FCPA Update

A Global Anti-Corruption Newsletter

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Recent FCPA Resolutions Highlight Key Considerations for Companies Operating In High-Risk Jurisdictions

Two recent FCPA resolutions highlight perennial anti-corruption risks and evolving regulatory expectations regarding proactive cooperation and robust remediation. First, DOJ resolved an investigation of Boston Consulting Group, Inc. ("BCG") with a declination with disgorgement. Like the November 2023 declination with disgorgement involving Lifecore, this resolution followed BCG's imposition of compensation-related penalties on certain partners and employees, and it reflects both DOJ's expectation and companies' increasing efforts to tie compensation to compliance.

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Second, a recent SEC resolution with Deere & Company ("Deere") reflects the recurring risk of using travel and entertainment to curry favor with foreign officials, particularly those with decision-making power over pending business opportunities. This resolution also underscores the importance of timely integrating acquired entities into the acquirer's compliance program.

Boston Consulting Group, Inc.

On August 27, 2024, BCG resolved a DOJ investigation related to its activities in Angola through a declination with disgorgement pursuant to the Corporate Enforcement and Voluntary Self-Disclosure Policy (the "CEP").[1]

According to the declination letter, from approximately 2011 to 2017, BCG, through its Portugal office, paid its agent in Angola the equivalent of approximately $4.3 million in commissions to help BCG obtain business with Angola's Ministry of Economy and the National Bank of Angola. BCG agreed to pay 20 to 35 percent of any procured contract to the agent, who then sent a portion of the commission to Angolan officials associated with the contract. While the declination letter does not itself make clear whether BCG personnel knew that the agent was sharing any portion of the $4.3 million in commissions with officials, it states that some BCG employees in Portugal knew of the agent's ties to Angolan government officials and falsified work product and backdated agreements to conceal the nature of the agent's work when questions were raised internally. All in, the agent assisted BCG in securing eleven contracts with the Angolan government agencies yielding revenues of $22.5 million and profits for BCG of $14.42 million.[2]

Despite finding evidence of FCPA violations, DOJ declined prosecution of BCG based on an assessment of the factors set forth in the Criminal Division's CEP, including. BCG's timely and voluntary self-disclosure, full and proactive cooperation, timely and appropriate remediation, and agreement to disgorge the profit of $14.42 million that BCG obtained from contracts secured by the agent. Notably, DOJ highlighted that BCG's remediation included terminating the employees involved in the misconduct "with compensation-based penalties" that included withholding bonuses, requiring implicated BCG partners to give up their equity in BCG, and denying departing employees access to financial transition benefits.[3]

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1. Letter from the U.S. Dep't of Justice, Fraud Section to Jason Halper and Gina Castellano, Re: *Boston Consulting Group, Inc.* (Aug. 27, 2024), https://www.justice.gov/criminal/media/1365431/dl?inline ("Declination Letter").
2. *Id.* at 1–2.
3. *Id.* at 2.

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Deere

On September 10, 2024, Deere, an Illinois-based agricultural machinery manufacturer, agreed to pay approximately $10 million to resolve the SEC's investigation of alleged violations of the FCPA's accounting provisions through Deere's wholly-owned subsidiary in Thailand ("Wirtgen Thailand").[4]

Deere acquired road-equipment manufacturer Wirtgen Group, including its subsidiary in Thailand, in 2017. According to the SEC, Deere then failed to timely integrate Wirtgen into Deere's compliance program and controls framework,

"Deere also appears not to have fully integrated local operations into its control environment, which the government found kept Deere from detecting or preventing the alleged improper conduct."

which contributed to a failure to devise and maintain sufficient internal controls related to reimbursements, payments to third parties, and gifts, travel, and entertainment. As a result, improper payments to both foreign officials and commercial customers went undiscovered for years. Those payments took various forms, including international travel disguised as factory visits.

According to the SEC's order:

- From at least late 2017 through 2020, Wirtgen Thailand regularly entertained governmental officials at massage parlors in Thailand, in violation of Wirtgen's Code of Business Conduct, which prohibited improperly influencing foreign officials.[5] In order to make receipts appear more reasonable, Wirtgen Thailand employees added the names of additional employees to expense receipts and used round-number amounts.[6] Attendees of the massage parlor visits included high-level officers of the Royal Thai Air Force responsible for awarding tenders and officials with the Department of Highways and the Department of Rural Roads.[7]

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4. Order, *In re Deere & Company*, Securities Exchange Act Release No. 100984 (Sept. 10, 2024), https://www.sec.gov/files/litigation/admin/2024/34-100984.pdf ("Deere SEC Order"); U.S. Sec. & Exch. Comm'n Press Release No. 2024-124, "SEC Charges John Deere With FCPA Violations for Subsidiary's Role in Thai Bribery Scheme" (Sept. 10, 2024), https://www.sec.gov/newsroom/press-releases/2024-124 ("Deere SEC Press Release").
5. Deere SEC Order ¶ 10.
6. *Id.* ¶¶ 10–11.
7. *Id.* ¶¶ 11–16.

