJ Compliance Counsel, VimpelCom Resolution, and FCPA Pilot Program Highlight Opportunities Presented for Telecom Industry by Robust Compliance, Self-disclosure, and Cooperation in Foreign Bribery Cases

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"Most people miss opportunity because it is dressed in overalls and looks like work." – Thomas Edison.

On November 3, 2015, the U.S. Department of Justice (DOJ) Fraud Section appointed Hui Chen as Compliance Counsel, noting in a press release that she would "provide expert guidance to Fraud Section prosecutors as they consider . . . the existence and effectiveness of any compliance program that a company had in place at the time of conduct giving rise to the prospect of criminal charges, and whether the corporation has taken meaningful remedial action."[1] Then on February 18, 2016, as part of a Deferred Prosecution Agreement (DPA) with DOJ and a settlement with the U.S. Securities and Exchange Commission (SEC) addressing the near total failure of internal controls and its compliance program, Netherlands-based telecommunications giant VimpelCom Ltd. (VimpelCom) and its wholly owned Uzbek subsidiary, Unitel LLC (Unitel), agreed to pay more than $795 million to resolve civil and criminal charges that they violated the Foreign Corrupt Practices Act (FCPA). VimpelCom was quickly followed by an SEC FCPA settlement with Qualcomm on March 1, 2016 related to hiring in China, where the SEC noted in its press release that companies "must effectively design and implement internal controls across all business operations to prevent FCPA violations."[2] Finally, less than two months after VimpelCom, the Fraud Section announced a one-year "Pilot Program" setting forth the

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maximum potential benefits for corporate self-disclosure of FCPA violations and both describing the requirements of "cooperation" and attempting to quantify the benefit available for cooperating in an FCPA investigation.[3]

Tracing the arc of these moves by DOJ and SEC in the foreign anti-corruption space for telecoms highlights that the hard work of implementing a meaningful compliance program and maintaining strong internal controls ultimately pays off. That work is a necessary prerequisite to retaining the *opportunity* to both avoid FCPA issues and to obtain self-disclosure and cooperation credit. That said, the questions of whether to self-disclose and whether and how much to cooperate remain fact-specific decisions, but failing to keep those options available through proper compliance planning is no longer a responsible option.

VimpelCom Case Background

The VimpelCom corruption scheme involved bribes paid by VimpelCom and Unitel executives and employees "to an Uzbek government official, who was a close relative of a high-ranking government official and had influence over the Uzbek governmental body that regulated the telecom industry."[4] The bribes enabled the company to "enter the Uzbek market and . . . gain valuable telecom assets and continue operating in Uzbekistan."[5] Although neither the DOJ nor the SEC identified the Uzbek government official by name, news outlets have reported it to be Gulanara Karimova, the daughter of Uzbekistan's president who has been living under house arrest on corruption charges since September 2014.

The bribes paid by VimpelCom took a variety of forms and were often funneled through Takilant Ltd. (Takilant), a shell company beneficially owned by the Uzbek government official. When VimpelCom entered the market in 2006, for example, it spent $60 million to acquire a company in which the Uzbek government official held an indirect interest because "VimpelCom management knew that" doing so "would ensure [the] Foreign Official's support for VimpelCom's entry into the Uzbek telecommunications market."[6] In another instance, VimpelCom sold Takilant a 33.3% stake in one of its subsidiaries and then repurchased it two years later at a $37.5 million premium. VimpelCom also collectively paid the Uzbek government official $55 million through Takilant to exert improper influence over the Uzbek telecommunications regulator in schemes to obtain 3G and 4G licenses. Additional bribes were made through sham contracts with Takilant and payments to charities directly affiliated with the Uzbek government official. In an attempt to "conceal and disguise the bribery scheme," VimpelCom also "falsified its books and records . . . by classifying payments as equity transactions, consulting and repudiation agreements and reseller transactions."[7]

Compliance, Internal Controls, and Pilot Program Credit Availability

DOJ's hiring of a dedicated Compliance Counsel, the terms of the VimpelCom settlement, and the FCPA Pilot Program all underscore the importance to entities of doing the difficult work up-front to implement robust compliance programs and strong internal controls. This is especially true for telecoms operating internationally, where aggressive extraterritorial investigations and international cooperation are now routine.[8] As a starting point, implementing, maintaining, and enforcing a company-appropriate regime of compliance and internal controls is not only required by law in most instances, but is important to protect

against both internal and external threats, foreign bribery being only one such danger. In the context of potential FCPA exposure and the new Pilot Program, however, a failure to have those programs in place can severely limit an entity's options when FCPA issues do arise.

Using VimpelCom as an example, DOJ noted that VimpelCom had "failed to implement and enforce adequate internal accounting controls, which allowed the bribe payments to occur without detection or remediation,"[9] "failed to implement a system for conducting, recording, and verifying due diligence on third parties,"[10] its chief compliance officer was a junior executive with "no background in compliance" and "no staff or support,"[11] and the company had "little to no anticorruption compliance program."[12] These types of avoidable failures nearly guarantee an entity like VimpelCom will miss the opportunity to identify suspicious activity, prevent corruption, and as now clear under the Pilot Program, successfully and efficiently cooperate to obtain the maximum benefit.

