



502 Anti-corruption: Tips on Appointing Agents & Consultants

Catherine Fox

Senior Vice President & General Counsel
Alcatel Alenia Space

Armando J. Tirado

General Counsel - Latin America & Caribbean
Tyco International Ltd.

Faculty Biographies

Catherine Fox

Senior Vice President & General Counsel
Alcatel Alenia Space

Armando J. Tirado

Armando J. Tirado is the general counsel for Tyco International, Latin America and the Caribbean, with oversight responsibility over all Tyco divisions: electronics, engineered products and services, fire & security, healthcare, and plastics/adhesives.

Prior to joining Tyco, he held the positions of director and regional counsel for Ingram Micro, vice president and general counsel for DHL Worldwide Express, regional counsel for Federal Express Corporation and chief legal officer for the public company predecessor of AT&T in Latin America. In private practice, he served his own clients as transactional advisor for international business transactions.

Mr. Tirado currently serves as co-chair of the corporate counsel section of the Inter American Bar Association and as a member of the steering committee of the South Florida Group of Regional Counsel, and chairs the ACC's European sub-committee of the International Legal Affairs.

He is one of the very few attorneys eligible to practice in three continents. He is licensed to practice in three U.S. jurisdictions (Florida, New York and Louisiana), and admitted to the practice of law in Venezuela. He is currently in the process of being sworn in as a Solicitor in England and Wales.

Mr. Tirado has an LL.M. from Columbia University School of Law in New York, an LL.M. specializing in international business from London School of Economics, University of London, and a J.D. with honors from Tulane University School of Law. He is also the holder of an LL.B. with honors from Catholic University in Caracas.



**502 Anti-corruption: tips on
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Allen B. Green

Armando J. Tirado

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Corruption Happens



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Fighting Corruption: The Global Context The International Legal Structure

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Chronology of Anti-Corruption Measures

1977	Foreign Corrupt Practices Act
1996	Inter-American Convention against Corruption
Jun. 1997	European Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union
Nov. 1997	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
1998	Council of Europe Criminal Law Convention on Corruption

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Chronology of Anti-Corruption Measures (cont'd)

- | | |
|-----------|---|
| 1999 | Council of Europe Civil Law Convention on Corruption |
| Jul. 2003 | African Union Convention on Preventing and Combating Corruption |
| Jul. 2003 | EU Council Framework Decision on combating corruption in the private sector |
| Oct. 2003 | United Nations Convention against Corruption |

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Foreign Corrupt Practices Act (cont.)

- **The U.S. Foreign Corrupt Practices Act** enacted in 1977:
 - prohibits bribery of foreign officials by U.S. companies and nationals, and potentially by any person, hoping to obtain or retain foreign business
 - Specifically, the FCPA prohibits:
 1. Payment, offer, authorization or promise to pay;
 2. to any foreign official, or to any person while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official;
 3. By U.S. entities or any officer, director, employee, agent or stockholder acting on behalf of such entity, or U.S. citizens, nationals, or residents; or “any person” committing an act in furtherance while in the United States;
 4. With a corrupt motive; and
 5. In order to assist in obtaining or retaining business for or to any person

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Foreign Corrupt Practices Act (cont.)

- Exception for “facilitating” payments made to officials for routine government action
- Affirmative defense that the “payment, gift, offer or promise of anything of value” to a foreign official, a political party, or a candidate’s country is in accordance with the written laws of that country. This affirmative defense is narrowly construed

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Foreign Corrupt Practices Act (cont.)

- Affirmative defense encompassing payments, gifts, offers or promises of anything of value that constitute a “reasonable and bona fide expenditure” that are “directly related” either to the promotion of products and services or to the execution of a contract with a foreign government or agency such as “travel and lodging expenses”
 - Aiding and abetting
 - Conspiracy
- Recordkeeping and Accounting provisions: publicly traded companies are required to keep accurate books and records and to devise a system of internal accounting controls to prevent the concealment of bribes

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Inter-American Convention

- **Inter-American Convention against Corruption (1996)**
 - First international anti-corruption treaty; entered into force in March 1997
 - Nearly all American states (thirty-three), including the United States, have ratified or acceded to the Convention as of April 2006
 - Provisions:
 - Criminalizes active and passive bribery of domestic and foreign public officials, but requires sanctions against businesses only for transnational bribery
 - Criminalizes money laundering and concealment of property
 - Reservations permitted
 - Follow-up Mechanism in operation from 2001 due to concerns over implementation by states

