

THE USE OF THIRD-PARTY FOREIGN AGENTS: A NECESSARY EVIL

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The world is growing smaller every day. More and more, small, private companies have to figure out how to establish themselves to compete in foreign markets without any idea of how to navigate the social, linguistic, political, legal, and cultural hazards of a foreign market or host country. Initially, an owner or trusted manager of a small company will make a few trips to the foreign market in an attempt to make some business contacts. They may also assess how to navigate in the host country to determine what, if any, the barriers to entry are.

The next step is deciding if it will be necessary to work through and with a third-party foreign agent. Foreign agents can help U.S. companies and their owners by opening doors and navigating the maze of red tape and confusion. This can also lead to slippery relationships, government investigations, and personal liability exposure for officers and managers if effective internal controls and compliance programs are not in place before doing business with host countries. Here are six things to do if you are considering doing business abroad.

Perform a baseline risk assessment. Are there any special host country requirements or circumstances which might put your company's reputation at risk? Consider potential legal, regulatory, and other issues that could arise. Are there any requirements to establish a local office staffed by locals? Are you required to use a specific third-party agent nominated by the host country?

Do your homework on the proposed third-party agent. There are professional agents who are clean and those who are dirty. It is often very hard to tell. Individuals are more challenging to investigate than corporations. Before you hire anyone as an agent, work through this checklist:

- ✓ References
- ✓ Bank account documentation
- ✓ Tax returns
- ✓ Proof of no prior U.S. or foreign law violations
- ✓ Knowledge of the Foreign Corrupt Trade Practices Act (FCPA) or other anti-corruption laws
- ✓ Embassy check to obtain information regarding proposed third-party agents

If your agent won't cooperate with your investigation of his/her affairs on the front end, chances are very good that he/she won't be there to help get you out of trouble on the back end. Before going forward with this third-party agent, you might want to employ the services a professional

private investigator who has experience looking into the background of third-party agents.

Have solid written contracts. Never do business on a handshake. Don't assume that more familiar legal documents such as agency agreements, non-disclosure agreements, distributorship agreements, and purchase orders are enforceable abroad. Work with an experienced lawyer on a good set of documents.

Document your files. Keep written records of all of your interactions with the foreign agent and of all of the background materials. You'll need them in case of an IRS or SEC investigation.

Understand the FCPA or other anti-corruption laws. The FCPA prohibits bribery of foreign officials and requires, when doing business with foreign officials, to maintain accurate accounting and account controls (books and records regulations). A "bribe" is an offer to pay or a payment of anything of value to a foreign official with a no de-minimis exception to secure improper advantage for the purpose of obtaining or retaining business. These types of payments can land you in jail, even if made by your third-party agent. Know the rules. Know your agent.

Know the results of noncompliance. For an individual, there is jail time and a felony record, fines, and/or deportation if not a U.S. citizen. For the company, under the U.S. sentencing guidelines, the greater of \$200,000 or as much as three times the damage done or gain achieved are possible consequences. Treble damage civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), being barred from doing business with the federal government, and, of course, loss of reputation and business opportunities are other ramifications of noncompliance.

Be suspicious. Be safe. Pay attention to red flags! If it doesn't smell right or feel like the right thing to do, stop and re-evaluate. **N**

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