

**BRIBERY AND MORE: PLOTTING A PRACTICAL PATH**

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Where specific reference is made to the law it is to English law as at 11 May 2011.

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## **BRIBERY & MORE: PLOTTING A PRACTICAL PATH**

Anti-corruption legislation is not a new concept for the UK. Anti-corruption laws were originally codified in three Acts –the Public Bodies Corrupt Practices Act 1889, and the Prevention of Corruption Acts of 1906 and 1916. However, this legislation was rarely utilised. In fact, it appears that between 2001 and 2005 only 40 defendants faced proceedings under the old legislation.

The Bribery Act, set to come into force on 1 July 2011, is to some extent a response to pressures from the Organisation for Economic Cooperation and Development, whose bribery convention was ratified by the UK in 1998 and who have been critical of the UK's archaic bribery legislation. It has also become apparent that we are significantly lagging behind the US due to their extremely pro-active approach to anti-bribery laws with their US Foreign Corrupt Practices Act.

The new Act will repeal the old legislation and replace it with one consolidated set of offences which go beyond the earlier Acts, which were limited to bribery of public officials.

Originally there were concerns that the new Act was so broad that it would prevent day to day business practices, in particular corporate hospitality. Perhaps the most widely publicised criticism came from the UK Formula One teams, who were worried that the new broadly drafted offences under the Act would deter sponsors who used Formula One as a significant networking opportunity. As a result, the coming into force of the Act was postponed from April 2011, whilst the Ministry of Justice prepared more detailed guidance on its provisions. However, the Act itself was not amended.

With the new Act not yet in force, to some extent we are forced to make an educated guess as to what the effect of the Act will be on business practices in the UK and overseas in the short and long term. But with its wider scope, it is safe to say that we can expect more activity under this Act than under the previous legislation. Certainly the noises from the SFO are that they are going to be much more robust about pursuing offenders.

The offences under the Act can be divided into three main categories: general bribery offences; bribery of foreign public officials; and failure of commercial organisations to prevent bribery.

### **Sections 1 and 2: general bribery offences**

Somewhat paraphrasing, under section 1 of the Act it is an offence to offer, promise or give a **financial or other advantage** to another person where there is an intention that it will bring about **improper performance** by that person of a **relevant function or activity** or where the person offering the bribe knows or believes that the acceptance of the financial or other advantage *in itself* constitutes improper performance of a relevant function or activity.

Breaking the definition down, you offer a bribe if you offer a financial or other advantage. So, a bribe is not necessarily monetary. It could be a gift, or anything else

which is of benefit to the person being offered it, for example membership of an exclusive club.

You need to offer the bribe to someone who performs a function or activity. What is a function or activity? The definition is set out in section 3, but the point to note is that it is incredibly broad and will catch almost everyone, if not everyone, working in some form of business or commercial enterprise today, including not-for-profit work and roles in public service.

What makes that function or activity relevant is if the person performing the activity is expected to do so in good faith, impartially, or does so from a position of trust, for example as a director or a trustee. Acting in good faith or with impartiality is expected in most business or similar positions nowadays, so again, this is likely to catch everyone here today.

As for improper performance, a person performs that activity improperly if they do so in a way which is at odds with how a reasonable person in the UK expects them to perform it.

Note that the person being offered the bribe does not need to accept it for an offence to be committed under section 1 by the person attempting the bribe.

In addition to committing an offence by bribing a person, it will also be an offence under section 2 of the Act to request, agree to receive or accept a bribe intending that its consequence will be improper performance of a relevant function or activity, or where accepting the bribe *in itself* is improper performance.

However, this offence goes further, and also includes situations where a person receives a reward for improper performance, meaning that the bribe post-dates the activity, and where there is improper performance because a person expects to request or receive the bribe later on.

So, what does this all mean in practice?

Let's start with the obvious. Someone turns up to a meeting with an insurance company board member with a suitcase full of cash to get them to vote in favour of a takeover bid. We can safely say this would fall within the definition of bribery under section 1.

