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Significant Remediation Spares Goldman Sachs a Monitor in Biggest FCPA Settlement in History

By Megan Zwiebel, *Anti-Corruption Report*

It has taken two years, but The Goldman Sachs Group (Goldman) has now settled allegations related to its role in the scandal surrounding sovereign wealth fund 1Malaysia Development Berhad (1MDB) for the eye-popping sum of $2.9 billion. But even with combined financial penalties and disgorgement that make it the largest FCPA settlement in history, the bank managed to dodge several bullets in negotiating its deal, due, perhaps, to its extensive remediation efforts. We analyze the unique ways the bank has sought to shore up its compliance program – including executive compensation clawbacks – and how those changes may have influenced the deal.

For a detailed analysis of the bribery scheme, see "How a Flamboyant Intermediary Snarled Goldman Sachs in the 1MDB Scandal" (Nov. 28, 2018).

Looting a Sovereign Wealth Fund

1MDB was a strategic investment and development company owned by the government of Malaysia, through its Ministry of Finance, formed in 2009, according to the criminal information (Information) filed against Goldman by the DOJ. Through numerous compliance failures, Goldman found itself deeply enmeshed in a series of fraudulent and corrupt transactions meant to raise capital for 1MDB.

A Well-Connected Intermediary

Goldman's relationship with 1MDB was mediated by Low Taek Jho, commonly known as Jho Low, a well-connected Malaysian national, who befriended Tim Leissner, the former Southeast Asia chairman at Goldman, and Ng Chong Hwa (a.k.a. Roger Ng), a managing director at the Goldman.

Low had cultivated relationships with the sons and daughters of the global elite during his time at Harrow, an elite boarding school in London, and then the Wharton School of Business at the University of Pennsylvania. His close relationship with Riza Aziz, the stepson of former Malaysian Prime Minister Najib Razak, positioned him as the primary go-between for the 1MDB financing deals.

Leissner and Ng attempted to bring Low on board as a Goldman client, but his background raised numerous red flags, leading a Goldman regional head of compliance to write in an email, "It is seldom that one sees a vendor report, which has been backed up verbally by them, that so clearly states that we should exercise extreme caution." Ultimately, Goldman's Business Intelligence Group (BIG) rejected Low as a client.

However, this rejection did not prevent Leissner and Ng from continuing their relationship with Low and using him to establish Goldman as the primary bookrunner and arranger for a series of three bond offerings, totaling $6.5 billion. Low promised gifts and remuneration to various 1MDB officials to facilitate the deals, even while not being officially involved.

Goldman's Control Functions Drop the Ball

Although Leissner and Ng took active steps to hide Low's involvement in the deals, control personnel at Goldman missed or ignored numerous red flags about the deals.

During due diligence for the first bond offering, referred to as Project Magnolia, "Goldman's control functions accepted the statements of the deal team members about Low's involvement at face value, rather than taking additional steps that Goldman's control functions took in other deals, such as reviewing the electronic communications of members of the deal team to look for evidence of Low's involvement (e.g., searching for references to Low)," according to the Information.

After the deal closed, Goldman's control function "failed to verify how Project Magnolia's proceeds were used," and ignored the additional red flag that 1MDB was seeking to raise funds only a few months after the first bond offering, in a deal code named Maximus.

In the lead up to the third deal, code named Project Catalyze, a member of the approval committee emailed Leissner asking, "Is there a story circulating about an intermediary on the Magnolia trades??" Leissner responded, "Not that I am aware of ... There definitely was no

intermediary on any of the trades. The blogs in Malaysia always try to link a young Chinese business man [sic], Jho Low, to 1MDB. That is not the case other than he was an advisor alongside other prominent figures to the King of Malaysia at the time of the creation of 1MDB." After Leissner's denial, there was no follow-up to determine the truthfulness of his assertion.

After each deal, Leissner directed funds to be transferred to various shell and holding companies, some of which were beneficially owned or controlled by 1MDB officials.

Even after all of the deals were completed, between March 2013 and February 2016, additional red flags were raised in the press and internal communications, but Goldman personnel failed to investigate or perform an internal review of its role in the bond "despite the clear implication that the deals had involved criminal wrongdoing," according to the Information.

