DEBEVOISE & PLIMPTON LLP

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The DOJ's First Opinion Procedure Release of 2014 Re-addresses Issues Arising When a Business Partner Becomes a Foreign Official

On March 17, 2014, the United States Department of Justice ("DOJ") issued its first opinion of 2014 (the "Opinion" or "Opinion Release 14-01")[1] under its Opinion Release Procedure.[2] The requestor, "a United States financial services company and investment bank" ("Requestor"), was faced with the problem of what to do when its foreign business partner was appointed to a government position, thereby becoming a "foreign official" under the FCPA.

Requestor proposed to do three things. First, Requestor would institute controls to avoid conflicts of interest and separate the individual who had become a foreign official from the operation of the business. Second, Requestor would terminate its business relationship with its partner in a transparent and commercially reasonable manner (which involved buying shares from the partner). Finally, Requestor would receive assurances from the partner and institute other controls in order to prevent lingering conflicts of interest. Eight months after submitting its initial request, and after significant back-and-forth, the DOJ informed Requestor that it "does not intend to take any enforcement action."

Although the summary above can be seen as providing guidance, Opinion Release 14-01 ventures no farther than previous guidance and likely reflects a conservative approach. Although a business partner becoming a "foreign official" is not an everyday occurrence, it is not unprecedented. Indeed, a prior Opinion Release (Opinion Release 00-01) dealt with a very similar situation.[3] Given the previous release, it is not clear why Requestor sought additional guidance, or why it took eight months to receive an answer. Moreover, during those eight months, the DOJ appears to have conducted a rather rigorous review of the proposed transaction, apparently going so far as to double check an outside

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1. DOJ Opinion Procedure Release No. 14-01 (Mar. 17, 2014), http://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-01.pdf.
2. The Opinion Release Procedure enables issuers and domestic concerns to obtain opinions from the DOJ regarding its current enforcement policy with regard to prospective non-hypothetical conduct. *See* 28 C.F.R. Part 80.
3. DOJ Opinion Procedure Release No. 00-01 (Mar. 29, 2000), http://www.justice.gov/criminal/fraud/fcpa/opinion/2000/0001.pdf.

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auditor's valuation. As discussed in greater detail below, the Opinion also contains novel qualifications to the no-action conclusion.[4] Although it is possible to speculate as to the reason of the Opinion's conservatism and unusual qualifications, without additional information it is difficult to see how the Opinion provides much new "non-binding guidance to the business community."[5]

Opinion Release 14-01

In 2007, Requestor, through a subsidiary, purchased a majority interest in a foreign financial services company, from a "Foreign Shareholder" and others. An individual ("Foreign Shareholder") remained as chairman and later served of CEO of the company. As part of the purchase, Requestor and Foreign Shareholder agreed to a five year lock-in period, prohibiting Foreign Shareholder from selling his interest, with the proviso that if Foreign Shareholder was appointed to high government office, Requestor would purchase his shares according to a contractually agreed-upon formula based on the company's average net earnings. At the end of 2011, Foreign Shareholder was appointed to a high-level position in the country's central monetary and banking authority. The banking authority did not directly regulate the company, but the authority was a long-term client of Requestor for investment banking and asset management services.[6]

When Foreign Shareholder became a "foreign official," he ceased to have any operational role in the company and recused himself from any decision concerning awards of business to the company, the Requestor, and their affiliates. As a result of losses due to the financial crisis, the contractually agreed-upon formula to determine the price of Foreign Shareholder's shares returned a value of zero, even though the company was an ongoing concern. Because this was not the intent of the parties and would have resulted in litigation and other potential risks, the parties agreed to have a "highly regarded, global accounting firm" determine the value of the shares. Foreign Shareholder also received his 2011 bonus, severance payment and accrued pension contributions.[7] The value of the shares and other compensation is not provided in the Opinion.

