

Maintaining a Relationship with a Foreign Business Partner after the Contract is Signed - Monitor, Monitor, and then, Monitor

In previous blog postings, we have shared our thoughts on other aspect of the Foreign Business Partner (foreign agents, reseller, distributors or any person/entity representing the company overseas) relationship including how to evaluate the Foreign Corrupt Practices Act (FCPA) compliance risk; how to perform due diligence on prospective Foreign Business Partners; how to internally evaluate the information obtained through such due diligence; and what compliance contract terms and conditions you should set for the Foreign Business Partners. In this posting, we will discuss the steps a US company must follow to implement a procedure to monitor the actions of a Foreign Business Partner going forward.

DPA Guidance

In its Deferred Prosecution Agreement (DPA) with the Monsanto Company for their FCPA violations, the Department of Justice (DOJ) provided some guidance on the continuing obligation to monitor Foreign Business Partners. In the Monsanto DPA, the DOJ agreed, after the initial due diligence and appropriate review were completed on Foreign Business Partners, for Monsanto to implement certain post contract procedures. These requirements to Monsanto can be used as guidelines as to what the DOJ will look for from other US companies who have entered into relationships with Foreign Business Partners; especially in the area of monitoring the foreign business partner.

A US company should, on a periodic basis of not less than every three years, conduct rigorous compliance audits of its operations with the foreign business partners. This monitoring would include, but not be limited to, detailed audits of the foreign business partner unit's books and records, with specific attention to payments and commissions to agents, consultants, contractors, and subcontractors with responsibilities that include interactions with foreign officials and contributions to joint ventures. The compliance audit should include interviews with employees, consultants, agents, contractors, subcontractors and joint venture partners. Lastly, a review of the FCPA compliance training provided to the foreign business partner should be included.

Ongoing Oversight

In addition to the DOJ guidance provided in the Monsanto DPA, it is recommended that there be substantial involvement not only by the business unit most closely involved with the Foreign Business Partner, but also by Legal; Compliance and other departments which would assist in completing the functions as outlined by the Monsanto DPA. The most significant reason for maintaining a post-contract relationship is to ensure the business units remain engaged in the Foreign Business Partner process. This involvement can also include some of the following participation, the senior business Vice President for the region where the Foreign Business Partner operates should annually call upon the Foreign Business Partner, in-person, to review all of the prospective business proposals and concluded business transactions that the Foreign Business Partner has engaged in.

This annual VP review must not take the place of a legal or compliance review but should focus on the relationship from the business perspective.

Managing the risk of a relationship with a foreign business partner is one of the most critical aspects of a FCPA compliance program. The documented risk for the potential violation of the FCPA by a foreign business partner to a US company is quite high. To engage a foreign business partner, in a manner that properly assesses and manages the risk to, and for, a US company, requires a committee of time, money and substantial effort. However, with a compliance based risk management procedure in place, the risk can be properly managed and a foreign business relationship can be successful for all parties.

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