

# **BRIBERY AND CORRUPTION RISKS AND STRATEGIES FOR NEW ZEALAND BUSINESSES OPERATING OVERSEAS**

## **What is bribery and corruption?**

Corruption occurs when persons in the public or private sector improperly enrich themselves or those close to them, or induce others to do so, by misusing their position.

Bribery is a form of corruption where one party improperly gives or receives an inducement for the purpose of influencing an outcome within their control. Bribes can involve anything of value, including money, employment or other benefits, such as discounts and bonuses.

## **Global consensus on bribery and corruption**

There is an increasingly global consensus that bribery and corruption are transnational phenomena with widespread and pernicious consequences, which must be combatted on a collective basis. This is reflected in UN and OECD conventions which require members to enact extraterritorial anti-corruption laws meeting minimum standards.<sup>1</sup>

New Zealand is part of this global consensus. Nonetheless, an October 2013 OECD Report found "serious concerns about the lack of enforcement of the foreign bribery offence" and recommended that "New Zealand significantly increase its efforts to investigate and prosecute foreign bribery, including by providing practical training to law enforcement authorities on the foreign bribery offence".<sup>2</sup>

Increased scrutiny on New Zealand is likely to lead to increased vigilance and enforcement of New Zealand companies operating overseas. The Government has indicated that it will introduce legislation this year to bring existing laws into line with the 2005 UN Convention Against Corruption, which New Zealand will then ratify.

## **CONTENTS**

**Part A – Legal Guidance Note**

**Part B – Compliance Guidelines**

**Part C – Red Flags**

**Part D – Crisis Response**

## PART A – LEGAL GUIDANCE NOTE

### Bribery and corruption risks for New Zealand businesses

New Zealand businesses increasingly operate in foreign markets, including those where bribery and corruption are endemic. If your business, agents or employees, work overseas you need to be aware of the risks of being associated with bribery and corruption.

The risks extend past legal penalties to the potential loss of commercial relationships, market access and reputation. New Zealand businesses, especially those operating overseas, can and should manage bribery and corruption risks through simple processes and procedures.

The purposes of this Guidance Note are to provide a brief overview of applicable anti-corruption laws, summarise how risks might arise (including when and where they are more likely to do so) and to provide general guidance on risk mitigation.

### The matrix of corruption laws

If you do operate overseas, you are likely to be subject to overlapping anti-corruption laws in different jurisdictions, including:

- New Zealand's own domestic laws – principally the Crimes Act 1961 – which apply extraterritorially to foreign operations;
- other “long-arm” laws that can apply to your business - being primarily the United States Foreign Corrupt Practices Act 1977 (*FCPA*) and the United Kingdom Bribery Act 2010 (*UK Bribery Act*); and
- the laws of the local jurisdiction in which you are operating.

You should comply with the most stringent applicable standard, which may be a foreign or even a local law.

### New Zealand legislation

In New Zealand it is an offence to engage in bribery and corruption in both the public sector (under the Crimes Act 1961) and in the private sector (under the Secret Commissions Act 1910).<sup>3</sup> Both offences apply to conduct outside of New Zealand.

### Overseas legislation

Other states' bribery and corruption laws can also apply to your business even where there is only an indirect connection with that jurisdiction. The key pieces of legislation to be aware of are the *FCPA* and the *UK Bribery Act*.

New Zealand businesses may also need to take specific advice on local anti-corruption laws. Many developing countries are implementing anti-corruption laws in line with UN and OECD norms. This means that local anti-corruption laws are likely to reflect similar concepts to those found in our Crimes Act, the *FCPA* and the *Bribery Act*, and may possibly be even more restrictive.

