Internal Review of a Proposed Foreign Business Partner

In prior blogs, we explored how to rank Foreign Business Partners so that you can begin an appropriate due diligence process. We also explored what you might wish to investigate during the due diligence process. A Foreign Business Partner Review Committee should be established which is tasked with reviewing all the investigative due diligence and the Business Unit's case for partnering with the person or entity. The next area of review should of the proposed Foreign Business Partner's ethics and compliance program. Such a program should have, at a minimum, the following elements of a Foreign Corrupt Practices Act (FCPA)-style compliance program in place.

- Your Foreign Business Partner should…
  - have a restriction on facilitation payments, gifts, entertainment and travel;
  - require proper accounting and invoicing;
  - have policies that flow down to any sub-vendors under the Foreign Business Partner

If the Foreign Business Partner's program does not meet your Company's, or the FCPA, standards you should require the implementation of a program that will meet those suggested in the US Sentencing Guidelines so that it will meet Department of Justice (DOJ) approval.

The next area of review by the Foreign Business Partner Review Committee is the proposed contract with the Foreign Business Partner. The contract must have compliance obligations stated in the formation documents, whether it is a simple agency or consulting agreement or a joint venture with several formation documents. All formation agreements should include representations that in all undertakings the Foreign Business Partner will make no payments of money, or anything of value, nor will such be offered, promised or paid, directly or indirectly, to any foreign officials, political parties, party officials, or candidates for public or political party office, to influence the acts of such officials, political parties, party officials, or candidates in their official capacity, to induce them to use their influence with a government to obtain or retain business or gain an improper advantage in connection with any business venture or contract in which the Company is a participant.

In addition to the above affirmative statement regarding conduct, you should have the following contractual clauses in your Foreign Business Partner contract.

- Indemnification: Full indemnification for any FCPA violation, including all costs for the underlying investigation.
- Cooperation: Require full cooperation with any ethics and compliance investigation, specifically including the review of Foreign Business Partner emails and bank accounts relating to your Company's use of the Foreign Business Partner.

- Material Breach of Contract: Any FCPA violation is made a material breach of contract, with no notice and opportunity to cure. Further such a finding will be the grounds for immediate cessation of all payments.
- No Sub-Vendors (without approval): The Foreign Business Partner must agree that it will not hire an agent, subcontractor or consultant without the Company's prior written consent (to be based on adequate due diligence).
- Audit Rights: An additional key element of a contract between a US Company and a Foreign Business Partner should include the retention of audit rights. These audit rights must exceed the simple audit rights associated with the financial relationship between the parties and must allow a full review of all FCPA related compliance procedures such as those for meeting with foreign governmental officials and compliance related training.
- Acknowledgment: The Foreign Business Partner should specifically acknowledge the applicability of the FCPA to the business relationship as well as any country or regional anti-corruption or anti-bribery laws which apply to either the Foreign Business Partner or business relationship.
- On-going Training: Require that the top management of the Foreign Business Partner and all persons performing services on your behalf shall receive FCPA compliance training.
- Annual Certification: Require an annual certification stating that the Foreign Business Partner has not engaged in any conduct that violates the FCPA or any applicable laws, nor is it aware of any such conduct.
- Re-qualification: Require the Foreign Business Partner re-qualify as a business partner at a regular interval of no greater than every three years.

Engaging in due diligence of a proposed Foreign Business Partner is but one of the many steps required to approve a person or entity who will represent your Company overseas, thereby creating a FCPA exposure. However, there are additional steps which you should employ internally in the Foreign Business Partner review process, some of which have been discussed above. Strong compliance terms and conditions are critical for the management of the relationship going forward. The Foreign Business Partner Review Committee must certify that the appropriate terms and conditions are in place to protect against a FCPA compliance violation and, should one occur, your Company can extricate itself immediately from doing business with such a Foreign Business Partner instead of vendor.