CUT OUT THE MIDDLE MAN?

Recent high profile news reports demonstrate the difficulties in ensuring that agents do not cause their trading principals to fall foul of anti-bribery and corruption laws. We look at what trading principals can do to manage this risk.

What has happened?

Agents are third parties that are engaged to execute business and to liaise with and maintain relationships with government authorities, counterparties and individuals on various aspects of a project or a particular transaction.

As a trading principal, it is difficult to be fully aware of the actions an agent is performing in a distant jurisdiction, particularly if the jurisdiction is better known to the agent than the trading principal. This could lead to an agent breaching anti-bribery and corruption laws that are applicable to the trading principal without the trading principal's knowledge.

The recently reported stories concerning alleged bribes to secure oil cargoes and purported payments made to employees of a Brazilian state controlled company by agents of well-known commodities traders have led to a number of trading principals tightening their policy towards agents. Allegations of bribery and anti-corruption can lead to the trading principal facing legal action, reputational damage and could impact upon bank financing arrangements (which will often include anti-bribery and corruption representations and warranties).

Analysis

Trading principals often rely on agents to perform a number of local services in jurisdictions which are far from the trading principal's centre of operations or which require local actors on the ground to ensure effective performance. It is often difficult to complete transactions or projects in these jurisdictions without engaging local agents. The range of services an agent may perform for a trading principal can vary widely. At one end of the spectrum is a very narrow scope with a tightly defined role which does not allow the agent to act without the input of the trading principal. At the other end of the spectrum is a very broad scope where the agent is granted a wide discretion to act as it sees fit to bind the trading principal.

The consequences of being embroiled in a bribery or anti-corruption scandal are so grave that some trading principals have adopted a "zero tolerance" attitude towards bribery and corruption and have elected to stop using agents altogether, employing only specialist service providers in specific jurisdictions.

How will this affect you?

A company commits an offence under the UK Bribery Act 2010 if a person "associated with" it (including an agent acting on behalf of that company) bribes another person intending to obtain or retain a business advantage for the company. There is no need to show motive or intent on the part of the company. The consequences for breaching this legislation include up to ten years' imprisonment for individuals or an unlimited fine for corporate entities. It is a defence to any action that the company has adequate procedures in place to avert bribery.

Any potential involvement in corrupt practices can have serious consequences, especially for companies with subsidiaries or headquarters in England and Wales. Even if it is an agent, and not the trading principal, that is responsible for giving or receiving a bribe, the trading principal can still be held responsible.

What should you do now?

Agents are a key part of international trade and it may not be practical to exclude their use. If it remains necessary or desirable to employ an agent, there are several steps you can take to manage the risks identified:

- **Understand your agent's involvement –** you should ensure that the agent is not giving/ receiving bribes on your behalf or on behalf of others. Further you should not ignore any behaviour that causes you any concern about any agent's actions. Follow up on any "red flags" and ask for detailed invoices and full reports of activities from agents.
- **KYC –** the same level of thorough due diligence that you would apply to a counterparty should apply to any agent. In addition, your due diligence should be more detailed when your agent is dealing with governments, government agencies, public officials and public international agencies. In addition, country risk should also be considered. If the business is in a higher risk jurisdiction, then the KYC undertaken should reflect this.
- **Agreement –** the agency agreement can be drafted to manage the risk of breaches of any relevant legislation. HFW can draft and review your anti-bribery and corruption policies and agency agreements to ensure that you are adequately managing your anti-bribery and corruption risks. Consider document retention, audit and termination rights.
- **Training –** have your agent read, understand and sign up to your policies and give them access to the training you provide for your employees.

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