Deutsche Bank - FCPA Recidivist

Part 1 - Introduction

There is a reason Donald Trump and his family use Deutsche Bank. It is one of the most corrupt banking institutions around. You have to admit, after Wells Fargo, that is really saying something. Last week, Deutsche Bank continued its ignoramus history in settling yet another set of corruption and illegal conduct claims. According to a Department of Justice (DOJ) Press Release, Deutsche Bank "agreed to pay more than $130 million to resolve the government's investigation into violations of the Foreign Corrupt Practices Act (FCPA) and a separate investigation into a commodities fraud scheme.

"The resolution includes criminal penalties of $85,186,206, criminal disgorgement of $681,480, victim compensation payments of $1,223,738 and $43,329,622 to be paid to the US Securities & Exchange Commission in a coordinated resolution." Settlement documents include a Deferred Prosecution Agreement (DPA) and Information and a Cease and Desist Order (Order) entered to with the Securities and Exchange Commission (SEC). This settlement comes on the heels of another Foreign Corrupt Practices Act (FCPA) settlement in August 2019, where the Bank paid $16.2 million to settle a 'Princeling' charge that it corruptly hired sons and daughters of foreign officials and of employees of state-owned enterprises. Today, I will begin a multi-part exploration of this settlement.

Deutsche Bank is still under Monitorship from that 2019 FCPA resolution. It is not clear if the monitor uncovered the continued illegal conduct of the Bank. The DPA dryly notes that the Bank "did not voluntarily and timely self-disclose to the Offices the FCPA conduct described in the Statement of Facts."

Acting Deputy Assistant Attorney General Robert A. Zink of the Justice Department's Criminal Division said in the DOJ Press Release, "Deutsche Bank engaged in a seven-year course of conduct, during which it failed to implement a system of internal accounting controls regarding the use of company funds and falsified its books and records to conceal corrupt and improper payments. Separately, Deutsche Bank traders on three continents sought to manipulate our public financial markets through fraud for five years. This resolution exemplifies the department's commitment to help ensure that publicly traded companies devise and implement appropriate and proper systems of internal accounting controls and maintain accurate and truthful corporate documentation. It also stands as an example of the department's efforts to police the public U.S. markets so that all may continue to trust, and rely upon, the integrity of our public financial systems."

The FCPA portion of the criminal action involved the use of third-parties to facilitate bribery and corruption to obtain and retain business. Acting US Attorney Seth D. DuCharme of the Eastern District of New York said, "Deutsche Bank engaged in a criminal scheme to conceal payments to so-called consultants worldwide who served as conduits for bribes to foreign officials and others so that they could unfairly obtain and retain lucrative business projects."

Charles Cain, Chief of the SEC Enforcement Division's FCPA Unit, said in a SEC Press Release, "While third parties can assist in legitimate business development activities, it is critical that companies have sufficient internal accounting controls in place to prevent payments to third parties in furtherance of improper purposes." Additionally, according to the SEC's order, "Deutsche Bank engaged foreign officials, their relatives, and their associates as third-party intermediaries, business development consultants, and finders to obtain and retain global business. The order finds that Deutsche Bank lacked sufficient internal accounting controls related to the use and payment of such intermediaries, resulting in approximately $7 million in bribe payments or payments for unknown, undocumented, or unauthorized services. The order further finds that these payments were inaccurately recorded as legitimate business expenses and involved invoices and documentation falsified by Deutsche Bank employees."

Between 2009 and 2016, the Bank "knowingly and willfully conspired to maintain false books, records, and accounts to conceal, among other things, payments to a business development consultant (BDC) who was acting as a proxy for a foreign official and payments to a BDC that were actually bribes paid to a decisionmaker for a client in order to obtain lucrative business for the bank." Specifically, regarding Saudi BDC, Bank employees conspired to contract with a company owned by the wife of a client decisionmaker to facilitate bribe payments of over $1 million to the decisionmaker, despite the fact that Bank employees knew about the relationship between the Saudi BDC and the decisionmaker. Indeed, the DPA stated, "In requesting approval of one payment, Deutsche Bank employees cautioned that the "client and [the Saudi BDC] are intimately linked and . . . any cessation of payment to the [the Saudi BDC] will certainly prompt a significant outflow of [business]" from the client."

