

## Anti-Bribery and Sanctions June 2011

### The UK Bribery Act

The UK Bribery Act 2010 ("Bribery Act") comes into force on 1 July 2011. While this act is, in certain ways, similar to the US Foreign Corrupt Practices Act (the "FCPA"), in other provisions it is broader, more aggressive and farther reaching in scope and application. The Bribery Act creates certain offences for companies carrying on business in the UK and therefore Neuberger Berman Europe Limited ("NBEL") will need to ensure that it has procedures in place to comply with the provisions in the Bribery Act. The new law:

1. creates offences covering:
  - the offering, promising or giving of an advantage;
  - the requesting, agreeing to receive or accepting of an advantage;
  - the bribery of a foreign public official; and
  - the failure to prevent a bribe being paid for or on behalf of an entity;
2. provides for a defence for companies which have adequate procedures in place to prevent bribery; and
3. requires the Secretary of State to publish guidance about what procedures an entity subject to the Bribery Act can put in place to prevent bribery.

In March 2011, the Secretary of State published the guidance referred to above (the "Guidance"). The Guidance helps clarify what "adequate procedures" a company may employ to help avoid liability under this law. This Guidance is risk-based. The question of whether adequate procedures are adopted and employed may only be resolved by a court, taking into account the facts and matters of the case. The guidance is based on six key principles, which are "flexible and outcome focused":

1. procedures must be proportionate to the bribery risks that a company faces, based on its nature, scale and complexity of operations;
2. a "top level" commitment to an "anti-corruption" culture;
3. assessment of the risks of violating the Bribery Act and taking adequate steps to prevent this through risk management controls;
4. engaging in due diligence to ascertain the counterparties who a company does business with;
5. taking steps to ensure that Staff know about and understand the Bribery Act, and are trained; and

6. engaging in active monitoring to help ensure that a company avoids an act or omission that would result in liability and that policies and procedures remain up to date and effective. Liability under the Bribery Act is extremely broad, more so that under the FCPA which is described in more detail below. It reaches nearly everyone that is in some way involved with NBEL and its business. It reaches nearly any payment of value, whether or not money is involved. This includes gifts and entertainment or acts that help us promote and market NBEL's business.

### **The US Foreign Corrupt Practices Act**

The FCPA is intended to prohibit US and non-US companies with shares or American Depositary Receipts listed or traded on a US exchange from obtaining business or an unfair business advantage through designated corruption activities. The primary FCPA mechanisms consist of anti-bribery and books and records provisions. Its provisions are sufficiently broad so as to reach the activities of non-US firms that have any connection to the United States.

The **anti-bribery** provisions of the FCPA criminalise any act that, directly or indirectly, involves the offering or giving of anything of value to a government, governmental entity, public official or a political party for the purpose of obtaining or retaining business or gaining an improper business advantage. The FCPA does, however, exempt certain facilitation payments in routine governmental transactions. In addition, the FCPA provides a defence if the act involved constitutes "anything of value" given in compliance with local applicable law or constitutes a "reasonable and bona fide" expenditure directly related to business activities.

The **books and records** provisions (or accounting and internal control principles) require companies to make and keep books and records that accurately and fairly reflect transactions and dispositions of the company's assets and prohibit the falsification of such books and records. They require companies to maintain a system of internal controls sufficient to provide reasonable assurances that:

- a. transactions are executed in accordance with management's authorization;
- b. transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and maintain accountability for assets;
- c. access to assets is permitted only in accordance with management's authorization; and
- d. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

The FCPA provides for criminal and civil penalties. Criminal penalties for individuals include fines of up to US\$100,000 and/or up to five years imprisonment. Businesses may suffer criminal fines of up to US\$2 million per violation. Also, the FCPA provides for civil fines of up to US\$10,000 against any business that violates the anti-bribery provisions of the FCPA, and against any officer, director, employee or agent of a business who willfully violates the anti-bribery provisions.

