

Conduct of Business

Firm Organisation

Anti-Bribery and Corruption 2010 – a Changing Landscape?

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The UK Bribery Bill (Bill), introduced in the Queen's speech on 18 November 2009, has completed its first and second readings together with its committee stage, and is due to complete its report stage in the House of Lords in the first week of February 2010. This demonstrates the Government's determination to see this Bill enacted as soon as possible.

The Bill, as it currently stands, contains four key offences, the first two being ones of bribing or being bribed. These offences apply in both the public and private sectors and relate to the person being bribed performing a relevant function improperly, or where the acceptance of the bribe would itself constitute improper performance. The third offence is one of bribing a foreign public official and the last, a corporate offence of failing to prevent bribery, subject to a statutory defence of having adequate procedures to prevent bribery.

Another feature of the Bill is the penalties. For individuals convicted of one of the first three offences, the maximum sentence will be 10 years imprisonment and an unlimited fine, for businesses convicted of the fourth offence, an unlimited fine. There are other potential repercussions for businesses, such as a ban from all government contracts throughout the EU and no doubt the U.S. as well.

It is not only the government that is taking this issue seriously, the Serious Fraud Office (SFO) and the Financial Services Authority (FSA) have also been active using the current legislation, both making their intentions quite clear in respect of the future landscape.

What Does this Mean for UK Financial Services Firms?

In September 2009 the FSA published its interim findings on anti-bribery and corruption systems and controls in commercial insurance brokers.¹ This came approximately nine months after the

FSA had fined [AON Ltd](#) £5.25 million for failing to take reasonable care to establish effective systems to counter the risks of bribery and corruption.

In its interim findings the FSA identified what it felt were "significant weaknesses" in firms' systems and controls which the regulator felt were common across the commercial insurance broker industry. Other financial service sectors would be well advised not to ignore this warning, and firms should regularly review their systems and controls, using a risk-based approach.

What Are the Risks?

There is no "one size fits all" solution to the identification and mitigation of the risks associated with corruption. Traditionally one of the key areas is the use of agents or other third parties. It is well known that some businesses have intentionally set up agency arrangements to facilitate the payment of bribes in the mistaken belief that the arrangement will protect them from prosecution. However, it is not only the use of agents where risk may exist. Firms that have grown through foreign acquisitions may have branches or subsidiaries whose attitude towards corruption is entirely different from that of the parent. Individuals may act in accordance with long-held traditions which hitherto have never been questioned, but which now present real and tangible risk.

In its interim findings, the FSA noted that "few firms adopt a risk-based approach, for example, by focusing on high-risk jurisdictions and those third parties that are individuals."² Indeed, the FSA had a lot to say about a firm's relationship with third parties, in particular the due diligence and independent checking undertaken in both acquisitions and the use of third parties to secure or retain business.

As an example the FSA commented that it found evidence that some firms, acting on the instructions of third parties, had made commission payments to persons other than the third party without a clear understanding why.

In the AON case the FSA proceeded using its regulatory powers, the fine being imposed for a breach of Principle 3 of the FSA's Principles for Business, as set out at PRIN [2.1](#). Although the FSA is not a criminal prosecutor for bribery and corruption, it has made it quite clear that where the FSA finds evidence of criminal conduct in this area, it will refer the case to the SFO.

For its part the SFO is taking a strong lead in the UK's fight against bribery and corruption. It has invested heavily in establishing an "anti-corruption domain," which is planned to have 100 staff members, about a third of the SFO's entire workforce. The SFO has also been actively promoting what it calls the "self reporting" of corruption by commercial organisations. This initiative is backed by SFO guidance in which it sets out the benefits of self reporting for businesses that identify an internal corruption issue. As with any carrot there is always a stick, and the SFO guidance makes it clear that knowingly failing to self report may have serious legal, reputational and financial

Many UK financial services firms will be familiar with the U.S. [Foreign Corrupt Practices Act](#) (FCPA) and its extra-territorial reach. Although this legislation may apply to a broad range of UK-based businesses, the proposed UK Bribery Bill is quite different, and firms should be aware that compliance with the existing U.S. legislation may fall short of ensuring compliance with UK law. For example, while FCPA specifically allows so-called facilitation payments, the UK law will not. Furthermore the FCPA relates to the bribing of foreign officials, whereas the UK law will apply to the act of bribing or accepting bribes for almost everybody who performs a function, whether that be a public function or one connected with business or employment.

