Foreign Joint Ventures: Dennis Haist and Some Characteristics of FCPA Risk

In an article in the January/February issue of the ACC Docket, entitled "Guilt by Association: Transnational Joint Ventures and the FCPA"; Dennis Haist, General Counsel of The Steele Foundation (Steele) discussed some of the risks US companies can encounter under the Foreign Corrupt Practices Act (FCPA) when doing business overseas through the vehicle of a Joint Venture. After an introduction of the increasing risks to US companies for FCPA enforcement by reviewing some recent Department of Justice (DOJ) enforcement actions, Haist reviews some of the characteristics which may increase FCPA risk. We found his list to be a useful resource in thinking through FCPA compliance. The listed included the following:

1. Sharing of Risk/Reward. The commingling of risk and reward by the joint venture participants. Most generally, a transnational joint venture will involve the cooperative pooling of resources by the participants, and the sharing of the rewards of the joint venture. The multinational will therefore benefit from any business obtained or retained, or any permits, licenses, permissions or other advantages granted to the joint venture through improper payments to foreign officials.

2. Local Content Requirement. A joint venture with a local company may be a jurisdictional requirement to participate in that foreign government's tendering process. Many times a foreign public tender process will restrict bidders to local companies or joint ventures that include a local company for content. The local company will likely use this requirement to negotiate an equal or majority equity interest and management control over the joint venture, adversely impacting the multinational's ability to control compliance.

3. Joint Venture Partner Selection Process. The foreign joint venture partner is usually selected based upon its knowledge of the local playing field and its connections to those players. Typically a business unit will attempt to nominate a strong local partner who is well connected within the country, with knowledge of how things are done to enhance the likelihood of business success. In many such situations, a company's law department will be brought into the discussions only after the preliminary negotiations have taken place, and perhaps even after the development of a term sheet, letter of intent or heads of agreement with the prospective partner. If compliance terms and conditions have not been a discussion in these preliminary negotiations, it may well be difficult to introduce them thereafter.

4. **The dreaded "Recommendation".** A governmental official may recommend the foreign joint venture partner. Unless the prospective partner was only one entity on a formal list of re-qualified local partners, such a recommendation should raise always red flag.

5. **Foreign Law Requirement.** It is often the case that when a foreign joint venture entity is formed, it is the local legal requirements that it must be formed under the laws of the foreign country. Such laws will usually dictate a certain percentage equity interest by the foreign partner and the appointment of local personnel to officer and management positions.

6. **Locals Dealing with Locals.** The foreign joint venture partner often has the designated responsibility for day-to-day interface with local government officials. These joint venture representatives will blanch at the seconding of expensive US or Western European expatriates to the joint venture and may well thwart any such action if the foreign partner has an equal or controlling equity interest in the joint venture.

7. **Management Fee.** The foreign joint venture partner may receive a "management" fee, which may be used for improper purposes. Such fees may simply be based upon a percentage of joint venture revenue or profit, and often are not required to correspond to defined tasks, or specific efforts or hours. Typically there are no substantive billings associated with such fees, they simply become due. Under this type of arrangement, it is almost impossible to justify this fee if requested by the Department Of Justice.

8. **Books and Records.** The books and records of the joint venture, or portions of them, may be kept in the local language, complicating auditing. The problem becomes more difficult if the foreign joint venture partner is receiving the sponsor or management fees discussed above, and keeps its books of account only in the local language. Even if the books and records are maintained in English they usually are not kept up to a US public company, SOX or other standard. This in and of itself, is a violation of the FCPA.

9. **Can you talk the talk?** The multinational may not have financial oversight personnel with requisite language skills in the foreign country. Some companies have a policy that English will be used throughout the world in its business dealings. However, even with such an English only policy in place, the risks represented by such lack of effective oversight by the multinational extend not only to potential FCPA violations, but to other corrupt acts, including kickbacks, fraud and theft.

10. **Lack of Controls.** The joint venture may have local bank accounts or funds that do not require dual signatures, precluding a reasonable level of control over the use of joint venture funds. Once again, such a lack of controls may be a *per se* FCPA books and records violation.

Haist goes on in his article to list several protections which the FCPA compliance practitioner can put in place to attempt to deal with or manage these risks. We will discuss some of these risk management strategies in a subsequent posting. We recommend Haist's article for your review and applaud him for putting together such a list to use as a guidepost when reviewing the creation of foreign joint ventures, from an FCPA perspective.