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European Convention

- **European Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (1997)**
 - Has not yet entered into force
 - Encompasses active and passive corruption
 - Prescribes “effective, proportionate, and dissuasive criminal penalties” including imprisonment in serious cases

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OECD Convention

● **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)**

- Entered into force on February 15, 1999
- 36 countries (all thirty OECD members and Argentina, Brazil, Bulgaria, Chile, Estonia, and Slovenia) had passed implementing legislation and ratified the Convention as of April 2006. After amending the FCPA, the United States ratified the Convention on December 8, 1998
- Provisions:
 - Focused on “active” or the “supply side” of bribery; criminalizes bribery of foreign public officials defined as:

any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business

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OECD Convention (cont.)

- "Any person:" individuals and companies and their accomplices
- An offer or promise of payment, as well as actual payment is prohibited if made directly or indirectly. While "authorization" is not explicitly prohibited as in the FCPA, its prohibition is implied because aiding and abetting is prohibited
- Foreign public officials:
 - » any person holding a legislative, administrative or judicial office of a foreign country
 - » any person exercising a public function, including officers of a public agency or public enterprise, i.e. an enterprise with government majority ownership or control
 - » any officer or employee of public international organizations (e.g. UN, World Bank)

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OECD Convention (cont.)

– Payment

- » Giving, offer, promise or (authorization) of a corrupt incentive
 - » Even if through an intermediary or third party
 - » Regardless of the form of the bribe, perceptions of local customs, tolerance of such payments by locals, or alleged necessity of the payment
 - » For the purpose of obtaining or retaining business or other improper advantage in the conduct of international business
- Provides guidance on sanctions (“effective, proportionate and dissuasive criminal penalties” for natural persons and statute of limitations;
 - Sets rules on jurisdiction (offense committed at least in part in the territory of the signatory country and if a state applies the nationality principal of jurisdiction to offenses committed abroad by its nationals, it must also do so here) and mutual assistance

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OECD Convention (cont.)

- Requirements for corporate accounting and auditing (off-the-books accounts, false statements, tax deductibility of bribes prohibited)
- Monitoring provisions: signatories agree to submit reports on their laws and enforcement activities to OECD review
- Prescribes mutual assistance between parties; establishes the Convention as the legal basis for extradition
- Contains similar provisions to the FCPA, but:
 - Broader in scope than pre-amendment FCPA because it applies to “any person;”
 - Narrower in scope: does not cover bribes to political parties or candidates for political office

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Council of Europe Criminal Law Convention

- **Council of Europe Criminal Law Convention on Corruption (1998)**
 - Entered into force in July 2002
 - Signed by 47 states as of April 2006: the member states plus Mexico, the United States, and Belarus. Over 30 states have ratified included the United Kingdom, but not including France, Germany, Italy, Spain or the United States
 - Similar to the UN Convention

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Council of Europe Criminal Law Convention (cont'd)

- Criminalizes active and passive bribery of domestic and foreign public officials, international public officials and private sector employees
- Also criminalizes trading in influence, money laundering and accounting practices used to conceal bribery
- Prescribes mutual assistance between parties including for confiscation and seizure of corruption proceeds; establishes the Convention as the legal basis for extradition
- Establishes a monitoring mechanism for compliance with the Convention by the Group of States against Corruption (GRECO)
- Limited reservations permitted

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Council of Europe Civil Law Convention

- **The Council of Europe Civil Law Convention on Corruption (1999)**
 - Entered into force in November 2003
 - Signed by 40 states as of April 2006: member states plus Belarus. The United States and Canada are not signatories. Twenty-five states have ratified; France, Germany, Italy, Spain, and the United Kingdom have not
 - Provisions:
 - A pioneering agreement that requires parties to provide remedies in their laws for persons who have suffered damage from acts of corruption in the private and public sectors

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Council of Europe Civil Law Convention (cont'd)

- A broad definition of corruption offenses: “requesting, offering, giving or accepting a bribe or any other undue advantage or the prospect thereof”
- Requires measures to ensure accurate accounting standards
- Corrupt contracts are null and void
- No reservations are permitted for any provision of the Convention
- Establishes a monitoring mechanism for compliance with the Convention by the Group of States against Corruption (GRECO)