The Requestor approached the DOJ and indicated that it would also approach U.S. and foreign regulators to approve the transaction. The Requestor also represented that Foreign Shareholder had recused himself from decisions concerning Requestor and affiliates and will continue to do so until the completion of the transaction, and that he will continue to recuse himself from any decisions relating to Requestor and affiliates which were under consideration prior to the time of the transaction. The Foreign Shareholder also represented that he had disclosed the transaction to the relevant foreign government authorities and was informed that the foreign government authorities did not object to the transaction, and warranted that payment for the shares was solely in consideration of the shares and not in expectation of any present or future official action.

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4. Op. Rel. 14-01 at 6.
5. A Resource Guide to the U.S. Foreign Corrupt Practices Act at 87 (Nov. 14, 2012), http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
6. Op. Rel. 14-01 at 1-2.
7. *Id.* at 2-3.

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The Requestor also represented that it would institute controls to allow Foreign Shareholder to recuse himself in appropriate situations, informed its employees of the Foreign Shareholder's need to recuse himself in any potential business dealings, and obtained a written opinion from a local firm that the share sale was legal under the laws of the foreign country.[8]

> "The basic situation described in Opinion Release 14-01 – a business partner who becomes a government official – is not a daily occurrence but it does happen."

In reaching its conclusion that it "does not presently intend to take any enforcement action," the DOJ noted that a business relationship with a "foreign official" does not "*per se*" violate the FCPA.[9] Citing a prior opinion release,[10] the DOJ stated that, when dealing with business transactions with foreign officials, it would look for "indicia of corrupt intent," specifically:

- "whether the arrangement is transparent to the foreign government and the general public;"
- "whether the arrangement is in conformity with local law;" and
- "whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business or otherwise assist the company."[11]

DOJ's Analysis

The basic situation described in Opinion Release 14-01 – a business partner who becomes a government official – is not a daily occurrence but it does happen. Indeed, the DOJ previously opined on a similar situation involving a law firm in Opinion Release 00-01. In that release, a foreign partner at a law firm was appointed to high-ranking government position. It was agreed that the partner would take a leave of absence, continue to receive group insurance benefits, interest on his partnership contribution, and a lump sum payment of "client credit" (an annual payment for clients brought into the firm by the departing partner). The firm would normally pay out client credit on an annual basis to partners on leave, but, as with Requestor's departure from the contractual formula for valuing the shares, the firm proposed to pay the client credit for four years in a lump sum "to have a 'greater separation'" from the foreign official. Moreover, the foreign official was guaranteed a return to the firm with full partnership and privileges upon his return (meaning that he would potentially benefit from increases in firm business during his tenure as a "foreign official" upon his return to the firm).[12]

In Opinion Release 14-01, the DOJ analyzed whether there are "indicia of corrupt intent" by noting that the purpose of the purchase of Foreign Shareholder's shares "avoid[s] what would otherwise be an ongoing conflict of interest."[13] The DOJ also discussed the decision to vary from the contractually agreed-upon formula for valuing the shares, noting that to do so "appears reasonable."[14] The Opinion mentions, in addition, that, late in the process, the Requestor provided revenue figures for 2013 (estimates of which were the basis of the valuation) which were nine percent higher than assumed in the previously-submitted valuation by "a leading, highly regarded, global accounting firm."[15]

Following the structure and approach of prior Opinion Releases 10-03[16] and 08-01,[17] the DOJ noted in Opinion Release 14-01 that there would be "appropriate and

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8. *Id.* at 3-4.
9. *Id.* at 4.
10. DOJ Opinion Procedure Release No. 10-03 (Sept. 1, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf (company retained a US consultant that was simultaneously acting as an agent of a foreign country to represent it in dealings with that foreign country).
11. Op. Rel. 14-01 at 4.
12. Op. Rel. 00-01 at 1.
13. Op. Rel. 14-01 at 4.
14. *Id.* at 4-5.
15. *Id.* at 3, 5.
16. DOJ Opinion Procedure Release No. 10-03 (Sept. 10, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf.
17. DOJ Opinion Procedure Release No. 08-01 (Jan. 15, 2008), http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf.

