Lessons From SEC's Bribery Claim Against Ex-Goldman Exec

By John Murray and Shrutih Tewarie (May 19, 2020)

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On April 13, the U.S. Securities and Exchange Commission brought an enforcement action under the Foreign Corrupt Practices Act against Asante Berko, a former executive of a U.K. subsidiary of Goldman Sachs Group Inc., for allegedly coordinating a bribery scheme to help a client of the subsidiary win a contract to build and operate an electrical power plant in Ghana.[1]

According to the complaint, although an intermediary paid multiple bribes to secure the business, Goldman's compliance division ended the bank's involvement in the deal based on concerns about that intermediary. The SEC did not charge either Goldman entity, noting in its press release that the "firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction."[2]

The complaint and press release do not make clear whether Goldman self-reported Berko's alleged misconduct to the SEC or whether the agency's charging decision was based on credit to the bank under the SEC's cooperation program.

The SEC's allegations with respect to Goldman's actions nevertheless provide and reinforce some important lessons for FCPA compliance.

The SEC's Allegations

The SEC's complaint alleges that Berko arranged for a client of Goldman's U.K. subsidiary, a Turkish energy company, to funnel at least $2.5 million in bribes through a Ghana-based intermediary to Ghanaian government officials in order to gain their approval to operate the power plant.

Berko, along with a managing director at the U.K. subsidiary who supervised him, also allegedly sought for the subsidiary to arrange financing for the plant, from which it would have earned over $10 million in fees. The managing director is not alleged to have participated in the scheme. Berko also allegedly helped draft a contract between the energy company's parent and the intermediary to pay up to $42 million, purportedly for services, but in fact intended to facilitate the payment of bribes for future regulatory benefits.

According to the complaint, Berko used his personal email account to orchestrate the scheme, and received $2 million from the energy company as compensation for his role, a portion of which was paid during his employment with the U.K. subsidiary.

In doing so, Berko allegedly evaded Goldman's policies and procedures, which included mandatory disclosure of payments to intermediaries and politically exposed persons in major transactions, a prohibition on the use of non-approved email accounts for work-related matters, and required approval for compensated outside activities by employees.

Goldman also required approval of the deal by a committee of senior members of Goldman and its U.K. subsidiary, which Berko allegedly attempted to deceive by failing to correct false denials about the intermediary's role in the posting memo used by the committee to

review the deal.

As described in the complaint, although the committee granted interim approval, it designated the deal as "significant and complex," requiring a second level of diligence before the project could receive final approval. As part of the enhanced diligence, Goldman's compliance personnel reviewed Berko's work emails, which revealed the involvement of the intermediary.

In response to follow-up questioning, Berko allegedly falsely downplayed the intermediary's role. Compliance then referred the issue to Goldman's legal department, which assigned a team of legal and compliance personnel to investigate further. At their direction, the deal team reached out to the energy company for more detail, and Berko allegedly helped the company draft misleading responses.

When the company refused to answer additional questions, compliance personnel terminated Goldman's involvement in the project. Berko allegedly resigned from the bank at the end of 2016.

Takeaways for Compliance

The government has long highlighted the importance of robust, risk-based FCPA compliance, and Berko bolsters the conclusion that this approach will yield a return for companies in the government's FCPA charging decisions. It also reconfirms the importance in FCPA diligence of looking beyond the representations of employees and others with an interest in a given transaction, a longstanding theme for the SEC.

For example, in 2015, global resources company BHP Billiton Ltd. agreed to a $25 million penalty to settle SEC charges that it violated the FCPA's internal controls provisions in connection with paying for foreign officials to attend the 2008 Beijing Summer Olympics.

The SEC stressed in its order that although the officials were mainly from countries in Africa and Asia with "well-known histories of corruption," creating a heightened risk of FCPA violations, BHP relied upon responses from business managers on a hospitality application the company required for approval of invitations to the games.[3]

Accordingly, FCPA diligence should take stock of the attendant circumstances and surrounding context in a broad and proactive way, particularly where a proposed intermediary is involved, given the significant weight that the SEC and U.S. Department of Justice place upon third-party diligence.[4]

These extend to information within the company's direct knowledge as well as information in the public domain or discoverable through further investigation. Relevant considerations include, for example:

- Does the proposed transaction involve public officials in a country with a known or reported history of endemic corruption or one that has figured in prior FCPA actions?
- Does the transaction involve an industry heavily regulated by foreign officials or dependent upon business from the public sector overseas?
- Are the payment terms for a proposed intermediary consistent with those prevailing in the country and industry at issue?

- Is the intermediary actually performing the work for which it is being engaged?
- Are there any atypical structural aspects of the proposed business, such as an unusual fee amount or unconventional payment or guarantee arrangements?
- Are the emails or other communications of personnel involved in the transaction consistent with their representations to compliance?
- Is there information available about a proposed client or intermediary in the media or public records or through further investigation overseas?