There was a similar relationship with an Abu Dhabi BDC, but here Bank employees knew the Abu Dhabi BDC "lacked qualifications as a BDC, other than his family relationship with the client decisionmaker, and that the Abu Dhabi BDC was in fact acting as proxy for the client decisionmaker. Deutsche Bank paid the Abu Dhabi BDC over $3 million without invoices."

Moreover, Bank employees conspired to falsify the Bank's books, records, and accounts, in violation of the FCPA. Bank employees knowingly conspired to fail to implement internal accounting controls in violation of the FCPA by "failing to conduct meaningful due diligence regarding BDCs, making payments to certain BDCs who were not under contract with Deutsche Bank at the time, and making payments to certain BDCs without invoices or adequate documentation of the services purportedly performed."

The SEC's found the Bank violated the books and records and internal accounting controls provisions of the Securities Exchange Act of 1934. The Bank agreed to a Cease-and-Desist Order and to pay disgorgement of $35 million with prejudgment interest of $8 million to settle the action. The SEC did not impose a civil penalty in light of the $79 million criminal penalty paid in the criminal resolution.

Part 2 – The Bribery Schemes

The bribery schemes were as basic in imagination as there were in brute force. According to the Information, "Deutsche Bank contracted with third-party intermediaries, which it called "Business Development Consultants" or "BDCs," to obtain and retain business globally. The BDCs were approved by then-high-level Deutsche Bank management and various regional committees." In some instances, Deutsche Bank made payments to BDCs that were not supported by invoices or evidence of any services provided. In other cases, Deutsche Bank employees created or helped BDC's create false justifications for payments.

Indeed, the Saudi BDC was a special purpose vehicle, "beneficially owned by the wife of an individual who was responsible for managing the family office and the personal investments ("the Family Office") of a Saudi official ("the Family Office Manager")." Moreover, the Saudi BDC was acting as a proxy for a foreign official and payments to a BDC that were actually bribes paid to a decisionmaker for the Bank in order to obtain lucrative business for the bank. The Saudi BDC would be paid fees that were falsely recorded in the Company's books as "referral fees," when the true purpose was for Deutsche Bank to make corrupt payments to the Family Office Manager in order for Deutsche Bank to retain the business of the Family Office.

The Family Office Manager made investment decisions for the Family Office and, during the relevant FCPA period, the Bank managed hundreds of millions of dollars in investments for the Family Office. The Bank contracted with the Saudi "BDC to facilitate and conceal corrupt payments from the Bank to the Family Office Manager, because Deutsche Bank bankers believed that the Family Office Manager would take the Saudi official's business to another bank if it did not pay bribes to the Family Office Manager."

All of this was well-known within the Bank. The Information reported that "at least four Managing Directors of DEUTSCHE BANK AG and several high-level employees and officers of DEUTSCHE BANK AG and Deutsche Bank's European subsidiary, knew that the Saudi BDC was the wife of the Family Office Manager and that the purpose of engaging the Saudi BDC was to corruptly provide bribe payments to the Family Office Manager in order to retain the business of the Family Office." Additionally, this knowledge went much higher than simply the Managing Director level. Finally, the Information stated, "On or about May 3, 2011, a Deutsche Bank Director, who was also the regional head of sales and business management ("Deutsche Bank Director 1"), emailed Managing Directors of the defendant DEUTSCHE BANK AG, including a high-level executive of Deutsche Bank's European subsidiary, seeking support and approval for the arrangement because "[the Saudi BDC's] husband [was] a Director of the [] client," creating an economic connection between the client and the "paid [Saudi BDC]""

This demonstrates not only actual knowledge but criminal intent as well. The Bank even helped to create the shell company to facilitate the corrupt payment, assisting the Saudi BDC in establishing a shell company in the British Virgin Islands ("the BVI Company") and opened an account for the BVI Company at the Bank.