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African Union Convention

● The African Union Convention on Preventing and Combating Corruption (2003)

- Adopted on July 11, 2003
- Forty countries are signatories
- The Convention shall enter into force after the deposit of the fifteenth instrument of ratification, while only twelve countries have ratified thus far
- Focuses on corruption prevention, criminalization, international cooperation and asset recovery
- Encompasses public and private sector corruption, domestic and foreign corruption, money laundering and concealment of property

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EU Council Framework Decision

- **EU Council Framework Decision on combating corruption in the private sector (2003)**
 - Criminalizes and provides a common definition for active and passive corruption in the private sector
 - Criminalizes instigating, aiding and abetting
 - Provides liability for legal and natural persons
 - Prescribes “effective, proportionate, and dissuasive penalties” including imprisonment in serious cases with maximum penalties of at least one to three years

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United Nations Convention

- **The United Nations Convention Against Bribery (2003)**
 - Approved by the UN General Assembly on October 31, 2003
 - The only Convention that is truly global; signed by 140 countries
 - Entered into force when it was ratified by thirty countries in December 2005
 - Over 50 states have ratified, accepted, approved or acceded including China, France, Mexico, and the United Kingdom. Signatories that have not yet ratified include: Germany, Italy, Japan, the Republic of Korea, and the United States
 - Provisions:
 - Comprehensive instrument - 71 articles that oblige parties to implement a wide range of anti-corruption measures affecting their laws, institutions, and practices

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United Nations Convention (cont'd)

- Criminalizes active and passive bribery of domestic and foreign public officials as well as international public officials and private sector employees
 - Many provisions are not mandatory: private sector corruption, requirements for transparency of political candidate and party funding
- Also criminalizes trading in influence, money laundering, concealment or continued retention of proceeds of crime, aiding and abetting and obstruction of justice
- Prescribes mutual assistance between parties including for confiscation and seizure of corruption proceeds; establishes the Convention as the legal basis for extradition
- Requires return of assets to prior legitimate owners and establishes an asset recovery framework
- Technical cooperation and information exchange provisions relating to developing countries

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Whither Global Enforcement?

- Today
- In five years
- In ten years

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Corrupt practices – *scenarios*

- Partner makes payments or gifts destined for a decision-maker to obtain government business
- Collusion between bid process participants
- Prospective partner receives kickbacks to purchase from a certain source
- Prospective partner offers an inducement to a buyer to purchase larger quantities
- Prospective partner obtains regulatory approvals or other permits, certifications by making gifts
- Prospective partner “cuts corners”
- Last but not least: the so-called “facilitating” payments

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Why does *this matter at all?*

- Your prospective partner can break the law and you can be held responsible
 - OECD - Convention on Combating Bribery
 - FCPA - US law imposing sanctions on bribes
 - Inter-American Convention against Corruption
 - EU Criminal Convention against Corruption
 - UN Convention against Corruption
 - Sarbanes-Oxley Act of 2002

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Why does *this matter at all?*

- It's bad business – easy money tainted by corrupt practices is costly in the long run
- Conduct by your agent may damage your reputation and good standing
- Your agent's win is a loss for someone else...who may complain – to the media or the government
- “Selective enforcement” of the law in certain countries exposes you to a greater deal of risk

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Why does *this matter at all?*

- If caught and prosecuted your sentence or settlement with the authorities will be known publicly and could be featured as an example in an anti-corruption presentation in future ACCE conferences like this one.....



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So how do I *deal with this....?*

- ... before it becomes a problem
 - Due diligence in the selection of partners
 - Set up your own in-house export sales organization
 - Carefully select your prospective partner
 - Implement contractual safeguards & a “robust and meaningful” compliance program
 - Be on the lookout for “red flags”
- ... after it becomes a problem
 - Investigation defense
 - Exercise your local rights under the contract and the law

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Due diligence – *agents and consultants*

- Lawyers beware:
 - “This person is the minister’s niece / son in law ...”
 - “All I need is a service contract for X “
 - “I have seen this person, s/he is great and knows everybody , just give him a retainer fee”.
 - “ Well , s/he needs to cover regular expenses just to keep people happy and uh...maintain their staff ...”
 - “ What do you mean a law firm should only provide regular legal services ?”

