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THE REALITIES OF THE UK BRIBERY ACT

INTRODUCTION

"This paper resets the dial on the UK Bribery Act. There has not been the early flurry of prosecutions that was feared but it has led to a significant change of attitude among business leaders – a greater concern about compliance and preventative training and preparation."

— Mark Malloch-Brown
Chairman,
Europe, Middle East
and Africa

In July 2012, one year after the UK Bribery Act became effective, FTI Consulting conducted a survey of senior and middle managers in large- and medium-sized businesses operating in the UK. We set out to uncover their current attitudes, the compliance steps undertaken or contemplated by their companies and their views on enforcement.

Compliance with global anti-bribery laws is an increasingly important issue for companies against a backdrop of sluggish economic activity, tough competition for market share, rigorous cost management and shrinking budgets for non-revenue generating activities, but increasing public expectations of business ethics and tougher enforcement by regulators. As companies seek growth through expansion into emerging markets they may also face new and different business environments and exposure to increased risk.

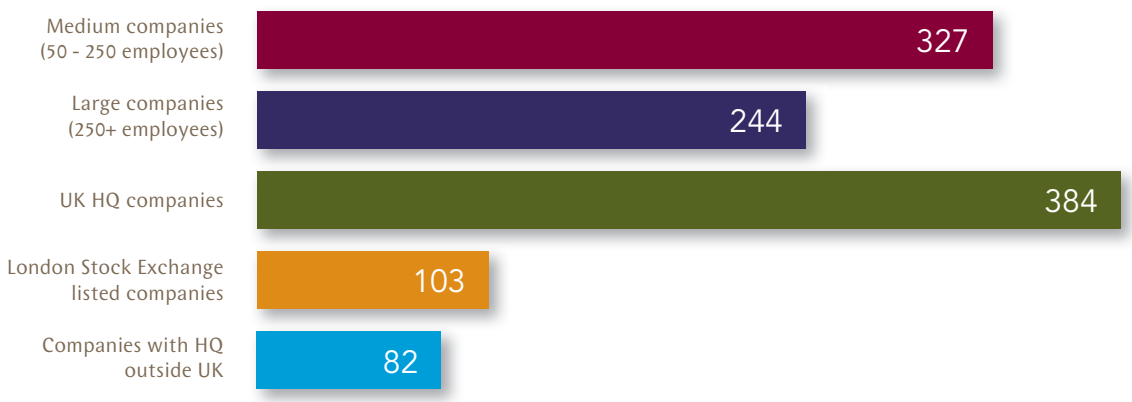
THE UK BRIBERY ACT

The UK Bribery Act, which consolidated, clarified and strengthened UK anti-bribery law, is generally broader and more stringent than the US Foreign Corrupt Practices Act (FCPA). The UK Bribery Act covers four categories of offence: (i) bribing another person; (ii) being bribed; (iii) bribery of foreign public officials; and (iv) failure of a commercial organisation to prevent bribery. Among the differences between the UK Bribery Act and the FCPA is that the UK Bribery Act criminalises bribery of private persons and companies, in addition to bribery of foreign public officials. In a previous survey by FTI Consulting into corporate investigations, 60% of respondents saw the UK Bribery Act as a top-three concern over the next five years.

PARTICIPANTS

The research, which surveyed 571 UK-based board level, senior and middle management, was conducted online by the Strategy Consulting and Research team at FTI Consulting.

Where our respondents originated:



IMPACT – ONE YEAR ON

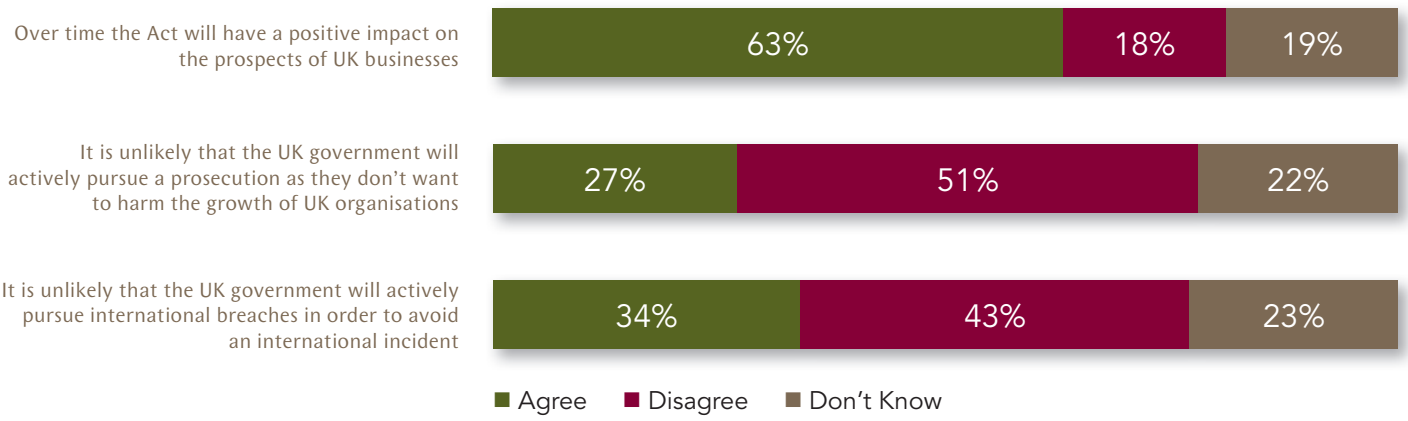
A flurry of advice and guidance to firms accompanied the introduction of the Bribery Act on 1 July 2011. One adviser at the time said that "any company in the UK or doing business in the UK that has not got this in hand is making a terrible mistake"[1]. Various experts predicted a spike in bribery investigations following the passing of the bill, yet the last year has seen only one Bribery Act prosecution and this was a domestic case involving an individual who was bribed to alter a motoring offences database. However, one year is very little time for the Serious Fraud Office (SFO) to bring a successful Bribery Act prosecution of a corporate as the average time for the SFO to investigate a case and bring it to charge is 18 months[2]. The Act only applies to crimes committed from 1 July 2011. The Ministry of Justice (MoJ) indicated in its impact assessment of the Bribery Act that a large number of prosecutions is unlikely.

Arguably that the primary purpose of the new Act was not necessarily to increase the number of convictions but to bring about a corporate cultural change – "to create a public and business culture where corruption was not tolerated"[3].

In our survey the general response to the Bribery Act was positive with 63% agreeing that the Act will, over time, have a positive effect on the prospects of UK businesses, with only 18% disagreeing.

But our research also shows that the perceived lack of enforcement has started to create doubts. Many companies that are on the cusp of compliance may be starting to waver: 27% of respondents believe that the UK government will not actively pursue cases because they do not want to harm UK growth; 34% believe that the UK government will ignore international breaches to avoid an international incident. Overall, one in five respondents believe they would not be prosecuted.

Impact of the Bribery Act



[1] John Rupp, head of the European Compliance group at Covington & Burling LLP
[2] SFO "Year in Review 2011-2012"
[3] Omar Qureshi, CMS Cameron McKenna

CLASSIFICATION OF RESPONDENTS

Our research highlighted varying levels of understanding and knowledge of the Bribery Act. Many respondents were simply not aware of or knowledgeable about the Act. Overall, 43% were not aware of or only slightly aware of the Act. As would be expected, board level respondents are considerably more likely to be fully or partly knowledgeable of the Act (77% in total). We were shocked to find that 9% of those who claim to be fully or partly involved in anti-bribery compliance are unaware of the Act!

Using responses to a group of related questions we have clustered respondents into three types:

"Dangerously Ignorant"

24% of those interviewed can be categorised as being "not knowledgeable" about The UK Bribery Act. Naturally they are less likely to be involved in anti-bribery and corruption compliance. But they are also unaware of the training their employer offers or how a breach would affect their organisation. They are more likely to be middle managers.

"Informed Adopters"

47% of respondents can be categorised as "informed adopters". They are familiar with the Act, their organisations have anti-corruption compliance procedures in place and they are concerned that breaches of the Act could lead to prosecutions. They are more likely to come from industries like mining, construction and energy where bribery and corruption is an important issue.

"Risk Takers"

The remaining 29% of respondents are categorised as "risk takers". They are reasonably knowledgeable of the Act and potential breaches (but not as much as the informed adopters), and 80% feel that they have received adequate training. But although they are aware they still take risks with compliance as winning new business takes priority and they might intentionally breach the Act to do this.

DO COMPANIES HAVE ADEQUATE PROCEDURES?

While this question is one that will ultimately be based on the facts of individual cases it is interesting to benchmark the survey responses to the MoJ guidance on adequate procedures. It highlights areas for management and compliance professionals to focus their efforts on going forwards.