## Key bribery and corruption legislation summarised

	New Zealand legislation		United States Foreign Corrupt Practices Act 1977	United Kingdom Bribery Act 2010
	Crimes Act 1961	Secret Commissions Act 1910		
<b>Summary of Offences</b>	The principal foreign bribery offence under domestic law is to corruptly bribe, or offer or agree to bribe, a person with the intent to influence a foreign public official. <sup>4</sup> A “corrupt” bribe has been interpreted by our Supreme Court as a gift with a value exceeding what would be considered a normal courtesy. <sup>5</sup>	An offence to corruptly give, or agree or offer to give, an agent any gift so as to influence the agent’s actions with regard to the affairs or business of the principal. <sup>6</sup> It is also an offence, as an agent, to secretly accept or solicit such a bribe. <sup>7</sup>	The FCPA prohibits corrupt payments or offers to pay money or anything of value to foreign officials or third parties, in order to influence any act or decision of that foreign official in his or her official capacity, or to secure any other improper advantage in order to obtain or retain business. <sup>8</sup>	The UK Bribery Act prohibits bribery of private or public persons. The key offence is bribery of a foreign public official with the intent to influence that person in their capacity as a foreign public official. <sup>9</sup> The Act also includes an offence of “failing to prevent” bribery. <sup>10</sup>
<b>Illustrative examples</b>	NZCo’s contract with a foreign government entity is due to come up for tender. An official contacts NZCo with confidential, non-public bid material from its competitors, on the understanding that, if NZCo wins the contract, it will pay for his holiday to Paris. NZCo receives the material, yet it does not win the contract.	NZCo offers real estate investment advice to its clients. NZCo signs a deal with DevCo, a property developer, for rights to sell its units on commission. NZCo sells the units to its clients but does not disclose the commission paid by DevCo to NZCo.	NZCo and EuroCo submit a joint bid for a construction project in a foreign country. A consultant is hired and EuroCo instructs him to pay part of his “commission” in bribes to foreign officials. Funds from NZCo and EuroCo are routed through US accounts to the consultant and paid to foreign officials.	NZCo has a small office in the UK. An employee in NZCo’s Asian subsidiary pays a bribe to a foreign official to secure an import license. NZCo has no compliance policy in place.
	<b>Risk</b> Even conditional agreements to do something to influence an official to misuse his office can amount to a bribe. <sup>11</sup>	<b>Risk</b> Taking a secret commission while acting as its clients’ agent/advisor. <sup>12</sup>	<b>Risk</b> NZCo could be subject to US jurisdiction for bribes paid on its behalf via US bank account.	<b>Risk</b> The UK has jurisdiction because of NZCo’s office in the UK and NZCo could be liable because of the absence of a compliance policy.
<b>Penalties</b>	A person who commits an offence is liable for a	A breach of the Secret Commissions	Up to 20 years imprisonment and	Penalties can extend to up to 10 years