The number of FCPA enforcement actions, civil and criminal, and the amount of the fines levied against individuals and companies have increased dramatically in recent years. The 2008 Siemens<sup>1</sup> case involved a settlement of US\$800 million, the largest ever payment of fines and disgorgements. This amount did not include fines paid to German authorities; in total, Siemens agreed to pay US\$1.6 billion to resolve all anti-bribery and corruption charges. What made the Siemens case egregious and led to the large fines was the fact that Siemens made thousands of payments totalling approximately US\$1.4 billion to foreign officials in many countries in connection with numerous contracts. These included the sale of medical devices in China, Russia and Vietnam, the sale of telecommunication devices in Nigeria and Bangladesh and the sale of other equipment in Venezuela, China, Israel, China, Argentina, Russia and Mexico. The SEC found a pattern of "widespread and systematic practice of paying bribes," an ineffective

system of internal controls and a corporate culture that “tolerated and even rewarded” bribery. The SEC found that:

*"Siemens failed to implement adequate internal controls to detect and prevent violations of the FCPA. Elaborate payment mechanisms were used to conceal the fact that bribe payments were made around the globe to obtain business."*<sup>2</sup>

The remediation efforts cost Siemens more than US\$850 million.

Another emerging trend is the desire to hold individuals responsible for such violations.

### **Anti-Corruption Programme**

NBEL does not wish to become exposed to FCPA charges or investigations or to incur any liability under the Bribery Act. NBEL will train staff and monitor all activities and take swift, decisive action to ensure complete compliance with the Bribery Act and the FCPA. The FCPA and the Bribery Act have a number of similarities but nevertheless there are some key differences and NBEL needs to ensure that it fully complies with both sets of legislation.

NBEL's anti-corruption programme has three objectives: to prevent corruption; to detect corruption if it occurs despite the preventative initiatives; and to respond to detected corruption. The responsibility for adopting and ensuring compliance with the anti-corruption programme and the business conduct rules rests with the Board of Directors of NBEL and is administered by the Compliance Officer. The anti-corruption programme includes existing compliance procedures and the anti-money laundering procedures.

The Compliance Officer is responsible for the day-to-day operations of the anti-corruption programme and is assisted by legal and internal audit personnel. The Compliance Officer is also responsible for writing and updating policies and procedures, communicating them and training

1. SEC v Siemens Aktiengesellschaft, No 08 CV 02167 (D.D.C.) (12 December 2008) ("*Siemens*"); "SEC Files Settled FCPA Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over \$1.6 Billion", Litigation Release 20829 (15 December 2008).
2. Litigation Release 20829.

Staff and, when appropriate, third parties. Management is responsible for supervising the anti-corruption programme in all aspects of daily operations.

### **Business Conduct Rules**

NBEL's business conduct rules set out the principles of anti-corruption, which are to prohibit corruption in any form whether direct or indirect and to implement and maintain the anti-corruption programme.

All of the business areas are required to adhere to the anti-corruption programme because they must understand that any act of corruption or the keeping of false books and records will directly implicate the relevant staff members and may result in investigation and, possibly, prosecution. Policies and procedures help identify the business areas that are more likely to face corruption risks and thus ensure that a rigorous compliance process is adopted with responsible compliance personnel in their respective area. All business areas are required to implement anti-corruption procedures.

The business conduct rules state the "prohibited acts" that constitute corruption.

To meet the requirements of applicable law, NBEL prohibits the following acts:

- the giving of anything of value to public officials or political parties unless clearly exempted (and documented);
- the making of facilitation payments outside pre-approved transactions;
- giving unreasonable gifts, hospitality and expenses.

To avoid conflicts of interest, Staff may make business decisions only in the best interest of NBEL, not based on their own personal interest. In that regard, the business conduct rules define the following: corruption; bribery; conflicts of interest; public official; political party; legal facilitation payments; reasonable gifts, hospitality and entertainment; but also proper donations, proper political contributions and proper sales commission as also indirect acts which are also prohibited.

NBEL as well as its staff may be held liable for acts of third parties who act on its behalf, such as strategic business partners, joint venture partners, consultants, sales and distribution agents, and other agents and intermediaries – or even parties with whom NBEL engages in discussions or negotiations, at any level and at any stage. For that reason, before entering into *any* contract with a third party, NBEL must take action to:

- evaluate the qualifications and reputations of such third parties;
- include appropriate provisions in agreements and contracts designed to protect NBEL.

This applies, in particular, if a third party has contact with public officials and political parties for or on behalf of NBEL.

Staff actions will differ depending on the classification of the third party involved. Different rules apply to third parties that represent the government, state-owned entities and private entities or to third parties that have any relations to public officials and political parties. Due diligence processes (see below) are designed to evaluate the qualifications and reputations of third parties. NBEL will employ anti-corruption clauses in all material agreements. Such clauses set forth anti-corruption representations and warranties; refer to compliance with applicable law; allow for periodic internal and independent audits of the books and records; and provide for termination as a result of any breach of applicable law.