PROPORTIONATE PROCEDURES

The MoJ guidance suggests that relevant policies and procedures might include:

- Gifts
- Hospitality
- Promotional expenditure
- Charitable and political donations
- Demands for facilitation payments
- Whistle-blowing procedures

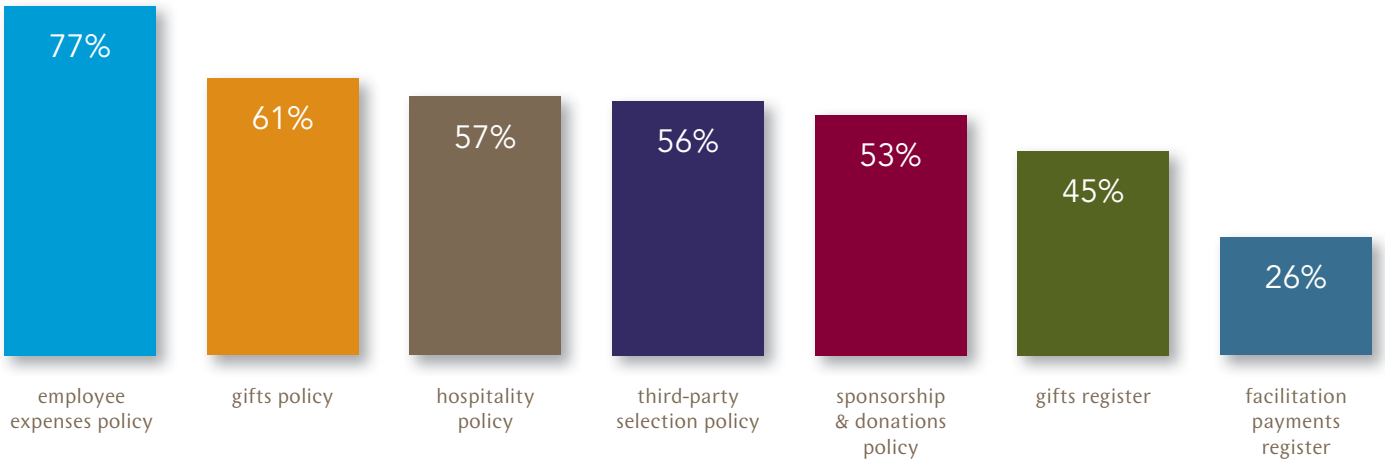
61% of the respondents' organisations had a gifts policy in place, 45% a gifts register, 26% a facilitation payments policy, 57% a hospitality policy, 77% an employee expenses policy, 53% a sponsorship and donations policy and 56% a third-party selection policy. There is a greater incidence of listed companies having these policies in place.

Companies continue to enhance their compliance regimes: for each of the above policies a further 8-13% of the respondents, who do not yet have a policy in place, are planning to implement one in the future. These figures are actually slightly higher for listed companies, which suggests that they consider more of a need to implement these procedures even if they have not done so yet.

Companies who do not yet have these policies and procedures in place, especially those larger firms listed on the London Stock Exchange, clearly need to take action urgently. Not only has the Act has been in force for over a year, they are lagging well behind their peers. Regulators will inevitably take a dim view of companies this far behind good practice.

WHISTLE-BLOWING

Whistle-blowing procedures and attitudes were considered separately in the survey as they are such an important tool for companies to detect corruption and other failures. In a recent survey[4] over half of all corruption incidents were identified from "tips" when a whistle-blowing hotline was in place compared to 35% when no hotline was available, showing that having a hotline increases reporting and internal detection. 86% of respondents claim to be prepared to report potential breaches of the Bribery Act even though 44% of respondents do not have, or are not aware of, clearly defined procedures for reporting on Bribery Act contraventions.



[4] Association of Certified Fraud Examiners, 2012 Global Fraud Survey

Despite showing willingness to report, and legal protection for whistle-blowers, there were a significant number (16%) of respondents who were very concerned about the possible harmful effect on their career of reporting a breach. In addition, a further 41% were slightly concerned whereas 43% were not concerned at all.

Further work therefore needs to be done by companies both to further a culture of transparency and to educate staff about the protections in place should they report breaches.

Anonymous reporting procedures can assist in increasing reporting. 65% of respondents would use anonymous reporting procedures but for over half of these (58%) their employer has no such facility.