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meaningful disclosure" of the transaction, as regulatory approval or no objection had been or would be obtained from U.S. and foreign regulators and the Requestor had received "written assurance of the legality of the purchase under local law."[18] With regard to controls, such as recusal designed to prevent conflicts of interest, the DOJ noted that the ongoing recusal warranties undertaken by the Foreign Shareholder and the Requestor resembled the "very strict recusal and conflict-of-interest-avoidance measures" that were put in place in Opinion Release 00-01, noting further that, unlike the case in Opinion Release 00-01, the purpose of the transaction in Opinion Release 14-01 was to completely sever the relationship between the two parties.[19] Given these facts and representations, the DOJ stated that, because "at present … the only purpose of the payment to Foreign Shareholder is consideration for the Shares, the Department does not presently intend to take any enforcement action."[20]

However, DOJ qualified this conclusion three times. First, DOJ included the qualification that is included in all Opinion Releases that "[the Opinion Release] can be relied on by Requestor only to the extent that the disclosure of facts and circumstances in its request and supplements is accurate and complete."[21] This was followed by two other novel qualifications, which are discussed in greater detail below.

How Much Guidance?

Opinion Release 14-01 provides guidance to the business community that one way to deal with a business partner becoming a "foreign official" is to sever the relationship in a transparent and commercially reasonable manner while instituting controls to address lingering conflicts of interest. This is not the only way to deal with the situation, as Opinion Release 10-03 made it clear that a continuing relationship would not be *per se* improper,[22] and Opinion Release 00-01, which dealt with a case very similar to the situation of Opinion Release 14-01, permitted something less than a complete severance with the foreign official. As such, Opinion Release 14-01 provides very little guidance beyond what has been known since 2000.

Given the existence of applicable precedent, it is not clear from the publicly available facts why the Requestor made the request. More importantly, why did it take eight months for the DOJ to issue an Opinion which could have simply cited Opinion Release 00-01? The delay does not appear to be related to the DOJ's heavy workload or bureaucratic inertia, as "significant backup documentation" was provided and "several follow up discussions"[23] took place during the eight months. As part of its review, it appears that the DOJ required, at the very least, data by which it could test the reasonableness of an independent valuation by a global accounting firm.[24]

Moreover, the ongoing recusal requirements appear to go beyond what might reasonably seem necessary. According to the Opinion, Foreign Shareholder ceased to have an operational role in the company at the end of 2011 and recused himself from any decisions relating to the company, the Requestor or affiliates since that time. The Opinion, however, not only requires continuing recusal until the time of the share purchase (even though the value of the shares has already been set), but continuing recusal on any matter that was "under negotiation, proposed or anticipated at the time of, or prior to, the payment for the Shares,"[25] which is to say that the recusal obligations extend to business more than three years after Foreign Shareholder began to recuse himself and an undetermined amount of time after the purchase price for the shares was determined. Indeed, demonstrating the existing detachment (and likely lack of knowledge) of Foreign Shareholder from the business, the Requestor separately undertakes to independently determine whether a

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18. *Id.* at 5.
19. *Id.* at 5-6.
20. *Id.* at 6.
21. *Id.*
22. Op. Rel. 10-03 at 3.
23. Op. Rel. 14-01 at 1 n.1.
24. *See id.* at 5.
25. *Id.* at 3, 6.

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transactions was "under negotiation, proposed or anticipated" prior to the share purchase and to "take reasonable steps to ensure that Foreign Shareholder's recusal representations and warranties are honored."[26] While such extended recusal undertakings were certainly required in the case of a continuing relationship (such as the promise of return in the case of Opinion Release 00-01) and certainly assist in avoiding any appearance of impropriety, it is unclear if such warranties were required by the DOJ (and if so, why they were requested) or were simply included out of an abundance of caution by Requestor.