	New Zealand legislation		United States Foreign Corrupt Practices Act 1977	United Kingdom Bribery Act 2010
	Crimes Act 1961	Secret Commissions Act 1910		
	maximum 7 year term of imprisonment. <sup>13</sup> Corporates can also be liable, in which case a monetary penalty applies instead. <sup>14</sup>	Act can result in a maximum fine of \$2,000 for a body corporate, and either a maximum term of imprisonment of 2 years or fine of \$1,000 for an individual. <sup>15</sup>	finest of up to US\$5m for individuals and US\$25m for companies. <sup>16</sup> Under the Alternative Fines Act, higher fines of up to twice the benefit obtained by the defendant can be imposed. <sup>17</sup>	imprisonment for individuals and uncapped fines for individuals or companies. <sup>18</sup>
<b>Jurisdiction</b>	It is a criminal offence in New Zealand for a New Zealand citizen, resident, or incorporated company to offer a bribe to a foreign public official overseas (even if no money ever changes hands). Other bribery offences, such as bribery of a judicial officer or an official, also have extraterritorial effect. <sup>19</sup>	Applies to conduct whether in New Zealand or overseas.	The FCPA can apply to any New Zealand firm that does business, even indirectly, within the jurisdiction of the United States (which could include routing emails through a US service, or making payments via a US clearing system). <sup>20</sup>	The offence of failing to prevent bribery applies to any New Zealand business which conducts commercial activities in the United Kingdom. <sup>21</sup> Other UK Bribery Act offences apply to residents of, or companies incorporated in, the United Kingdom. <sup>22</sup>
<b>Key Exclusions/ Defences</b>	The Crimes Act presently contains exclusions for facilitation payments (small, routine, payments for the purpose of expediting government processes) <sup>23</sup> and payments that were not at the time an offence in the relevant country (with the defendant having the burden of proving this). <sup>24</sup> If the Government introduces anticipated amending legislation, however, it is likely that these exclusions will be either removed or restricted. <sup>25</sup>	A charge under the Secret Commissions Act can be defended if it can be shown either: that there is no agency relationship; that the agent did not accept the benefit in exchange for doing or forbearing to do some act; or that the agent disclosed the source, amount and nature of the benefit.	The FCPA contains two defences: that the payment was lawful under the written laws of the foreign country (the "local law" defence); or that funds were spent as part of demonstrating a product or performing a contractual obligation (the "reasonable and bona fide business expenditure" defence).	There is a defence to the offence of failing to prevent bribery if the business can prove it has in place "adequate procedures" to prevent bribery (such as compliance programs). <sup>26</sup>

## Bribery and corruption risk vectors

Bribery and corruption is what might be classified as a 'low probability, high impact' risk, and should be managed accordingly. Few, if any, New Zealand firms operating in international markets will be directly engaged in corrupt conduct. You must be cautious, however, if you rely on foreign intermediaries or third parties. Areas of elevated risk include:

**Emerging markets and specific sectors:** Emerging markets tend to have relatively high levels of corruption, especially in sectors where the government plays a prominent role through public tenders, licenses or permits (such as resource extraction, infrastructure projects and government procurement).

**Using local subsidiaries, joint ventures and agents:** Distance and a lack of operational control can make it hard to control choices made by local partners who may not have the same culture as a New Zealand business.

**Acquiring existing local operations:** Embedded corrupt practices can be difficult to uncover when you acquire an existing business. As the new owner you may inherit liability for historic bribery and corruption issues.

## Risk mitigation

The risks associated with bribery and corruption issues are real but manageable. Common-sense is key. As a New Zealand firm operating in foreign jurisdictions you should:

- undertake due diligence on foreign partners and risk assessments of foreign operations;
- monitor expenditure and treat every unofficial payment as a potential liability. If in doubt, seek legal advice;
- adopt a sensible compliance strategy tailored to your firm's risk profile – it doesn't need to be exhaustive or extensive; and
- have a process for responding if a potential incident is uncovered.

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<sup>1</sup> For a full list of the applicable conventions and links to their text, see the Appendix.

<sup>2</sup> OECD *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in New Zealand* (October 2013), at 5.

<sup>3</sup> Links to relevant legislation are found in the Appendix.

<sup>4</sup> Crimes Act 1961, sections 105C and 105D.

<sup>5</sup> *Field v R* [2011] NZSC 129 at [65].

<sup>6</sup> Secret Commissions Act, section 3.

<sup>7</sup> Secret Commissions Act, section 4.

<sup>8</sup> FCPA, 15 U.S.C. § 78dd-3.

<sup>9</sup> UK Bribery Act, section 6.

<sup>10</sup> UK Bribery Act, section 7.

<sup>11</sup> *Field v R* [2011] NZSC 129 evidences a similar fact pattern.

<sup>12</sup> *R v Kelly* [1992] 2 SCR 170 evidences a similar fact pattern.

<sup>13</sup> Crimes Act, sections 101, 105 and 105C.

<sup>14</sup> Sentencing Act 2004, section 39(1). There is no maximum fine for the offence of foreign bribery.

<sup>15</sup> Secret Commissions Act, section 13.