But what about a situation where an insurance broker places a risk with a large premium with an underwriter who is known in the market for being generous to his business contacts? The broker then receives an unusually expensive gift with a thank you note. Is that bribery under section 2? Quite possibly.

So there is a real possibility that the line between corporate hospitality and genuine appreciation for business can be blurred by the broad scope of the Bribery Act.

## **Section 6: bribery of a foreign public official**

In order to fall foul of this offence there must be an intention to influence the official in their capacity as a foreign public official in order to obtain or retain business or an advantage in the conduct of business.

Under section 6(5), a foreign public official is anyone who holds a legislative, administrative or judicial position, whether appointed or elected, or exercises a public function or is an official or agent of a public international organisation.

A person's conduct will amount to bribery if they offer, promise or give a bribe to the official or to another person at the official's request or with the official's consent, and the official is not permitted or required by their written law to be influenced by the offer or gift. This bribery can be conducted either directly or through a third party.

So, when could it be a *requirement* for a public official to be influenced by an offer or gift? One example the Ministry of Justice guidance gives is where a government body is accepting tenders for a large publicly funded contract – occasionally in order to distinguish between the tenders governments will require some commitment to invest in the local economy or local community. This is most likely to be relevant in tenders for construction work for example, where a tenderer could be expected to offer to build a children's playground for the community in addition to a new apartment building or housing estate.

At first glance, the offence of bribing a public official may not seem particularly important in an insurance context. However, there are a number of jurisdictions where individuals with significant social standing are automatically given government or other public offices, even if in practice they are little more than a title. This means that someone being engaged as an introducer of business in an overseas jurisdiction could also hold a public office. Another potential scenario which could arise is if a broker wants to do business with a state-owned insurer, to broker their reinsurance. It is possible that the senior level management or directors of that insurer could be public officials in their own jurisdiction.

### **Corporate Hospitality**

We have already briefly referred to corporate hospitality, which has been a particular bugbear for UK businesses when considering the impact of the Bribery Act. Seeing how broad the definition of bribery is, it is apparent that there is a potential for all forms of corporate hospitality to fall foul of the Act, as the very purpose of corporate hospitality is to win or retain business.

The Ministry of Justice guidance has tried to offer some comfort when it comes to the giving and receiving of corporate hospitality, and it is very unlikely that a genuine attempt to encourage good relations with clients or increase the public profile of your business will amount to an offence under the Act.

The guidance uses a few examples to show how we can distinguish between genuine corporate hospitality and bribery:

First, *“an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a PR exercise designed to cement good relations or enhance knowledge in the organisation's field is **extremely unlikely** to engage section 1.”*

Second, *“flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of **genuine mutual convenience**, and some **reasonable** hospitality for the individual and*

*his or her partner, such as fine dining and attendance at a baseball match...are unlikely to raise the necessary inferences.”*

However, *“if the choice of New York as the most convenient venue was in doubt because the organisation’s senior executives could easily have seen the official with all the relevant documentation when they had visited the relevant country the previous week then the necessary inference might be raised.”*

So, whilst generally the more lavish the expenditure the greater the inference that it is intended to influence decision making, this is not necessarily the deciding factor. Each situation should be judged on its own merits. Also, the hospitality being offered should be *“commensurate with the reasonable and proportionate norms for the particular industry.”* We would caution that it is not necessarily the industry, but also the person being offered the corporate hospitality that is part of the overall picture. If someone who is never normally offered corporate hospitality in the course of business is suddenly invited to an expensive day out at Twickenham because it becomes apparent that they have a significant input into a key decision, then it is fair to say that this may raise question marks.

#### **Section 14: liability of senior officers**

At this stage, it seems prudent to briefly mention section 14 of the Act. This is an interesting little section, tucked away near the end of the Act. It states that if an offence under sections 1, 2 or 6 is committed by a body corporate or a Scottish partnership, and it is proved that the offence was committed with the consent or connivance of a senior officer of the body corporate (or a person purporting to act in that capacity) then that person is also guilty of the offence.

The definition of a senior officer of a body corporate is set out in subsection (4), and goes further than just directors, referring to managers and company secretaries for example. Also, the fact that the Act includes a person purporting to act in the capacity of a senior officer, suggests that de facto directors will also be caught by it.