Moreover, the Opinion Release contains two qualifications that appear to go beyond what would normally appear necessary. More than 70 percent (27 out of 37) of Opinion Releases prior to Opinion Release 14-01 contain no qualification beyond requiring "accurate and complete" disclosure in the request.[27] Of the ten Opinion Releases that do contain a limitation, five explicitly note that they do not apply to prospective conduct,[28] one explicitly refuses to endorse specific due diligence or anti-corruption measures,[29] three combine a refusal to endorse specific anti-corruption measures, explicitly exclude prospective conduct and/or otherwise explicitly narrow their application to the facts of the request.[30] Opinion Release 98-01 is an outlier, as it concludes that the DOJ would take enforcement action against the requestor but qualifies that conclusion with a suggestion of action that would not lead to enforcement action.[31]

"[T]he Opinion Release contains two qualifications that appear to go beyond what would normally appear necessary. More than 70 percent (27 out of 37) of Opinion Releases prior to Opinion Release 14-01 contain no qualification beyond requiring 'accurate and complete' disclosure in the request."

None of the ten prior qualifications to an Opinion Release bears any resemblance to the two qualifications to Opinion Release 14-01. The first,

> this Opinion does not foreclose future enforcement action should facts indicative of corrupt intent (such as an implied understanding that Foreign Shareholder would direct business to Requestor or inflated earnings projections being used to induce Foreign Shareholder to act on Requestor's behalf) later become known

appears to be entirely superfluous. Qualifying an opinion by saying that the conclusion is not valid if the facts presented were incorrect, even if not implied, is already covered by the general "accurate and complete" qualification contained in all Opinion Releases. If the facts listed in the qualification are true, the request would have been inaccurate and incomplete.

The second qualification also appears to go beyond what would be expected in an FCPA analysis. It states:

> The Department's lack of enforcement intent is further conditioned on Requestor and Foreign Shareholder making all required notifications and obtaining all required approvals (or non-objections), including those described above.

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26. *Id.* at 3; *see also id.* at 6.

27. The Opinion Release procedure has been in place since 1993. Not counting Opinion Release 14-01, there have been 37 Opinion Releases, 27 of which included only the "accurate and complete" qualification. *See* Op. Rel. 93-01; 93-02; 94-01; 95-01; 95-02; 95-03; 96-01; 96-02; 97-02; 98-02; 00-01; 01-02; 01-03; 04-01; 04-03; 04-04; 07-01; 07-02; 07-03; 08-01; 08-03; 09-01; 10-01; 10-02; 11-01; 12-02; 13-01. All of the Opinion Releases are available for download at http://www.justice.gov/criminal/fraud/fcpa/opinion/.

28. *See* Op. Rel. 97-01 (Feb. 27, 1997), http://www.justice.gov/criminal/fraud/fcpa/opinion/1997/9701.pdf; Op. Rel. 10-03 (Sept. 1, 2010), http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf and Op. Rel. 12-01 (Sept. 18, 2012) (not taking enforcement action as a result of a relationship with a third party, but noting that the relationship creates the potential for future enforcement risk), http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf; Op. Rel. 03-01 (Jan. 15, 2003) (noting that the opinion does not apply to future conduct), http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf; Op. Rel. 08-02 (June 13, 2008) (the so-called "Halliburton Opinion," which also qualifies the opinion with respect to conduct not reported within a specific time), http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

29. *See* Op. Rel. 06-02 (Dec. 31, 2006), http://www.justice.gov/criminal/fraud/fcpa/opinion/2006/0602.pdf.

30. *See* Op. Rel 01-01 (May 24, 2001) (qualifications intended to clarify an unclear representation; to refuse to endorse a material adverse circumstances clause; to caution as to prospective conduct with a third party), http://www.justice.gov/criminal/fraud/fcpa/opinion/2001/0101.pdf; Op. Rel. 04-02 (July 12, 2004) (qualification refusing to endorse specific compliance measures and explicitly not applying to prospective conduct), http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf; Op Rel. 06-01 (Oct. 16, 2006) (qualification very explicitly limiting opinion to narrow set of facts), http://www.justice.gov/criminal/fraud/fcpa/opinion/2006/0601.pdf.

