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Aerospace and Defense Insights

Bribery and Corruption Outlook 2021

Alexei Dudko and Peter S. Spivack

Aerospace, defense, and government services – tighter control ahead

2020 was an eventful year for companies in the aerospace, defense, and government services (ADG) sector. The industry saw arguably the largest anti-corruption settlement in enforcement history, and faces budget constraints and challenges from pandemic-related pressure on state defense budgets and commercial customers. Here is what we see in the future for anti-bribery and anti-corruption enforcement in the ADG sector.

Direct sales will not completely eliminate risk

Many ADG companies have reduced their external risk by eliminating or drastically reducing their reliance on third parties such as agents, brokers, and distributors. Because third parties have figured prominently in major cases in the past, this move away from indirect sales channels will help improve accountability and decrease improper payments. Reliance on direct sales channels, however, means that risk is brought in-house, and places a greater premium on active monitoring of interactions with government officials and state-owned enterprises.

ADG is no longer untouchable

Enforcement authorities will not be reluctant to investigate and prosecute ADG companies, even when those companies may be central to national

defense and national security. However, because procurement bars can do significant damage to a company in the long term, companies will need to be increasingly responsive to national law enforcement authorities, and ensure that they pay careful attention to corporate liability and debarment risks. The increased attention of law enforcement authorities on investigating and prosecuting bribery and corruption violations in the ADG sector is a part of the general trend for much tighter control over the use of state funds and interactions with state entities.

More international cooperation means more multi-country internal investigations

There will continue to be active and increased cooperation among national authorities in the investigation of corruption offenses, and newer players, such as France's *Parquet National Financier* and *Agence Française Anticorruption*, will become increasingly active. As a result, multijurisdictional internal investigations will be necessary to meet the expectations of national law enforcement authorities. Outside counsel will need experience and expertise in negotiating with multiple different national enforcement authorities, to effectively resolve cases as part of a global strategy, rather than on a piecemeal basis. Companies have successfully used "virtual law firms" when no single law firm can cover all geographies involved in an investigation.



Conflicting legal regimes may result in uncomfortable choices

Geopolitical developments influence this sector perhaps more than any other. The counterpoise of the trend towards increased international cooperation has to do with the regulatory “decoupling” affecting other jurisdictions, such as China and Russia. This will bring complex issues for internal investigations on the ground – especially in such spheres as data protection, state secrets, international transfers of classified information and controlled technology, and sanctions compliance, where multinational companies may face conflicting legal obligations. Companies may need creative solutions to resolve these legal conundrums.

One word: data

As data expands exponentially, technology-assisted review, with refinements such as continuous active learning technology, will be both necessary and expected for analyzing electronically stored data. With the expansion of anti-corruption legislation that incorporates OECD¹ guidance for mitigated penalties or avoided liability for effective compliance programs, companies will need to build more (in their programs) with less (in their budgets). That will increase the deployment of data analytics platforms to harness the data that companies generate internally, to leverage it for compliance purposes.

Settlements will be more expensive, but more flexible

With one record set in January 2020 and then broken in October 2020, fines look set to continue to grow. But just as they skyrocket, the UK and other national enforcement authorities are becoming increasingly comfortable with the use of deferred prosecution agreements, to encourage companies to come forward to report on wrongdoing. Because company boards of directors often seek the certainty of the least-worst option, settlements that permit companies to continue as going concerns will encourage self-reporting.

Get ready for more acronyms

Companies in the ADG sector are subject to considerable regulation, and enforcement authorities have become more adept at coordinating investigations that span criminal laws and national security statutes. Companies and defense counsel will need to do the same, being adept with investigations and settlements that may involve anti-bribery and anti-corruption, trade controls, and economic sanctions, among other areas. In the United States, that means the Arms Export Control Act (AECA) and its implementing regulations, the International Traffic in Arms Regulations (ITAR), the Trading With the Enemy Act (TWEA), the sanctions regime enforced by the Office of Foreign Assets Control (OFAC), the Money Laundering Control Act (MLCA), and other statutes too numerous to mention.

The bottom line

The ADG sector faces pressure on all sides: from national authorities that will ratchet up investigation and enforcement pressure; from defense and commercial procurements that will aim to reduce costs; and from internal budgets that will necessitate achieving results with fewer resources.

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*Our associated offices
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Alexei Dudko

Partner | Moscow
T: +7 495 933 3015
E: alexei.dudko@hoganlovells.com



Peter Spivack

Partner | Washington, D.C.
T: +1 202 637 5631
E: peter.spivack@hoganlovells.com

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