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Due diligence – *agents and consultants*

- **You need a Procedure which:**
 - Covers **export** business and also **local** contracts.
 - **Centralizes** the process

- **STEP 1: Who Selects :The Area or the Business Division?**
 - Who Proposes remuneration**
 - Who Verifies capabilities**
- **STEP 2** Who accepts cost and Who pays
- **STEP 3** Who **checks** the process and approvals, and then issues contract
- **STEP 4** Who is **responsible for relationship** with agents and consultants
- **STEP 5** Who **collects documents showing services actually provided**

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Due diligence – *agents and consultants*

[Cont'd]

● A common legal interface

The consultant must provide contractual warranties to:

- Respect the OECD convention
- Conform to the company's Business Practices
- Act in compliance with both

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Due diligence – *agents and consultants*

● A Procedure/Standard agreements for :

- General Agent
- Consultant for a specific project

● Differentiate from a bona fide supplier of market reviews or studies.

- * **Watch out** for the “secret ” agent disguised as a lawyer or supplier of an indispensable “study on the global market for paper clips in the Republic of Banarnia”

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Due diligence – *agents and consultants*

- Key features of the process
- **Primary responsibilities are with Regions/Areas or the Business Division ?**
- **Necessity for complete documentation**
 - Profile and reports
- **Ability to show:**
 - **Region/Area President approves personally**
 - Value for money
 - Services provided

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Due diligence – *agents and consultants*

● Policy should include:

- responsibilities: region/area and business division
- all contracts to be centralised
- identified person to negotiate and review
- Remuneration
- training (including for agents and consultants)
- upgraded profile (especially conflict of interest)
- annual appraisal of agent or consultant
- separate “subcontractor or supplier” from “consultant”
- reports plus invoice before payment

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Due diligence – *agents and consultants*

● **Company Profile**

- Standardized form in compliance with Business Practices
- Prepared and signed by the consultant
- Basis of formal contract, and is considered a contractual document
- Appointment signed off by Region/Area President

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Due diligence – *agents and consultants*

● Company Profile [cont'd]

- The criteria we must satisfy are:
- **Who** is the company, the owners, the managers?
- **What** business do they do, what is its link to the territory?
- **Why** are we hiring them? Their experience, relevance?

● Must be kept up-to-date

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Due diligence – *agents and consultants*

● Company Profile [cont'd]

- strong link to code of Business Practices
- strong warranties, guarantees and undertakings
- identification of ultimate beneficial owner
- identification of conflicts of interest

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Due diligence – *agents and consultants*

● **Annual appraisal** to include:

- formal appreciation of quality of consultant
- ability to perform in market
- knowledge of the company's portfolio
- respect for the statement of Business Practices
- training needs
- compensation: amount; terms of payment
- must be completed at least annually

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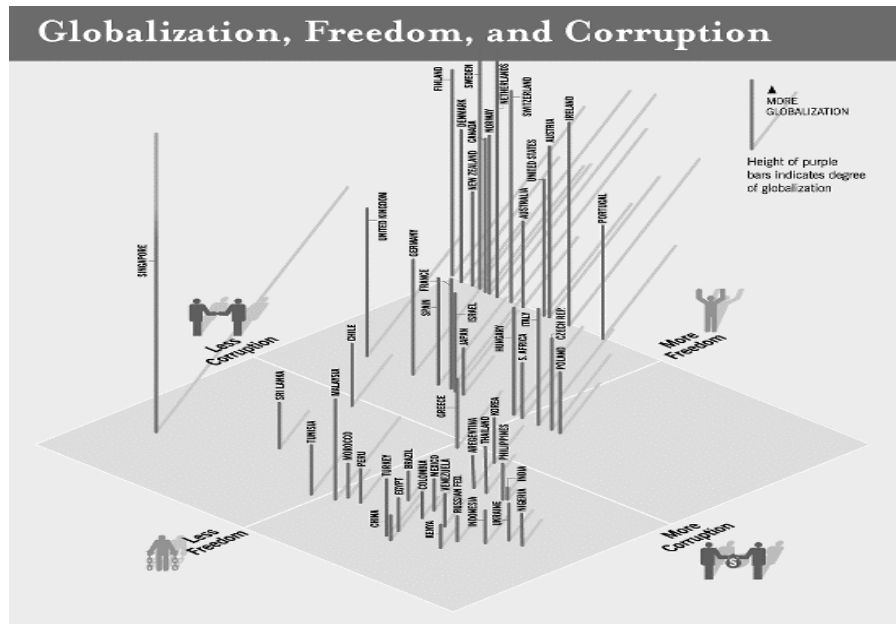


