

NEWSSTAND

Complying with Corruption and Bribery laws

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Investigating and punishing companies for paying bribes to win public business is an increasing priority of law enforcement agencies around the world. There is no reason to expect that the insurance industry is immune from corrupt activities: in January 2009, the Financial Services Authority fined Aon Limited £5.25 million following an investigation into compliance systems failures causing possible breaches of anti-bribery laws.

In the United States corruption investigations and enforcement actions are at an all time high, and the Aon and other cases suggest that the United Kingdom authorities are now intent on achieving similar results. This will be given impetus if Parliament accepts Law Commission proposals to overhaul bribery laws.

This article outlines the US legislation, the Law Commission's proposals in the UK, and the Aon case.

The United States: the FCPA

The Foreign Corrupt Practices Act (FCPA) criminalizes the corruption of foreign public officials to win or keep business. Representatives of state-owned companies could be public officials under the Act.

The FCPA also requires companies whose shares are traded in the US to maintain books and records that accurately and fairly reflect their transactions, and to maintain an adequate system of internal accounting controls.

Infringement of the FCPA can lead to civil or criminal penalties. Individuals can be jailed for up to five years. Fines in criminal proceedings can be up to twice the benefit sought by paying the bribe, and civil penalties can equal the gross amount of the benefit gained by the defendant.

The defences to prosecution include the legality of the payment in issue under the written laws of the country in which it is made. Reasonable expenditure incurred to demonstrate a product or to perform a contractual obligation is also permitted.

Broad Application

The Act applies to corrupt activities within or outside the US, and companies are liable for the activities of their officers, directors, employees or agents. The Act also extends to foreign individuals or companies who take steps in the US as part of a scheme to bribe a foreign public official. This could include the use of a bank account in the US, wire transfers through the US or lesser links such as travel or communications through the US.

The accounting provisions apply both to issuers of US securities, and to their domestic and foreign subsidiaries. That may include companies in which an issuer has only a minority interest.

The UK position: Proposed Reform of Anti-bribery Laws

The law of bribery in England and Wales is outdated and uncertain. On 30 November 2008, the Law Commission published a detailed review of the existing law, and proposed a draft bill intended "*to make the law of bribery simpler and more appropriate to modern times and consistent with our international obligations*". The proposed bill, or something akin to it, could be passed in late 2009 or early 2010. It proposes the following broad offences:

- requesting or receiving a bribe
- offering or giving a bribe
- bribery of a foreign public official
- a corporate offence of negligently failing to prevent bribery.

The proposed bill does not distinguish between bribery in the public and private sectors, save for the specific offence of bribery of a foreign public official. That offence would be committed if the defendant offers or pays a bribe with the intention of influencing a foreign public official in his or her official capacity to obtain or retain business, or an advantage in business. Again, representatives of state-owned companies could be foreign public officials under the proposals. It would be a defence to show that the payments were 'legitimately due', or that the defendant reasonably believed that this was the position.

The corporate offence of failure to prevent bribery is perhaps the most significant proposed change. It would apply to companies and limited liability partnerships whose registered office is located in England and Wales. The offence would be committed if:

- any person performing services for or on behalf of a company or partnership paid a bribe (whether an employee, agent or subsidiary)
- the bribe was in connection with the defendant's business
- any person with responsibility for preventing bribery negligently failed to prevent the payment of the bribe.

It would be a defence to show that adequate procedures had been implemented intended to prevent bribery by the person paying the bribe, unless the act complained of is that of a director or other senior company representative.

It is proposed that criminalisation will extend to bribes paid overseas by British citizens, UK residents and companies or partnerships incorporated in the United Kingdom, even where no steps in relation to the bribes are taken in the UK. Individuals found guilty of an offence would face a maximum of ten years imprisonment or a fine, or both. The maximum penalty for a company would be an unlimited fine.

The Aon Case

On 6 January 2009, Aon Limited was fined £5.25 million by the Financial Services Authority for failing to take reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption by overseas third parties (OTPs) in a way that assisted it to win reinsurance business. That failure was a breach of Principle 3 of the FSA's Principles for Business which state that "[a] firm must take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems".

Aon's energy and aviation business used OTPs to win business in overseas jurisdictions. For example, payments were made to co-brokers who assisted in the placement of insurance or reinsurance, or to consultants helping to introduce clients or who provided market information.

Some of the customers were state owned entities, in whole or part, or otherwise had government connections. This created a significant risk that payments made by Aon to third parties dealing with those customers would be used for bribes, or other inappropriate purposes, in particular in certain high risk jurisdictions in which Aon undertook business.

Between 14 January 2005 and 30 September 2007, Aon made 66 'potentially inappropriate' payments to OTPs, totalling about US\$2.5 million and Euros 3.4 million. The FSA identified the following failings in Aon's systems and controls:

- weak due diligence when entering into relationships with OTPs, or before payments were made
- Aon did not take into account the potential risks in the countries in which it operated, particularly where it had regular dealings with clients with political or state connections
- Aon failed routinely to review and monitor its relationships with OTPs in respect of bribery risks
- Aon did not provide staff dealing with OTPs with sufficient guidance or training on the bribery and corruption risks involved in such dealings
- the absence of compliance monitoring
- oversight committees were not provided with relevant management information, nor did they routinely assess whether bribery and corruption risks were being managed effectively.

In assessing the level of the fine, mitigating factors were taken into account: suspicious payments in Bahrain and Indonesia were reported promptly to the authorities; Aon appointed external advisers to conduct a thorough review of its systems and controls in relation to payments to OTPs; those external advisers were also asked to conduct a robust review to identify suspicious payments; lawyers were instructed to carry out detailed investigations into the suspicious payments; disciplinary action was taken against staff involved in the making of the suspicious payments. The FSA recognised that in taking these steps Aon had incurred considerable costs.

Further, Aon introduced new and enhanced systems and controls to combat bribery and corruption – these measures included a global anti-corruption policy, robust risk-based procedures to review existing and future third party relationships, and enhanced training. The FSA did not conclude that the failures were deliberate or reckless, otherwise the fine would have been significantly higher. Aon also received a 30% discount for early settlement.

However, the fine remained substantial, both in itself and compared to the profit that Aon made as a result of the suspicious transactions. The FSA has said that the fine was intended to provide a "clear message to the UK financial services industry that it is completely unacceptable for firms to conduct business overseas without having in place appropriate anti-bribery and corruption systems and controls".

Conclusion

Enhanced scrutiny and investigation of publicly awarded contracts means that evidence of bribery and other corrupt practices will increasingly be uncovered. Those caught paying bribes are at risk of very substantial fines, imprisonment for individuals, payment of the profits made on contracts obtained by corruption, debarment from public contracts and potential law-suits from competitors and shareholders.

Robust and effective anti-corruption and anti-bribery policies, systems and controls are, in effect, a requirement of the proposed UK bribery legislation. Vigorous enforcement of the US FCPA already make this essential for any company trading internationally.