

## **PRACTICE NOTE ON GLOBAL ANTI-BRIBERY AND ANTI-CORRUPTION POLICY**

*Practice Notes represent the author's view of good practice in a particular area. They are not legal advice and the author will not accept any legal liability in relation to them.*

### **Issue**

For more than 30 years many international groups based in the United States and elsewhere have implemented global anti-corruption compliance policies based on the United States' Foreign Corrupt Practices Act. The United Kingdom's Bribery Act, which took effect in 2011, sets a new, higher standard for anti-corruption compliance and raises the question: Should it replace the FCPA as the model for international groups' global anti-bribery and anti-corruption compliance policies?

### **Background**

In 1977, the United States passed the Foreign Corrupt Practices Act (FCPA), which made it unlawful for a "U.S. person" to make a payment to a foreign official anywhere in the world for the purpose of obtaining or retaining business. Facilitation or "grease" payments are, on the other hand, permitted. Furthermore, issuers are required to "make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."

In 1997, 38 member states of the Organization for Economic Cooperation and Development (OECD), including most European countries, signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, agreeing to adopt legislation to make it a crime to bribe foreign public officials. France, for example, passed its anti-bribery law (limited to bribery of public officials) in 2007.

Other countries outside the OECD have also passed a variety of anti-bribery laws. China's law, for example, prohibits both "active" (giving) and "passive" (receiving) bribery of both public officials and private persons ("commercial bribery"). Famously, sanctions for individuals include the death penalty.

### **UK Bribery Act**

The UK's new Bribery Act, which came into force on July 1, 2011, is the broadest and strictest anti-corruption law in the world, prohibiting bribery of both public officials and private persons, including both the giving and receiving of bribes, as well as facilitation payments except in certain limited circumstances. Significantly,

the UK law also holds a company liable for failing to prevent bribery unless “adequate procedures” are in place to prevent the bribery.

To avail itself of the “adequate procedures” defense, a company must put in place a compliance program based on the following six principles:

- Proportionate procedures: A company’s anti-corruption procedures should be “proportionate to the bribery risk it faces and the nature, scale and complexity” of its business activities.
- Top-level commitment: Top-level management “must be committed to preventing bribery” and to creating and maintaining a compliance culture with a zero-tolerance for bribery.
- Risk assessment: A company must periodically perform appropriate risk assessment procedures “accurately to identify and prioritize the risk it faces”, including country/sector risk, transaction risk, business opportunity risk and business partnership risk;
- Due diligence: A company must have policies and procedures enabling it to feel confident that employees and third parties who perform services for or on behalf of the company are not engaged in bribery.
- Communication: Beyond simply adopting written policies and procedures, a company must ensure effective implementation of its anti-corruption program through effective communication and training so that an anti-corruption culture is established throughout the organization.
- Monitoring and review: A company should have effective auditing procedures in place to help ensure that its anti-corruption program remains up-to-date in light of the company’s business activities and that any issues that arise are identified and addressed on a timely basis.

To comply with the UK Bribery Act, the board of directors of each company in the UK which contracts with clients or suppliers, including the UK subsidiaries of groups outside the UK, must formally adopt a UK Anti-Bribery and Corruption Policy which includes processes that must be followed at the companies to ensure there is an audit trail, which is required to prove that adequate procedures are in place and followed. Namely, training for every employee and proper communication and adoption of the associated procedures and process are required to fulfill the obligations imposed by the ‘communication’ and ‘monitoring and review’ bullet points above. Further, as part of that policy, UK companies are required to impose the same standards of conduct on “associated persons” who are acting on their behalf. This includes external third party representatives such as agents or consultants, as well as affiliated companies who are deemed to perform services for or on behalf of a UK company. Each UK company should send a short form version of the policy for such purposes to its third party representatives, and a short one-page policy to its suppliers, wherever they may be located.

The question arises: What is the best way for international groups – and especially groups with operations in both the U.S. and the UK that may already have in place a global compliance policy based on the FCPA – to ensure that affiliated companies outside the UK acting on behalf of UK companies also comply with the Bribery Act? One way is for the board of directors of each such affiliate outside the UK to adopt a UK Anti-Bribery and Corruption Policy in compliance with the UK Bribery Act. The disadvantage of this approach is that it would result in having conflicting policies in

effect within the same group: one based on the UK Bribery Act for UK subsidiaries and their affiliates outside the UK that are acting on their behalf, and another based on the FCPA for all other group companies. A second approach is for the group to adopt a new global policy on anti-bribery and anti-corruption based on the UK Bribery Act. While this approach has the disadvantage of being broader than necessary with respect to non-UK subsidiaries that are not affiliates acting on behalf of UK subsidiaries, it has the significant advantage of simplicity, as well as demonstrating the group's commitment to best practices in the sensitive area of anti-corruption.

### **Strategy**

It is, therefore, recommended that international groups with operations in both the U.S. and the UK put in place a single global Anti-Bribery and Anti-Corruption Policy based on the UK Anti-Bribery Act as the best practice in the area, supplemented by a section on the accounting requirement under the FCPA if the group is a U.S. issuer.

Such a single global policy dedicated to anti-bribery and corruption will enable the group to demonstrate that it satisfies both the written policies and procedures element of the "adequate procedures" defense in the UK and the "adequate compliance standards and procedures" element of an "effective compliance program" under the United States Sentencing Guidelines for Organizations. It also sends a strong message to clients, employees and governments that the group places a high value on integrity.

It must be stressed, however, that to be effective any compliance program must also include the other elements of the "adequate procedures" defense, namely:

- Top-level commitment
- Periodic risk assessment
- Due diligence when appointing representatives to act on behalf of Groupe companies
- Communication and training
- Monitoring and review

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