

June 18, 2015

Foreign Corrupt Practices Act Alert

IAP Worldwide Services, Inc. Agrees to Pay \$7.1 Million to Resolve DOJ Investigation into Conspiracy to Violate FCPA by Providing Bribes to Kuwaiti Officials

SUMMARY

On June 16, 2015, the United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Eastern District of Virginia (collectively, DOJ) announced a non-prosecution agreement (NPA) with IAP Worldwide Services, Inc., pursuant to which IAP agreed to pay a \$7.1 million penalty to resolve an investigation into whether IAP conspired to violate the anti-bribery provisions of the Foreign Corrupt Practices Act. In connection with the NPA, IAP admitted that it conspired to pay Kuwaiti officials approximately \$1.78 million through an intermediary between September 2006 and March 2008 to secure contracts for a project undertaken by Kuwait's Ministry of the Interior (MOI) to develop nationwide surveillance capabilities for the Kuwaiti government. DOJ separately charged a former vice president of IAP, James Michael Rama, with one count of conspiracy to violate the anti-bribery provisions of the FCPA. Rama pleaded guilty to that charge on June 16 in the U.S. District Court for the Eastern District of Virginia and will be sentenced in September 2015.

This NPA illustrates the importance DOJ places on a rigorous anti-corruption compliance program. DOJ considers the "minimum elements" of such a program to include: (a) written anti-corruption policies and procedures that are enforced at all levels of the company; (b) periodic assessments of corruption-related risks; (c) high-level commitment to and oversight of an anti-corruption compliance program; (d) periodic anti-corruption compliance training; (e) internal reporting and investigation of potential violations of anti-corruption laws, policies and procedures; (f) risk-based due diligence of agents and business partners; and (g) risk-based due diligence of new business entities formed through merger and acquisition activity. The NPA also demonstrates that, in some situations, companies may avoid prosecution even in cases involving serious allegations of bribery if the company investigates the conduct, engages in remediation, and cooperates fully with law enforcement.

BACKGROUND AND DISCUSSION

In or about 2004, the MOI commenced a homeland security project titled the Kuwait Security Program to develop a nationwide closed-circuit television camera system and other Kuwaiti government surveillance capabilities. The MOI contracted the work associated with implementing the Kuwait Security Program in two phases. In February 2006, IAP and Rama established a U.S. shell company, Ramaco International Consulting, LLC, to bid on the Phase I contract. The MOI awarded Ramaco the Phase 1 contract for \$4 million. IAP, Ramaco, and Rama diverted approximately \$2 million of that sum through a Kuwaiti general trading company (Kuwaiti Company) to a Kuwaiti citizen (Kuwaiti Consultant) who, under the guise of liaising with the MOI concerning the Kuwait Security Program, distributed at least some of the funds to various Kuwaiti government officials on behalf of IAP and Ramaco in order to retain the Phase I contract and obtain the Phase II contract. To hide the scheme, the Kuwaiti Company sent IAP artificially inflated invoices that misdescribed the payments from IAP and Ramaco to the Kuwaiti Consultant. Between September 2006 and March 2008, IAP and its co-conspirators paid at least \$1.78 million to the Kuwaiti Consultant with the understanding that the money would be paid as bribes to Kuwaiti government officials.

On June 16, 2015, IAP and DOJ entered into an NPA. In entering into the NPA, DOJ considered that IAP: (a) cooperated with DOJ, including conducting an extensive internal investigation, voluntarily making U.S. and foreign employees available for interviews, and collecting, analyzing, and organizing voluminous evidence and information for DOJ; (b) engaged in remediation, including disciplining the officers and employees responsible for the payments or terminating their employment, enhancing its due diligence protocol for third-party agents and consultants, and instituting heightened review of proposals and other transactional documents for relevant IAP contracts; (c) committed to continue to enhance its compliance program and internal controls, including ensuring that its compliance program satisfies what DOJ characterized as the “minimum elements” of an anti-bribery compliance program; and (d) agreed to continue to cooperate with DOJ and other domestic or foreign law enforcement and regulatory authorities in any investigation of the conduct of IAP and its officers, directors, employees, agents, and consultants relating to possible violations addressed by the NPA. IAP also agreed to pay a monetary penalty of \$7.1 million over a three-year period and to submit annual reports during that period to DOJ regarding IAP’s implementation of the compliance program it agreed to undertake.