Recent well-publicised cases demonstrate the direct risks associated with non-compliance. Siemens paid a total of \$1.6 billion in fines in Germany and the U.S., and incurred additional associated costs estimated to be in the region of \$1 billion.³ But it is not only the fines that will impact on a non-compliant business. Reputational risks at customer, supplier and shareholder level may add further damage to business efficiency. Share price volatility and reputational damage may have an adverse impact on loans, covenants and credit lines, not to mention the impact of the imprisonment of key personnel.

Firms and directors should also be aware that under the Costs in Criminal Cases (General) (Amendment) Regulations 2009 (SI 2009/2720) which came into effect in October 2009, companies and directors that are acquitted of criminal charges following trial will no longer be able to recover all their defence costs from the public purse. This could result in bills of many millions of pounds. The answer must be that firms and their directors ensure that they are, and are seen to be, fully compliant with anti-bribery laws.

Adequate Procedures and Guidance

The corporate offence proposed in the UK Bribery Bill includes a statutory defence. If a corporate can prove that it had in place adequate procedures designed to prevent it, or anyone acting on its behalf, from bribing another, it would not be guilty of the offence.

At present it is not the government's intention to provide detailed guidance or "safe harbours" in relation to what might be considered to be adequate procedures. Last December Lord Bach, the Parliamentary Under-Secretary of State at the Ministry of Justice, outlined the government's proposal to issue guidance that would be flexible and indicative, setting out relevant principles backed up by illustrative good practice examples. This, the minister said, would help organisations better understand the adequate procedures defence, and to develop their own procedures for preventing bribery.

Irrespective of the eventual outcome of parliamentary discussions on the level of guidance to be

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provided, firms need to focus on their own procedures to prevent bribery. This may require no more than a regular review of existing controls, or it may require the detailed development and implementation of new systems and controls focused specifically on anti-bribery measures. Such controls will need to be tailored to individual circumstances, albeit they should fall under a number of overarching principles. These can be grouped into four areas: policies, processes, people and communication.

Policies

- Business ethics– creating a culture of doing the right thing;
- Code of conduct – dealing directly with corruption and with conflicts of interest;
- Gifts and hospitality;
- Oversight and responsibility;
- Disclosure mechanisms (whistle blowing) and appropriate follow-up procedures.

Processes

- Using a risk-based approach;
- Embedded in business strategy and meshed with budgets and forecasts;
- Regularly reviewed and monitored for effectiveness;
- Recorded and audited;
- Independent, enhanced due diligence of third parties.

People

- Setting the tone from the top;
- Zero tolerance of bribery and corruption issues;
- Specific executive responsibility;
- Encourage "open talk" balancing sanctions and incentives;
- Train, educate and train again.

Communication

- Clear and unambiguous messages, setting the tone from the top;

- Across all cultures and languages;
- Introducing full disclosure on policy, processes and breaches in all reports;
- Ensuring disciplinary policy is communicated and enforced;
- Implementing appropriate and ongoing training and education.

The adequacy of a firm's procedures should be assessed by experienced individuals who are independent of those implementing or monitoring them. In addition regular monitoring should be undertaken, including an assessment of the ability of the firm's procedures to deliver the corporate anti-bribery policies.

A firm's commitment to maintain adequate procedures will, at least in part, be driven by the board's communication and actions. Sufficiently experienced human resources need to be made available to ensure continuing compliance. Risk assessments need to consider local culture and language, and should not be influenced by the size of the operation in any particular location.

To avail itself of an adequate procedures defence, a firm would need to be able to demonstrate that the procedures were in place at the time the bribery took place. However, this is not the only reason for acting now. Business ethics are becoming increasingly important in today's society, and anti-corruption controls will be high on the agenda of regulators and law enforcement alike.

The implementation of robust controls may take many months to complete. It is clear from the words and actions of the authorities that firms with weaknesses in their anti-corruption controls may face significant penalties, not to mention the cost and disruption associated with any investigation. It therefore follows that waiting until something happens or the Bill becomes law is not sufficient, as it might well be too late. The time to act is now.

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The interim findings are available on the FSA web site at http://www.fsa.gov.uk/pages/About/What/financial_crime/library/interim.shtml.

2

Ibid.

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See Siri Schubert and T Christian Miller, Siemens, Bribery Was Just a Line Item, The New York Times, 20 December 2008 at <http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html>.

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