

*Presenting a live 90-minute webinar with interactive Q&A*

## **Managing Risk with Third-Party Contractors: Minimizing Liability in the Outsourcing of Goods and Services**

Structuring Agreements to Limit Exposure and Responding to Third-Party Breaches

---

THURSDAY, SEPTEMBER 20, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

---

Today's faculty features:

Margaret M. Cassidy, Principal, **Cassidy Law**, Washington, D.C.

Akiba Stern, Partner, **Loeb & Loeb**, New York

Geri L. Williams, Senior Corporate Counsel, **The Home Depot**, Atlanta

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

**BACK UP INFORMATION  
ETHICS & COMPLIANCES  
CLAUSES, REPS, WARRANTIES  
& CERTIFICATIONS**

**SELECT LAWS REQUIRING  
OVERSIGHT OF THIRD PARTIES –  
DRIVE NEED FOR CLAUSES, REPS,  
& CERTS**

# Know Your Business Partner Requirements

# Know Your Business Partner – Prohibited Parties

- Treasury’s Office of Foreign Asset Controls (OFAC) enforces economic sanctions programs primarily against countries, entities and persons through blocking assets and trade sanctions to enable national security
- “knowing or having reasonable cause to know”: fines and/or up to 10 years imprisonment (18 U.S.C. § 2332(d))
- Enabling statute and regulations:
  - President can take action to deal with unusual and extraordinary threat from outside the U.S. to national security, foreign or economic policy 50 U.S.C. § 1701
  - Enabling regulations-31 CFR § 501
- OFAC Sanctions Site:  
<http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>

# Know Your Business Partner – Prohibited Parties

- Debarred List: Persons barred from receiving defense articles
- Denied Persons List: Persons who are debarred from exporting process
- Entity List: Entities that may present an unacceptable risk to national security or foreign policy interests so are debarred
- Sanctioned Countries: Countries under U.S. sanction or embargo (OFAC)
- Specially Designated Nationals: Persons with whom U.S. businesses may not conduct business (OFAC)
- Unverified List: Entities where U.S. has been unable to identify end-users, only a red-flag not a complete ban

# Know Your Business Partner - Government Officials & Politically Exposed Persons

- Any officer employee of:
  - Any non-U.S. government (e.g., tribal head, mayor, governor, legislator)
  - Any department, instrumentality, or agency of a non-U.S. government (e.g., doctor at public hospital, director of Institute)
  - A foreign state-owned or controlled entity
  - Any non-U.S. political party
  - Any public international organization (e.g., UNESCO, WHO)
- Any person acting in any official capacity for such organization
- Candidates for foreign political office
- Influential member of royal family

U.S. Foreign Corrupt Practices Act 15 USCS § 78dd-1(f)(1)

# FCPA – Who Must Comply

- Issuers – Selling securities on a U.S. market; filing reports with the SEC
- Domestic Concerns – Organized under U.S. laws or principle place of business in the U.S.
- Officers, directors, employees, shareholders
- Alternative Jurisdiction - Any organization or individual who furthers the illegal conduct whether in the U.S. or not
  - Phone calls
  - Emails
  - Attending meetings
  - Aid/abet/conspire

15 U.S.C. §§ 78dd-1; 78dd-2



# FCPA - Prohibited Transactions

Offer, promise, authorize payment of any gift or hospitality, promise to give or authorize any gift or hospitality for the purpose of obtaining or retaining business or a government advantage by:

- Influencing a non-US official's act or decision in their official capacity
- Inducing non-US official to do or omit to do any act in violation of their lawful duty
- Securing any improper advantage from a non-US official
- Inducing a non-US official to use influence with a foreign government to influence the government's act or decision

**Third Parties** - Cannot have others do what you cannot do. Adequate due diligence is required to assure others do not act contrary to the FCPA on your behalf.

15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a)

# FCPA – Intent Requirements

- Corrupt Intent – Purpose of the action is to have the government officially misuse their government position
- Willfully – Person undertaking the act must “know” their behavior is illegal
- But – does not require precise knowledge that their behavior is illegal just need to act with wrongful intent
- Organization does not have to act “willfully” – engaging in the act is sufficient for liability
- Success is not required – recipient need not know of illegal payment; recipient need not ask for the bribe; recipient need not actually receive the bribe.

