

Documentation and the TRACE Due Diligence Guidebook

One of the themes coming out of the talks given by representatives of the Department of Justice and Securities and Exchange Commission at FCPA compliance conferences is that of documentation. While many companies focus on the specifics of a *best practices* FCPA compliance program, we believe that companies should also make documentation an overarching principal in their compliance programs. By this we mean that everything done or performed within the context of your FCPA compliance program should be documented so that if your company is investigated, it can quickly and efficiently provide documentation of its work. Not much will give you more credibility with a prosecutor than responding quickly with documentation of your compliance program.

With this in mind we reviewed the TRACE Due Diligence Guidebook: Doing Business With Intermediaries Internationally chapter on documentation. Initially we would note that volume, available on the TRACE International website, is designed to be used by “business people, compliance officers, in-house counsel, and those responsible for vetting their company’s international business representatives. It incorporates the due diligence “best practices” of more than 150 companies, representing diverse industries in different countries.” It is an excellent resource for the FCPA compliance practitioner and we would recommend it to you.

Chapter Seven of the Guidebook deals specifically with the issue of documentation. It indicates that for any *best practices* compliance program, documentation through a detailed written record of your company’s foreign business representative review process is mandated. This written record should include documentation of the review process utilized by your company, a summary of the risk assessment which were used to determine the appropriate level of due diligence, copies of all records relating to your due diligence, the contract and your management of the foreign business relationship after the contract is signed. This documentation should be maintained for the duration of the business relationship and in accordance with your company’s document retention policy.

The TRACE Guidebook recommends several specific areas to focus your documentation upon. These include:

- A written commitment by the foreign business representative to avoid even the appearance of an inappropriate payment and to report any requests by customers for inappropriate payments to the identified point of contact within management;
- Express language prohibiting the foreign business representative from offering or giving anything of value to a customer in order to secure a business advantage;
- Guidelines as to when the foreign business representative should seek approval for any hospitality or customary gifts; and
- A requirement to certify compliance annually.

In addition to documenting the due diligence process, a written contract should be considered as a key part of your company's documentation process. The TRACE Guidebook also makes clear that no foreign business representative should be engaged or certainly paid, without a written contract, detailing the full scope of the engagement. The TRACE Guidebook suggests several standard concepts which should be included in any foreign business representative contract. These terms and conditions should include the following:

- Compensation should be paid to a foreign business representatives only in accordance with the terms and conditions of the written contract;
- The written contract should require the foreign business representatives to comply with all applicable anti-bribery laws and regulations and should describe the elements of those laws;
- The written contract should require the foreign business representative to comply with all applicable local law requirements, such as registration and other regulatory requirements;
- Foreign business representatives should be required to certify annually that they have complied with all laws and policies;
- The written contract should permit immediate termination of contract without compensation in the event of a violation of anti-bribery laws;
- The written contract should prohibit the foreign business representative from assigning its contract rights to a third party which has not gone through your company's full due diligence process and from employing a third party to provide the services described in the written contract without first obtaining the approval of the company;
- The written contract should allow the company to audit the foreign business representative's books and records upon credible allegations of misconduct or reasonable suspicion of improper payments; and
- The foreign business representative should be required to provide prompt notice of any change of ownership. The foreign business representative also should be required either to advise the company of any other changes or to confirm that all other information previously provided remains accurate on a regular basis.

The TRACE Due Diligence Guidebook: Doing Business With Intermediaries Internationally is an excellent resource for you to use a guidebook in either performing due diligence on your company's foreign business representatives or as a benchmark for your current program. It is just one of the resources available on the TRACE INTERNATIONAL website which we commend to you.

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