A company that has neglected the front-end work of having company-appropriate internal controls and compliance programs in place to identify improper payments may never have the opportunity to obtain the Pilot Program's self-disclosure credit because the issue may come to DOJ's attention before the company is even aware of it. This can happen in any number of ways, whether through the media,[13] through a competitor, or through an internal whistleblower. As the DPA makes clear, VimpelCom chose not to self-disclose after an internal investigation uncovered wrongdoing and was therefore "not eligible for a more significant discount."[14] DOJ has now quantified in the Pilot Program what that additional discount will look like. Thus, proper internal controls and a robust compliance program not only can prevent the bribes from taking place, but, in a Pilot Program world, through early identification, can preserve a company's options as to whether to self-disclose and be eligible for up to a 25% self-disclosure credit.

Second, as staggering as the $795 million settlement may sound, the amount would have been even greater had VimpelCom not fully cooperated with the government's investigation and conducted "extensive remediation."[15] As described in the DPA, VimpelCom obtained credit for its "substantial cooperation," which included providing evidence uncovered in the earlier internal investigation; undertaking to provide foreign evidence to the government; conducting additional investigation independently, proactively, and as requested; voluntarily making foreign employees available for interviews; assisting with interviews of former employees; and collecting, analyzing, translating, and organizing voluminous evidence.[16]

Unsurprisingly, many of the steps DOJ identified in the VimpelCom DPA that resulted in the issuance of a 25% coopertion and remediation credit are the same as those identified in the subsequently issued Pilot Program. Most importantly, as the Pilot Program notes, where a company has self-disclosed, fully cooperated, and appropriately remediated, the FCPA Unit "generally should not require appointment of a monitor" if a company has "at the time of resolution, implemented an effective compliance program," and "will consider a declination of prosecution."[17] All of these steps necessary to be in line for a declination or a fine reduction can only be accomplished in an efficient and cost-effective manner if they are in place before a problem is discovered. As experienced practitioners know, the costs, both in terms of raw dollars and lost productivity, are exponentially greater when facts are being gathered under the press of a DOJ or SEC investigation.

Opportunity for all of these benefits, from lower investigation costs to a declination, flows directly from having done the work to have proper compliance and internal controls programs in place at the outset. That is in addition to the primary benefit – avoiding corruption problems in the first instance.

Conclusion

As DOJ's announcements in the last six months have reinforced, encouraging companies to invest in internal controls and compliance programs is a priority in its anti-corruption fight. To that end, DOJ is putting its money where its mouth is, both by investing in Compliance Counsel to help its Fraud Section prosecutors evaluate compliance programs and remediation efforts and by setting out in the VimpelCom DPA and in the Pilot Program the potential benefits for self-reporting, cooperation and remediation. Telecom companies operating internationally are therefore well-advised to maintain a robust, company-appropriate, and meaningful compliance program as the first line of defense. As the latest guidance makes clear, failing to do no not only risks an FCPA enforcement action, but can lead a company to forego opportunities to obtain such desirable results as a lower fine, the avoidance of a monitor, and ultimately a declination.

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[1] DOJ Press Release, "New Compliance Counsel Expert Retained by the DOJ Fraud Section" (Nov. 2, 2015), *available at* https://www.justice.gov/criminal-fraud/file/790236/download.

[2] SEC Press Release, "Qualcomm Hired Relatives of Chinese Officials to Obtain Business" (Mar. 1, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-36.html.

[3] DOJ Press Release, "Criminal Division Launches New FCPA Pilot Program" (Apr. 5, 2016), *available at* https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

[4] DOJ Press Release, "VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme" (Feb. 18, 2016), *available at* https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million.

[5] *Id.*

[6] *United States v. VimpelCom Ltd.* Deferred Prosecution Agreement (DPA) at Attachment A ¶ 14, *available at* https://www.justice.gov/usao-sdny/pr/global-telecommunications-company-and-its-subsidiary-charged-massive-bribery-scheme.

[7] DOJ Press Release.

[8] The VimpelCom press releases thanked regulators and law enforcement from nine different countries.

[9] DOJ Press Release.

[10] DPA at Attachment A ¶ 62.

[11] *Id.* at Attachment A ¶ 69.

[12] *Id.* at Attachment A ¶ 70.

[13] *See, e.g.*, Fairfax Media and The Huffington Post, "Unaoil: The Company that Bribed the World," *available at* http://www.theage.com.au/interactive/2016/the-bribe-factory/day-1/the-company-that-bribed-the-world.html; International Consortium of Investigative Journalists, "The Panama Papers: Politicians, Criminals, and the Rogue Industry that Hides Their Cash," *available at* https://panamapapers.icij.org.

[14] DPA ¶ 4.

[15] *Id.*

[16] *Id.*

[17] DOJ Criminal Division, "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" (Apr. 5, 2016), at 8-9, *available at* https://www.justice.gov/opa/file/838386/download.