# UK BRIBERY ACT

- “British FCPA”
- Unlike FCPA – prohibits commercial bribery
- Unlike FCPA – strict liability for “failure to prevent bribery” by an “associated person” - third parties
- Defense – adequate procedures to prevent bribery
- Broad jurisdiction - Applies to conduct anywhere in the world if doing business in the UK
- Strict Liability: Was there intent to influence; to obtain, retain or get business advantage

# Requirements to Know Where Export Controlled Materials Are Going

# What is an Export?

- Covers US origin items wherever located – including technology and software
- Certain non-U.S. items if U.S. content, technology or software is included as part of the item
- Categorized based on type of item
  - Commercial use only – no license required to export
  - Military, intelligence or law enforcement use – will need a license to export
  - Dual use – both commercial and military, intel and law enforcement – will need a license to export

# Exporting

“Knowing” transfer of an export controlled item to a non-U.S. person, either within or outside of the U.S by:

- Shipping or carrying items out of the U.S.
- Shipping through a sanctioned country
- Transferring or disclosing technology or information through:
  - Oral or visual means
  - Electronic means – eg. emails, databases, networks
  - Providing a “defense service” – eg. training, assembly of products, repair related to military, intelligence or law enforcement
  - Re-export – transferring item to a non-U.S. person who re-exports the item to another country 15 CFR 730.5
  - Non-U.S. products: May be considered an export, after brought into the U.S

# ARE YOUR BUSINESS PARTNERS... VIOLATING HUMAN RIGHTS?

# What is Human Trafficking?

- Engaging in severe forms of human trafficking
- Procuring commercial sex acts
- Using forced labor to perform the contract
- Destroying, concealing, or denying employees access to their identity or immigration documents
- Providing housing that fails to meet the host country housing and safety standards



# Know Your Business Partner - Human Trafficking

- Federal Government contractors with contracts in excess of \$500,000 for supplies or services received from outside of the U.S. must institute a compliance program to prevent human trafficking
- Prohibitions on human trafficking apply to:
  - Individuals, including directors, officers, employees
  - Independent contractors
  - Suppliers, distributors, vendors,
  - Any firm that furnishes supplies or services authorized to act on behalf of the organization.

# Human Trafficking Disclosures

Contractors are obligated to report and cooperate with the government when violations of trafficking laws and regulations have occurred:

- The contractors must shall immediately report to Contracting Officer and the agency Inspector General any credible information it receives from any source (including host country law enforcement) that alleges an employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates human trafficking laws and regulations, if a clause requiring disclosure is included in the solicitation or the contract
- The disclosure must be sufficient to identify the nature and extent of the offense and the individuals responsible for the conduct
- Reports must include actions the contractor has taken against the offending employee, subcontractor, subcontractor employee, or their agent

# California's Anti - Human Trafficking Requirements

- California businesses with \$100,000,000 in worldwide gross receipts are required to disclose aspects of its efforts to prevent human trafficking on its website
- Each year the California Attorney General will receive a report of the organizations required to display the disclosure and will seek injunctive relief in the event of non-compliance.

# California Required Posting on Anti-Human Trafficking Controls

**Verification:** Explain actions to identify, manage and mitigate human trafficking risk to include whether a third party reviews those actions

**Audit:** Explain whether third parties are audited for compliance with human trafficking laws and regulations

**Certifications:** Indicate whether third parties must certify compliance with human trafficking laws and regulations

**Internal Accountability:** Describe internal controls designed to assess compliance with human trafficking laws, regulations or corporate policies.

**Training:** Describe any training.

# UK Human Trafficking – Transparency in Supply Chain

Generally, the following information must be disclosed on the entity's website:

- The entity's structure, including a description of its supply chain operations
- The entity's policies and procedures designed to prevent and detect human trafficking
- The due diligence the entity undertakes to identify human trafficking and any audits done to detect human trafficking
- The efforts made to identify geographic locations where the entity has operations that are particularly prone to human trafficking and efforts it has undertaken to mitigate these risks
- Its assessment of the effectiveness of its controls that were designed to detect and prevent human trafficking
- Any training the entity provides to employees or third parties on human trafficking

# ADDITIONAL LAWS & REGULATIONS THAT MAY REQUIRE CONTRACTUAL CONTROLS

# Additional Laws & Regulations to Consider

## Campaign Finance

- Campaign contributions may be either prohibited or restricted
- Government contracts may require compliance certification or require that contributions be disclosed

## Lobbying

- Lobbying and business development with the government may be limited or restricted
- Government contract may require compliance certification or disclosure of certain communications

## Conflicts of Interest

- Personal, professional and business relationships with government officials/employees may violate corruption or conflict of interest laws
- Must avoid conflicts of interest
- Government contract may require that relationships with government officials/employees be disclosed

## Gifts/Gratuities/Entertainment

- May be prohibited or restricted
- Government contract may require compliance certification or disclosure of gifts and gratuities

