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Clear Channel and Albemarle FCPA Settlements – Key Takeaways for Compliance Officers

Last week saw two notable settlements of enforcement actions brought under the Foreign Corrupt Practices Act (the "FCPA") that underscore the importance of robust processes for following up on negative internal audit findings and performing risk-based due diligence on third parties. First, on September 28, it was announced that Clear Channel Outdoor Holdings Inc. ("Clear Channel"), a Texas-based outdoor advertising company, agreed to pay the Securities and Exchange Commission ("SEC") $26.1 million as settlement for violations of the anti-bribery, books and records, and internal accounting provisions of the FCPA.[1] The following day, it was announced that Albemarle Corporation ("Albemarle"), a global specialty chemicals company headquartered in North Carolina, agreed to pay a combined settlement of $218 million to the SEC and the Department of Justice for violations of the same provisions.[2] Both matters involved allegedly improper payments to government officials through third parties who worked on the companies' behalf (known as "third-party intermediaries" or "TPIs") to secure business in Asia. Discussed below are certain key takeaways from these enforcement actions, which should be considered by companies when evaluating their internal audit and third-party due diligence processes.

The Need for Robust Internal Audit Follow-Up Processes

Over a five-year period, Clear Channel's internal auditors prescribed certain remedial actions to be taken in response to identified bribery risks and concerns at the company's majority-owned subsidiary in China, Clear Media Limited ("Clear Media"), relating to numerous high-risk activities, including payments to cleaning and maintenance vendors (discussed in greater detail below), travel, gifts and entertainment, compliance training, and whistleblower hotline implementation. According to the settlement documents, even though the audit reports identified certain remedial actions, Clear Channel management and its audit committee failed to ensure that Clear Media took adequate steps to address the identified concerns. Regulators also observed that, in 2013, Clear Channel's internal auditors reported that the issues raised in the prior year's compliance audit were resolved, but the auditors did not provide any detail as to how those issues had been resolved. The same issues then became the subject of repeat audit findings in subsequent years.

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[1] *See* In the Matter of Clear Channel Outdoor Holdings, Inc., Securities Exchange Act of 1934 Release No. 98615 (September 28, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98615.pdf?utm_medium=email&utm_source=govdelivery.

[2] *See* In the Matter of Albemarle Corporation, Securities and Exchange Act of 1934 Release No. 98622 (September 29, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98622.pdf; *see also* Non-Prosecution Agreement re: Albemarle Corporation, Department of Justice (September 28, 2023), https://www.justice.gov/media/1316796/dl?inline.

In the Albemarle enforcement action, regulators specifically cited a series of internal audit reports over the course of four years that found compliance control gaps relating to the company's use of TPIs. Although Albemarle took certain actions to address these findings, the authorities alleged that certain of the identified gaps were allowed to persist.

These settlements underscore the importance of having a formal, robust, and repeatable process for following up on internal audit findings, including (i) deliberate countermeasure development, (ii) documenting countermeasure implementation, (iii) testing, (iv) establishing individual accountability for sufficient remediation, and (v) reporting on the foregoing to senior management and the audit committee, as appropriate.

The Importance of Comprehensively Identifying TPIs and Implementing Third-Party Controls and Due Diligence

The Clear Channel enforcement action highlighted Clear Media's alleged use of "cleaning and maintenance" vendors as a conduit for improper payments, many of which were companies owned by Clear Media's joint venture partner. Although the primary function of the cleaning and maintenance vendors was to build, clean, and maintain Clear Channel's outdoor billboards in China, these vendors were also responsible for extensive government interactions, including approvals for government concessions for the right to place outdoor signage in certain locations. Regulators faulted Clear Channel for a number of alleged control lapses with respect to Clear Media's use of cleaning and maintenance vendors, including (i) making payments to the vendors based on oral agreements, (ii) failure to have anti-corruption provisions in the contracts with these third parties, (iii) paying vendor invoices that contained non-specific work descriptions, and (iv) automatically renewing vendor contracts without due diligence or public bidding. Furthermore, Clear Media allegedly did not properly diligence or document a number of TPIs because the identities of the consultants were considered "sensitive and confidential" information.

Two dynamics at issue in this action should stand out in particular for companies with cross-border operations. *First*, the cleaning and maintenance vendors could be considered as "stealth TPIs," meaning that their primary role of physically servicing billboards does not necessarily connote the extent of their government interactions. This case serves as a reminder that the anti-corruption risk of all third parties should be assessed based on their actual function and government interactions, rather than merely their primary category of service. *Second*, this action suggests that the cleaning and maintenance vendors may have enjoyed relaxed controls and oversight by Clear Channel because they were owned by Clear Media's joint venture partner. When entering foreign joint ventures, companies often rely on joint venture partners to handle regulatory interactions, though this case underscores that companies must maintain strong due diligence, contracting, and payment controls even when a vendor is a related party.

The Albemarle enforcement action highlights particular alleged lapses in third-party due diligence that should be instructive to companies in assessing their anti-corruption controls. Specifically, regulators referenced a certain TPI retained by Albemarle that was registered to do business only a few weeks before starting work for the company and that had no website. These facts triggered an expectation by the regulators that due diligence would include a review of whether a TPI has an established professional profile, beyond a simple evaluation of whether the TPI is duly registered to conduct business. The TPI in question reportedly also raised other compliance red flags, including that it was recommended by an official of Albemarle's state-owned customer in China and that the TPI had a familial connection to the official. Although Albemarle's local subsidiary was aware of these red flags, it allegedly did not report them to the compliance personnel conducting due diligence. This stands as a reminder of the importance of ensuring that personnel at local subsidiaries are trained on anti-corruption compliance standards, ensuring that comprehensive information is collected during the diligence process, and that local personnel are

accountable for following compliance processes. Additionally, the enforcement action referenced a sales agent in the United Arab Emirates that was retained before due diligence was conducted, and allegedly had "close and well-publicized ties to the UAE government and royal family" that were not acknowledged in the agent's due diligence questionnaire. Importantly, this case underscores that companies could be held accountable if they do not undertake their own checks to verify certain key representations made by third parties during diligence.

Conclusion

The resolution of these cases offers helpful guidance that should be considered when assessing and enhancing third-party due diligence programs and protocols for harmonizing internal audit activities with compliance enhancement.

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If you have any questions about these matters or strategies for related enhancements to internal audit procedures and anti-corruption compliance programs, please do not hesitate to contact authors Brian Markley (partner) at 212.701.3230 or bmarkley@cahill.com; Brock Bosson (partner) at 212.701.3136 or bbosson@cahill.com; Jennifer Potts (counsel) at 212.701.3390 or jpotts@cahill.com; or Quanece Williams (associate) at 212.701.3887 or qwilliams@cahill.com; or email publications@cahill.com.

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