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- <sup>16</sup> FCPA, 15 U.S.C. § 78ff.
- <sup>17</sup> Alternative Fines Act, 18 U.S.C. § 3571(d). Fines are often imposed via plea agreements or via deferred or non-prosecution agreements. The average corporate FCPA settlement penalty in 2012 was \$17.7 million and \$22.1 million in 2011 (with high and low outliers removed): Shearman & Sterling LLP *FCPA Digest: Recent Trends and Patterns in FCPA Enforcement 2012*.
- <sup>18</sup> UK Bribery Act, section 11.
- <sup>19</sup> Crimes Act 1961, sections 101 (bribery of a judicial officer) and 105 (bribery of an official). Extraterritorial effect can arise via the effect of section 7A.
- <sup>20</sup> FCPA, § 78dd-3.
- <sup>21</sup> UK Bribery Act, section 7.
- <sup>22</sup> UK Bribery Act, section 12.
- <sup>23</sup> Crimes Act 1961, section 105C(3).
- <sup>24</sup> Crimes Act 1961, section 105E.
- <sup>25</sup> See *Organised Crime: All of Government Response* (June 2013), at [95]. Many other countries, including the United Kingdom and Canada, no longer recognise a facilitation payments exclusion.
- <sup>26</sup> UK Bribery Act, section 7.

## **PART B – PROTECTING YOUR BUSINESS**

When considering what procedures your organisation should have in place from a compliance perspective, it is imperative that you consider proportionality. You need to understand what your risks are and then ensure that the steps you put in place are proportionate to those risks. Even if you are not working in a high-risk environment, you should still have some basic procedures in place to ensure that you can demonstrate knowledge and compliance with legislation and best practice.

The following checklist is a guide so you can consider which policies and processes are most appropriate for you. While you should consider all of the measures below, we have indicated the most appropriate measures to implement, based on the size of your organisation, and the inherent risk of the industry that you operate in or where you do business. Policies rated level one should be in place in most organisations. Those rated level two may be more appropriate for medium sized organisations or those with heightened risk due to the industry or location. A three rating should particularly be considered for high risk organisations.

- 1** Appropriate for most organisations
- 2** Appropriate for medium sized/heightened risk organisations
- 3** Appropriate for high risk organisations

<b>Checklist</b>	<b>Proportionality scale</b>
<b>1. Policy in place:</b>	
The policy should provide operational guidelines for achieving compliance and address issues such as:	
<ul style="list-style-type: none"> <li>• Travel expenses</li> <li>• Gifts and entertainment</li> <li>• Controls around cash and other high-risk transactions</li> <li>• Facilitating payments</li> <li>• Bribery of government officials</li> </ul>	<b>1</b>
<ul style="list-style-type: none"> <li>• Commercial bribery</li> <li>• Use of third-party agents, consultants and other intermediaries</li> <li>• Third-party due diligence</li> </ul>	<b>2</b>
<ul style="list-style-type: none"> <li>• Due diligence in mergers and acquisitions</li> <li>• Accuracy of financial reporting</li> <li>• Audits of internal controls</li> </ul>	<b>3</b>

**2. Communication:**

The Policy should be accessible and easily understood:

- Dissemination of information of policies to all staff relevant and easily accessible within the organisation 1
- Ensure procedures and policies are easily understood throughout the organisation

- Communication internally and externally, including appropriate training to reinforce policies and to establish where to report any concerns 2

The Policy should be adhered to:

- Strong, clear support and commitment from senior management (top down approach) to preventing bribery and corruption 1
- Appropriate steps in place to identify and undertake action in response to any breaches reported

**3. Oversight:**

- Board of directors that are committed to overseeing effectiveness of the compliance program 1

- A compliance officer with responsibility for the compliance program and for reporting on a regular basis to appropriate senior management about the effectiveness of the compliance programme 3