Due diligence – *why?*

- Media, interest groups, NGOs, shareholders and employees receive pressure to maintain high standards
- Company executives receive pressure to take responsibility for governance failings

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Set up your export sales organization

- Decide or review your in-house international marketing infrastructure
- Very few companies realize how much work is involved in changing a company so that it has the capability of becoming successful in international trade.
- Extremely high failure rate for companies who do not have the wherewithal to follow through and continue with a sound business strategy
- Option of setting up your in-house international department vs. engaging an international intermediary to set up your distributor network.

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Set up your export sales organization

Export marketing intermediary (export management company or global trading company)

- An outsourced export department
- Sometimes have their own established networks of distributors in several countries.
- Primary role is to assist in setting up a distributor network in overseas markets
- Specialized knowledge of the product vs. scope of coverage and presence in several markets

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Set up your export sales organization

Your own international or export sales department

- Right profile of management and employees personnel - not everybody can figure out how to do business overseas.
- Develop collateral marketing materials suitable for your target markets
- Establish a strategic plan that takes into account your company's capabilities and the advantages of your product or service
- Identify your competitors and understand what is happening in your particular industry worldwide
- Patience required - international business requires longer transaction times

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Prospective partners **– *selection***

- Do you have clear written policies and procedures regulating the selection of agents & consultants?
- Are the appointments of agents & consultants subject to senior management review with defined levels of financial authority?
- Do you have an internal procurement process that encourages competitive tendering?
- Are there established procedures for inviting, opening and handling proposals, bid evaluation and negotiation
- Are there more than one person involved in the selection and appointment stages involve more than one person?

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Contractual safeguards

– *tips*

- Is the Agency / Consulting agreement based on standard contract terms?
- Does it clearly outline the scope and nature of services required?
- Does the contract have conditions to provide for variation of service levels and/or scope?
- Does the contract contain suitable provisions for termination of services if necessary?
- Are the commission criteria or deliverables clearly stated including any milestone and payment conditions?
- Are there adequate provisions for indemnity, risk and liability?

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Contractual safeguards

– *tips*

- Have you stipulated in the contract or your policies the basis for payment of fees and expenses?
- Does your export organization have a system to supervise and monitor their activities?
- Are adequate records maintained of meetings and instructions issued to agents/consultants?

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Contractual safeguards

– *tips*

- Is there a formal appraisal system to assess the agent or consultant's performance?
- Do supervising staff compile periodic evaluation reports and a summary report at the end of the commission?
- Are the evaluation reports prepared in a standard format and subject to review?
- Are the records of performance held securely to prevent tampering?

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Contractual safeguards

– *tips*

- Right to audit
- Termination for cause – making corrupt practices or failure to follow up on “red flags” a just cause
- Commitment to compliance with anti-corruption laws applicable to you and your policies
- Annual certification

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Contractual safeguards

– *tips*

- “Tropicalize” or “Internationalize” your agreements
- Do not make assumptions based on your knowledge of the law under your legal system
- Tailor your agreement for specific jurisdictions
- Example: Europe

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Contractual safeguards

– *tips*

- U.N. Convention on the International Sale of Goods – does your counsel know about this?
- Independent contractors – employee protection
- Dealer termination restrictions and indemnity
- Exclusivity –
- Territory restrictions

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red flag [↑]
A sign of a problem.

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Red Flags – *organizational*

- *Prospective partner has an unduly complex business structure*
- *Prospective partner does not have an internal audit team*
- *Frequent changes in executives or directors*
- *Frequent changes in independent auditors or outside legal counsel*
- *Excessive control in the hands of a few key persons*
- *Too much trust given to a relative in a key position*
- *Lax management*

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Red Flags – *financial*

- *Unusually large and/or profitable transactions*
- *Large amounts of cash circulating within the company or to and from third parties*
- *Reluctance to provide auditors with requested information*
- *Failure to provide justification for expenses*
- *Poorly documented expenses*

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Red Flags – *Cash management*