31. Op. Rel. 98-01 (Feb. 23, 1998), http://www.justice.gov/criminal/fraud/fcpa/opinion/1998/9801.pdf.

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As set forth in Opinion Release 10-03, disclosure to the foreign government and others indicates transparency and is an indicator of the lack of corrupt intent. Once such disclosures are made, however, failure to obtain approval or non-objection from a separate regulatory agency (presumably related to the law or regulations governing that agency) should not affect a legal analysis under the FCPA. If the transaction were to be blocked or objected to by a dubious ruling by a foreign regulator, based on a foreign law (say for competition law reasons or regulations relating to foreign ownership), it seems unlikely that the DOJ's decision on whether or not to commence an enforcement action would properly depend on the outcome of a foreign court proceeding appealing that ruling.

It is possible to speculate as to the the reasons behind the length of time it took the DOJ to respond to the request as well as the Opinion's conservatism and unusual qualifications. First, there are potentially very significant facts omitted from the Opinion Release: the amount of money at issue and (as is common for Opinion Releases) the country involved. It is possible that either or both of these facts required the DOJ to look especially carefully at the proposed transaction. Alternatively, the apparent rigor of the DOJ's review of the request, the relatively onerous representations and warranties, and the novel qualifications to the conclusion could suggest that the DOJ has decided to take a decidedly more conservative approach than in past Opinion Releases. In either case, Opinion Release 14-01 raises several questions and provides relatively limited "non-binding guidance to the business community." The inability of the public and the business community to determine which of the two scenarios has led to the DOJ's guidance in this case will only reinforce the common perception that the Opinion Release process is of limited utility, particularly when a decision on a business transaction is needed promptly.

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UK Financial Conduct Authority Imposes Fine on Besso Limited

The commercial insurance broking sector is heavily reliant upon the services of third parties to help obtain, retain and service customers ("Third Parties"). Given that brokers' customers and potential customers are often geographically dispersed, it is not commercially viable to maintain a presence in all locations in which a broker may wish to conduct business. Third Parties enable brokers to penetrate a wider range of markets than they would otherwise be able to access.

The use of Third Parties is not in and of itself problematic. However, all businesses that engage Third Parties must recognize that it increases their risk profile in terms of compliance with various anti-bribery legislation, including the United Kingdom's Bribery Act and the U.S. Foreign Corrupt Practices Act. In light of increasingly active enforcement by prosecutors and regulators across the globe, businesses must systematically identify, assess, monitor and mitigate such risks.

Increasingly active enforcement in this area is certainly apparent in the United Kingdom, as demonstrated by the Financial Conduct Authority ("FCA") Final Notice dated 17 March 2014 in respect of Besso Limited ("Besso").[1] The FCA fined Besso for shortcomings in its anti-bribery and corruption procedures relating to its use of Third Parties. The fine follows the recent fine of nearly £1.9 million levied against another commercial insurance broker, JLT Specialty Limited ("JLTS"), in December 2013 for the same failings.[2] Two fines within the space of three months is evidence of the FCA's robust approach to Third Party bribery and corruption risks.

The Besso Fine

Besso is the insurance broking subsidiary of Besso Insurance Group Limited, an independent, management-owned Lloyd's broking group that has operated in the London Market for more than 40 years. Besso is a general broker specializing in marine, aviation, transport, casualty, international and liability insurance.