**4. Awareness of relevant legislation:**

At least the Compliance Officer, senior management and the Board aware of relevant legislation. This includes NZ Crimes Act, Secret Commissions Act, UK Bribery Act, FCPA and any other legislation in countries in which the business is operating 1

**5. Regular Risk Assessments undertaken:**

An appropriate internal or external team tasked with monitoring and reviewing policies and ensuring effective, adequate and relevant procedures in place to address internal and external risks 2

**6. Due diligence conducted on third parties:**

- Due diligence at the commencement of a third party relationship and then regular oversight 2
- Commitment from third parties to adhere to your ethical standards



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**7. Reporting:**

Communication to staff of the avenues that anyone can use to safely report any breaches of law or professional standards in good faith, without fear of retaliation

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## PART C – RED FLAGS

There are often indicators an organisation can look out for when it comes to the potential existence of bribery and corruption. The following table sets out some of the signs that corruption may be occurring. On their own, these scenarios do not conclusively mean that corruption exists. However, particularly when a number of signs are evident, they do suggest that a heightened level of scrutiny is required.

Some of the following red flags of corrupt activity are drawn from the free online training module provided by Transparency International New Zealand and the NZ Serious Fraud Office. This module can be accessed at

<http://www.doingbusinesswithoutbribery.com/newzealand.html>.

### Bribery & Corruption Red Flags

#### Payments and Transactions

- Payments being received (in cash) that are irregular and/or are not in the normal course of business.
- Requests for commissions that are substantially higher than the “going rate” in that country.
- Payments or transactions made in a country or industry with a history of corruption.
- Continually inadequate or missing documentation and records.
- Significant observed changes in the attitude and behaviour of an employee (for example suddenly becoming more animated and aggressive or alternatively becoming evasive when they had always been quite open).
- Vendors request over-invoicing, invoice backdating or cheques to be made out to “bearer” or “cash”.
- Requests for payments to be made urgently or ahead of normal accounts payable schedule.
- Payments being made through a third-party country e.g goods or services supplied to country “A” but payment made to shell company in country “B”.
- Payments split into multiple accounts for the same agent, often in different countries.
- Payments made to a third party with no clear link to the commercial transaction.
- Payments requested to be made to a private account or private address.

#### Contracting and Procurement

- Private meetings being held with public contractors or companies tendering for contracts.
- Close relationships with suppliers, such as taking holidays with them.
- Individual never takes leave even if sick or for holidays. Individual insists on dealing with specific contractors him/herself.
- Decisions surrounding projects or contracts which have been accepted seem illogical or unexpected.

- Contracts awarded to a contractor which breaches the normal decision making process. There may be avoidance of independent checks on tendering or contracting processes.
- Awarding contracts which have unfavourable terms for own organisation.
- Preferential treatment of certain contractors which is unexplained.
- Raising barriers around specific roles or departments which are to prevent full participation in the tendering/contracting process.
- Excessive number of last minute orders or contract variations.
- Lack of documentation surrounding key meetings and decisions.
- Tender documents use specification favourable to a particular company's products.
- Lack of independent checks and due diligence of contracting or tendering process.

#### **Dealings with foreign officials**

- Gifts, hospitality, travel and entertainment of foreign officials or relatives, particularly those connected to procurement.
- Certain foreign representatives or consultants recommended by a government official.
- Requests for special favours, such as sponsorships, payments for schooling the children of foreign officials or to charitable organisations headed by foreign officials.
- A vendor has family or business ties with local government officials or has a poor reputation in the business community.
- Purchasing or renting properties from foreign officials or their relatives.

#### **Third Parties**

- The use of foreign commercial intermediaries including business consultants, distributors, sales agents and representatives for simple transactions.
- Fees are being paid in cash.
- There is no apparent business reason for the use of certain agents or third parties.
- Use of consultancy services without any apparent value.
- Unusual incentive arrangements or high bonuses/commissions paid to foreign representatives.
- Budget managers who have close personal relationships with suppliers.

