

Panalpina's "World Wide Web"

On November 12, 1990, Sir. Tim Berners-Lee with help from Robert Cailliau published a formal proposal for the World Wide Web in Switzerland. Today, twenty-two years later- we look at a different world wide web, one which ensnared a Switzerland based company named "Panalpina".

According to the Department of Justice, Basel, Switzerland based Panalpina World Transport "is one of the world's leading suppliers of forwarding and logistics services, specializing in global supply chain management solutions and intercontinental air freight and ocean freight shipments and associated supply chain management solutions." It operates "a close-knit network with some 500 branches in over 80 countries," does business in a further 80 countries with partner companies, and employs approximately 15,000 individuals. The criminal information focuses on a "network of local subsidiaries ... each of which was responsible for providing the freight forwarding and logistics services to customers and for coordinating with other Panalpina-affiliated companies with respect to the transportation and shipment of cargo from abroad." In addition, PWT and its subsidiaries "provided customers with importation, customs clearance and ground shipment services once the shipped goods reached their destination jurisdiction." The subsidiaries under investigation were from the U.S., Nigeria, Angola, Brazil, Azerbaijan, Kazakhstan, Russia and Turkmenistan (hence my reference to the "world wide web"!)

There have been many blogs, papers and articles written about the facts and settlement the DOJ and SEC entered into with Panalpina and many of the oil service companies utilizing its services. There is no reason for me to recite the facts of that case again. More importantly, I have seen first-hand the improvements made by Panalpina in its own compliance program since the investigation began in 2005. This is a company that should be lifted up as a model for others to follow. I have always been taught that it isn't the fact that you get knocked down that shows your strength and courage, but the fact that you get back up and learn from your mistakes. All of us can learn improvements from each and every one of the FCPA reported settlement agreements, including that of Panalpina.

Practical Pointer for today's blog- once a third party has passed the due diligence process, it is important to include contractual language specifically targeted to the FCPA (and in my opinion the UK Bribery Act). There are several well recognized concepts that should be included in the contractual language, including an overarching statement that the Agent or Partner will not authorize, offer, or pay anything of value to a foreign government official (or private entity if UK Bribery Act is encompassed) for the purpose of obtaining or retaining business or gaining any improper business advantage. This concept is followed by the promise to submit itemized invoices, with accurate supporting documentation to allow for transparency in the processing of payments. Along with these two requirements are the rights to audit, to terminate or suspend the contract, and perhaps, the right to recoup any losses and investigation costs for violation of the above. The final agreements would include the obligation to undertake training, periodic due diligence requalification and annual certifications.

On Friday, we discussed the Due Diligence process and provided some language to assist in the identification of “Red Flags” when considering the use of a third party Agents or Partners. Today, we provide you with additional language to consider utilizing once an Agent or Partner has been retained:

In addition, unless approved by the Company Compliance Officer or his or her designee, all contracts with Agents or Partners shall contain provisions addressing the following matters:

- payment mechanisms that comply with this Manual, the FCPA, the UKBA and other applicable anti-corruption and/or anti-bribery laws during the term of such contract;
- the counterparty’s obligation to maintain accurate books and records in compliance with the Company’s Policy and Compliance Manual;
- the counterparty’s obligation to certify on an annual basis that: (i) counterparty has not made, offered, or promised any payment or gift of money or anything of value, directly or indirectly, to any Government Official (or any other person or entity if UK Bribery Act applies) for the purpose of obtaining or retaining business or getting any improper business advantage; and (ii) counterparty has not engaged in any conduct or behavior prohibited by the Code of Conduct, Anti-Corruption Policy and Compliance Manual and other applicable anti-corruption and/or anti-bribery law;
- the Company’s right to audit the counterparty’s books and records, including, without limitation, any documentation relating to the counterparty’s interaction with any governmental entity (or any entity if UK Bribery Act applies) on behalf of the Company, and the counterparty’s obligation to cooperate fully with any such audit; and
- remedies (including termination rights) for the failure of the counterparty to comply with the terms of the contract, the Code of Conduct, the Anti-Corruption Policy and Compliance Manual and other applicable anti-corruption and/or anti-bribery law during the term of such contract.

All contracts that provide for the disbursement of funds by the Company to a third party shall be in writing and shall require the other party to submit a written invoice for payment in compliance with the terms of its contract with the Company. All invoices shall be accompanied by accurate and sufficient supporting documentation for all outlays to third parties. Contracts requiring the disbursement of funds by the Company for such services shall also require that, unless the Company Compliance Officer or his or her designee determines that payment in another jurisdiction does not violate local law and that a valid business reason for payment in another jurisdiction exists, funds shall be transferred only to a bank account owned by the designated recipient and that such account shall be located in the jurisdiction where the relevant business services are to be performed/occurs.

As we discussed last week, companies can be held liable for the acts of third parties acting on their behalf. The use of the contracting strategies suggested above will clearly communicate to the Agent and/ or Partner the seriousness of your company’s commitment to abiding by the law and spirit of the FCPA and similar anti-corruption laws and regulations.

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