While it may not seem possible, the scheme involving the Abu Dhabi BDC was even more brazen. The Information stated, "Prior to entering into a contractual relationship with the Abu Dhabi BDC, certain bankers of the defendant DEUTSCHE BANK AG, including at least four Managing Directors of DEUTSCHE BANK AG who also held high-level regional and functional positions in Deutsche Bank, knew that: (1) the Abu Dhabi BDC was a relative of a high-ranking official of, and a decision-maker for, the Abu Dhabi SOE and its parent entity ("the Abu Dhabi SOE Official"); (2) the Abu Dhabi BDC was acting as a proxy for the Abu Dhabi SOE Official; and (3) paying BDC fees to the Abu Dhabi BDC was a requirement for Deutsche Bank to obtain the Project X business from the Abu Dhabi SOE."

Several emails quoted in the Information pounded this message home.

Email 1 - ("Deutsche Bank AG Managing Director 1"), emailed a regional Deutsche Bank executive, who was also a Managing Director of DEUTSCHE BANK AG, explaining that "[the Abu Dhabi BDC] confirms he is behind [the Abu Dhabi SOE Official]."

Email 2 - Managing Director of the defendant DEUTSCHE BANK AG sent an email to Deutsche Bank AG Managing Director 1 stating that the Abu Dhabi BDC "really is the gate keeper to [the Abu Dhabi SOE Official]."

Email 3 - Deutsche Bank AG Managing Director 1 also made it clear to others at Deutsche Bank that approving the Abu Dhabi BDC's contract was necessary to close the deal for Project X.

Email 4 - Deutsche Bank AG Managing Director 1 emailed another Managing Director of the defendant DEUTSCHE BANK AG, who was the head of a regional business line, stating, "We need to close the [Abu Dhabi BDC] angle within the next 48hrs. Need ur [sic] leadership and influence on getting it thru GMRAC."

Lest you think these were simply rogue employees going somewhere the Bank was not aware of, the formal bank compliance committee in charge of BDCs specifically approved the Abu Dhabi BDC in spite of (1) knowledge of "the Abu Dhabi BDC's relationship to government officials; (2) the Abu Dhabi BDC's lack of qualifications to serve as a BDC; (3) the indirect involvement of another intermediary (the "Abu Dhabi Intermediary") who was a relative of the Abu Dhabi BDC and business partner of the Abu Dhabi SOE Official, and who had roles with several state-owned entities, including the parent company of the Abu Dhabi SOE; and (4) the fact that the Abu Dhabi SOE Official was also pressuring Deutsche Bank to finance a yacht in which the Abu Dhabi SOE Official had an ownership interest in exchange for winning additional business from the Abu Dhabi SOE."

Part 3 – Overlooked Red Flags and Internal Control Failures

One thing that is clear from all the settlement document is that Deutsche Bank had a robust written Global Anti-Corruption Policy which prohibited the payment of bribes, both directly and indirectly, in both the public and private sectors. The Policy also prohibited the offer of anything

of value to influence any act or decision of a public officials. The Order makes clear that it was a *paper* program only, with no teeth.

When it came to third-parties, representatives such as the BDCs could only be retained under the following conditions:

1) Documented pre-contractual due diligence;
2) A written contract which set out the BDC's role and/or services approved by the Bank's Legal department;
3) The contract contained a documented description of services to be performed, amount to be paid, and other material terms of the engagement;
4) The payment was proportionate to the value of the services rendered; and
5) Review and approval was obtained before the engagement began.

