

## **FCPA Contractual Provisions in Alliance and Joint Venture Agreements**

As was recently shown by the RAE Systems, Inc., enforcement action, foreign Joint Ventures are still the bane for many companies under the Foreign Corrupt Practices Act (FCPA). Similarly Alliance or Consortium Agreements can place a US company at risk for the actions of others which may violate the FCPA. This post will set forth some of the risk management techniques that companies can use to assist in controlling this FCPA exposure through the utilization of contractual clauses.

As a starting point, we believe that it is important to have compliance terms and conditions, these reasons can include some of the following: (1) To set expectations between the parties; (2) To demonstrate the seriousness of the issue to the non-US party; and (3) To provide a financial incentive to do business in compliant manner.

The ensuing provisions are those we believe that you should include in your Joint Venture, Alliance or Consortium Agreements, as a minimum. They include:

1. Prohibit Bribery and all forms of corruption. Many foreign Joint Venture and Alliance Partners may not understand that the FCPA applies to them if they partner in a business relationship with a US company. Further, they do not understand that they may be governmental officials under the FCPA. This all must be spelled out for them so you should have language regarding the following:
  - Prohibition of all forms of bribery and corruption, but you should be careful to make note that FCPA is broader than simple bribery; it includes hospitality/gifts/entertainment/travel as well.
  - Affirmation of FCPA compliance, this should be in writing and it should also require that the non-US party understand or have familiarity with the FCPA, as well as that they will comply with the tenets of the FCPA.
  - Agreement to comply with local laws and customs regarding anti-bribery and anti-corruption in the jurisdiction where it is located and/or does business.
  
2. Right to Cancel and Recoupment rights. These should include the following:
  - Right to cancel the contract if there is a compliance violation or breach of contract because that allows you maximum flexibility.
  - Withhold any payments due.
  - Allow for disgorgement of any monies previously paid under the agreement.
  - Take any other action you think necessary or appropriate.

### 3. Duties

- Spell out exact duties and deliverables of the Joint Venture, Alliance or Consortium.
- Agent has continuing duty to adhere to training and due diligence
- Duty to report changes in ownership structure of any non-US partner. This includes changes in corporate structure and/or corporate leadership. There must be immediate notification to the US company and it is particularly important when government changes.

4. Audit Rights - recognizing that our colleague Howard Sklar is not a big fan of audit rights; we nevertheless believe that they are an important tool in your FCPA risk management profile. Therefore we would suggest that they be included in any Joint Venture, Alliance or Consortium Agreement that you may enter into. In addition to putting your non-US partner on notice that you are not simply willing to look the other way once the agreement is signed, it is an active acknowledgement that there will be ongoing transactional due diligence during the term of the relevant contract. If any illegal payments are made or discovered the US company should retain full access to the audit trail which it can then turn over to the proper authorities. Additionally, the Joint Venture, Alliance or Consortium should have the right to audit any agent it may hire for its own use.

At this point we should note that we are in absolute agreement with Howard Sklar on the following point; if you have audit rights you better exercise them. The same calculus is true for termination rights. If you have a good faith belief that your non-US partner has violated the FCPA, you better exercise your right to terminate. If you do not do so, your US company will probably be in more hot water with the Department of Justice (DOJ).

5. Prohibited Parties - the Joint Venture, Alliance or Consortium will not deal with US designated Prohibited Countries or Prohibited Parties. At this point the list includes Cuba, North Korea, Iran, Sudan, Syria and Myanmar (formerly Burma).

Lastly one area which is continuing to be problematic is that of how to make payments. Some of the tools we would suggest are the following:

- Always try to make payments via wire transfer.
- No large upfront payments unless designated for legitimate start-up expenses.
- Pay only to the named company, not unknown third parties.
- Payment in local currency, however you can pay in USD. The key is consistency in how you are paying and your documentation.

- Pay where the agent's country of residence or where the work is done.
- Agent must be able to justify the payment requested.

All of the above steps should be taken only after extensive due diligence has been completed. After the contract is signed your company will have to work just as hard to keep the compliance program for any Joint Venture, Alliance or Consortium robust and meaningful. However, with these terms and conditions in place, you will have a chance to maintain your FCPA obligations and to manage the risk that is involved when working jointly with non-US companies.

*This publication contains general information only and is based on the experiences and research of the author. The author is not, by means of this publication, rendering business, legal advice, or other professional advice or services. This publication is not a substitute for such legal advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified legal advisor. The author, his affiliates, and related entities shall not be responsible for any loss sustained by any person or entity that relies on this publication. The Author gives his permission to link, post, distribute, or reference this article for any lawful purpose, provided attribution is made to the author. The author can be reached at [tfox@tfoxlaw.com](mailto:tfox@tfoxlaw.com).*

© Thomas R. Fox, 2011