- *Bank statements not reconciled or done so untimely, or changes in logs, spreadsheets*
- *Checks with second or third endorsements*
- *Excessive number or changes in checking accounts, voids or refunds*
- *Sudden activity in a dormant banking account or unauthorized account*

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Red Flags – *transactional*

- *Related-party transactions*
- *Lack of separation of the authorization of transactions from the custody of the related assets*
- *No clear boundary between custody of assets from the accounting of those assets*
- *“Too close” association with customers or suppliers*
- *Request to make a bid or payment through a specific 3rd party*

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Red Flags – *transactional*

- *Requests to make a payment in a 3rd country or to someone else*
- *Unusually large commissions*
- *Cash only, please*
- *Prospective partner or a government official insists on the use of certain local subcontractors or suppliers*

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Red Flags – *political and regulatory*

- *Multiple/high profile problems with regulators*
- *Substantial amount of litigation or regulatory / administrative procedures open against the partner*
- *Substantial or numerous contributions to a person or political party directly related to the 3rd party agent or to the deal*
- *Ownership of the entity by a politically connected individual*

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Red Flags – *record keeping*

- *Missing files and supporting documents*
- *Prospective partner records do not reconcile with control account*
- *File contains copies where originals are expected*
- *Unrecorded or unusual transactions*

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Red Flags – *personnel management*

- *Failure to adequately screen employees prior to hiring them*
- *Inadequate or missing personnel screening policies*
- *Lack of cross-training or rotation of duties*
- *High employee turnover especially in vulnerable areas*

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Red Flags – *internal controls*

- *Accusations – tips – anonymous e-mails*
- *Rumors of undue influence or family/friendship bonds*
- *Prospective partner ignores or tries to explain away rumors or accusations*
- *Poor or poorly enforced internal controls, procedures, policies or security*

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Red Flags – *internal controls*

- *“Special arrangements” with 3rd party decisions makers or their superiors (or their family members)*
- *Failure to take action on the results of internal / external audits or reviews*
- *Partner refuses to agree to reasonable reviews and controls*

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Red Flags – *sales and inventory*

- *Inventory purchased in excess of sale capacity*
- *Increase in scrap materials and reorders for same items*
- *Vendors without physical address listed*
- *Large number of write-offs*
- *Unexplained inventory shortages*
- *Too many debit or credit memos*

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Red Flags – *nature of intermediation*

- *Prospective partner providing ill-defined, generic, or unneeded services*
- *Prospective partner agreement is boilerplate and only vaguely describes the services to be provided if at all*
- *Prospective partner fee is too large for the services to be provided, or provides little or no useful services or work product*
- *Prospective partner has no permanent business premises or staff - requests payment to an account in a secrecy jurisdiction*

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Red Flags – *nature of intermediation*

- *Payments are calculated as a percentage of the contract value rather than on a time or services basis*
- *Government or prospective partner officials recommend or insist on a particular agent or consultant*
- *Unexplained or unusual delays in the procurement process (as kickback amounts are negotiated or government/partner employees try to defeat the controls)*

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Red Flags – *nature of intermediation*

- *Unjustified or repeat sole source awards*
- *Repeated selection of unqualified or high priced contractors*
- *Prospective partner or government official (e.g. purchasing director) lives beyond its known means*

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Red Flags – *bid processes*

- *Bid specifications are too narrow or too vague, unreasonable pre-qualification requirements, short time to submit bids*
- *Selection of unqualified contractors, repeated selection of other than the low bidder, questionable disqualification of winning bidder and re-bidding*
- *Selection of low bidder followed by a change order increasing price or scope; extending an expired contract rather than re-bidding*

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Red Flags – *bid processes*

- *Persistent high bid prices*
- *Few bidders, same bidders*
- *Excessive or unreasonable bid protests to exclude new bidders*
- *Bid prices drop when new bidder enters*
- *Apparent connections between bidders affiliated companies, same fax numbers on bidding documents, etc.*

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Trivia questions

In 2003, your company began selling and servicing its products in [*insert foreign country here**] through a local agent. Your agreement requires your agents not engage in corrupt practices of any kind,, and certify their compliance with the laws on an annual basis.

On June 16, 2006, your General Manager for the region that covers [*insert foreign country here**] reports that the local agent has asked for reimbursement for \$12,000 USD of expenses without providing any paperwork detailing the payee and purpose.