A Compliance Overhaul

Once the corrupt nature of the 1MDB transactions came to light, Goldman took a hard look at its internal controls and began to make significant changes. According to a press release issued by Goldman's board of directors, over the past five years, it has "overseen significant enhancements to compliance and internal controls," including "expanding the global compliance division; establishing an enhanced framework for addressing potential reputational risks, including an expanded review of significant and complex transactions; improving anti-bribery controls; enhancing the technical sophistication and training for the control-side of the Firm; and creating new programs to investigate and prevent risks and potentially harmful actions."

In an unusual move, Goldman released a detailed slide show presentation (Presentation) of its completed and ongoing compliance enhancements at the time the settlement was announced. It offers a unique view into how the company conceptualized its remediation efforts as a whole and how they fit into the larger fabric of the bank's business model.

A Focus on Reputational Risk

With the huge tab Goldman was left with when the dust finally settled, one might think the bank's remediation focus would be on avoiding further brushes with the law and the fines they bring with them. However, many of Goldman's program enhancements are couched in terms of minimizing reputational risk, rather than legal risk.

The bank's compliance and internal control enhancements "include re-designing our framework for addressing reputational risk, including the creation of a Firmwide Reputational Risk Committee [FRRC] that is made up of predominantly control-side members who are empowered to stop any transaction," David M. Solomon, chairman and CEO of Goldman stated in a memorandum to all employees sent at the time the settlement was announced. "Over the past several years, we have materially changed our focus to put reputational risk at the center of our decision-making," he said.

The FRRC has management-committee-level representation and reviews transactions that might cause reputational risk, as determined by a dynamic reputational risk "grid," according to the Presentation. Goldman developed a comprehensive reputational risk framework and trained employees on reputational risks. The memberships of key transaction review committees integral to control and reputational risk management processes, such as the capital committee and the suitability committee, were changed so that a majority of the membership is from the control side of the firm.

To some, the firm's focus on reputational risk is not a surprise, Timothy Belevetz, a partner at Ice Miller, told the Anti-Corruption Report. "Being known as a bad actor, an unethical partner, or a bad corporate citizen turns off investors, high-quality employees, customers and clients," he said. "No one wants that type of reputation, and avoiding it is something companies take – or at least should take – seriously."

See "Designing and Implementing Effective Press and Social Media Policies to Mitigate Reputational Harm From Anti-Corruption Investigations" (May 29, 2013).

Data, of Course

Another way in which the Goldman remediation plan is not surprising is its focus on using data analytics to improve compliance, though the firm may be taking it farther than most.

To enhance the firm's data-driven compliance program, it has introduced "advanced analytical techniques to facilitate the search of trades, transactions, asset movements and email and voice communications data," according to the Presentation. Additionally, the firm is now using "data and metrics to assess the design, efficacy and performance of [its] compliance controls."

In the realm of more advanced compliance measures, Goldman has developed metrics to track and measure governance, culture and control, the Presentation explains. The metrics track conduct across

the firm, are made available to supervisors and they are regularly reported to management and the board of directors.

What these metrics look like in practice is not specified in the Presentation, but they will likely look at things such as leadership, communication, accountability, tone at the top and other indicators of a fair and just working environment, Belevetz suggested.

"Cultural metrics typically include results of employee risk surveys, employee training data, annual code of conduct and other policy certification data, and hotline and investigation data, including substantiation rates and disciplinary actions taken against employees," Parth Chanda, founder and CEO of Lextegrity, told the Anti-Corruption Report. These types of data are subjective, "revealing employees' representations or opinions about the company's compliance with policies and/or laws," he explained.

But to get the full picture, a company should also look at objective data that can provide insights on culture, Chanda emphasized. "Data analytics that flag potential fraud, policy violations and trends across the company can help the control function assess the culture on the ground, in real-time," Chanda suggested. "It appears Goldman has significantly enhanced its use of both traditional cultural metrics as well as advanced analytics to really assess its compliance culture and controls and to identify and prevent wrongdoing."

See our four-part series on measuring compliance: "Getting Started" (Aug. 2, 2017); "Seven Areas of Compliance to Measure" (Aug. 16, 2017); "How to Measure Quality" (Sep. 6, 2017); and "Gathering and Analyzing Data" (Sep. 20, 2017).