## PART D – CRISIS RESPONSE PRINCIPLES

If your firm operates in foreign markets you should plan how to respond in the unlikely event that bribery or corruption incidents arise.

This exercise can form part of your businesses' overall crisis response plan. Crisis response plans can be more or less extensive depending on the risks a business faces due to factors such as its size and the markets it operates in.

### Scope and purpose of a crisis response plan

The purpose of a crisis response plan is to document the procedures to follow, and define the responsibilities for action in the case of an adverse event. All plans should be tailored to your organisation. Rehearsal through simulated drills can be very useful.

The advice below is targeted at responding to bribery and corruption incidents, which are similar to fraud incidents and really a sub-set of overall regulatory risk. It covers the following common elements of regulatory crisis response plans:

1. Facilitate *preliminary reporting*
2. Establish an *internal investigation team and plan*
3. Gather and review *evidence*
4. Preserve *legal professional privilege*
5. Manage internal and external *communications*
6. Respond appropriately to *external investigations*
7. Capture *future learning* and risk mitigation

### 1. Facilitate preliminary reporting

Begin by establishing reporting lines through which suspected incidents of bribery and corruption can be easily reported – including anonymously and without fear of reprisal – to senior management.

This can be as simple as clarifying to staff that if bribery or other corruption is suspected, it must be reported to that individual's manager, to a compliance officer, or to identified representatives of an audit committee. A whistle-blower policy is best practice to counteract the perceived career risks of reporting internal wrongdoing.

On receiving a report of bribery or corruption, the recipient should treat the report confidentially, and report it through the appropriate lines within the organisation. The recipient should not collect evidence or carry out their own investigation into the matter. Any allegations of substance should instead trigger the organisation's response plan.

### 2. Establish an internal investigation team and plan

Irrespective of whether criminal conduct is suspected, it is prudent for the business to conduct its own internal investigation into the incident to determine:

- the facts of and response to the incident;
- whether disciplinary action is needed;
- whether to report the incident to authorities;
- the steps that can be taken to recover a loss; and
- any improvements to prevent a future occurrence.

Businesses can put in place simple procedures to appoint a team to conduct an internal investigation. The investigation team itself should be kept small and each member given a clearly defined role. To preserve legal privilege, the investigation should be led by, or include, in-house or external legal counsel.

Establish the investigation with a clear purpose in mind, recorded in a terms of reference document. This purpose could be to report to the audit committee or board, to consider matters prior to anticipated litigation, or to pre-empt a regulatory investigation. To preserve legal privilege, the terms of reference will often have a primary purpose of establishing the facts in order to obtain legal advice.

### 3. Gather and review evidence

Once established, the investigation team will need to set out a work programme to gather and preserve the evidence necessary for the firm to understand the facts surrounding the incident.

**Securing documentation** is the first and most important action the team will undertake (i.e. all relevant emails, files, phone records, backup tapes, accounting records). Devices such as phones, laptops and desktops used by employees who are the subject of investigations should also be identified, secured, and if necessary, taken out of circulation until a decision is made on whether a forensic copy should be obtained. The assistance of an IT forensic specialist is often useful to ensure that the integrity of the electronic evidence is preserved if it is to be used in legal proceedings at a later date.

A member of the investigation team should be appointed to ensure documents remain in one location, are secured against tampering, and that access is restricted and traced to those authorised to review it. Once the documents are collated and reviewed, it may be useful to involve fraud or recovery specialists such as forensic accountants.

The investigation team may suggest, after consulting with management / human resources staff, that employees implicated in the matter should be placed on suspended leave until the investigation is complete. Any such decisions should be made in accordance with internal employment policies.

The investigation approach required will be dependent on the circumstances. You should consider how you will analyse the data, review the electronic records and conduct background searches. You should consider seeking independent, specialist guidance or assistance to conduct an investigation.

