BANISHING THE BACKHANDER

The Global Crackdown on Bribery & Corruption
AGENDA

• Introductions
• Summary of Proposed UK Anti-Corruption Legislation
• From Proposal to Reality: A Corruption Investigation
• Practical Perspectives on Implementing Anti-corruption Compliance Programmes
• Q&A
• Reception
Participants

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- Barry Donnelly, *Partner* Jones Day
- Michael Brown, *Partner* Jones Day
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Background to Proposed UK Legislation

- US at forefront of fight against foreign bribery and corruption:
  - Foreign Corrupt Practices Act 1977 (as amended) (“FCPA”);
  - Liaison with the Organisation for Economic Cooperation and Development (“OECD”) in 1980s.
• OECD criticism of the UK:
  • “…disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK. The continued failure… to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery has hindered investigations… ”.
• UK reform a slow process:
  • Nolan Report 1995;
  • Draft Corruption Bill published 2003 & withdrawn 2007;
  • Law Commission consultation paper October 2007 & report November 2008
  • Bribery Bill published March 2009.
Dedicated Resources

- SFO – Anti-Corruption unit announced over 50% increase in investigators in November 2008.
- City of London Police – Overseas Anti-Corruption Unit (“OACU”).
- FSA – Focus on firm’s systems and controls for combating bribery & corruption.
• 3 recent cases:
  • OACU – 2008 - landmark conviction for bribery;
  • SFO – 2008 - £2.25M settlement in bribery investigation;
  • FSA – 2009 - £5.25M fine of Aon for systems and controls failings.
Proposed UK Legislation

- Common law offence of bribery, together with all or relevant parts of the 1889, 1906, 1916 and 2001 Acts to be repealed:
- Replaced by four new offences:
  - two general offences of bribery relating to the Payer (P) and the Recipient (R);
  - one specific offence of bribery of a foreign public official (FPO).
• A new corporate offence for “Commercial Organisations”, including companies incorporated in the UK (whether or not carrying on business in the UK), any company (wherever incorporated) carrying on business or part of a business in the UK, and partnerships including LLPs.
First General Offence – P

• Where P offers, promises or gives an advantage to another, intending it to induce another person to do something *improper*; or to reward someone for behaving *improperly*.

• Where P knows or believes that the acceptance of the advantage would itself constitute improper behaviour
Second General Offence – R

- If R requests or accepts an advantage, intending that he or another should in consequence behave improperly or the request or acceptance itself constitutes improper behaviour by R;
- If R asks for a reward for improper behaviour (by R or another);
- If R (or another) behaves improperly in anticipation or in consequence of requesting or accepting an advantage.
Matters applicable to the General Offences

• “Improper”: performance of a function or activity (business, professional or public) wherever performed, will be improper if carried out in breach of one or more expectations.

• “Expectations”: being expectations that a reasonable person would have that:
  • Someone will perform a function or activity in good faith or impartially; or
  • An expectation created by the fact that someone is in a position of trust.
Territoriality

- The general offences will apply to acts done outside the jurisdiction if they would have amounted to an offence within the jurisdiction; and
- The person accused is, among other possibilities, a British Citizen, an individual ordinarily resident in the UK, or a body incorporated in the UK.
Individual responsibility

- An individual director, manager or equivalent person who consents to or connives at the commission of one of the new general offences will himself/herself commit the relevant offence.
- Upon conviction, a sentence of up to 10 years imprisonment may be imposed.
Bribery of a FPO

• An FPO is an individual who holds a legislative, administrative or judicial position of any kind (whether appointed or elected) in a Country or territory outside the UK; or
• Exercises a public function
  • for or on behalf of a country or territory outside the UK or
  • for any public agency or enterprise of that country or territory; or
• Is an official agent of a public international organisation.
• If P offers or gives any advantage not *legitimately due* to FPO or to another person at/with the FPO’s request or assent.

  • P must offer or give the advantage:
  • Intending to influence the FPO in his or her capacity as an FPO, and
  • Intending to obtain or retain business.
• If the law applicable to the FPO permits or requires the FPO to accept an advantage, that advantage would be “legitimately due” and therefore exonerate P.

• The proposed defence for P to show that he or she had reasonable belief that the law permitted or required the FPO or another recipient with the FPO’s assent to accept the advantage, taking into account any steps taken by P to investigate the true position, has been removed from the Bill.
The New Corporate Offence

• Where a commercial organisation negligently fails to prevent bribery committed by a person performing services on behalf of the organisation in question.

• If someone acting on C’s behalf commits bribery; the bribe was in connection with C’s business; and someone connected with C, whose functions included preventing bribery being committed by the persons acting on C’s behalf negligently failed to prevent the bribery.
• Punishable by unlimited fine
• Defence to show that there were adequate procedures in place designed to prevent persons committing bribery, but not if the negligent responsible person was a director, manager or equivalent person within the company, or a partner or any person who has control or management of the business of a partnership.
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A Corruption Investigation: Hypothetical

- City-based Brokerage Firm: Steiff Hupper & Lippe
- Dallas, Texas US Brokerage: Steers & Beers
  General Counsel is Walker “Tex” Ranger
- **AQUAFIRE**: Hot IPO Privatization of Water Monopoly from Vanuatu
US DOJ & SEC Subpoenas

- **Paul Douey:**
  - Moroccan citizen
  - Government relations consultant
  - Paid 100,000 Sterling
- **Green Pipe:**
  - Panamanian contracting firm,
  - Received large IPO Allocation
Questions: Step I

• Who will handle the investigation? Who else will be on the team?
• What steps should be taken to preserve the attorney-client privilege?
• Reporting to senior management?
• When should outside counsel be called?
Quick Friday Investigation Reveals:

- **Green Pipe**: Also has SH&L Dusseldorf account
  - Received large IPO allocation
  - Sold and wired 200,000 Euro to US Bank Account
  - Traded other Vanuatu Privatizations
- **Nancy Howe**: Account Signatory
- **Ian Cheatum**: Referred Green Pipe Account
  - Cheatum: SH&L’s Head of Investment Banking

**Request:**
- Emails from Cheatum & Dusseldorf
- Travel records
Questions: Step II

- Will the investigation leak?
- What should employees be told?
- Should other steps be taken to preserve records?
- What about records from foreign countries?
What a way to start a Monday . . .