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Despite violating Wirtgen's Code of Business Conduct—and "without regard for compliance with Deere's policies and procedures"—Wirtgen Thailand's Managing Director and Wirtgen's Managing Director for Southeast Asia routinely approved these expenses. During this period, Wirtgen Thailand was awarded multiple tenders with the departments employing these officials, including two Royal Thai Air Force tenders amounting to $665,000, tenders with the Department of Highways amounting to $4.25 million, and a tender with the Department of Rural Roads amounting to $1.28 million.[8]

- Further, in October 2019, Wirtgen Thailand funded a trip for four officials from the Department of Highways, including a member of the procurement committee, and two of their spouses, to visit Wirtgen's facilities in Germany. While expense receipts described the purpose of the trip as being "to visit factory," the itinerary indicated that, over the eight-day trip, the group did not visit any factories. Rather, Deere spent $47,500 on a sightseeing trip in Switzerland that featured shopping, touring in the Alps, and staying at luxury hotels. During the trip, Wirtgen Thailand submitted a bid for a Department of Highways tender, which was awarded shortly after the trip. A month later, the Department of Highways awarded Wirtgen Thailand a second tender.[9]
- Wirtgen Thailand also made direct cash payments and payments through a third party in order to secure tenders. Through sham commission agreements, Wirtgen Thailand sent approximately $285,129 to secure Department of Highways and Department of Rural Roads tenders.[10]

Deere consented to the SEC's cease-and-desist order charging violations of the FCPA's books and records and internal accounting controls provisions and agreed to pay disgorgement of approximately $4.3 million, prejudgment interest of $1.1 million, and a civil penalty of $4.5 million.[11]

In resolving the matter, the SEC noted Deere's cooperation and remediation efforts, including terminating responsible employees and improving its international audit and compliance programs. Deere revised its Code of Business Conduct, including its travel policies, introduced new compliance initiatives, increased anti-bribery training, and committed to continued assessment of its compliance program and controls.

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8. *Id.* ¶¶ 11, 14–15.
9. *Id.* ¶ 17–18.
10. *Id.* ¶¶ 20, 22–23.
11. *Id.* ¶¶ 37–41.

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Takeaways

These two resolutions serve as timely reminders to companies to bolster their anti-corruption practices, including:

- **Consider how compensation-related incentives and disincentives can strengthen a compliance program and encourage desired behaviors.** Beyond withholding bonuses, BCG's compensation-related remediation included forcing culpable personnel to relinquish equity and lose transition benefits. With that, the last two FCPA-related declinations with disgorgement have involved terminating responsible employees and withholding bonuses and compensation—and more.[12] This is consistent with DOJ's emphasis on compliance-promoting compensation and penalties—which has been incorporated into the newly-updated "Evaluation of Corporate Compliance Programs" (the "ECCP") and applied in the enforcement context through the compensation clawback pilot program.[13] We're likely to see this emphasis continue.

- **Regularly review policies, procedures, and accounting controls regarding gifts, travel, and entertainment—and enforce them.** Deere's failure to adopt and maintain effective internal accounting controls allowed corrupt practices to proceed undetected for years, notwithstanding prohibitive policies. Ensuring the sufficiency of those controls can allow for swift detection and prevention, and self-disclosure as appropriate.

  The FCPA does not prohibit legitimate hospitality expenditures that are reasonable, bona fide, and directly related to the promotion, demonstration, or explanation of a company's products or services. Sometimes companies have blanket prohibitions regarding the provision of travel and entertainment to foreign officials, which appears to have been the case at Wirtgen. But local management flouted the prohibition and approved expenses lacking sufficient documentary support. Deere also appears not to have fully integrated local operations into its control environment, which the government found kept Deere from detecting or preventing the alleged improper conduct. There may be room to argue about the appropriateness of certain gift and entertainment expenses or about the circumvention of adequate controls that have been implemented. But that room constricts where the government can demonstrate that existing internal controls were not yet in place.

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12. *See* Letter from the U.S. Dep't of Justice, Criminal Division, Fraud Section to Manuel A. Abascal, Re: Lifecore Biomedical, Inc. (Nov. 16, 2023), https://www.justice.gov/media/1325521/dl?inline.

13. *See, e.g.*, Kara Brockmeyer, et al., "DOJ Issues Trio of Updates That Further Heighten Compliance Expectations," FCPA Update, Vol. 14, No.8 (Mar. 2023), https://www.debevoise.com/insights/publications/2023/03/fcpa-update-march-2023.