So, this section allows the law to look behind the corporate veil to the actions and conduct of the senior level directors and managers. Prosecution under this section is limited to senior officers who have a “close connection” with the UK, as defined under section 12(4) of the Act, and not by reference to where the act of bribery took place.

#### **Section 7: failure of commercial organisations to prevent bribery**

This is perhaps the most interesting and the most controversial introduction to anti-corruption legislation in the UK, as it extends potential liability under the Act beyond the actual wrongdoer to those commercial organisations who do not take an active role to prevent offences under sections 1, 2 and 6 from taking place.

A commercial organisation is defined in section 7(5), but is essentially any business entity which carries on a trade or profession in the UK. The commercial organisation will be guilty of a section 7 offence if a person who performs services for or on behalf of the organisation bribes another person with the intention of obtaining or retaining business for the organisation or obtaining or retaining an advantage in the conduct of business for the organisation. It does not matter where the act of bribery took place.

The capacity in which the person performs services for or on behalf of the organisation doesn't matter, so they could be for example an employee, agent, probably an appointed representative, and perhaps even a subsidiary. If the person is an employee there is a presumption that they meet the definition of a person performing services for or on behalf of the organisation. In all other cases, it will depend on all the relevant circumstances and not merely by reference how the relationship is described.

There is a section 7(2) defence to an allegation of failing to prevent bribery, which is that the organisation had in place adequate procedures designed to prevent persons associated with the organisation from paying bribes. The million dollar question is of course what are adequate procedures? This was a particularly controversial area when the initial Ministry of Justice guidance came out, and so to some extent the guidance has been beefed up to deal with concerns expressed by businesses. There is also some Serious Fraud Office guidance on the issue although this is potentially a little outdated. However, it remains a difficult area, and so is worthy of further consideration a little later on in this paper.

### **Facilitation Payments**

Facilitation payments are worth a mention in their own right because it has been another controversial area in the run-up to implementation of the Act. A facilitation payment is basically a small bribe paid to facilitate routine government action, for example a payment to a customs official to ensure that they turn up to deal with a shipment. In other words, not a bribe to get them to authorise a shipment they wouldn't otherwise authorise, but paying them to do their job, i.e. to turn up and deal with the matter. Whilst it would not be a payment to facilitate improper conduct, the acceptance of the payment could itself be improper conduct and therefore fall foul of the Act. In taking this stance, UK law differs from the US bribery legislation, which expressly allows for facilitation payments, which could make it more difficult for UK companies who compete with US companies for business in jurisdictions where facilitation payments are almost a way of life.

The guidance is fairly unsatisfactory. It says "*The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent*". In the meantime, businesses are obviously encouraged not to make such payments. However, the guidance in relation to facilitation payments is a reminder that (1) there must first be a sufficiency of evidence in order to prosecute and (2) eventual prosecution will depend on whether or not it is in the public interest to do so.

The Serious Fraud Office's General Counsel, Vivian Robinson QC, has indicated that there is unlikely to be prosecution in cases of small, one-off payments where steps have been taken to avoid further payments in the future. However, where there is a practice of regularly making such payments or making large payments and there have been no steps taken towards ending these, then prosecution becomes more likely.

To some extent, there is added commercial pressure in relation to facilitation payments because of the Organisation for Economic Cooperation and Development's request that signatory countries "*discourage companies from making such payments*",

and the Ministry of Justice's guidance on the Bribery Act, which says that businesses have "*a role to play*" in eradicating facilitation payments.

It seems like a rather tall order to expect commercial organisations such as brokers, insurance companies and loss adjusters to be helping the government implement international policy but, if that is the case, then it makes the Bribery Act much more than just another piece of legislation to be adhered to.

### **Territorial Effect of the Act**

All of the offences under the Act have what we term extra-territorial application. This means that anyone with a close connection with the UK can be prosecuted under the Act even if the bribery took place in a foreign jurisdiction, in addition to circumstances where the bribery does take place in the UK.