Insider Threats

Goldman's remediation efforts included the expected tightening of controls around its interactions with third parties, including broadening its intermediary policy and enhancing due diligence and onboarding processes.

However, the firm put a greater focus on mitigating risks from the firm's own employees. It established an "Insider Threat Program" that provides a "a framework that will actively manage the risk that careless or malicious insiders may cause reputational or monetary harm to the firm, its employees or its clients," the Presentation explains. The program "leverages enhanced surveillance analytics to prevent and detect potentially harmful action by employees," Solomon explained in his memorandum.

In developing the program, the firm "[a]nalyzed historical cases of employee misconduct and studied changes in employee behavior to identify meaningful trends and data points of potential and likely

insider threats to develop and enhance on-going surveillances for continuous monitoring." This review led to the creation of an enhanced model used to identify insider threats by incorporating data points that may signal employee behavior, such as compensation information and gifts and entertainment violations. The employee surveillance is holistic, "looking at patterns and trends, not just individual alerts," the Presentation explained.

Additionally, the firm is heightening its scrutiny of senior-level people engaged in high-risk business. It has developed "a program to conduct 'in-depth' reviews of senior people using all available data, both internal and external," according to the Presentation, and "reviewed the process for approval of senior people's travel and entertainment expenses, with particular focus on those in high risk jurisdictions."

More controversially, Goldman is using advanced tools in its surveillance of its employees' electronic communications. It is using "new technology," such as natural language processing, AI and machine learning, "to provide greater transparency and speed around e-communication surveillance" and has created "centers of excellence for e-communication review based on new technology."

There are tradeoffs in aggressively monitoring employee communications, Belevetz advised. While they can help a company identify risks, but "they can also foster a culture of distrust, where employees feel at the outset they are under a cloud of suspicion with upper-level management looking to scapegoat them," he said, which can be counter-productive. "There is also the risk of implementing techniques that conflict with data privacy laws like the GDPR and those in Asia, where they tend to be fairly strict," he warned.

See "Effective and Compliant Employee Monitoring (Part One of Two)" (May 30, 2018); Part Two (Jun. 13, 2018).

Personal Accountability and Clawbacks

On the flip side of Goldman's hunt for insider threats, it is also encouraging its employees to take personal responsibility for protecting the interests of the company. "[A]s an organization that seeks to live up to a common set of ideals and values, we are responsible for each other's actions," Solomon said. Everyone at the bank shares in the benefits when colleagues perform well for clients, but "the opposite must be true as well," he warned. "When a colleague knowingly violates a firm policy, or much worse, the law, we – as a firm – have to accept responsibility and recognize the broader failure that individual behavior represents for our firm."

To that end, Goldman developed a training program targeted at senior-level employees at the partner or managing director level that

focuses on their personal responsibility to identify and escalate issues and protect the firm from reputational risk. It also conducted a training on control-side responsibilities to reinforce the role of the control-side in monitoring and escalating issues and conducted awareness training for revenue-side vice presidents on their personal responsibility to identify and escalate issues.

Perhaps as a way to lead by example, Goldman also announced that it would be clawing back compensation from senior level executives involved with the 1MDB transactions. According to the board's statement, the firm "has undertaken clawback actions to the full extent of its contractual entitlements" from Leissner, Ng and one other former employee who was directly involved in the transactions, seeking approximately $76 million. The board is further seeking compensation forfeiture from the firm's former CEO, COO, CFO, head of Goldman Sachs International and global head of growth markets. Additionally, the current executive leadership team, including the CEO (Solomon), COO and CFO will have their compensation reduced for 2020.

"We must continue to hold ourselves to the highest standards, and each of us has a vital role to play," Solomon said. "Our success as a firm can only be ensured through a culture rooted in integrity, shaped by a long-term mindset and guided by a sense of personal accountability and responsibility for our actions."

Were such clawbacks to become a common feature of settlements, high-level executives might have more personal incentive to make sure their teams are doing business the right way. Clawbacks "are not as powerful as the prospect of spending time in prison, and the DOJ will still prosecute individuals in cases where it believes that is appropriate," Belevetz said, "but, as long as the financial penalties are meaningful, they will provide an important disincentive to unethical behavior."

See our two-part series taking a fresh look at hotlines: "Responding to a Global Focus on Whistleblowers" (Sep. 1, 2020); and "Fostering a Speak-Up Culture and Leveraging Data" (Sep. 16, 2020).