When pressed the agent stated these were “marketing funds”....

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Liability for the acts of Distributors *- (the InVision settlement)*

- **First FCPA** enforcement action against a company based on business practices of an independent distributor
- Theory of “deliberate ignorance” : failure to follow up on red flags
- Liability based on acts of a foreign distributor

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Liability for the acts of Distributors - (*the InVision settlement*)

- **2004** - InVision settles with the DOJ - civil penalty of US\$800,000
- The case involved several alleged payments made or contemplated by InVision's **agents and distributors** in Thailand, China and the Philippines.
- The FCPA prohibits U.S. companies
 - from making bribes to foreign government officials in order to obtain or retain business
 - from making payments to third parties, such as sales representatives or consultants, where the U.S. company knows that the third parties will use the funds to bribe foreign officials

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Aggressive application to traditional partner arrangements

- InVision maintained a traditional, arms-length arrangement with the distributor, who took title to and possession of the products prior to resale.
- DOJ indicated that InVision knew of certain *red flags* that indicated that the distributor planned to pay to secure the resale of its products
- No assertion that InVision paid anything of value or any money went from InVision to the distributor.
- **DOJ asserted that the bribes were paid from the distributor's profits on the resale of InVision products.**

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Aggressive application *to traditional partner arrangements*

- InVision violated the FCPA by failing to conduct "additional inquiry and thereby deliberately avoided learning the truth."
- DOJ did not draw a distinction between a distributorship transaction and a sales representative arrangement.
- **A U.S. company will be liable for the illicit activities of its distributors if the company has not conducted due diligence on distributors to determine the existence of red flags.**
- DOJ has repeatedly said that U.S. companies have an affirmative obligation to conduct due diligence on sales representatives, consultants and joint venture partners to assure that no red flags are present.

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Aggressive application *to traditional partner arrangements*

- DOJ took into account InVision's voluntary disclosure, and preventing the payment from being made
- InVision took swift disciplinary action against the employees involved
- InVision cooperated in full with the DOJ: leniency
- Note effect on the proposed GE acquisition of InVision

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Answers

● What should I do today?

- Instruct your client to initiate an *internal investigation* as soon as practical to establish whether the payment can be considered an FCPA violation and whether a *voluntary disclosure* of that event should be made to the DOJ. This is a typical “red flag” and if discovered could lead to a “top to bottom review” by the government of *all* of your foreign operations

● What should I have done in 2003?

- At the time your company should have taken the necessary steps to design and implement a *meaningful* and *robust* FCPA Compliance Program to discover FCPA violation. Failure to have such a program will lead the DOJ to send a *compliance monitor* to make sure a program is established and that *investigative protocols* are implemented.

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Answers

- Policy: *no corrupt payments of any kind* – clear, simple, with documented full support by the Board
- Management: a senior officer of the company in charge of the compliance program
- Reporting: mechanisms designed to receive and channel reports of fraud or corrupt practices (preserving anonymity)
- 3rd party agents and distributors: monitoring mechanisms for all third-party relationships, including audit rights of their books and records, to assure compliance by their overseas employees and subcontractors
- Disciplinary sanctions for compliance failures

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Answers

- **Require every agent, distributor, consultant, even joint venture partners, contractors and subcontractors to complete written statements in accordance with your compliance policy**
- **Check references and follow-up on all *red flags***
- **Seek a legal opinion from foreign counsel on proper and improper business activities of the prospective partner in that country.**
- **Make sure these standards are reviewed by an internal compliance organization and senior officer in charge of this function**

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Transparent Agents and Contracting Entities - TRACE

- non-profit anti-bribery membership organization that works to reduce corruption in transactions involving 'business intermediaries'.
- specializes in anti-bribery due diligence reviews and compliance training intermediaries - consultants to subcontractors.
raise anti-bribery compliance standards while lowering the associated costs by pooling resources.
- incentive for companies to improve their anti-bribery measures comes in the form of a large stick being wielded with ever increasing vigor by the DOJ — and the prospect of the European regulatory authorities joining the fray.
- focus is on providing best practice guidelines to companies that appreciate the dangers of turning a blind eye to corruption.
- 'standard for doing business with intermediaries internationally' outlines best practice for conducting due diligence reviews of commercial third parties such as agents, consultants, suppliers and distributors for example.

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