Anti-corruption controls help ensure compliance with the business conduct rules.

### ***Due Diligence***

A centralised anti-corruption due diligence process helps address the risk of NBEL becoming involved in a corruption situation. Due diligence processes are designed to evaluate the qualifications and reputations of third parties. NBEL investigations will differ depending on the classification of the third party involved. Different rules apply to third parties that represent the government, state-owned entities and private entities. The key component in the due diligence process is to identify any relation to public officials and political parties and classify the third party so that the business areas can request appropriate assurances to prevent a corruption situation, such as anti-corruption provisions in agreements. These background checks will be repeated at renewals of contracts. Completed due diligence records will be maintained and if appropriate all contracts and payments related thereto.

### ***Client entertaining and hospitality***

Staff should ensure that when they are entertaining clients any spending is “reasonable and proportionate” and any time spent with clients is to cement good relations with the client, to enhance the client’s knowledge of NBEL and its business or to fulfill a genuine business purpose. It is clear under the Guidance that genuine client hospitality which is used to present NBEL’s products and service or to establish or further a business relationship is not prohibited by the Bribery Act. It is therefore necessary for all staff to document any client entertaining which they undertake so that a “genuine business purpose” can be demonstrated.

### ***Policies and Procedures***

An effective anti-corruption programme consists of policies and procedures in four areas: (1) business conduct rules; (2) anti-corruption due diligence; (3) anti-corruption controls; and (4) procedural processes for the compliance personnel. All policies and procedures are approved by the Board of Directors. Anti-corruption compliance policies and procedures cover the following: Staff tasks and responsibilities; anti-corruption programme communications (see below); anti-corruption training; the "helpdesk" operation; the hotline operations; compliance audit ; investigations; voluntary disclosure; disciplinary measures; and reporting requirements.

(a) Communication of procedures

The Compliance Officer communicates approved policies and procedures. These will be maintained on the publicly available Compliance Policies and Procedures drive.

(b) Training

The Compliance Officer ensures regular training on NBEL's anti-corruption program, including updates of policies and procedures. Staff will be required to complete at least one anti-corruption awareness training session annually.

(c) Helpdesk

Call the Compliance Officer to clarify a potential corruption situation. Compliance will initiate an investigation in any suspected violations reported.

(d) Anti-corruption controls

The objective of anti-corruption controls is to detect suspected disbursements. Approval processes have been implemented concerning the following: authorisation of contracts with affiliates; authorisation of contracts with agents and other intermediaries; authorisation of contracts with unusual terms; payments based on a contract with a public counterparty; payments to public officials; facilitation payments; authorisation of gifts, meals, travel and lodging for public officials; cash payments; openings of petty cash accounts; offshore payments; excessive sales commissions; excessive compensations based on poorly documented consultancy services; and gifts and donations.

(e) Hotline

Directors, officers, employees, agents, business partners and other third parties should be able to report (anonymously) suspected corruption in the first instance to NBEL's Compliance Officer.

(f) Compliance Audits

The Compliance Officer is responsible for periodic anti-corruption programme compliance audits. Policies and procedures provide for ad-hoc and specific corruption audits and regular reviews of incidents reported. If the audit results suggest that there is a weakness in the anti-corruption programme, remediation recommendations will be implemented.

(g) Compliance Investigations

The Compliance Officer is responsible for the prompt investigations of suspected violations reported. Investigation results are to be reported to the Legal team and the Board of Directors. Violations of the anti-corruption programme are reported to the Board of Directors without delay and with a recommendation whether external counsel should be consulted and whether voluntary disclosure should be considered.

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(h) Voluntary Disclosure

The consideration of voluntary disclosure of corruption to authorities is considered best practice. Compliance will consult with the Legal team and external counsel when and as required.

(i) Disciplinary Measures

NBEL's policies and procedures describe when and which disciplinary measures shall be imposed in the case of a violation of the anti-corruption programme. The Compliance Officer recommends disciplinary measures to the Board of Directors which will make the final decision.

(j) Tracking

The Compliance Officer compiles and retains all reported suspected violations of the anti-corruption programme in a database for monitoring purposes and to help identify patterns and trends. Policies and procedures require that suspected corruption, identified red flags and (suspected) breached internal controls are reported with remediation recommendations.

(k) Monitoring Effectiveness

NBEL monitors the effectiveness of the anti-corruption programme. It prepares periodically a report for the Board of Directors that includes, inter alia, the results of the regular compliance audits, investigations, remediation efforts and updates of policies and procedures.