Section 12(1) of the Act is as expected; an offence is committed under sections 1, 2 or 6 of the Act if any act or omission forming part of the offence takes place in the UK.

Section 12(2) goes significantly further. The Act or omission will still be an offence if it takes place outside the UK and (a) it would be an offence if it had taken place in the UK and (b) the person has a close connection with the UK.

### **Penalties**

If prosecuted under the Act, the penalties are harsh. Potentially, an individual could face imprisonment of up to ten years and an unlimited fine, and companies also face unlimited fines. It's difficult to predict the level of fines we could be looking at in the UK but, in the meantime, it is useful to look to the US by way of example.

In the US, fines related to the Foreign Corrupt Practices Act amounted to \$87m in 2007. Two years later, in 2009, that figure rose to \$627m. Then, it hit \$1.8bn in 2010. One of the most highly publicised fines in the US more recently has been the April 2010 fine of \$185m levied on German company Daimler AG. As of February 2011, the highest fine under the Act was the \$800m fine imposed on Siemens AG in 2008.

Fines in the US context means both criminal fines paid to the justice department and civil fines paid to the SEC. This combination of civil and criminal fines in the US reminds us that there are no indications in the UK that criminal fines under the Bribery Act and civil fines levied by the FSA are mutually exclusive.

### **Money Laundering**

The Bribery Act has tended to divert attention from the money laundering rules. It is crucial that firms don't overlook money laundering and the Proceeds of Crime Act as it an equally important – and different – piece of legislation.

This lecture will not go through the offences in the Proceeds of Crime Act in any detail as that is another lecture in itself and anyway most people are familiar with them although there have been a few changes in recent years. Very briefly as a reminder, there are three offences of money laundering and also offences of failing to disclose and of tipping off.

The three money laundering offences are:

1. Concealing, disguising, converting or transferring property which a person knows or suspects to be criminal property or removing it from the United Kingdom;
2. Entering into or becoming concerned in an arrangement that a person knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person;
3. Acquisition, use or possession of property that a person knows or suspects to be criminal property

The offences apply to individuals and to businesses. Criminal property is very widely defined to include not just the proceeds of serious crime but any crime (whether committed in the UK or elsewhere if it would have been a crime if committed in the UK) and there is no de minimis limit.

Indeed, the territorial scope of the Proceeds of Crime Act can be wider than the Bribery Act. An example might be a UK subsidiary not involved in the payment of a bribe overseas by an overseas parent company. If the bribe produces revenue for the UK subsidiary, it seems possible that the Proceeds of Crime Act could bite (the revenue being the proceeds of the offence of bribery) whereas the Bribery Act probably would not bite as the bribe was not made by a person connected with the UK (although there may be arguments that the Act should bite if the subsidiary is sufficiently under the control of the parent to be considered essentially the same business – that is an area of argument that we will have to see how it develops under the Bribery Act).

The test for failure to disclose differs depending whether the firm is in the regulated sector or not as those in the regulated sector are subject to a more onerous objective test (i.e. they will be guilty of the offence if a reasonable person would have known of or suspected money laundering even if they don't themselves). The specific tipping off offences also apply (since changes in the Act) only to information that has come to a person in the course of a business in the regulated sector.

The regulated sector includes most of the financial services industry but not general insurers or general insurance brokers. Some of the offences are therefore not directly relevant to them but would be, for example, to those in the life sector, members' agents and other financial advisors.

The three principal money laundering offences are relevant to everyone. There is also an often overlooked offence of prejudicing an investigation which also applies to those outside the regulated sector and covers disclosure of knowledge or suspicion of a money laundering investigation and other matters such as destruction and falsification of documents. There are also separate offences to bear in mind regarding terrorist financing which are different in scope again, not least because terrorist funds sometimes originate from criminal activity but not always.

## **FSA**

Both bribery and money laundering have been the subject of specific FSA attention fairly recently. In May last year, the FSA published two papers – one on “Anti-Bribery and Corruption in Commercial Insurance Broking – reducing the risk of illicit payments or inducements to third parties” and another – “The Small Firms Financial Crime Review”. The first of those papers was partly as a result of the £5.25m fine levied on AON for failures in its systems and controls.