In addition to these requirements, a BDC "with a "political or governmental affiliation" was classified as a politically exposed person ("PEP") and required enhanced due diligence" and such person could not be retained without additional vetting and approval by senior management, Legal, and the Bank's compliance functions. Such third-parties were mandated to have "sufficient expertise and qualifications" to perform the services. Finally, "Payments were required to be proportionate to the services rendered and made only in circumstances where the supporting invoice contained "sufficient detail regarding the services or matters to which such invoice relates.""

The gaping hole in all of this was who actually managed the BDCs after they were approved. It was the front-line business representatives who had initially proposed the BDC in the first place. Moreover, not only were these business representatives evaluated by how the BDCs performed but their compensation was in part based on the work brought in by the BDCs. The Order stated, business sponsors, as Bank employees were "compensated, in part, based on the revenue earned by Deutsche Bank. The business sponsors recommended the engagement of the identified BDC, determined whether payments to the BDCs complied with both the terms of the BDC contract and the Bank's policies, and maintained records concerning the services provided by the BDC, including invoices."

A. Missed Red Flags

The Bank's internal audit, in both 2009 and 2011 identified red flags around the BDCs. The 2009 Report noted identified concerns with the Bank's use of one BDC including insufficient oversight over that BDC engagement to ensure it was not being used for corrupt purposes and a lack of documentation detailing what actual services were rendered by the BDC. The report went on to recommend that the Bank's "global BDC Policy be revised and that the internal accounting controls around BDCs be enhanced to include centralized and thoroughly documented due diligence to demonstrate that a BDC was qualified to perform the services for which it was contracted, maintenance of detailed records of all work performed by the BDC, and a

requirement that BDC engagements include books and recordkeeping provisions giving Deutsche Bank inspection rights."

The 2011 Report went further finding "problems related to specific BDC engagements; lack of due diligence; general lack of training and awareness of Deutsche Bank's BDC Policy and due diligence requirements among employees; failure by business sponsors to appropriately assess, document, and mitigate corruption risks and conflicts of interests; and failure to document the proportionality and justification for certain BDC payments."

B. Internal Control Failures

Even with this specific information in both Reports going to the Bank's senior management there were numerous internal control failures. Between 2009 and 2016, the Bank retained and utilized BDCs: 1) with no expertise or qualifications; 2) were foreign government officials; 3) without a contract; 4) using form agreements which had description of the services to be performed and/or provisions calling for "success fee" payments; 5) with compensation rates that were unreasonably high; and 6) in circumstances where either adequate due diligence was not performed or where due diligence was conducted more than a year after the BDC was retained and paid.

Due to these internal control failures, the Bank paid certain BDCs in circumstances where no invoices were submitted and where invoices contained insufficient documentation to detail what services were performed. These failures made "it nearly impossible to determine what, if any, services were performed or to determine the purpose for the payment." At times, the BDCs were paid in excess of what was provided for pursuant to their contract with the Bank and some BDCs were paid even though they had no contract at the time certain of the services were purportedly performed. Finally, as the Order dryly noted, "Amongst the BDC payments made in these circumstances were those that were bribes."

C. Some Examples

In China, a BDC, who was a government official, was hired and worked for the entity whom the Bank was attempting to gain business from. This third-party was ""a close friend of" a foreign government official whose approval was needed for the establishment of the investment fund." Moreover, and with a huge red flag, "that same government official required that Deutsche Bank work through Consultant A to establish the investment fund." This corrupt agent was paid "at least $1.6 million. This included payments for services purportedly performed before he was engaged." The Bank gave this BDC "a partnership interest in the investment fund that required little or no upfront capital and entitled him to a large potential profit share." This agreement was executed without Legal and Compliance having full information about the circumstances of BDC's relationship with the government entity.

In Italy, the Bank hired an Italian Tax Court Judge, to refer high net worth clients to the Bank. Apparently little to no due diligence was performed prior to retaining the BDC. Numerous

payments were made to BDC that exceeded the commission rate in his contract and included payments outside the terms of his contract. Additionally, the BDC was paid more frequently than permitted by contract and was paid despite not performing some of the services for which invoices were issued. The Order stated, "For example, he received payments for at least three purported client introductions despite not having introduced those clients to the Bank. When he made demands for payments outside the scope of his contract, he received additional payments and was paid for research reports and advisory information that were of no value to the Bank."