The broad span of Besso's work means that it is heavily reliant upon Third Parties. First, co-brokers assist with the placement of insurance. Second, external brokers provide administrative and policy insurance services when insurance is placed in markets where Besso does not have a presence. Third, Besso retains intermediaries to introduce potential clients and to provide market information. Fourth, producing brokers deal directly with insured parties and introduce proposals for insurance to Besso.[3]

The FCA found that Besso's control environment was deficient and the company was fined £315,000. As in the JLTS fine, Besso was found to have breached Principle 3 of the FCA's Principles for Businesses, which requires any business regulated by the FCA to take "reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."[4] The FCA also found that Besso had failed to meet its obligations to "establish and maintain effective systems and controls" and "make and retain adequate records" under the Senior Management Arrangements, Systems and Controls Rules.[5] These deficiencies gave rise to an unacceptable risk that payments made to Third Parties by Besso could be used for corrupt purposes, including the payment of bribes to persons connected with insured parties or public officials.[6]

The fine clearly illustrates the bribery and corruption-related compliance risks associated with the use of Third Parties. It is also further confirmation of the FCA's robust approach in its scrutiny of commercial insurance brokers, and

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1. FCA Final Notice re: Besso Ltd. (Mar. 17, 2013), http://www.fca.org.uk/static/documents/final-notices/besso-limited.pdf.
2. *See* Karolos Seeger, Bruce E. Yannett, Robin Lööf, and Robert Maddox, "UK Financial Conduct Authority Imposes Limited Fine on JLT Specialty," *FCPA Update*, Vol. 5, No. 7 (Feb. 2014), http://www.debevoise.com/fcpa-update-2-27-2014/.
3. FCA Final Notice re: Besso Ltd., note 1, *supra*, at ss. 4.2-4.3.
4. *Id.* s. 5.3.
5. *Id.* s. 5.3-5.4; Id. Appendix A, ss. 3.1-3.2.
6. *See generally id.*

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regulated entities more generally. By now, however, the need for robust anti-bribery procedures is well-known to the commercial insurance broking industry.

> "With the recent JLTS and Besso fines, a trend in the FCA's enforcement can certainly be ascertained."

The Trend of Enforcement in Commercial Insurance Broking

In November 2007 the FCA's predecessor, the Financial Services Authority ("FSA"), issued an open letter stressing to each recipient that it must minimize the risk that it "makes, or will make, illicit payments either directly or indirectly to, or on behalf of, third parties" (the "Dear CEO letter").[7] This risk was highlighted in January 2009 when the FSA fined Aon Limited £5.25million for inadequate internal control systems that allowed $2.5million and €3.4million in suspicious payments to be made to Third Parties.[8]

Following the Aon fine, in May 2010 the FSA issued guidance on reducing the risk of illicit payments or inducements to third parties in commercial insurance broking.[9] Even so, in July 2011, the FSA fined Willis Limited £6,895,000 for breaching Principle 3 and other related obligations in respect of its use of Third Parties.[10] The penalty was, at that time, the largest fine for financial offences ever imposed by the FSA. With the recent JLTS and Besso fines, a trend in the FCA's enforcement can certainly be ascertained. Beyond that, however, on its own the Besso fine provides useful guidance on how to implement an effective control environment when dealing with Third Parties.

Guidance for Companies

It is now clearer than ever that any business that engages Third Parties to obtain, retain or service clients must give serious consideration to the associated anti-bribery and corruption risks.

1. The Besso fine reiterates that the FCA will adopt a robust risk-based approach to enforcement. The increased risk that payments made to Third Parties could be used for corrupt purposes caused by Besso's weak compliance environment was sufficient to merit sanction. The fact that no suspicious payments were identified and that Besso's conduct had been neither deliberate nor reckless was irrelevant.

