Oversight Committee and Management of Foreign Business Partners

We have previously blogged on the various stages of the relationship that a US company would travel through with a Foreign Business Partner, from the pre-relationship due diligence to the post-contract execution management. One of the key elements in all of these stages is a high level oversight of the process at all of these stages. This article will discuss the concept of a Foreign Business Partner Review and Oversight Committee.

This concept appears to have found favor with the Department of Justice (DOJ), through its use in a Deferred Prosecution Agreement (DPA) with the Monsanto Corporation. The 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 execution procedures. These requirements, placed upon 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 ongoing monitoring of the Foreign Business Partner.

In January, 2005, the Monsanto Company entered into a DPA for violating the Foreign Corrupt Practices Act (FCPA) in connection with an illegal payment of $50,000 to a senior Indonesian Ministry of Environment official, and the false certification of the bribe as "consultant fees" in the company's books and records. In Appendix B to the DPA, Monsanto agreed to, among other things, "the establishment and maintenance of a committee to supervise the review of (I) the retention of any agent, consultant, or other representative for purposes of business development or lobbying in a foreign jurisdiction", or an Oversight Committee. It should be noted that Monsanto successfully completed the terms of its DPA and was discharged from further obligations under it in 2008.

The scope of this Oversight Committee is not fleshed out in the DPA. However, it is suggested that a company should incorporate both a pre-execution function and a post-execution management function in overseeing the full relationship with the Foreign Business Partner. While this oversight would most necessarily focus on FCPA compliance, there should also be a commercial component to this function.

Who Should be on the Oversight Committee?

The Monsanto DPA provides guidance on this point by stating "The majority of the committee shall be comprised of persons who are not subordinate to the most senior officer of the department or unit responsible for the relevant transaction;" this would indicate that senior management should be involved in the Oversight Committee. It would also indicate that more than one department should be represented on the Oversight Committee. This would include senior representatives from the Accounting (or Finance) Department, Compliance & Legal Departments and Business Unit Operations.

What Should the Oversight Committee Review?

The Oversight Committee should review all documents relating the full panoply of a Foreign Business Partner's relationship with a US company. This would begin with a review of any initial requests to engage a new Foreign Business Partner. The information presented to the Oversight Committee would include the Business Unit's request to engage the Foreign Business Partner, the costs and benefits. The next step would be to review the due diligence and all background investigative materials on the prospective Foreign Business Partner.

The Oversight Committee should receive copies of, and approve, all due diligence and background investigative materials before a contract is executed with a Foreign Business Partner. Particular attention should be paid to the form of the contract. If there are deviations from the company's standard form of agreement, with regard to the FCPA compliance issues, there should be a full explanation by the Foreign Business Partner or Business Unit. The Oversight Committee should determine if the company is taking on any unwarranted FCPA compliance risk if non-standard FCPA compliance terms and conditions are used.

After the commercial relationship has begun the Oversight Committee should monitor this relationship on no less than an annual basis. This annual audit should include a review of remedial due diligence investigations on the Foreign Business Partner and evaluation of any new or supplement risk associated with any negative information discovered from a review of financial audit reports on the Foreign Business Partners. The Oversight Committee should review any reports of any material breach of contract including any breach of the requirements of the Company Code of Ethics and Compliance.

In addition to the above remedial review, the Oversight Committee should review all payments requested by the Foreign Business Partner to assure such payment is within the company guidelines and is warranted by the contractual relationship with the Foreign Business Partner. Lastly, the Oversight Committee should review any request to provide the Foreign Business Partner any type of non-monetary compensation and, as appropriate, approve such requests.

The oversight of Foreign Business Partners is one of the key tools that a company can use to prevent and detect any violation of its own Code of Ethics and Compliance and the FCPA. The proper structure of the Oversight Committee and its full engagement with all aspects of a company's relationship with a Foreign Business Partner is one of the areas that the DOJ will look for in a successful FCPA compliance program.

Conclusion

An Oversight Committee is a key tool which can be utilized by a company to manage its relationships with its Foreign Business Partners. Its use has been commented upon favorably by the DOJ through its citation in the Monsanto DPA. An Oversight Committee does not replace any of the other key components of an effective FCPA compliance program but it does provide an additional level of protection, back-up and transparency for all deals with a Foreign Business Partner. It should be a employed by US companies as an additional protection against any type of FCPA compliance and ethics violation “slipping through the cracks” to become a much larger problem down the road.