Boards and Chief Compliance Officers should beware the risk of whistle-blowers reporting externally direct to enforcement agencies: 25% of respondents would externally report a former employer and 24% a competitor. This chimes with the SFO which, after having set up its own whistle-blower hotline in November 2011 to allow anyone to report concerns to them, has received up to 500 tip-offs per month. The controversial Dodd-Frank whistle-blower reward provision has recently seen the IRS pay US$104m to a former UBS whistle-blower, and the SEC stated in its first mandatory report on the scheme – covering only the first 7 weeks since its inception on 12 August 2011 – showed 334 reports received including 10 from China and 9 from the UK. There is a substantial risk to those responsible for compliance – including Executives and NEDs – that infringements they are not aware of will be reported directly to regulators.

TOP-LEVEL COMMITMENT

The MoJ guidance on adequate procedures suggests that "the top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable".

In our survey, 18% of all respondents say that they might breach the Act to win business. This goes up to 25% among board level respondents and implies that for some companies the cultural influence from the top is negative rather than positive. This is reinforced by our own anecdotal experience. It may be because the threat of sanction – size of penalties and/or risk of imposition – is less significant in the minds of a few board members than growing revenue – and the ethical imperative clearly does not sway this group either. Of the risk takers group, 60% think that the Bribery Act will have little immediate impact as firms will just find a way around the legislation. 76% of them believe that it is unlikely that the UK government will actively pursue a prosecution because they don't want to harm the growth of UK organisations.

RISK ASSESSMENT

The MoJ guidance suggests risk assessments are undertaken. Many companies have adopted this approach, especially when considering external risks (e.g. country, sectoral, transaction, business opportunity and business partnership). However, internal factors may not be being considered sufficiently as the survey suggests that some organisations do not have a clear anti-bribery message from the top-level management combined with deficiencies in employee training, skills and knowledge, all of which could lead to substantial internal risk. These are looked at in more detail below.

DUE DILIGENCE

MoJ guidance states that "The commercial organisation applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for, or on behalf, of the organisation in order to mitigate identified bribery risks."

This is one of six main headings in the MoJ guidance, but 33% of respondents do not have a policy on the selection of suppliers and 22% are unlikely to implement one. We consider this to be a major risk for companies as suppliers, agents and distributors, especially those in emerging markets, are typically a key factor in the corruption investigations we conduct and a major work stream in an effective anti-corruption programme.

COMMUNICATION AND TRAINING

The MoJ guidance on adequate procedures suggests "Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation's procedures and to the organisation's commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation's procedures and deal with any bribery-related problems or issues that may arise."

It is clear that ignorance is not a defence. The dangerously ignorant group, some of whom will be present in most organisations, may be inadvertently breaching the Act and storing up trouble for their employer. This group's lack of knowledge leaves them ill-equipped to exercise good judgement.

We are particularly worried – and shocked – at the 9% of our respondents who are unaware of the Act yet claim to be fully or partly involved in anti-bribery compliance.

We believe, based on our wide investigation and remediation experience, that this is indicative of failures in the training programme. We have seen "off the shelf" training which, for example, deals specifically and solely with the US FCPA, used for global training. Not only does this approach miss the company's own ethical standards and culture, and local legislation, it can also alienate some non-US employees who feel their country's sovereignty is being overridden. We have also seen cases where high-quality training content is sabotaged by poor training management: key audiences (new hires, promotes to exposed roles) not being addressed, failure to ensure the full intended audience participate, failure to update and maintain relevance, or key senior management setting the wrong tone by skipping training.

MONITORING AND REVIEW

The MoJ guidance states that "The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary."

We asked a series of questions around compliance with policies and procedures and bribery in the respondent's organisation and the following statistics are interesting:

- 4% know that facilitation payments have been made
- 3% know that facilitation payments were concealed by recording them as something else
- 6% know that gifts have been given that exceed policy limits
- 5% know that gifts have not been properly recorded
- 2% know that customs officials were paid small amounts to ensure clearance was provided
- 3% know that hospitality was given in the expectation of receiving a customer's business
- At least twice as many again suspect that the above has taken place in their organisation. Each of the above may be a bribe, depending on the particular circumstances, and may also cause a regulator to look carefully at the procedures a company has implemented.
- We have found that many companies struggle in this area. Substantial effort – and cost – is expended in implementing and rolling-out policies and procedures yet not enough is done subsequently to ensure that they are being consistently followed. This is a particular problem when companies treat anti-bribery compliance as a one-off project directed at minimum legal compliance rather than seeking to embed a sustainable business ethics mindset into the corporate culture. Whilst companies certainly need to address the procedural aspects of monitoring including intelligent analytical reporting and review of "red flag" transactions and other information, these will, over time, be circumvented by smart senior staff unless the corporate culture is appropriate

BRIBERY: BAD FOR BUSINESS IN THE BRICs?