Generally, the FSA’s requirements on anti-bribery and anti-money laundering take the form of high level principles rather than detailed rules. This is a deliberate stance on the part of the FSA to force firms to consider the risks they face and tailor their procedures accordingly. Firms must take reasonable care to establish and maintain effective systems and controls for complying with applicable requirements and standards under the regulatory system and countering the risk that the firm may be used to further financial crime. Systems and controls must be comprehensive but the FSA also accepts that they should be proportionate to the nature, scale and complexity of a firm’s activities. The MOJ also recognises this in the revised bribery guidance.

There are some more specific requirements on money laundering contained in the FSA handbook which do not apply to general insurers or general insurance brokers (or managing agents) but these firms should still look to them as guidance as the FSA sees it as good practice for firms voluntarily to adopt them where appropriate. Lloyd’s takes a similar stance. All firms need to make sure in any event that they have in place adequate policies and procedures to meet the high level FSA principles as well as to comply with the Bribery Act and the Proceeds of Crime Act and other related legislation. The FSA will doubtless be looking at the systems and controls firms have put in place as part of ARROW visits and we might expect to see more “Dear CEO” letters.

So what should firms have in place?

### **Policies/Procedures**

The Ministry of Justice guidance on the Bribery Act sets out six principles which should be borne in mind by firms when they put in place their procedures for bribery prevention:

1. A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.
2. The top level management of a commercial organisation (be it a board of directors, the owners or any equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.
3. The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

4. The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.
5. The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.
6. The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

This lecture looks at some measures that we believe are important taking into account this MOJ guidance and also FSA requirements. The key is to have in place procedures which, firstly, minimise the risk of the firm being caught up in financial crime, and at the same time, maximise the likelihood of being found to have had adequate procedures in place - to assist in defending any claim or regulatory intervention.

To try and give some structure they are grouped very loosely into five areas, although there is some overlap between them.

1. Know who you're dealing with
2. Your internal policy/procedures
3. Communication and training
4. Senior management involvement
5. Ongoing review

#### ***1. KNOW WHO YOU'RE DEALING WITH***

The first key thing is to make sure you know who you are dealing with. The FSA requires some firms (i.e. those in the regulated sector) to verify customer identity. General insurers and brokers are not subject to these detailed requirements, not being in the regulated sector, but the FSA and Lloyd's looks to these firms to treat the requirements as guidance and to adopt good practice. So still think about the potential risks and the need to verify identity. Consider whether an individual is a Politically Exposed Person. You may want to think about subscribing to one of the commercial websites that allow checks for that type of issue.

Verify the identity also of third parties such as introducers to whom payments may be made. Consider what bribery risk the third party presents to the firm and tailor procedures and due diligence accordingly. One of the main areas of concern in the insurance market (certainly when it comes to bribery) will be payments to people who facilitate the introduction of business, and who are

likely to pose a higher bribery risk. The FSA is concerned that the commercial broking sector in particular relies heavily on market gossip instead of proper due diligence.

Consider whether the customer or third party is based in a higher risk country. Some perhaps more obvious examples might include Iran, Nigeria and Syria. But there are other countries considered higher risk that might not immediately spring to mind such as Greece, Turkey and Argentina. A full list of higher risk countries is available on the Treasury website or the Financial Action Task Force (FATF) website. Always ensure you keep up to date as the lists are updated regularly. Greece, for example, is said to be making progress on anti-money laundering and the position there might change.

If you are dealing with an individual rather than a company, the FSA seemingly perceives this as potentially higher bribery risk because individuals may be more susceptible to being bribed. Consider in particular whether third parties have connections to the assured or to public bodies or officials that could increase the risk of payments being bribes, directly or indirectly.

If you do not meet an individual face to face that should also alert you to a possibly higher risk situation. Similarly, be alert to requests by one party to pay money not to them but to someone else. This might indicate both bribery risk and also money laundering risk where, for example, return premium or claims payments are requested to be made to a party other than the insured.