Part 4 – Recidivism, the Penalty and FCPA Enforcement

This FCPA enforcement action brings the Bank into the ignominious category of recidivist. Although given the corrupt nature of the Bank, they obviously do not give a flying flip to be labeled as such and may even see it as a badge of pride (The 'Edgy' Bank). Nevertheless, this status does provide some interesting points for consider and distinct lessons to draw from going forward.

Under the Policy, companies have the presumption of a declination if they meet four criteria: (1) self-disclose, (2) timely and appropriately remediated, (3) extensively cooperated with the DOJ, and (4) disgorged all ill-gotten gain. According to the Policy, "absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism."

If a company does not meet the above criteria, it still can receive credit under the Policy. "If a company did not voluntarily disclose its misconduct to the Department of Justice in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range." There is nothing in this subsequent paragraph about aggravating circumstances or criminal recidivism nor does it relate back to the paragraph laying out the factors for the presumption of a declination.

Deutsche Bank was still able to receive a 25% discount off the minimum US Sentencing Guidelines calculation. How did they achieve this result? As noted in the DPA, the Bank did not self-disclose to authorities. Indeed, there is no mention of how these crimes came to light. The Bank is under a Monitorship and perhaps it came about through that mechanism. If so, it illustrates one important aspect of a Monitorship not often discussed which is that a monitor may well uncover instances of additional illegal acts which can be stopped. It may even be that employees or ex-employees may well be willing to talk to a monitor and reveals such actions.

The Bank did receive credit in three areas: (1) ***Cooperation*** - the Bank "received full credit for its cooperation with the FCPA investigation conducted by the Offices, including making detailed factual presentations, providing regular updates on the Company's internal investigation,

highlighting key facts and documents, making foreign-based employees available for interviews in the United States, and producing extensive documentation to the Offices, including documents located in foreign jurisdictions"; (2) ***Disclosure pursuant to the Yates Memo*** - the Bank provided to the DOJ all relevant facts known to the Bank, including information about the individuals involved in the conduct; and (3) ***Timely and Appropriate Remediation*** - the DPA and Order provided the following factors of remediation:

- Significantly enhancing its internal accounting controls, its anti-bribery and anti-corruption program, and its third-party agent program on a global basis;
- Reducing the number of third-party agents used by the Bank;
- Requiring that the Anti-Fraud, Bribery and Corruption ("AFBC") function approve, and a member of the Management Board support, any new third-party agents;
- Reviewing the third-party agents on an annual basis with involvement by representatives of AFBC;
- Instituting enhanced due diligence procedures and practices on third-party agents;
- Disciplining and terminating certain employees involved in the misconduct;
- Enhanced monitor and control of third-party agents;
- Increasing the Bank's anti-corruption compliance staff; and
- Increased and more regular anti-bribery training specifically addressing the use of third parties to obtain and retain business.

What all this continues to communicate to the compliance community and the white-collar defense bar is that the DOJ will provide solid and tangible credit for companies no matter how corrupt the companies were, if they move forward to substantively clean up their act and cooperate with the DOJ. The Policy language of "Aggravating circumstances that may warrant a criminal resolution" including "*involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism*" only appears to apply to the first part of the Policy, dealing with a presumption of a declination. It does not appear to apply to a company which does not self-disclose and thereby is ineligible for a declination.

If you significantly clean up your act during the investigation phase and cooperate, it can save you some big bucks, even for a recidivist. How much did that mean in hard dollars deducted from the overall fine and penalty? Somewhere in the neighborhood of $20 million.