- **Gno Howe**: Vanuatu Minister of Public Works
- **Nancy Howe**: Only child of G. Howe
- **Cheatum**: Allocated shares to accounts that “would do the firm the most good.”
- **Travel Records**: Vanuatu/Dallas (Steers & Beers)
  - Hotel: $5,263.68
  - “Gifts for Howes”: $20,000
  - Entertainment @ Douey’s Bazaar: $20,000
The (unhelpful) Due Diligence Memo

- Dallas meeting with Steers & Beers lead banker
- “Douey introduced Minister Howe and his daughter.”
- “A discussion about the customs of Vanuatu and the offering was had.”
Questions: Step III

- What do you do next?
- Is it time to tell others?
- Does the team need assistance?
- What do you tell senior management?
- What will you say to Cheatum when he returns?
Cheatum returns and Tuesday does not get better . . .

- SH&L Compliance Policy:
  - Prohibits bribery, Limits gifts to 100 S in value
- Cheatum’s Response:
  - Missed the training
  - Real world, at this for 20 years +
  - No different from Russian deals in ’90s and every Vanuatu deal
  - Everyone makes money
  - Wasting time; good-bye.
Questions: Step IV

• Do you look more broadly now?
• What to do about Douey, Cheatum & Howe?
  • What do you tell:
    – Senior Management
    – Board
    – Employees
    – FSA, SFO
    – US DOJ, SEC
    – Vanuatu Government?
Questions: Step V

• Do you provide a Written Report?
• What about the impact on other pending deals?
• The public fallout?
• What will you say about the effectiveness of SH&L’s compliance programmes?
• How will you remediate the problems?
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Implementing a compliance programme
DOJ Opinion 04-02: The “ABB Test” components of an FCPA compliance programme

“ABB Test” Components

- Independent audits to ensure compliance
- System of internal controls and accurate books and records
- Training and annual certification
- Disciplinary process
- Compliance Chief reports to Compliance / Audit Committee
- Due diligence oversight
- Standards and procedures apply to all parties
- Reporting system and helpline
- Clearly articulated policy
- Standards on business relationships with reputable partners
Steps in developing a compliance programme

1. Risk Assessment, Policy Development & Roll-out
2. Controls Development & Implementation
3. Policy & Controls Monitoring & Remediation
# Bribery and corruption

## Identifying the signs – how and where you do business

### Location and nature of business activities

- Countries in which you operate have a high propensity to corruption
- Your business includes large sales to, or other commercial transactions with, government agencies
- You are dependent on government approvals / licenses / regulatory permissions to operate
- You make / are asked to make charitable or political donations or sponsorship in at-risk foreign jurisdictions

### Corporate attitude

- Excessive pressure for sales without appropriate ethics messaging
- Failure to respond adequately to allegations raised by whistleblowers
- Failure to address weaknesses and discipline offenders following criminal conduct in relation to bribery and corruption
- Lack of due diligence conducted - on target entities (prior to acquisition), joint ventures etc...
### Intermediaries/agents

- Significant use of third party agents/intermediaries in negotiations or sales situations, particularly those with government agencies
- Lack of transparency in third party intermediary/agent contracts, such as opaque scope of services and remuneration criteria
- Intermediaries are located in a different location to the location where the services are performed, or request funds to be transmitted to a different location/entity/individual
- Refusal by third party to sign warranties or allow right to audit of records
- Absence of business history or experience of third party / intermediary
- Lack of actual involvement by the third party / intermediary in the transaction / arrangement

### Tendering/subcontracting

- Unusual bidding practices e.g. losing bidder hired as subcontractor, or sole bidder
- Lack of relevant experience of successful candidate
- Payments not commensurate with value of services rendered or vague deliverables in contracts
## Anti-bribery and corruption programme

### Key success factors

<table>
<thead>
<tr>
<th>Top five factors in achieving a successful anti-bribery and corruption programme</th>
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<tbody>
<tr>
<td><strong>Tone from the top</strong></td>
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<td><strong>Strong internal controls</strong></td>
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<td><strong>Focus on training</strong></td>
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<td><strong>Adherence to policies</strong></td>
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<td><strong>Disciplinary action</strong></td>
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Example of a potential structure as it relates to policies, procedures and controls for business relationships

**COMPLIANCE**
- Ensure relevant anti-corruption policies, procedures and controls embedded within ethics training
- Review returns and certifications for any risk issues
- Respond / investigate hotline reports
- Monitoring press reports, DOJ / SEC opinions and enforcement actions

**INTERNAL AUDIT**
- Identification of business relationships falling within scope
- Data mining
- Detailed transactional testing
- Review of business partners’ books and records, where possible
- Identification of potentially non-compliant business partner contracts
- Identification of potentially non-compliant transactions
- Review of due diligence files
- Review of ‘Know your business partner’ files

**LEGAL**
- Draft standard business partner contracts
- Draft form of returns and certifications from business unit managers and business partners
- Termination of non-compliant business relationships
- Drafting business relationship due diligence procedures
- Review and update ‘Know your business partner’ procedures
- Monitoring changes in relevant legislation
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