There are conflicting opinions that the Act has caused organisations to both win and lose business outside of the UK. We speculate that the world may be polarising more between those who buy into doing business by the rules and those who don't. Each may be attracting like-minded organisations and thus some are winning and others losing business, although further work is needed to understand this fully.

However, in the significant BRIC growth markets where the UK sometimes struggles to have an impact and which many politicians care most about, respondents express clear concerns. We found an expectation that the Bribery Act will make conducting business more difficult. Amongst the board level respondents with arguably the most experience and expertise in predicting this, 56% think it will be difficult to do business in Brazil, with 27% of those thinking it will be very difficult. In China, these figures are 60% and 31%, in India 54% and 35% and in Russia 58% and 42%. Those involved in anti-bribery issues at all levels of the organisation give similarly high responses.

These countries are also the ones where the majority of respondents report having personally come across the most breaches: 5% in Brazil, 7% in China, 8% in India and 8% in Russia. These figures are perhaps not a surprise when the Transparency International 2011 Corruption Perception Index ranks these countries 73rd, 75th, 95th and 143rd respectively (out of 183 countries assessed).

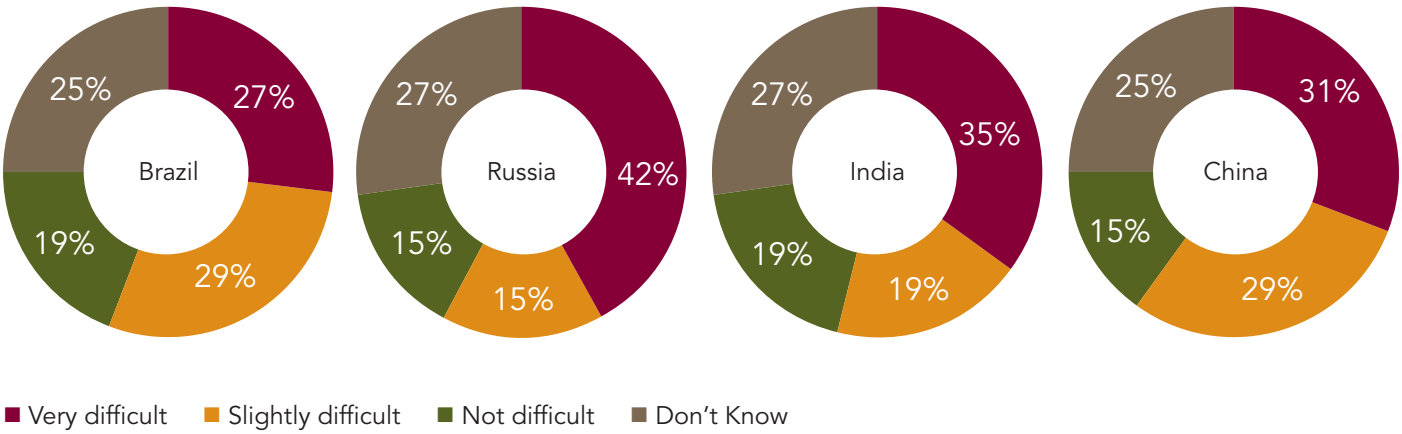
THE FUTURE OF UK ENFORCEMENT

An early sign that UK companies convicted of bribery could expect tough sanctions came when Lord Justice Thomas, the second most senior criminal judge, said it was self-evident that corruption was "much more serious" than price-fixing, which attracts fines of ten million pounds. Indeed, following the Innospec settlement, where the company settled for fines of US$40 million in the US and the UK for paying off Indonesian government officials to win contracts for a toxic lead petrol additive, LJ Thomas reluctantly confirmed the UK part of the fine, but said this was "wholly inadequate" and should have been in the tens of millions for a "very serious" offence.

The likely introduction of Deferred Prosecution Agreements (DPAs) is another tool in the armoury of the SFO in corruption cases. The recent consultation on this indicated future fines could average between £3 million and £60 million; a wide range but one that is markedly larger than existing levels. The DPA regime will also facilitate the SFO settling cases and imposing penalties without the need to present evidence in a criminal trial – while still appealing to companies as less damaging than a criminal conviction.

