Establishing Relationships with Foreign Business Partners—Due Diligence, Due Diligence and then Due Diligence

There are several critical components in the selection, use and retention of any Foreign Business Partner, such as agents, resellers, joint venture partners or distributors. In view of the critical risks a US Company must manage when entering into a relationship with a Foreign Business Partner, the US Company should, prior to establishing the relationship, kick off the risk management process by initiating thorough due diligence on the proposed Foreign Business Partner. The due diligence process should contain, at a minimum, inquiries into the following areas:

- **Need for the relationship with a Foreign Business Partner:** The Company Business Team or Business Person should articulate the business case for the proposed Foreign Business Partner relationship. This must be approved by management before it goes to legal or compliance for review.

- **Credentials:** List the critical reasons for selection of the proposed Foreign Business Partner. This should include a discussion of the business partner's background and experience.

- **Ownership Structure**: Describe whether the proposed Foreign Business Partner is a government or state-owned entity, and the nature of its relationship(s) with local, regional and governmental bodies. Are there any members of the business partner related, by blood, to governmental officials?

- **Financial Qualifications:** Describe the financial stability of, and all capital to be provided by, the proposed Foreign Business Partner. Obtain financial records, audited for 3 to 5 years, if available.

- **Personnel:** Determine whether the Foreign Business Partner will be providing personnel, particularly whether any of the employees are government officials. Obtain the names and titles of those who will provide services to the US Company.

- **Physical Facilities:** Describe what physical facilities will be provided by the Foreign Business Partner. Who will provide the necessary capital for their upkeep?

- **Reputation:** Describe the business reputation of the proposed Foreign Business Partner in its geographic and industry-sector markets.

These due diligence inquiries are required under the Federal Sentencing Guidelines and the guidance offered by the Department of Justice (DOJ) Opinion Releases and the publicly released Plea Agreements and Deferred Prosecution Agreements (DPA) entered into by US companies who admit to violating the Foreign Corrupt Practices Act (FCPA). This due diligence should be recorded and maintained by the US Company for review, if required, by a governmental agency. Some of the due diligence can be handled by the US Company's in-house legal and/or compliance groups. However, it is recommended that for any high risk Foreign Business Partner, an outside forensic auditing firm and outside legal counsel be retained to conduct the due diligence investigations. This brings a level of expertise usually not available within a corporation plus an outside perspective less susceptible to in-company business pressures.

After this initial inquiry is concluded the US Company should move forward to perform a background check on a prospective Foreign Business Partner by using the following resources:

- **References:** Obtain and contact a list of business references.

- **Embassy Check:** Obtain information regarding the intended business partner from the local US Embassy, including an International Company Profile Report.

- **Compliance Verification:** Determine if the Foreign Business Partner, and those person within the Foreign Business Partner who will be providing services to the US Company, have reviewed or received FCPA training.

- **Foreign Country Check:** Have an independent third party, such as a law firm; investigate the business partner in its home country to determine compliance with its home country's laws, licensing requirements and regulations.

- **Cooperation and Attitude:** One of the most important inquiries is not legal but based upon the response and cooperation of the Foreign Business Partner. Did the business partner object to any portion of the due diligence process? Did it object to the scope, coverage or purpose of the FCPA? In short, is the business partner a person or entity that the US Company is willing to stand up with under the FCPA?

After a company completes these due diligence steps, there should be a thorough review by the Board, or other dedicated Management Committee, on the qualifications of the proposed foreign business relationship partner. It is critical that the reviewing Committee is not subordinate to the US company's business unit which is responsible for the business transactions with the Foreign Business Partner. This review should examine the adequacy of due diligence performed in connection with the selection of overseas partners, as well as the Foreign Business Partner's selection of agents, subcontractors and consultants which will be used for business development on behalf of the US Company.

The steps listed herein do not include the use of, or continued management of, a Foreign Business Partner. These steps need to be taken by all US Companies entering into, or already engaged in, a relationship with Foreign Business Partners as the FCPA applies to all US Companies, whether public or private. Remember, due diligence, due diligence and once that has been completed; more due diligence.