Wayne Gretzky famously said, “I skate to where the puck will be, not where it has been.” Even though we are trying to digest the current dynamic and understand how to effectively work from home, now is the time for supply chain and compliance professionals to be planning for what business will look like once the Covid-19 pandemic eases. If history is any indication, demand will outpace supply in very short order and we will be in a capacity crunch. Companies should take time now to plan and implement changes for where they want to be.

**Practical considerations:**

**Leverage Relationship with Key Vendors.** Companies need to be continually checking in with mission-critical vendors to insure continued delivery and operations. If there are concerns or issues, companies may need to determine whether *force majeure clauses* have been triggered to excuse performance. Strategic companies will be using these check-ins as an opportunity to re-open negotiations. Suppliers may be receptive to amending supply agreements given the current uncertainty in the market. Companies need to review their existing agreements to determine whether there are any hidden impediments (e.g., clauses relating to exclusivity, requirements or most-favored nations) to leveraging a renegotiation of the existing agreement. However, one lesson learned from the “Great Recession” is that squeezing too hard on the supply base can create a domino effect and drive out alternative sources of supply.

**Dual Sourcing.** Strategic companies should be reviewing their supply base (at all levels) to see whether there is an opportunity or need to dual source any components that are currently sole-sourced. True, given the worldwide nature of the pandemic, dual sourcing may not help with the current supply disruption. Nevertheless, recall that in January and February, China was completely shut down by the Covid-19 virus and many companies were struggling to find available parts. By some estimates, the production capacity in China fell by 40%. Similarly, it is probably safe to say that the current economic conditions may cause some suppliers to file bankruptcy or go out of business. Although many companies and supply chain professionals have contemplated the need to dual source as a result of the Chinese Trade War of 2018 and 2019, it is now more imperative than ever to see whether there are alternative sources of supply available. For many companies, the time to identify and onboard a new supplier can be six months or more, depending on the critical nature of the supplier and how many engineering or regulatory approvals are required.

While no one hopes that the current pandemic lasts for two months, supply chain professionals need to be looking for alternative or duplicate suppliers now.

Aside from the basic qualification and operational issues (i.e., is this potential supplier qualified and “capable of producing my widget”), there are a host of legal and compliance related issues that should be considered when on-boarding a new supplier. Nevertheless, depending on the industry and the size of the supply base, companies may want to be open and transparent with their existing supplier about exploring a second source of supply. In most industries gossip travels fast and the last thing a company needs is for a key supplier to find out from a competitor that their relationship is at risk. This is especially true when supply is scarce.

Every relationship is unique so this should serve as a general roadmap of issues to consider:

**Onboarding Checklist:**
• Signed Agreements with appropriate risk mitigation clauses:
  — Common examples of risk mitigation clauses:
    — Force majeure clause
    — Forecasts and binding orders
    — Limitations of damages
    — Termination rights
    — Indemnification rights
    — Insurance clause
    — Audit rights
    — Time is of the essence

• “Due diligence” items:
  — Common examples of due diligence items:
    — Site Inspection
    — Review of Beneficial Ownership
    — Cross check with OFAC and other lists
    — Insurance Certificates
    — Review of Information Security Protocols

• Compliance related items:
  — Acceptance of company’s Supplier Code of Conduct (or review of vendor’s Code of Conduct)
  — Supplier training
  — Compliance Certification
  — Conflicts of interest

• Business Continuity and Disaster Recovery Plan
• Establish working group to address issues arising during relationship

Now is the time to prepare for the recovery. Strategic companies will want to leverage this opportunity to review their existing relationships and determine what can be done to improve them. Strategic companies will also want to explore additional opportunities to hedge against disruptions in the future. One thing that cannot be overlooked, however, is a company’s integrity. Companies will need to be hyper-vigilant to protect their reputations so that when we come out of this recession, they will be seen as a trusted partner. Companies will also want to remind their employees and agents and distributors that violations of the Code of Conduct will not be tolerated. When the immediate crisis is lessened, there will be tendency for sales to feel pressure in order to meet their numbers. This could result in them “looking the other way” to questionable or illegal activities, e.g. offering or soliciting bribes. Now is not the time to look the other way. Now is the time to be pro-active and seize the opportunity.

Edwin J. Broecker: (317) 399-2828 / ed.broecker@quarles.com

© 2020 Quarles & Brady LLP. Published with permission.