Corporate Compliance Program “Minimum Elements”

The NPA identifies what DOJ considers the “minimum elements” of an effective anti-bribery compliance program. In particular, DOJ expects such a program to include:

- “Strong, explicit and visible support and commitment” to the company, anti-corruption program by directors and senior management;

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- Assignment of one or more senior executives that report directly to the board of directors to implement and oversee, with autonomy, sufficient resources and audit authority, the company's anti-corruption compliance program;
- Development of compliance policies and procedures designed to deter violations of anti-corruption laws, that apply not only to all directors, officers and employees of the company, but also, as appropriate, to foreign and domestic agents and intermediaries, consultants, representatives, distributors, teaming partners, contractors and suppliers, consortia, and joint venture partners (collectively, agents and business partners);
- Periodic assessments of the corruption-related risks facing the company;
- Annual review and updating of anti-corruption policies and procedures "to ensure their effectiveness, taking into account relevant developments in the field and evolving international and industry standards" and periodic "testing" to evaluate and improve their effectiveness;
- Periodic training for not only directors, officers and employees but also, as appropriate, agents and business partners;
- A system that allows directors, officers, employees and, as appropriate, agents and business partners to report internally and confidentially violations of anti-corruption laws, policies or procedures, and for providing confidential advice on compliance;
- A reliable process for documenting, investigating and responding to allegations of violations of anti-corruption laws, policies or procedures;
- Institution of "risk-based due diligence and compliance requirements" pertaining to the hiring and oversight of all agents and business partners, which includes informing agents and business partners about the company's anti-corruption policies and procedures, seeking a reciprocal commitment from agents and business partners, and including in contracts with agents and business partners, as appropriate, anti-corruption representations and undertakings as well as termination rights and rights to conduct audits to ensure compliance; and
- Institution of policies and procedures for mergers and acquisitions requiring "risk-based due diligence on potential new business entities."

DOJ's articulation of the elements of an anti-bribery compliance program has expanded over time, and the "minimum elements" included in the NPA are more comprehensive than those DOJ required as recently as a few years ago. These elements are consistent, however, with more recent DOJ guidance, as well as guidance provided in the U.S. Sentencing Guidelines and the Organization for Economic Cooperation and Development Good Practice Guidance on Internal Controls, Ethics, and Compliance, which DOJ endorsed in February 2010, and reflect greater emphasis on the need for companies to conduct adequate corruption-related due diligence of third parties that act as agents or business partners, especially where a company or its subsidiaries do business in regions that present significant compliance challenges.

Benefits of Cooperation and Remediation

The Statement of Facts accompanying the NPA sets forth serious allegations of misconduct on the part of an IAP officer and an IAP domestic subsidiary. That DOJ was willing to enter into the NPA notwithstanding these allegations underscores the type of "credit" that DOJ may give companies that fully cooperate in DOJ investigations of potential corruption and institute extensive remedial actions.

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Penalty Paid in Installment Payments

DOJ permitted IAP to pay its \$7.1 million penalty in four equal installments over a three-year period. Installment payments are an unusual feature in non-prosecution agreements. DOJ normally requires that the full penalty be paid within 10 days of the date of the non-prosecution agreement and has not agreed to installment payments in any other non-prosecution agreement in the last five years. DOJ does not explain its acceptance of installment payments in the NPA, but it is reasonable to assume that the cooperation and remediation discussed above factored into DOJ's consideration of the issue.

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