**Interviews with employees** should be approached with care, and involve input from both human resources and legal representatives. If notes or a transcript is to be taken, legal advisors should be present at, or conduct, the interview to underscore that the interview is being conducted in order to obtain legal advice, and thus help preserve privilege.

If legal advisors are present, the employee should be told at the outset that the legal advisor represents the company and not that employee personally. The employee should be permitted to seek their own legal representation.

**Other relevant matters** include:

- the potential for leaks of confidential aspects of an internal investigation. Steps to minimise this risk include securing documents and not permitting interviewees to take notes; and
- an interviewee's privilege against self-incrimination and their right not to speak to authorities or to counsel for the organisation.

#### 4. Preserve legal professional privilege

Preserving legal professional privilege is essential when investigating a suspected incident of bribery and corruption. Privileged information is protected from disclosure in any subsequent proceedings and cannot be seized or reviewed by any external investigatory authority.

During the course of an investigation, identify and preserve privilege that may attach to communications. In legal terms, there are two types of privileged legal communication:

- **Legal advice privilege:** this applies to any communication between a person and their legal advisor if the communication was intended to be confidential and made in the course of and for the purpose of obtaining legal services from the legal advisor.
- **Litigation privilege:** this applies to any communication or information that is made, received, compiled or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding; and extends to both communications between the person, their legal advisor, and to confidential communications with third parties.

Privileged communications include both those pre-existing the investigation and those created during the investigation. They must be kept confidential and not disclosed outside the lawyer-client relationship, thereby risking waiver of the privilege. Usually, legal counsel will need to ensure that these documents are located and segregated. Special care must be taken to protect privilege at or during:

- the start of the investigation – establish that the investigation is being conducted to render legal advice to the organisation;
- the investigation itself – maintain privileged documents in secure files and keep a privilege log; and
- the report of an investigation – avoid inadvertent waiver of privilege.

#### 5. Manage internal and external communications

The key principle of any internal or external communication is that the company should communicate only the *fact* of, but not the *facts* of, an investigation until it is complete.

Where the business is a listed entity on a registered stock exchange, it should seek legal advice on compliance with NZX continuous disclosure requirements.

The company should also consider establishing a public relations strategy, including managing media and stock exchange announcements and the publicising of any internal findings.

Once the facts are known the company should consider, after seeking legal advice, whether they are sufficiently serious to warrant voluntary disclosure to regulators.

Businesses should also be alive to the potential for matters to be disclosed without permission. Where there is a real or perceived risk of leaks, management should weigh the possibility of making voluntary disclosure to regulators in the first instance, and potentially publically thereafter. In many instances, voluntary disclosure to authorities regarding a bribery and corruption incident can mitigate the risk of enforcement action, result in reduced penalties and even reduce adverse publicity.

#### 6. Respond appropriately to external investigations

Despite the steps above, the first an organisation learns of a suspected bribery and corruption event may be a notice or inquiry issued by an external regulator or an inquiry by the media.

Businesses faced with an external investigation may receive notices and requests for information. Responding to these requests will require legal assistance. All communications with a regulator should be made in the spirit of co-operation, but with the utmost care.

**Search warrants** may authorise government agencies to come onto the premises and review or seize records and/or electronic files. Search warrants are relatively rare, but can be executed without warning at any time. All should be treated very seriously.

Businesses should have in place a set of basic procedures for staff that may be served with a search warrant. While your policy should always be to co-operate with investigators it is important, in responding to a warrant, to avoid relinquishing any legal rights that may protect the company, its employees, directors and agents.

