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A REVIEW OF THE EXPANDED ADEQUATE PROCEDURES AND WHAT THEY ACTUALLY MEAN FOR FINANCIAL SERVICES FIRMS

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From 1 July 2011, when the Bribery Act 2010 becomes operative, it will be a criminal offence for a firm to fail to prevent bribery by persons who provide services on its behalf. There is a presumption that this will include all employees. It may also include a range of third parties with whom the firm has no direct contractual relationship. This has been described as a strict liability offence but the Bribery Act provides one statutory defence - that an organisation can show it had "adequate procedures" in place to prevent such bribery from occurring. On 30 March 2011, the Government published guidance on the meaning of "adequate procedures" (the "Guidance").

Organisations that carry on business, or part of a business, in the UK will be caught by the "failure to prevent" offence , regardless of where the actual bribery takes place. This will include firms that are subject to FSA regulation. So what should firms do to ensure that they are not exposed to the risk of prosec

A risk-based approach

The Guidance is premised on a risk-based approach. As a result firms should undertake risk assessment exercises across their business units to ascertain the level of bribery risk they face within the sectors in which they operate, the risk profile of their customer base or counter-parties and the jurisdictions in which they do business. Though the risk assessment should be carried out across all business units, naturally relationships and business in countries with a high perceived risk of corruption should receive close attention For firms with US operations, that will have familiarity with the requirements of the US Foreign Corrupt Practices Act ("FCPA"), it is important not to overlook that Bribery Act compliant procedures must address the risks of bribery in all commercial contexts, not just risks presented by foreign public officials (the narrower scope of the FCPA).

Using the output of the risk assessment, firms should implement policies and procedures to mitigate the identified risks that are proportionate to the nature and level of the specific risks and the size of the firm itself. Each firm will need to ensure that it has a tailored compliance programme.

Six key principles

The Guidance is built around six key principles:

1. Proportionate measures: the Guidance recognises that the nature of the risk faced by, for example, an investment adviser working with retail clients exclusively within the UK will be very different from the risks facing a large investment bank operating in multiple jurisdictions. This may provide some comfort to smaller firms but they should still ensure that they can defend decisions made when assessing bribery risk and demonstrate that their procedures are appropriate to the level of risk exposure.

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2. Top level commitment: the Guidance has made it clear that the primary responsibility for setting organisational standards in relation to bribery risk sits with senior management. Though day-to-day management of the implementation of the policies can be delegated, those carrying out the implementation must have a clear channel of communication with senior management (or the firm's board) to get support as required.

3. Risk assessment: the Guidance identifies five common types of risk: country risk; sectoral risk; transaction risk; business opportunity risk and business partnership risk. These are not exclusive.

4. Due diligence: Financial Services firms should carry out due diligence on persons who perform services on behalf of the firm. This is especially important where a firm's business model requires the use of intermediaries and introducers.

5. Communication and training: training is key, but the Guidance also points out the importance of providing a means for employees and other individuals to raise concerns related to bribery in a confidential and secure manner (for example a whistle blowing line).

6. Monitoring and review: firms should undertake a regular review of their anti-corruption policies and make any changes or improvements, particularly in light of any expansion into new sectors or countries.

Particular areas of concern for financial services firms

FSA Principles and rules in relation to improper inducements, with the internal policies and controls regulated firms have in place to meet them, already cover some of the ground relevant for Bribery Act "adequate procedures". Existing policies and procedures should be recruited but also expanded upon where appropriate in light of the risk assessment. It should be made clear that the firm has the risk of bribery explicitly built into its control framework.

Gifts, hospitality, and political and charitable donations are only a small part of the picture, though they have received the most column inches in the media debate around implementation of the Bribery Act. Other ways of potentially delivering and disguising bribes through the normal business activities of a financial services firm must be considered carefully. The FSA so far has only turned its attention to anti bribery controls in any detail in the commercial insurance broking sector, where the FSA has issued detail guidance. Though that guidance is very sector focussed it is worth other firms reviewing it as a more general steer on FSA expectations. Procedures satisfactory to the FSA's successors are likely to be deemed so by a prosecutor under the Bribery Act. You can also expect that going forward the FSA's successors will consider that anti bribery procedures are of supervisory interest across all financial services sectors in rather the same way that they will continue to take an interest in anti money laundering and anti market abuse procedures.

Relationships with Agents, Consultants and Other Third Parties

Firms should review with particular care their use of and relationships with third parties for whose actions they could be found liable under the new "failure to prevent bribery" offence. As stated above, this is not limited to contractual relationships. Local relationships in high-risk jurisdictions should be reviewed carefully. Appropriate due diligence should always be undertaken. A firm should consider extending its own training programme to such third parties and requiring them to sign up to the firm's anti corruption policy or obtain other explicit representations that they will apply appropriate anti corruption standards. The use of express contractual terms should also be considered in appropriate cases.

Gifts and hospitality

In response to concerns raised by the business community, the Guidance has confirmed that it is not the intention of the Act to criminalise reasonable and proportionate hospitality and promotional or other similar business expenditure forming part of legitimate business activities. Nevertheless, the Guidance acknowledges that hospitality can be used as a bribe and the fact that a particular type of corporate hospitality activity accords with industry standards will not in itself be sufficient evidence that bribery has not occurred, particularly if those standards are "extravagant". A day at a sporting event is very unlikely to fall foul of the Guidance, but a week long skiing trip may well do so. Firms should review their client entertainment policies carefully.

Political and charitable contributions

Donations to political parties, or even to charitable organisations, may be a way in which bribes can be channelled to government officials. A firm which makes political donations may in some circumstances also be perceived to be trying to exert improper influence over government or regulatory policies. Employees should be made alert to the fact that it is not always immediately obvious that a "charitable" organisation or event is linked to or backed by a particular political party – thorough due diligence should always be undertaken.

Conclusion

Financial Services firms operate within a tightly regulated environment and are familiar with compliance obligations. For many larger organisations in this sector it will be relatively easy to roll out appropriate compliance procedures and training building upon their existing framework; for smaller firms that nevertheless rely on overseas relationships the need for anti-corruption compliance to reach out beyond our shores may be more challenging. For all, the time for implementation is now upon you with a challenging deadline to meet. If an "adequate procedures" defence is to stand up, being able to demonstrate that a proper risk assessment exercise was conducted and that directors and partners have been and continue to be directly engaged in anti corruption controls and culture is key.

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