

Haist on Foreign Joint Ventures and the FCPA – Part II

In our most recent post, we wrote about an article by Dennis Haist, General Counsel of Steele, which recently appeared in the ACC Docket. The article was entitled, “Guilty by Association: Transnational Joint Ventures and the FCPA”. In our first post we discussed Haist’s list of risk characteristics of a foreign joint venture for a US company. In our concluding post on Haist’s article, we will discuss some of the tactics that Haist suggests a US company engage in, to identify these risks in the due diligence phase and to manage these risks in the contract negotiation stage and thereafter.

Due Diligence

The starting point for any company is to engage in a due diligence investigation on any prospective foreign joint venture partners. Such a foreign entity or persons must provide enough basic information that a reasonable investigation can be performed. Haist breaks down his suggested due diligence inquiries as follows:

1. Entity information

- Entity name, DBA, previous names, physical address and contact information, website address.
- Legal structure, jurisdiction of organization, date organized and whether the entity is publicly traded.
- Entity registration number(s), and dates and places of registration; number of years in business.
- Entity tax licenses, business licenses, or certificates or commercial registrations.
- Description of business, customers, industry sectors.
- Names, addresses and jurisdictions of formation for all companies or other affiliated entities, and ownership interest in each.
- Names and contact information for main point of contact.
- Names and contact information for entity’s outside accountants/auditors and primary legal counsel.

2. Ownership information

- Name, address, nationality, percentage of ownership and date of acquisition for each parent company up to ultimate parent.

- Name, nationality, ID type/number, percent ownership and date of acquisition for all shareholders and owners (5 percent threshold more for publicly-listed entity).
- Identity of any other persons having a direct or indirect interest in the entity's equity, revenues or profits.
- Identity of any other person able to exercise control over the entity through any arrangement or relationship.
- Information on any direct or indirect ownership interest by any government, government employee or official; or political party, party official or candidate.

3. Management information

- Name, address, nationality, ID type/number and title for each member of the entity's governing board.
- Name, address, nationality, ID type/number and title for each officer of the entity.
- Information on any other business affiliations of principals, owners, partners, directors, officers or key employees who will manage the business relationship.
- Information on whether any principals, owners, partners, directors, officers or employees, currently or in the past, have been officials or candidates of a political party or been elected to any political office.

4. Government relationships

- Information on whether any principals, owners, partners, directors, officers or employees hold any official office or have any duties for any government agency or public international organization.
- Information on whether any owners, directors, officers or key employees have an immediate family member who is an employee, contractor or official of the foreign government, or a public international organization.
- Information on whether any employee of, or contractor or consultant to, any government entity or public international organization will benefit from the joint venture.
- Approximate percentage of entity's overall annual sales revenue derived from government sales.

5. Business conduct

- Information on whether the entity has ever been barred or suspended from doing business with a government entity Information on whether any principals, owners, partners,

directors, officers or employees are identified on any government designated nationals, blocked persons, sanction, embargo or denied persons lists.

- Information on whether the entity, its principals, owners, partners, directors, officers or employees have ever been charged with, convicted of, or alleged to have been engaged in fraud, bribery, misrepresentation and/or any other criminal act.
- Information on whether the entity, its principals, owners, partners, directors, officers or employees have been investigated for violating the US Foreign Corrupt Practices Act or any anti-corruption law.
- Information on whether the entity has a compliance program which includes the prevention of bribery and information on the training of employees.

6. References

- Three or more unrelated business references, including a bank and existing client.

7. Certification/authorization/declaration

- Certification of accuracy.
- Authorization to conduct due diligence, authorization for third parties to release data and consent to collection of data.
- Anti-corruption compliance declaration.

Haist emphasized that an over-riding key is to document the entire process that your company goes through in investigated and creating a foreign joint venture. Additionally, it is important to remember, that obtaining this information is only one step. A company must evaluate the information and follow up if responses to such inquiries warrant such action. A paper program is simply not good enough and can lead to serious consequences if Red Flags are not reviewed and cleared.

Contract Issues

Haist believes that any Joint Venture Agreement with a foreign business partner should include FCPA anti-bribery and corruption representations, warranties and covenants. These representations, warranties and covenants not to violate the FCPA should also include reference to the national and local anti-corruption laws of the foreign country, including laws enacted to comply with the OECD anti-bribery Convention and the UK Bribery Act. If the Joint Venture will operate in any other countries, the anti-corruption laws of those jurisdictions should be referenced as well.

Additional clauses that Haist suggests including in the Joint Venture Agreement are the following:

- A right of immediate termination for breach of the warranties or covenants relating to FCPA-anti-bribery and anti-corruption.
- A requirement for annual certification of compliance with such provisions by joint venture partners and joint venture officers, managers and employees.
- Require that the joint venture follow generally accepted accounting principles (GAAP), and conduct an annual audit by an agreed upon independent accounting firm.
- The right to conduct ongoing audits of the joint venture books.
- Prohibit the creation of any funds without the approval of the joint venture's governing body (supermajority approval in the case of minority interest by the multinational).
- If the foreign joint venture partner has day-to-day management responsibilities, require dual signatures for checks or electronic funds transfers drawn on joint venture bank accounts.
- Require that the joint venture conduct investigative due diligence on agents, consultants and other third parties retained by the joint venture.
- Require the implementation of a code of business conduct by the joint venture and implement an anonymous reporting mechanism for joint venture employees.

Navigating the waters involving a foreign joint venture partner are tricky at best. In addition to all the business issues, the added requirements of the FCPA and the UK Bribery Act for foreign joint ventures make such a category of business relationship a potentially risky step. His article provides to the FCPA practitioner solid advice with which to provide counsel, whether you are in-house counsel or a lawyer in private practice, to your client who may be new to the foreign joint venture arena. Once again, we applaud him for putting together such an article to use as a guidepost when reviewing the creation of foreign joint ventures, from an FCPA perspective.