Companies should also consider whether the assistance of an investigations firm may be appropriate. Entities failing to take this approach, no matter how multi-layered their review processes, risk being viewed as conducting mere check-the-box compliance, which the SEC and DOJ have repeatedly rejected as inadequate.[5]

With respect to third parties, the SEC and DOJ have advised that the "degree of scrutiny should increase as red flags surface."[6] The SEC may have given Goldman credit for following this guidance in light of the follow-up diligence described in the complaint.

Berko also reflects the continued significance in the government's charging calculus of senior management's commitment to a culture of compliance, manifested by the company's good faith enforcement of its compliance program.[7]

The SEC and DOJ have repeatedly underscored this criterion in the FCPA context, and the SEC presumably applied it here given that, according to the complaint, Goldman heeded the concerns of its compliance personnel by terminating its involvement in the project.

In addition, the action points to the value for a U.S. parent company of effective policies and procedures that apply uniformly to the parent and its foreign subsidiaries in mitigating the risk of liability for FCPA violations by a subsidiary or its employee.

The SEC and DOJ will generally deem a parent to be liable where the parent takes part in the misconduct or where the subsidiary functions as an agent of the parent.[8] The government will consider agency to exist where the parent exercises control over the subsidiary, and it has taken a broad view of what constitutes such control.[9]

Here, the SEC's complaint contains extensive allegations of control by Goldman over its U.K. subsidiary, based, inter alia, on overlapping management, integrated financial structure and reporting, and oversight of legal and compliance.

Had the U.K. subsidiary responded to the red flags independently under a different, less effective compliance program, its New York-based parent may have faced a different outcome.

Hence, policies and procedures that function reliably across a global corporate family, as in this case, may allow a U.S. parent to avoid liability for bribery by a subsidiary's employee despite such potential indicia of control.

Finally, the lack of clarity in the SEC's press release and complaint as to whether Goldman self-reported Berko's misconduct is noteworthy. The SEC and DOJ have long made clear that they "place a high premium on self-reporting, along with cooperation and remedial

efforts," in their FCPA charging determinations.[10]

If Goldman did not in fact self-report here, the SEC's decision not to pursue the bank would make the importance of vigorous and thorough diligence all the more evident. More detail on this question may emerge over time.

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[1] Complaint, SEC. v. Berko, No. 1:20-cv-01789, (E.D.N.Y. Apr. 13, 2020), available at https://www.sec.gov/litigation/complaints/2020/comp-pr2020-88.pdf. The complaint did not name the Goldman entities or the client, but they have been identified in press coverage. See, e.g., Dave Michaels, Ex-Goldman Banker Arranged Bribes to Ghana Officials, SEC Says, Wall Street Journal (Apr. 13, 2020), available at https://www.wsj.com/articles/ex-goldman-banker-arranged-bribes-to-ghana-officials-sec-says-11586817542.

[2] SEC Press Release, SEC Charges Former Financial Services Executive With FCPA Violations (Apr. 13, 2020), available at https://www.sec.gov/news/press-release/2020-88.

[3] SEC Press Release, SEC Charges BHP Billiton With Violating FCPA at Olympic Games, (May 20, 2015), available at https://www.sec.gov/news/pressrelease/2015-93.html.

[4] See A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) ("FCPA Resource Guide") (jointly published by DOJ and SEC) at 60, available at https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

[5] See, e.g., id. at 57.

[6] Id. at 60.

[7] Id.

[8] Id. at 27.

[9] See Marcela E. Schaefer, Note, Should A Parent Company Be Liable for the Misdeeds of Its Subsidiary? Agency Theories Under the Foreign Corrupt Practices Act, 94 N.Y.U. L. Rev. 6 (Dec. 2019), available at https://www.nyulawreview.org/issues/volume-94-number-6/should-a-parent-company-be-liable-for-the-misdeeds-of-its-subsidiary-agency-theories-under-the-foreign-corrupt-practices-act/.

[10] FCPA Resource Guide at 54 see also SEC, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decision (Oct. 23, 2001) (commonly referred to as the "Seaboard Report"), available at https://www.sec.gov/litigation/investreport/34-44969.htm; U.S. Attorneys' Manual §§ 9-28.000, 9-28.300 (Principles of Federal Prosecution of Business Organizations, Factors to be

Considered), available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.300. The DOJ's FCPA Corporate Enforcement Policy also provides that companies are entitled to a presumption of a declination, absent aggravating circumstances, where the company has voluntarily self-disclosed misconduct, fully cooperated, and timely and appropriately remediated the misconduct. 9-47.120 (FCPA Corporate Enforcement Policy), available at https://www.justice.gov/criminal-fraud/file/838416/download.