2. When engaging Third Parties, businesses should adopt a three-stage review. First, businesses must identify exactly who they are dealing with and whether the Third Party is connected either to the underlying customer or to a public official. Computerized tools may prove useful in this respect, but should be used with caution; they are not a substitute for human examination. Spelling variations of individuals' and company names should be screened, and businesses should adopt a thoughtful as opposed to mechanical approach.
Second, having accurately and fully identified the Third Party and its relationships, businesses must assess the level of risk that would be involved in retaining their services. Businesses should consider the countries in which the Third Party as well as the relevant customer(s) operate. In this regard, they cannot discount bribery and corruption risks simply because the jurisdictions involved are perceived to be low risk; low risk does not mean no risk, and a business' focus on work being carried out in high risk jurisdictions should not be at the expense of the examination of that which takes place elsewhere.

   Third, once the level of risk has been identified, businesses must take steps to mitigate it. If any of the three steps is conducted in an inadequate manner, the business leaves itself open to the very real risk of sanction.

3. Businesses should conduct regular, rolling due diligence and risk assessments, and staff should be sufficiently well trained to carry them out. For example, the FCA found it unacceptable that Besso failed to review its (unwritten) arrangement with one U.S.-based Third Party between 2002 and 2010 and that this was not identified as a cause for concern within the company.[11]

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7. FSA "Dear CEO" Letter (Nov. 22, 2007), http://www.fsa.gov.uk/pubs/ceo/ttp_letter.pdf.
8. *See* FSA Final Notice re: Aon Ltd. (Jan. 6, 2009), http://www.fsa.gov.uk/pubs/final/aon.pdf.
9. *See* FSA, Anti-Bribery and Corruption in Commercial Insurance Broking (May 2010), http://www.fsa.gov.uk/pubs/anti_bribery.pdf.
10. *See* FSA Final Notice re: Willis Ltd. (July 21, 2011), http://www.fsa.gov.uk/pubs/final/willis_ltd.pdf.
11. *See* FCA Final Notice re: Besso Ltd., note 1, *supra*, at s. 4.40.

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Businesses must be able to show that if issues do arise, they are able to identify them independently of regulatory investigations or enforcement action.

> "The Besso Final Notice stressed the importance of recording the commercial rationale for using Third Parties as, in the absence of an established business case, it will be difficult, or in some cases impossible, adequately to assess whether a Third Party's remuneration is commensurate to the services it provides."

4. Businesses must heed both formal guidance as well as that which can be drawn from publicized regulatory enforcement. Besso only changed its internal compliance to address the issues raised in the Dear CEO letter two years after it had been issued.[12] Furthermore, despite the highly publicized Aon and Willis fines, the 2010 guidance paper, and two visits by the FCA as part of its thematic review of the insurance broking industry, Besso's compliance processes remained deficient up until August 2011. While the company made improvements in how it engaged Third Parties over this period, even significantly improving a weak control environment does not mean the FCA's required standards will be deemed met.

5. Third Parties should be engaged in a structured manner. The Besso Final Notice stressed the importance of recording the commercial rationale for using Third Parties as, in the absence of an established business case, it will be difficult, or in some cases impossible, adequately to assess whether a Third Party's remuneration is commensurate to the services it provides.[13] Linked to this, written agreements should be put in place and all compliance requirements satisfied, prior to a Third Party starting to provide services.[14] Furthermore, review processes should be well-documented. For instance, the Besso Anti-Bribery and Corruption Working Group failed to keep minutes.[15] Consequently, the FCA had no way to ascertain whether the group fulfilled its responsibilities. Shortcuts may be tempting, but by undermining overall anti-bribery and corruption procedures, they give rise to a real risk of regulatory enforcement.

Establishing compliance processes that adequately address the bribery and corruption risks associated with the use of Third Parties can be time consuming and resource intensive. However, it is only once a control environment has become well-established and forms part of an organization's general compliance culture that businesses can fully reap the commercial benefits of using Third Parties while minimizing the regulatory risks. Moreover, the business case for instituting a robust compliance regime is clear, including that the failure to do so may very well lead to serious financial and reputational consequences as a result of regulatory enforcement action.

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12. *Id.* s. 4.6.
13. *See, e.g., id.* s. 4.14.
14. *Id.* s. 4.40.
15. *Id.* s. 4.39.