

## *Ethical Issues in the Appointment and Use of Agents*

For businesses to operate according to their ethical values, it is important that the agents<sup>1</sup> they appoint work to the same or similar standards. Moreover, under the UK Bribery Act 2010, companies can be held liable for actions performed by agents (covered as 'associated persons' in the Act) on their behalf, recognising that '*past and present cases of transnational bribery demonstrate that third parties have very frequently been instrumental to the corruption*'<sup>2</sup>. Companies are expected to have in place 'adequate procedures' to prevent their agents committing bribery offences.

Good practice around agent selection, remuneration and how best to monitor their conduct so as to avoid integrity risks, is set out in this briefing.

### Selecting agents

Working with an agent who uses unethical business practices can have reputational, legal and financial repercussions for a company. Examples from recent years are the negative media coverage experienced by Siemens, BAE Systems and Rolls Royce following accusations that some of their agents were involved in bribery and corruption<sup>3</sup>. An agent might also be representing other companies which have questionable practices. Through association this can also damage reputation.

A critical part of the agent selection process is robust due diligence. Though not a formal requirement with any recognised standard, ethical due diligence<sup>4</sup> (EDD) would include obtaining and judging information of an ethical nature regarding an agent, as a prelude to establishing a business relationship. This would be in addition to financial, legal and operational risks. The agent's alignment to the organisation's values system also needs verification. This process may be done by the company itself or by the growing number of independent EDD and risk management specialists. Evaluation of an agent's overall reputation may be assisted by examining its record on issues such as corporate governance, bribery and corruption, human rights, employment practices and conflict of interests. EDD would also require the prospective agent to provide

<sup>1</sup>Agents, in this briefing, refers to individuals paid by a company and acting on their behalf in transactions with a third party. Also referred to as brokers, consultants, intermediaries, middlemen, or representatives.

<sup>2</sup>*Business ethics, global companies and the defence industry*, Woolf Report (2008): [http://www.baesystems.com/article/BAES\\_051651](http://www.baesystems.com/article/BAES_051651) accessed 23/05/2013.

<sup>3</sup>For more information see <http://www.bbc.co.uk/news/business-16166354>, <http://www.telegraph.co.uk/finance/newsbysector/industry/defence/8216172/BAE-Systems-timeline-of-bribery-allegations.html> and <http://www.guardian.co.uk/business/2012/dec/06/rolls-royce-faces-prosecutions-fines-asia>

<sup>4</sup>For more information see *Ethical Due Diligence* (2008): [http://ibe.org.uk/index.aspx?upid=121&msid=8#A4\\_DUE\\_DILIGENCE](http://ibe.org.uk/index.aspx?upid=121&msid=8#A4_DUE_DILIGENCE)

relevant information and external references to help assess whether their appointment would present any risks to the company, as well as their suitability for the task. A face-to-face interview with the prospective agent is essential. It provides the opportunity both to explain the company's policies on business ethics and bribery, and the practical implications for the proposed agent's activities. It enables word of mouth verification of information gathered as part of EDD.

The EDD process should provide assurance to a company that the ethical values and practices of the proposed agents are well aligned with their own. Company policy may state that the agent has to comply with the code of ethics which it applies to its own employees.

#### Box 1: 'Red flags' that may arise during the selection process include<sup>5</sup>

- A history of corruption in the territory
- A lack of experience in the sector and/or with the country in question
- Non-residence of an agent in the country where the customer or the project is located
- No significant business presence of the agent within the country
- A close personal/professional relationship to the government or customers that might improperly influence the customer's decision
- Recommendation by a government official or customer
- Requests for special payment arrangements.

## Remuneration of agents

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Careful consideration needs to be given to the payment structure proposed for the agent and companies should create clear guidelines for determining proportionate payments. For example, incentivising agents through commission payments could act to encourage the use of corrupt payments to secure more contracts. In dealing with 'advisers', The report from the Woolf Committee<sup>6</sup> suggested that '*a clear description of the activities to be undertaken*' and '*an objective justification for the proposed payments*' should be documented. It suggested that companies should keep transactions transparent while cash payments, payments to third parties, numbered or off-shore accounts, or some other person or entity should not be permitted.

#### Box 2: Red flags around remuneration<sup>7</sup>

An agent:

- states that money is needed to 'get the business'
- requests 'urgent' payments or unusually high commission rate
- requests payments be paid in cash, use of a corporate vehicle such as equity or be paid in a third country, to a numbered bank account, or to some other person or entity
- requires payment of the commission, or a significant proportion thereof, before or immediately upon award of the contract by the customer to the company
- refuses to sign an agreement to the effect that he has not and will not make a prohibited payment

<sup>5</sup>See *The Woolf Report* (2008): [http://www.baesystems.com/article/BAES\\_051651](http://www.baesystems.com/article/BAES_051651) accessed 23/05/2013

<sup>6</sup>The Woolf Committee was set up in 2007 by BAE Systems to investigate good practice in business conduct following allegations of corruption.