David Green QC, the new head of the SFO, has also said publicly that he wants to focus more on prosecuting offences to create a stronger deterrent to potential offenders.

How The UK Bribery Act is expected to make business more difficult:



CONCLUSIONS

The hype surrounding the introduction of the UK Bribery Act has had a tangible effect – many companies have thought long and hard about compliance – and perhaps to a lesser extent business ethics generally – and our figures show that many believe that they have implemented the necessary compliance measures.

The concern, given mounting doubts about the enforcement of the Act, is that more informed adopters will shift to a risk takers' stance, especially if they feel their competitors are winning business in emerging markets.

The key question for Boards and Chief Compliance Officers must be how many risk takers and how many of the dangerously ignorant does your business employ? And how many potential whistle-blowers? A very small number of each can create huge risk for the company, yet it is likely that both these numbers are higher than many would wish to believe. It seems certain that many organisations are still exposed to a significant and unnecessary risk.

ABOUT THE RESEARCH

Research was conducted online by the Strategy Consulting and Research team at FTI Consulting from 13 to 17 July 2012 with 571 executives in UK businesses in board level, senior management and middle management positions. Respondents are drawn from affiliate panel databases. Company size is as follows: Respondents totalling 327 are from medium-sized companies (those with between 50-250 employees), 244 are from large companies (those with more than 250 employees). Respondents totalling 384 come from companies that are headquartered in the UK only, 103 from companies listed on the London Stock Exchange and 82 with headquarters outside of the UK. Please note that the standard convention for rounding has been applied consequently some totals do not add up to 100%.

ABOUT FTI CONSULTING ETHICS AND COMPLIANCE SERVICES

Our clients benefit from the unparalleled depth of our intellectual capital and applied knowledge. We adopt a multidisciplinary approach bringing together a broad spectrum of services – including pro-active advice, business intelligence, investigations, and strategic communications – to preserve and enhance our client's reputation and value. We draw from our collective experience of numerous previous anti-corruption engagements to provide cost-effective solutions that resolve issues quickly and efficiently. With offices throughout North America, Latin America, Europe, the Middle East, Africa and Asia, and many multi-lingual staff, FTI Consulting has the ability to offer comprehensive anti-corruption services anywhere needed.

We work with the full range of organisations exposed to risk in this area: start-ups and midcaps operating in opaque and complex regulatory environments; private equity, hedge funds and sovereign wealth funds; global enterprises; on both sides of M&A transactions; joint ventures; inbound companies of all sizes; and public sector bodies.

ETHICS AND COMPLIANCE ADVISORY SERVICES

Our mission is to build sustainable relationships with leaders of organisations that help them to give substance to their ethical aspirations. We design, implement, monitor and assure all aspects of ethics and compliance programmes.

Our skills and experience include: organisational ethics, compliance governance and strategy; culture change; change and programme management; policies, procedures and controls; training; communications; business partner programmes, including outsourcing; helpdesk and whistle-blower facilities; and reporting, monitoring and data analytics.

In addition to proactive programme development, we have wide experience of assisting clients subject to potential or actual regulatory intervention. Our early remediation expertise (working in parallel with investigations) has helped clients improve their relationship with regulators and achieve significant settlement benefits.

BUSINESS INTELLIGENCE SERVICES

We enable our clients to understand and navigate the political, regulatory and cultural challenges of operating in complex and opaque environments.

Our team includes former government officials, journalists, corporate investigators and regional analysts, all with relevant legal, financial, cultural and linguistic backgrounds. Our intelligence is bespoke, confidential and carried out with the utmost sensitivity and integrity.

We offer: transactional and business intelligence; market entry and exit strategy consulting; enhanced due diligence; litigation and arbitration support.

INVESTIGATIONS AND FORENSIC ACCOUNTING

Our team includes former enforcement agency staff, prosecutors, financial regulators, financial and forensic accountants, industry specialists, internal and external auditors, electronic evidence and computer forensic experts, and financial and enterprise data analytic specialists.

Our investigation services include: internal fact-finding investigations; forensic accounting reviews of books and records; assistance in responding to government requests for information or investigations; witness interviews; electronic discovery and corrupt data and record recovery; preparation of formal reports for regulators and enforcement agencies; supporting counsel in plea negotiations.

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