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- **Ensure timely integration of acquired entities.** As numerous past enforcement actions brought by both DOJ and the SEC have made clear,[14] companies expanding through acquisitions should ensure the adequacy of and timely integration of acquired entities into well-designed compliance programs. That expectation is codified into DOJ's CEP through the DOJ-wide M&A Policy and the six-month safe harbor that was announced last October.[15] And post-acquisition integration was also emphasized in last week's updates to DOJ's ECCP, which now provides that DOJ prosecutors evaluating compliance programs should ask what role the compliance and risk management functions have in designing and executing the integration process, how the acquirer ensures compliance oversight of the acquired business, and how the new business is integrated into the acquirer's risk assessment procedures.[16] The SEC specifically called out the importance of this message in the Deere resolution: "[t]his action is a reminder for corporations to promptly ensure newly acquired subsidiaries have all the necessary internal accounting control processes in place."[17]

Andrew M. Levine

Douglas S. Zolkind

Andreas A. Glimenakis

Elizabeth R. White

Andrew M. Levine and Douglas S. Zolkind are partners in the New York office. Andreas A. Glimenakis is an associate in the Washington, D.C. office. Elizabeth R. White is an associate in the New York office. Full contact details for each author are available at www.debevoise.com.

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14. *See, e.g.*, Kara Brockmeyer, Winston M. Paes and Philip Rohlik, "WPP Settlement Highlights Risks of Expansion By Acquisition," FCPA Update, Vol. 13, No. 3 (Oct. 2021), https://www.debevoise.com/insights/publications/2021/11/fcpa-update-october-2021; Kara Brockmeyer, et al., "U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic," FCPA Update, Vol. 9, No. 10 (May 2018), https://www.debevoise.com/insights/publications/2018/05/fcpa-may-2018.
15. *See, e.g.*, U.S. Dep't of Justice, "Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy" (updated Jan. 2023), https://www.justice.gov/opa/speech/file/1562851/download; Kara Brockmeyer, et al., "DOJ Announces Six-Month 'Safe Harbor' Policy for Acquisition-Related Disclosures," Debevoise Update (Oct. 6, 2023), https://www.debevoise.com/insights/publications/2023/10/doj-announces-six-month-safe-harbor-policy.
16. *See* Helen V. Cantwell, et al., "DOJ Updates Guidance on Corporate Compliance Programs to Include AI Risk Management," Debevoise Update (Sept. 25, 2024), https://www.debevoise.com/insights/publications/2024/09/doj-updates-guidance-on-corporate-compliance-pro.
17. Deere SEC Press Release.

DOJ Updates Guidance on Corporate Compliance Programs

On September 23, 2024, the U.S. Department of Justice updated its guidance to federal prosecutors related to the "Evaluation of Corporate Compliance Programs" (the "ECCP").[1] This revision, the first since March 2023, addresses how companies manage risks associated with new and emerging technology, including artificial intelligence, and expands on preexisting guidance regarding employee reporting channels, whistleblower protection, post-acquisition compliance integration, and use of data for compliance purposes.

Noteworthy Changes to DOJ's Guidance

Federal prosecutors use the ECCP in evaluating companies' compliance programs in connection with charging decisions and penalty determinations, including whether to impose a monitor. First issued in February 2017 and revised in 2019, 2020, and 2023, the ECCP centers on three fundamental questions. In particular, the ECCP considers whether a compliance program is: (1) well designed; (2) applied earnestly and in good faith, with adequate resourcing and empowerment; and (3) working in practice.

The following are the key additions and other modifications in the latest ECCP:

- Most significantly, the updated ECCP squarely addresses the impact of new technologies, such as AI. DOJ now asks prosecutors to consider what technology a company uses to conduct business, whether the company has conducted a risk assessment regarding the use of such technology, and whether the company has taken appropriate measures to mitigate risks associated with the technology. DOJ then lists an array of follow-up considerations, including how the company assesses the potential impact of AI or other new technology on the company's ability to comply with applicable laws, what governance structure and controls the company has implemented with respect to the use of technology, what other steps the company has taken to mitigate technology-related risks and avert potential misuse of technology, and how the company trains its employees on the use of AI and other new technology.

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1. U.S. Department of Justice, Criminal Division, "Evaluation of Corporate Compliance Programs" (Sept. 2024), https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl.