A Big Deal

In its entirety, Goldman's global settlement with multiple authorities in the U.S. and abroad requires payment of more than $2.9 billion in disgorgement and penalties. While that is a chart-topping number in the realm of FCPA settlements, Goldman's cooperation and extensive remediation did contain the damage.

A Coordinated Resolution

To settle with the DOJ, Goldman agreed to pay a criminal monetary penalty of $2,315,088,000 and disgorgement of $606 million. At the same time, Goldman also settled or otherwise brought to repose investigations with numerous other authorities, including:

- the SEC, agreeing to pay $606 million in disgorgement and a civil monetary penalty of $400 million pursuant to a cease-and-desist order;
- the Board of Governors of the Federal Reserve System, which fined the firm $154 million;
- the New York State Department of Financial Services, by entering into a consent order and agreeing to pay a civil money penalty of $150 million;
- the U.K. Financial Conduct Authority and Prudential Regulation Authority, paying a civil penalty to each of $63 million (for a total of $126 million);
- the Attorney General's Chambers of the Republic of Singapore, agreeing to pay $122 million and resolving the investigations by the Monetary Authority of Singapore and the Commercial Affairs Department of the Singapore Police Force; and
- the Hong Kong Securities and Futures Commission, agreeing to pay $350 million.

The DOJ agreed to credit Goldman for the amounts paid to these other authorities, to keep the total payment at $2.9 billion.

At a press conference announcing the settlement, Acting Assistant Attorney General Brian Rabbitt, described the case as "historic" due to the "unprecedented coordination" among the authorities involved. The coordination is notable, he said, because "it shows criminals cannot escape responsibility simply because their misconduct spans jurisdictions and law enforcement authorities." At the same time, "it demonstrates that the department will ensure that fraud and corrupt conduct is punished appropriately, but not unfairly," he said. "Where companies work in good faith to facilitate a coordinated resolution, we will do our part by providing appropriate crediting and not 'piling on' or imposing duplicative penalties."

See "Piling On? Examining the Reality of Multi-Jurisdictional FCPA Resolutions" (Jul. 11, 2018).

A DPA for Goldman

An interesting feature of the settlement with the DOJ is that Goldman itself was able to enter into a deferred prosecution agreement, which did not require a guilty plea, leaving that unpleasantness to its

Malaysian subsidiary. However, Rabbitt pointedly noted that the settlement required Goldman to "admit wrongdoing."

Still, a DPA does not involve a conviction, as a guilty plea would require, which means the company can avoid certain consequences, such as "licensing difficulties, reputational harm and possible suspension or debarment from government contracts or projects with multilateral development banks such as the World Bank," Belevetz explained.

See "Trends in and Nuances of Negotiating NPAs, DPAs and Declinations" in this issue.

Only Partial Cooperation Credit but No Monitor

Goldman failed to bring its conduct to the DOJ's attention and, in turn, received no self-reporting credit under the Corporate Enforcement Policy (CEP). Additionally, the DOJ did not award the firm full cooperation credit because was it "was significantly delayed in producing relevant evidence, including recorded phone calls in which the Company's bankers, executives, and control functions personnel discussed allegations of bribery and misconduct," the DPA explains. As a result, it received only a 10-percent discount off the bottom of the Sentencing Guidelines' fine range.

The DOJ found that Goldman "ultimately engaged in remedial measures," though the DPA provides little in the way of detail as compared to the information provided in the Presentation. Going forward, the firm agreed to report on its compliance program in 12-month intervals for a three-year term.

Based on the compliance improvements already made and the reporting requirements, the DOJ determined "that an independent compliance monitor is unnecessary." This decision is somewhat surprising, given the nature of the conduct, the extreme compliance failures that enabled it and the untested nature of compliance improvements that are only a few years old.

"The conduct Goldman admitted to is the type that likely would have led in the past to an independent monitor," Belevetz observed. The decision here is likely indicative of a larger trend away from using monitors in corporate resolutions at the DOJ, he suggested. "It appears Goldman's pledge to perform its own internal anti-corruption monitoring and annually report to the government was deemed sufficient."

See "How Avon Made Its Unique Monitorship a Positive Experience" (Jan. 22, 2020).

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