

Foreign Business Representatives: Some Red Flags to Review

Most Foreign Corrupt Practices Act (FCPA) Practitioners are aware that the greater the contacts with a foreign governmental official and the greater amount of money involved, the greater the FCPA risk for a company if a third party is involved. This is more particularly so if the foreign business representative involved does nothing more than simply make an introduction or uses his (or her) connections to get your company in front of “right people.”

This posting will discuss three Red Flags which a company should review regarding a foreign business partner. Many businesses look to the value obtained in the use of a foreign business representative. This simple economic analysis is not sufficient in the FCPA context. There should be a separate analysis on whether the foreign business representative has the substantive skills to perform the services requested. Finally, if the services performed by the foreign business representative are too far out of line with those performed by competitors, this can also present a Red Flag requiring additional scrutiny.

In his recent book entitled, “*Foreign Corrupt Practices Act – A Practical Resource for Managers and Executives*” noted FCPA specialist Aaron Murphy discussed this issue. Murphy had been in situations where the decision to retain a foreign business representative was based solely upon an economic analysis, with no substantive discussion within the company of whether the proposed foreign business representative had the requisite skills to provide substantive services. He observed that such a decision making process is a “dangerous mentality to adopt when doing business with foreign governments or state owned entities.”

Why

He goes on to discuss the situation where a foreign business representative is recommended by the entity with which your company is attempting to secure a contract. As a threshold issue, Murphy makes the inquiry as to whether such a “recommendation” is really a “requirement”. If your company is informed that the retention of such a foreign business representative would make things go more smoothly, this is clear evidence of a Red Flag on the proposed foreign business representative. Murphy recommends several inquiries which include the following:

- With whom is the proposed foreign business representative related or affiliated?
- What services does the foreign business representative bring to the table which our company cannot provide?
- Was the need for the foreign business representative always contemplated as a part of the transaction?

Murphy focuses on the final question as particularly important. If the “recommendation” for the proposed foreign business representative appeared out of the blue and was not a part of any original bid requirement or tender package, a company should be particularly suspicious. Such a

request has the indicia that the proposed foreign business partner is really just a sham and potential conduit for the transfer of money to a foreign governmental official.

What Happened?

A separate issue arises when the services of a foreign business representative is unexplained or vaguely understood. Usually a foreign business representative will perform some service(s) but just exactly what the service(s) are is unclear to your company. Murphy poses this situation as the “*What Happened*” scenario where a company may have a FCPA internal controls/books and records violation because it simply cannot explain what the service(s) foreign business representative provided. This situation can arise where a service was performed quickly, and apparently efficiently, by a foreign business representative but with little understanding by your company of just how such service(s) were delivered.

Too Good to be True?

Another Red Flag which should be evaluated is where the foreign business representative performs services which are far above that of any competitor or demonstrable success rate. James Min, Vice President, Int'l Trade Law & Corporate Compliance at DHL Americas - Legal Department, has developed a risk matrix model which evaluates the performance of companies in the freight forwarders/express delivery industry. In this matrix, Min analyzes risks by multiplying factors noted herein and thus scoring. The model shows that location should not be the sole criteria for risk. The factors in the Min Model are the performance of your company’s customers clearance brokers and how far that performance varies from the norm your company normally receives. In the below chart, +1.00 equals average clearance time. >1.0 equals faster than average and <1 means slower than average.

The Min Model

Country	TI CPI	Customs Clearance Performance	Variance from Average Performance	Risk Score	Risk Rank
A	55	.93	1.21	61.9	1
B	20	.76	0.89	13.5	3
C	54	.29	1.00	15.6	2
D	88	.12	0.7.	7.39	4

Min presented his model at the recent ACI FCPA Bootcamp. The key in this approach is how often the Customs Broker/Express Delivery Service varies above the average for customs clearance times. If the percentage of customs clearance performance is so great that your vendors variance is above 100% most of the time, this could be a Red Flag that bribery or corruption is

involved. This should lead to further investigation, due diligence, or asking of questions of your vendor.

Most companies understand the need for and perform due diligence on foreign business partners. Many companies follow this up with a contract, with the foreign business partner, which requires FCPA compliance terms and conditions. However, there should be additional monitoring and review of the services provided to your company during the term of the agreement. The Red Flags listed in this article are not a complete list or dispositive, as each review will be determined by the facts involved in the transaction.

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