Secrecy about payments should always be a red flag particularly when it comes to bribery – ideally all parties to the transaction should be aware that payments are being made if not the amounts. Certainly a specific request by a third party for secrecy should put you on alert, whereas if the party is happy for all to know that he is receiving payment that may give you some comfort.

## **2. *YOUR INTERNAL PROCEDURES***

You should have a written policy (or policies) accessible to all staff and good practice is to begin with a general statement of the firm's commitment to the prevention of financial crime. That sets the right tone for the firm.

Insofar as possible the policy should be tailored to your particular firm and the risks the firm faces. With that in mind, the starting point is a risk assessment (as set out in the MOJ bribery guidance). Consider the risks the firm faces in terms of, for example, countries in which it operates, the nature of its transactions and all types of business relationships, including with, amongst others, customers, joint venture partners, introducers, appointed representatives and contractors.

Look at the firm's stance on corporate hospitality which may need reviewing in light of the Bribery Act and the issues mentioned earlier in the lecture – this ties in also with conflicts of interest issues for FSA firms

The policy should make it clear who within the firm is responsible for dealing with the issues. The MOJ guidance suggests that firms consider having their policies and procedures vetted externally to ensure they are effective.

Good practice is to have a third party account opening form at least for high risk third parties such as introducers and the like which is required before any payments can be made. The firm's procedures should ensure that it has to be fully completed before any third party can be approved.

The FSA likes to see independent review of third party account opening forms by, say, compliance or a peer review by someone outside the relevant transaction – the rationale of course being that someone close to the transaction with a vested interest in it going ahead may be more likely to cut corners or turn a blind eye to deficiencies in the information.

It is also recommended good practice to have a third party payments register which is essentially a consolidated document detailing all relevant third parties and the amounts and frequency of payments to them, and also the nature of those payments, e.g. is it commission or an introducer fee. Amount and nature of the payments is important, not least because the FSA is quite clear that payments should be commensurate with the service being provided – so the amount and the purpose of the payment are key. The FSA has suggested that, for example, where the service provided is merely an introduction it might be more appropriate for payment to take the form of a one-off fee rather than an ongoing commission. In practice it will of course depend on the business relationship, but do be aware of the need potentially to be able to justify the rationale for a payment and its amount.

### **3. *COMMUNICATION AND TRAINING***

So you have your policy, but it is of little use if people are unaware of it or don't understand the reason for it and how it works in practice. Training is crucial. Best practice is that all staff within a firm receive at least some basic training on financial crime issues, and those in positions with more likelihood of encountering bribery or money laundering risk or with greater responsibility should certainly receive enhanced training tailored to their role. Training should be provided by someone who is themselves sufficiently well versed in the issues to deal with questions arising.

Training should be ongoing, not seen as just a one-off to tick a box. Refresher sessions should be arranged from time to time. New employees should be trained as part of their induction.

Full records should be kept of training dates and who attended so that the FSA can see what has been done. It is also vital for any defence under the Bribery Act that the firm has adequate procedures to prevent bribery.

Staff should be made aware of the firm's whistleblowing procedure, to ensure that they can voice concerns about any suspected bribery or money laundering activity (or indeed other concerns) confidentially. The FSA suggests that in smaller firms where this may be difficult, it might be appropriate to use a third party service provider. There is also the FSA's own confidential whistleblowing helpline for regulated firms.

There may need to be a report to the Serious Organised Crime Agency (SOCA) in some circumstances. Don't forget that bribery being itself an offence, means

that bribery concerns could in turn lead to money laundering concerns and potential SOCA reporting implications.

On a more positive note, it can often be a good idea to ensure that your clients and other third parties know about your internal policies on bribery and money laundering – they are likely to have their own requirements and it will give them comfort in doing business with you. Conversely, you might want to ask them what their policies are.

And also think about stipulating certain minimum standards in your contracts with other parties. Examples might include:

- Obligations to comply with UK and possibly overseas legislation
- Obligations to comply with parties' own internal policies and procedures and/or specifically stated requirements
- Requirements on contracting parties to make sure their agents, contractors etc. also comply and/or controls on sub-contracting
- Reporting requirements and provisions to allow for monitoring and audit of parties
- Appropriate warranties and indemnities
- Appropriate termination rights

#### **4. SENIOR MANAGEMENT INVOLVEMENT**

Again, this is the subject of a specific MOJ principle – namely that top level management must be committed to preventing bribery and fostering a culture whereby bribery is never acceptable. This also chimes with the FSA's stance that management should be informed and responsible when it comes to financial crime prevention.

