

Middle East meets West: Where is the line between relationship-building and bribery?

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When does an internship cost \$14.8 million? When it constitutes bribery of a foreign official in violation of the U.S. Foreign Corrupt Practices Act (“FCPA”)

On 18 August 2015, Bank of New York Mellon (“BNYM”) consented to a Securities and Exchange Commission (“SEC”) Order requiring BNYM to pay \$14.8 million to settle charges that it violated the FCPA by providing student internships to family members of foreign government officials affiliated with a Middle Eastern Sovereign Wealth Fund (“SWF”). All parties involved, except BNYM, have been anonymised in the Order so that the nationality of the foreign public officials and the SWF is publicly unknown beyond being described as ‘Middle Eastern’.

The BNYM internships were given to three people: the son and nephew of one key figure of the SWF and the son of another. The internships were given despite the facts that the interns did not meet the rigorous selection criteria usually applied by BNYM and did not go through the standard (or any) recruitment process before being awarded the internships. In addition, these internships were found by the SEC to be more valuable than those offered to the regular applicants, who had endured the competitive admissions process against strict entry requirements. For example, rotation between business units was arranged, which is not an opportunity afforded to regular interns.

Emails between BNYM employees clearly demonstrate that the motivation behind the favour to the foreign officials was to influence the latter’s decision-making in the interests of BNYM. There can be no doubt that this was bribery in action – the BNYM employees expected to retain and gain business from the foreign officials in return for offering their relatives valuable internships to which they would not otherwise have had access.

A Cultural Issue?

The term ‘cultural differences’ is often, rather pejoratively, used in discussions concerning questionable business practices, as an apparent explanation of the way that persons from the Middle East (and other places) approach business ethics. It is clear, however, from correspondence referred to in the Order, that the BNYM situation cannot be explained as either party acting honestly and in accordance with cultural norms that happen to differ from the rules to which they are subject, thereby creating some sort of ethical dilemma. This was indisputably a case of bribery, not only as defined by the FCPA but also as defined by, for example, the Penal Code of the United Arab Emirates. One of the foreign officials involved told BNYM employees that the internships represented an opportunity for the bank and that he could get competitor banks to offer the internships if BNYM did not deliver. No, this was not a subtle cultural issue of, for example, gifts that would be seen as extravagant in the ‘West’ but perfectly standard in the Middle East, which BNYM had to massage into a US law-compliant form. This was an out and out corrupt deal and the bank was fully in on it.

Relationship-Building v Bribery: Where is the line?

Notwithstanding the BNYM case, building relationships by giving (reasonable and proportionate)

gifts, entertainment and hospitality is an established and accepted part of doing business. Indeed, it is referred to as much in the official Ministry of Justice Guidance to the UK Bribery Act, for example.

So the question becomes: where is the line between acceptable relationship-building and bribery?

A number of factors will determine which side of the line any given expenditure or benefit falls and are common to jurisdictions including the US, the UK and the UAE. These include the value, proportionality, timing and appropriateness of the expenditure in all the circumstances. None of these alone, nor any of them combined, will suffice to prove bribery without the criminal intention, required by all jurisdictions, for the offence to be completed.

In the absence of direct evidence of bribery, such as the damning emails uncovered in the BNYM case, many factual elements will point to or away from the presence of criminal intent. In such cases, it is this circumstantial evidence that will provide the only information upon which law enforcement agencies can decide which side of the line a case falls. The bottom line is that the person(s) involved will know what the intention behind any particular expenditure was. In circumstances where a company is required to decide whether bribery has been committed by an employee, the importance of well-designed and properly-implemented systems and controls will become apparent quickly.

Genuine Engagement Required

Importantly, in addition to the anti-bribery provisions of the FCPA, the SEC found that BNYM violated the internal controls provisions of the FCPA. Although BNYM had a code of conduct and a specific FCPA policy in place, which prohibited employees from violating the statute, the SEC highlighted that there was insufficient guidance on the risks of hiring customers and relatives of customers, including foreign government officials. In conclusion, the SEC found, the systems and controls in place were inadequate to ensure compliance with its written policy against bribery of foreign officials.

This finding highlights the importance of actively engaging with the responsibilities imposed by applicable legislation. Merely holding a written policy but not making efforts to enforce it by, for example, the training of employees, will not guarantee compliance with the law.

Whilst there is no suggestion in the Order that BNYM deliberately gave less attention to the issue than was required, the Order demonstrates the importance of taking the requirements of the law seriously and implementing sufficient programs to ensure compliance.

Conclusion

The BNYM case serves as a reminder that a bribe can comprise anything of value and clarifies that an internship is an example of such a thing. It also highlights the importance of the legal and compliance function acting in conjunction with senior management and HR to ensure effective compliance with applicable laws in relation to specific activities, such as hiring, gifts & entertainment, charitable contributions, sponsorship or business transactions. Finally, staff must be trained on company policies if such policies are to be effective.

There are many circumstances in which businesses in the Middle East might be subjected to enquiries in respect of corruption issues, whether by local law enforcement agencies investigating an allegation, or by related foreign entities (such as parent companies or counterparties) to whom laws such as the FCPA or Bribery Act apply. In such situations, the ability to provide documented evidence of policies, and of their implementation and adherence, will be invaluable in saving time, money and, in the worst cases, prosecution.

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