<sup>7</sup>See Footnote 5, and *Corruption Indicators* (2013): <http://www.sfo.gov.uk/bribery--corruption/corruption-indicators.aspx> accessed 23/05/2013

## Monitoring of agents

Once an agent is selected and working on behalf of the company, it is important that their conduct is monitored to ensure that they are conducting business according to the ethical standards expected.

The Woolf Committee advised that any contract with an agent should include a requirement to allow auditing and compliance checks to be made. In order to support adherence to the company's anti-bribery policies and global code it was suggested that agents should receive regular training from the company on its policies and what they mean in practice. The Committee also recommended that agents submit regular activity reports detailing how they are undertaking the contracted services. Due diligence needs to be repeated regularly, possibly annually. The results from this, along with confirmation that no aspect of an agent's conduct or performance has given cause for concern, would be documented and reviewed as part of any proposal to reappoint that agent.

Where agents breach their contract, companies can suspend all payments and terminate the contract to mitigate reputational damage. All agents could be required to indemnify the company for damages arising from the breach, including recovery of payments already paid in accordance with the terms of the contract.

### Box 3: How the use of agents is being addressed

Advice for businesses on the use of agents is predominately around mitigating the potential for bribery which could lead to legal and reputational risk for companies. In the Partnering Against Corruption Initiative's (PACI) Principles which provide a framework for good business practices for countering bribery, the use of agents is addressed with recommendations around training, due diligence and anti-bribery programmes<sup>8</sup>. In their good practice procedures for corporate anti-bribery programmes, Transparency International highlight the use of agents as a risk area and offer checklist guidance to help businesses identify where problems could arise<sup>9</sup>.

The findings of The Woolf Committee showed that most large companies have '*explicit policies regarding their relationships with agents, advisors, consultants, contractors etc*', e.g. 'The **Balfour Beatty** Policy on Agents and Commissions'<sup>10</sup> and **BAE Systems**' 'The Advisers Policy'<sup>11</sup>.

Corporate codes of ethics often include statements on company policy around the use of agents and frequently emphasise the need for adherence to their own ethical standards:

- In their Code of Conduct, **BP** state that agents '*must willingly make a contractual commitment where it is feasible to operate in line with the principles of this Code and our ethics and compliance requirements*'<sup>12</sup>.
- **Balfour Beatty** say '*the help, advice and local knowledge of agents and other consultants or contractors can sometimes be essential. However, we require them to operate at all times in accordance with our standards, particularly in relation to bribery and corruption*'<sup>13</sup>.
- **Diageo** state that they ensure '*that third parties representing or acting on behalf of Diageo (including temporary and contract employees, consultants and agents) are made aware of the Code and our expectation that they comply with it*'<sup>14</sup>.
- **Shell** demands that '*agents working on our behalf or in our name, through outsourcing of services, processes or any business activity, will be required to act consistently with the Code when acting on our behalf*'<sup>15</sup>.

<sup>8</sup>Principles for Countering Bribery (2005): [http://www.weforum.org/pdf/paci/principles\\_short.pdf](http://www.weforum.org/pdf/paci/principles_short.pdf) accessed 04/06/2013

<sup>9</sup>Adequate Procedures Checklist (2010): <http://bit.ly/13xx4Re> accessed 03/06/2013

<sup>10</sup>Policy on Agents and Commissions: <http://www.balfourbeatty.com/index.asp?pageid=65> accessed 23/05/2013

<sup>11</sup>The Advisers Policy: [http://www.baesystems.com/article/BAES\\_051651](http://www.baesystems.com/article/BAES_051651) accessed 23/05/2013

<sup>12</sup>Our Code (2011): <http://bit.ly/11uyI2U> accessed 23/05/2013

<sup>13</sup>How we work, what we value (2011): [http://www.balfourbeatty.com/files/publications/2011/code\\_of\\_conduct.pdf](http://www.balfourbeatty.com/files/publications/2011/code_of_conduct.pdf) accessed 23/05/2013

<sup>14</sup>Code of Business Conduct (2012): <http://bit.ly/14uJdHP> accessed 23/05/2013

<sup>15</sup>Code of Conduct (2010): <http://bit.ly/11aOuAd> accessed 23/05/2013



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