# Ethics & Compliance Clauses, Reps, Warranties, Disclosures, Certifications To Consider



## Consider Including...

- Agreement to not engage in any corrupt or fraudulent behavior
- Disclose business relationships
- Disclose personal relationships
- Disclose conflicts of interest
- Disclose campaign contributions
- Disclose ongoing or past internal investigations
- Disclose ongoing or past government investigations
- Disclose non-public government or private settlements
- Certify that no gifts, meals, entertainment or favors have been provided to government officials
- Comply with the other party's code of conduct or policies – even if you do not know them
- Agreement to engage in “ethical behavior”
- Certify to existing ethics and compliance program

# Determining Whether to Accept Clauses, Disclosures, Reps and Certs

- Is the certification or clause consistent with US laws and the laws of other nations
- Do the requirements have a disproportionate cost or impact on your organization
- Is the clause effective at managing the ethics and compliance risk?
- Do you have the means to conduct the due diligence necessary to make the certifications?
- Do the disclosures expose sensitive business operations and procedures; investigations or settlements?
- What will the cost of complying with the requirements impose on the business?
- How invasive and cumbersome will the audit be?
- Is the scope and purpose of the audit narrowly tailored?

# DOJ Opinions on Contract Clauses

## OPINION 06-2, DECEMBER 2006

- Company wanted to hire non-US law firm to assist it with filing government forms in country where law firm worked
- Firm would perfect certain government filings that had previously been accepted but now government was rejecting
- Contract Included:
  - Certified to no past improper payments and will not make improper payments in the future
  - Certified that no employees or their close family members had been government officials in the past three years
  - Firm would comply with FCPA by not making improper payments
  - Firm understood Company's compliance policies
  - Company had audit rights
  - Firm required to make progress reports monthly
- Part of what DOJ used to opine the arrangement was acceptable

# Sample Due Diligence Questions

# SAMPLE DUE DILIGENCE QUESTIONS REGARDING OPERATIONS

- Where is the entity incorporated, where does it do business, what is its business structure?  
How long has the entity been in business?
- Does it have the required permits, licenses, etc. to conduct its business?
- Does the entity have a compliance program and infrastructure?
- Does the entity have a system to report concerns, ask questions, or raise issues?
- What is the entity's financial condition?
- Does the entity have adequate financial, accounting, IT, HR, legal and operational systems and support?
- Does the entity have appropriate insurance coverage?
- What is the entity's debt structure? lines of credits, mortgages, leases, etc. Where does the entity bank and invest?

# SAMPLE DUE DILIGENCE QUESTIONS REGARDING MANAGEMENT CAPABILITY

- Who are its leaders, executives, major owners?
- How are leaders, executives, employees compensated?
- Does leadership have a reputation for being responsible, ethical and experienced?
- Are leaders, owners related to or in a business arrangement with any government official?
- How many employees does the entity have? Where are they located?
- Does the entity have human resource policies that foster fair treatment?

# SAMPLE DUE DILIGENCE QUESTIONS REGARDING REPUTATION

- Obtain references from the entity's professional advisors: Bankers, Accountants
- Has the entity ever been debarred or suspended by any government or quasi-government agency?
- Is there negative news on the entity, its owners, or its executive management? Does the entity have a satisfactory record of integrity and ethics?
- Is the entity current on its tax obligations?
- Is the entity involved in any litigation, administrative actions, audits, or investigations?
- Has the entity been involved in any litigation, administrative actions, or investigations in the past five years? If the entity is publicly traded, are its public filings timely and accurate?
- Are there any auditor letters to management on internal controls?

# SAMPLE DUE DILIGENCE QUESTIONS REGARDING EXPERTISE, SKILLS, CAPABILITIES

- Does the entity and its employees have the necessary education, training, skills, experience and capabilities to provide the goods/services?
- Does the executive management team have the necessary education, experience, and capabilities to manage the organization?
- Considering the entity's existing work, does it have the ability and time to comply with the proposed delivery schedule?
- What is the entity's history of past performance?
- What do its manufacturing and office sites look like? Are they clean, safe?
- Do employees live at the entity's sites? What are the living conditions?



# SAMPLE DUE DILIGENCE QUESTIONS REGARDING BUSINESS DEVELOPMENT, MARKETING, PRICING

- What are the entity's products and services? Who are its major competitors?
- Is the entity's pricing, costs, commissions, agreements, discounts, financing, payment system standard in the industry and/or competitive?
- Do agreements include a clear, defined statement of work?
- What does the entity's website, press releases, marketing materials say? How does the company go to market? Identify customers?

# SAMPLE DUE DILIGENCE QUESTIONS REGARDING BUSINESS RELATIONSHIPS

- Does the entity have: subsidiaries, joint ventures, partnerships, if so, with whom? Who are the entity's material suppliers? Does the entity sole source or rely on only a few suppliers? Who are the entity's material customers? Does it only have a few customers?
- Does the entity rely on sales agents, sales consultants, distributors? If so, who are they
- How are they selected?