Part 5 – Final Thoughts and Lessons Learned

A. Internal Controls

The following examples demonstrate multiple internal control failures. In China, a third-party, who was a government official, was hired and worked for the entity whom the Bank was attempting to gain business from. This third-party was ""a close friend of" a foreign government official whose approval was needed for the establishment of the investment fund." Moreover,

and with a huge red flag, "that same government official required that Deutsche Bank work through Consultant A to establish the investment fund." This corrupt agent was paid "at least $1.6 million. This included payments for services purportedly performed before he was engaged." The Bank gave this third-party "a partnership interest in the investment fund that required little or no upfront capital and entitled him to a large potential profit share." This agreement was executed without Legal and Compliance having full information about the circumstances of BDC's relationship with the government entity.

What were the internal control failures? Hiring a third-party who himself was a foreign official and worked for the entity with whom Deutsche Bank was trying to obtain business. The third-party was also a well-known a "close friend of a foreign government official whose approval was needed for the establishment of the investment fund." Finally, the Bank actually set up an investment fund for the third-party and the Bank's customer.

Consider Italy, where the Bank hired an Italian Tax Court Judge, to refer high net worth clients to the Bank. There was little to no due diligence performed prior to retaining the third-party. Even with the pretense of a written contract, numerous payments were made to the third-party that exceeded the commission rate in his contract and included payments outside the terms of his contract. Even when no services were provided by the third-party, he was paid more frequently than permitted by contract. A written contract acts as an internal control because a third-party should not be paid outside the term and amount of the contract and should certainly not be paid when no work is performed.

Another key internal control is the segregation of duties. You simply cannot have a Business Development (BD) person, who recommends a third-party, be responsible for managing that third-party when the BD person is being compensated based in part of the sales of the third-party. The financial incentive to allow or encourage the third-party to engage in bribery and corruption in well-known high-risk jurisdictions is simply too great. When coupled with a corrupt culture such as the one in place at Deutsche Bank, it is a clear recipe for disaster in the form of a FCPA violation.

B. Ignoring Internal Audit

Based on the settlement documents, you might rightly question why the Bank even had an internal audit function as in both 2009 and 2011 it identified red flags around the third-parties used by the Bank. The 2009 Report noted identified concerns with the Bank's use of one third-party around insufficient oversight over the engagement to ensure it was not being used for corrupt purposes. Internal audit also reported a lack of documentation detailing what actual services were rendered by the third-party.

The 2011 internal audit report found other areas of concern such as:

- Lack of due diligence around third-parties;
- Lack of training and awareness of the Bank's third-party Policy by bank employees

- Lack of knowledge about due diligence requirements before hiring third-parties by Bank employees;
- Failure by business sponsors to appropriately assess, document, and mitigate corruption risks and conflicts of interests; and
- Failure to document the amount and justification for certain payments to third-parties.

Internal audit recommended that the Bank's "global BDC Policy be revised and that the internal accounting controls around BDCs be enhanced to include centralized and thoroughly documented due diligence to demonstrate that a BDC was qualified to perform the services for which it was contracted, maintenance of detailed records of all work performed by the BDC, and a requirement that BDC engagements include books and recordkeeping provisions giving Deutsche Bank inspection rights." Of course, none of this was ever done.

C. Final Thoughts

Reading and re-reading the settlement documents, one can only wonder at the culture at the Bank which basically boiled down to win at all costs: lie, cheat, steal, engage in bribery and corruption, manipulate the markets, we don't care. Just Win Baby. The Bank was also comfortable in dealing with some very dodgy characters beyond even Donald Trump and his family. The Bank has now said it will no longer do business with Trump and his personal banker left the Bank at the end of 2020.

Does this mean the Bank will turn state's evidence against Trump? It is hard to say at this point, but the Bank is committed in the DPA to "cooperate fully with the Offices in any and all matters relating to the conduct described in the Statement of Facts ***and other conduct under investigation by the Offices at any time during the Term***, subject to applicable laws and regulations, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the end of the Term." [emphasis supplied] While this is boilerplate language found in every DPA it certainly takes on greater significance now.