Businesses can accomplish this by advising staff to follow the following procedures:

#### **During the search**

- *Immediately contact legal counsel:* Inform the officers that legal counsel will be contacted. A list of management and legal counsel's contact details should be kept close to hand.
- *Ask for identification:* Obtain the identity of officers conducting the search and a copy of the warrant. Note down instances where officers appear to stray outside its scope.
- *Monitor the search:* Observe the officers and never leave them unattended. Note every item the officers review, the questions they ask and the statements they make.
- *Co-operate but do not consent to a search:* Co-operate with the officers and do not obstruct or impede their search. Do not, however, consent to the search unless legally advised to do so.
- *Contact the firm's IT supplier:* Consider, again after taking legal advice, whether it is sensible for someone familiar with the company's IT systems to come on site to talk directly to the officers' computer forensic expert to ensure that the cloning of any server or hardware can be done with minimum disruption.

#### **At the conclusion of the search**

- *Ask for inventory of items seized:* Request a detailed schedule of items and documents seized, along with when and where they were removed from.
- *Assert legal privilege where appropriate:* Advise the officers of any seized documents or servers over which the company wishes to assert legal professional privilege.

#### **After the search**

- *Write down what happened:* Staff present during the search should prepare a written summary of what occurred, what was searched, and what was uplifted from where.
- *Seek legal advice:* Consider the possibility of challenging the execution or validity of the warrant, claiming privilege, requesting confidentiality or arranging return of hardware.
- *Implement the crisis response plan:* Seek legal and public relations advice before issuing a press release, make disclosure to the market, or contacting clients.

## **7. Capture future learning and risk mitigation**

One question that a company invariably asks following an investigation into an incident of bribery and corruption is: what can it do to prevent a recurrence?

The risk of bribery and corruption cannot usually be removed, but it can be reduced. You will know the best way to modify internal culture and processes to reduce risk. A company should ensure that all employees involved in the initial incident are appropriately disciplined, internal processes, policies and compliance programs are reviewed and remedial measures are put in place.

This is also an appropriate time to refresh awareness amongst employees and you should consider running an awareness training programme for all staff.

Finally, the best way to identify the corrective actions required is to instigate a focussed corruption risk assessment. The objective of this process should be to recognise where bribery and corruption risks exist, which of these risks are the priority to address and the steps that are required to do so.



## APPENDIX

### Organisation for Economic Co-operation and Development Bribery and Corruption Conventions

OECD Convention on Combating Bribery of Public Officials 1999

[http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf)

OECD Recommendation of the Council for Further Combating Bribery 2009 and the Good Practice Guidance on internal controls, ethics and compliance 2010

<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44176910.pdf>

### United Nations Conventions

United Nations Convention against Transnational Organized Crime and Protocols 2000

<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

United Nations Convention against Corruption 2005

[http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf)

### New Zealand Legislation

(Can be found at [www.legislation.govt.nz](http://www.legislation.govt.nz))

Crimes Act 1961

Secret Commissions Act 1910

### Overseas Legislation

Bribery Act 2010 (UK)

[http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga\\_20100023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf)

Foreign Corrupt Practices Act of 1977 (US)

<http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>

### Other Website Resources

Association of Certified Fraud Examiners

<http://www.acfe.com/>

Deloitte Bribery and Corruption Survey 2012

[http://www.deloitte.com/assets/Dcom-NewZealand/Local%20Assets/Documents/Services/Forensics/nz\\_Bribery\\_and\\_Corruption\\_Survey\\_2012.pdf](http://www.deloitte.com/assets/Dcom-NewZealand/Local%20Assets/Documents/Services/Forensics/nz_Bribery_and_Corruption_Survey_2012.pdf)

OECD Good practice Guidance on Internal Controls, Ethics and Compliance

<http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>

Six Principles for Bribery Protection

<http://www.law-now.com/law-now/adequateproceduresbriberyactjuly2010.htm?cmckreg=true>

Transparency International's Adequate Procedures Checklist

<http://www.transparency.org.uk/our-work/publications/10-publications/207-adequate-procedures-checklist-excelbe>

US Department of Justice Guidance

<http://www.justice.gov/criminal/fraud/fcpa/guidance/>

UK Ministry of Justice Guidance

<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

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