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- The prior ECCP already stressed the importance of an effective mechanism by which employees can anonymously or confidentially report compliance issues, as well as measures to ensure that employees who report will not be subject to retaliation. The new ECCP builds on that guidance, instructing prosecutors to consider whether and how a company incentivizes reporting (or, conversely, engages in "practices that tend to chill such reporting"), whether the company has an anti-retaliation policy, and whether the company trains employees on internal reporting channels, anti-retaliation policies and laws, external whistleblower programs, and whistleblower protection laws.
- In the transactional context, DOJ places additional emphasis on post-acquisition integration. The 2023 version of the ECCP called for assessment of a company's process for implementing compliance policies and procedures, and conducting post-acquisition audits, at an acquired entity. DOJ reinforced the importance of those considerations when it announced, later in 2023, that it will apply a presumptive six-month post-closing "safe harbor" during which an acquiring company may self-report at an acquired entity without fear of prosecution. In the new ECCP, DOJ also asks what role the compliance and risk management functions have in planning and carrying out the integration process, how the company ensures compliance oversight of the acquired business, and how the new business is integrated into the company's risk assessment procedures.
- Similarly, with regard to the use of data for compliance purposes, the new ECCP expands on DOJ's existing guidance. Specifically, prosecutors should ask not only whether a company's compliance function has sufficient access to relevant data sources but also whether the company is "appropriately leveraging data analytics tools" for compliance purposes, how the company is managing the quality of its data, and how the company is ensuring the reliability of any data analytics models it is using.

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Key Takeaways for Companies

The updated ECCP's greatest impact likely will be on how companies tailor their compliance programs to address new technologies, particularly the expectation that companies will have "conducted a risk assessment regarding the use of [AI] . . . and . . . taken appropriate steps to mitigate any risk associated with the use of that technology." To meet those expectations, companies that have deployed AI for significant business or compliance operations may be asked to explain and demonstrate:

- where they have deployed AI;
- which AI use cases, if any, are high risk;
- who determines what uses are high risk and on what basis;
- the process for determining that the benefits of high-risk AI uses outweigh the risks;

"This revision … addresses how companies manage risks associated with new and emerging technology, including artificial intelligence, and expands on preexisting guidance regarding employee reporting channels, whistleblower protection, post-acquisition compliance integration, and use of data for compliance purposes."

- that this process includes assessing risks associated with malicious or unintended uses of the AI (e.g., through stress testing);
- for high-risk uses, the company knows the specific risks that are elevated for the particular use case (e.g., privacy, bias, transparency, quality control, vendor management, cybersecurity, loss of IP protections, regulatory compliance, contractual compliance, conflicts, etc.), and people knowledgeable about those risks have either accepted the risks or mitigated the risks (e.g., through alerts, data controls, technical guardrails, training, labeling, human review, compliance affirmations, model validation, etc.);
- high-risk uses are monitored on an ongoing basis to ensure that the risk remains acceptable or mitigated, that the AI continues to function as intended, and that significant deviations in the AI's performance are detected quickly; and
- the above process is adequately documented.

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In addition, the revised ECCP puts companies on notice that, if their use of AI leads to significant compliance problems or fails to adequately identify and address those problems, as part of a charging decision, DOJ may examine the resources devoted to AI risk management and compliance. If those resources seem small compared to the resources devoted to other areas of similar risk within the company, or as a proportion of the overall expenditures on the commercial side of the AI ledger, then DOJ may find the compliance program lacking in resource allocation.

Most of DOJ's other changes to the ECCP expand on principles already articulated in the guidance and that should be integral to any well-developed compliance program. Nevertheless, by providing additional questions and specific factors for prosecutors to consider when evaluating compliance reporting channels or post-acquisition integration procedures, for example, DOJ seeks to help companies and their compliance functions more effectively design and enhance their policies, procedures, and other compliance-related tools. The ECCP remains a valuable resource not only for companies that fall under DOJ's investigative spotlight, but for any company seeking to ensure that its compliance program remains aligned with increasing regulatory expectations.

Helen V. Cantwell

Avi Gesser

Andrew M. Levine

David A. O'Neil

Winston M. Paes

Jane Shvets

Douglas S. Zolkind

Erich O. Grosz

Helen V. Cantwell, Avi Gesser, and Andrew M. Levine are partners in the New York office. David A. O'Neil is a partner in the Washington, D.C. office. Winston M. Paes, Jane Shvets, and Douglas S. Zolkind are partners in the New York office. Erich O. Grosz is a counsel in the New York office. Full contact details for each author are available at www.debevoise.com.

FCPA Update

FCPA Update is a publication of
Debevoise & Plimpton LLP

66 Hudson Boulevard
New York, New York 10001
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

San Francisco
+1 415 738 5700

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Luxembourg
+352 27 33 54 00

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Douglas S. Zolkind
Co-Editor-in-Chief
+1 212 909 6804
dzolkind@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Winston M. Paes
Co-Editor-in-Chief
+1 212 909 6896
wmpaes@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Andreas A. Glimenakis
Associate Editor
+1 202 383 8138
aaglimen@debevoise.com

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