There should be one or more individuals at sufficiently senior level (i.e. Board or reporting directly to the Board) with ultimate responsibility for the firm's anti-financial crime measures. Responsibilities and reporting lines should be documented. It is good practice for all board members to understand the legal requirements at least at a basic level, and certainly to be fully familiar with the firm's own policies and procedures. In a recent survey carried out by Kroll, only a third of senior managers believed they were 'thoroughly familiar' with anti-bribery legislation - and only 42% said their firms had assessed their own bribery risks and put in place the necessary procedures. Some were uncertain as to what had been done and 24% said it had not been done. It is in directors' interests to make sure that they are involved in and aware of what is going on, not least because of the potential for personal liability both under financial crime legislation and by way of FSA disciplinary action.

Regular and accurate management information is therefore important. One practical step could be regular meetings where senior management are informed of new third party arrangements and given an opportunity to question the need

for them and their scope. Depending on the size of firm and risks involved, it may be appropriate for the Board itself (or a committee) directly to approve in advance at least certain higher risk third party arrangements or those involving more significant sums. Also have internal procedures for the Board to be informed of any breaches or concerns.

Keeping up to date is vital, which leads to the last point, ongoing review.

## 5. *ONGOING REVIEW*

This is another MOJ principle – it recognises that bribery risks may change over time as may the nature of a firm's activities - so the risk assessment should be ongoing and policies and procedures should be regularly reviewed with a view to updating them. The law itself may change (or its interpretation – particularly important for a new Act like the Bribery Act where no-one is yet entirely sure how it will be interpreted and enforced) and the FSA's requirements may also change and should be monitored.

Ensure customer and third party details, including bank details, are kept up to date and match the name of the party so that you are not unwittingly paying someone else. Regular review of files can highlight red flags for money laundering such as abnormal transactions of unusual nature, size, frequency or claims patterns, or with unusually high cancellation rates with premium return.

There should be periodic checks on third party account opening forms and also on the register of third parties to look for things such as unusually high or frequent payments. Also don't forget basic points like checking that payments made actually do match the register. And use expenses audits as a check too.

As mentioned earlier, keep up to date with the list of higher risk countries which will change regularly depending not only on political and economic instability but also countries' steps to improve their existing laws. Some countries may drop off the list making your life easier.

## **Employment Issues**

Lastly, it is worth remembering that these issues do not stand alone and should inform other aspects of the business. As well as the need to think about money laundering together with bribery, these issues also feed for example into your employment practices and relationships.

The FSA is very keen on good staff vetting for many reasons, not least financial crime prevention – so consider Criminal record checks particularly for FSA approved persons and other higher risk staff. This applies not just to permanent staff but also temporary staff – if you are using an employment agency ask them what checks they have carried out and ask for evidence where appropriate.

Remuneration policies are another ongoing hot topic for the FSA and more widely. Structures which reward people by bonus for bringing in business are very attractive from a commercial perspective but the concern is that they can encourage people to take risks and perhaps overstep the mark by making suspect payments or overlooking concerns in order to bring in business and meet targets. Alternatives more palatable

to the FSA include so-called 'balanced scorecards' taking into account other factors such as good compliance and deferral and/or clawback of bonuses. This is a general issue but the FSA has specifically highlighted it as a concern in the bribery area.

You should make clear to staff the consequences of breach of the firm's policies – and your disciplinary procedures may need to be updated to address the issues.

Finally, one area that is often overlooked is the business that comes with employees or teams newly recruited from rivals. You should consider what due diligence is appropriate on the clients they bring and also their third party arrangements, rather than simply relying without question on what has been done before. And consider if your firm's policies or procedures need to be changed in light of the new business, particularly for example where it is higher risk than the firm's existing business because of its nature or the countries involved.

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