

Using Local Consultants in Foreign Lands

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1. Introduction

Companies often conduct their business in foreign lands through local consultants. There are many good reasons² why companies do this, including to:

- access and build relationships with government officials;
- pursue business opportunities without the expense of hiring or relocating employees;
- penetrate opaque or restrictive markets;
- comply with local law requiring the use of a resident intermediary;
- pursue large volumes of modest sales in a number of countries; or
- establish an in-country presence on a temporary basis at minimal cost.

When recruited and managed properly, local consultants can add value for a company. They open local markets and bridge the gap between a foreign company and the local business community. However if not properly recruited, retained and managed, they can significantly increase a company's liability; particularly when there is the risk of corruption. As a matter of public policy, anti-bribery laws around the world prohibit companies from making illegal payments to government officials in order to obtain or retain business or to gain an improper advantage. Companies have historically used intermediaries to pay bribes in order to cover their tracks and to avoid such liabilities.³ As a result, anti-bribery laws clearly state that these prohibitions apply whether these payments are made directly by the company or indirectly through intermediaries.

This paper looks at the risks associated with retaining local consultants or intermediaries to conduct business in foreign countries and how to manage those risks. It begins with a survey of international law on the liabilities from using intermediaries to pay bribes to foreign public officials, in particular the plethora of international anti-corruption treaties that have emerged over the last decade. The paper then focuses on some of the domestic laws that have been implemented to combat foreign bribery (specifically the prohibitions around using intermediaries), most of which have directly resulted from these treaties. The three countries' laws that are analyzed are the United States, the United Kingdom and Canada. All of these countries share a common law tradition, a strong belief in the rule of law and an independent and respected judiciary. One would naturally assume that they would also share similar approaches in defining and prosecuting these kinds of liabilities. That is not the case. Finally, the paper describes best practices for corporations to use in retaining local intermediaries in foreign countries.

2 Alexandra A. Wrage, *The TRACE Standard: Doing Business with Intermediaries Internationally* (Washington DC: Trace International, Inc., 2002), 5.

3 A number of research surveys have indicated this trend. See, John Bray, "International Business Attitudes to Corruption – Survey 2006" (Control Risk, 2006), 13. Their other surveys can be found at www.crg.com. Similar research conducted by Transparency International can be found at www.transparency.org.

2. International Law

There has been a long standing principle in international law that corruption and bribery are against public policy.⁴ This has now been clearly established over the last decade through a half dozen international treaties. The three most prominent anti-corruption treaties are the OAS Convention in 1996, the OECD Convention in 1997 and the UN Convention in 2003. All three Conventions apply prohibitions on indirect as well as direct payments. However, they do not articulate specific standards around “knowledge” and “vicarious liability” as seen in U.S. law. Instead, the Conventions rely on the criminal law standards and implementing domestic legislation of each signatory country to establish the degree of knowledge required of funding parties and their subsequent liability. The reason for this approach is that the drafters of these Conventions have only attempted to establish *functional equivalency*. This does not require signatory countries to unify their laws, only to harmonize them through defining common goals in the treaties and then allowing them to use their local legal traditions in their implementing legislation. The drafters did not aim for substantive unification of the many domestic laws involved, given the diverse legal systems of the signatory countries. Instead, parties to these Conventions were able to choose their own means to implement their domestic laws as long as the results were comparable.⁵ This approach has resulted in great divergence amongst countries in standards of knowledge and vicarious liability.⁶ This is the case even in legal systems that share many common attributes, as will be described in this paper’s analysis of the laws of the United States, the United Kingdom and Canada.

2.1 OAS Convention

The Inter-American Convention Against Corruption (OAS Convention)⁷ simply states that *direct or indirect* solicitation or acceptance by a public official of any article of monetary value or other benefit, whether for the public official or for another individual or entity, in exchange for any act or omission in the performance of his or her official functions is prohibited.⁸ It does not define or describe what degree of knowledge is required of or the specific kind of liability that will be imposed on parties that fund indirect payments to public officials. That is left to the implementing legislation of each signatory country.

As of December 31, 2007, 34 countries have signed the OAS Convention and 33 countries have deposited their instruments of ratification of accession to the OAS

4 A. Timothy Martin, “The Development of International Bribery Law,” *Natural Resources & Environment*, (Fall 1999) Vol. 14, Issue 2.

5 Mark Pieth, “International Efforts to Combat Corruption in Business Transactions,” *Middle East Executive Reports*, Nov. 1999: 12.

6 Lucinda A. Low, “The New Global Legal Framework: The OECD, OAS and Council of Europe Anti-Bribery Conventions,” (Paris, France: IBA/ICC/OECD Conference: The Awakening Giant of Anti-Corruption Enforcement, April 2003), 44.

7 OAS Doc. B-58, *reprinted in* 35 I.L.M..724 (1996). Adopted at the third plenary session, held on March 29, 1996 and entered into force on March 6, 1997.

8 *Id.* Article VI.1.a&b.

Convention.⁹ The United States and Canada have ratified the OAS Convention. The United Kingdom is not a signatory to the OAS Convention.

2.2 OECD Convention

The Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention)¹⁰ prohibits indirect as well as direct payments to public officials. The OECD Convention states:

“Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, *whether directly or through intermediaries*, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”¹¹

Similar to U.S. law, the OECD Convention’s anti-bribery offence is an “intent” crime. However, neither the OECD Convention nor its accompanying Commentaries¹² state what the standard of knowledge is or how vicarious liability is established. The Commentaries do state that:

“Article 1 establishes a standard to be met by Parties, but does not require them to utilize its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfill its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph.”¹³

The result is that no autonomous standard of knowledge was created by the OECD Convention and consequently each signatory country to the OECD Convention has addressed the concepts of knowledge and vicarious liability in a manner consistent with its own domestic law.

U.S. Federal law sets a knowledge standard that can be easily met. No single person or group of persons is required to have the requisite knowledge. U.S. prosecutors can simply establish the collective knowledge of those employed by or acting on behalf of an entity. In contrast, under the criminal law of many parties to the OECD Convention there is a requirement that a single person have the requisite knowledge. The result is that many parties to the OECD Convention have a higher threshold than U.S. law to establish knowledge on the part of an entity funding illegal payments through an intermediary.¹⁴

9 See <http://www.oas.org/juridico/english/Sigs/b-58.html>

10 OECD Doc. DAFFE/IME/BR(97)20, *reprinted in* 37 I.L.M. 1(1998). Adopted by Negotiating Conference on 21 November 1997.

11 *Id.* Article 1.1.

12 Commentaries on the Convention of Combating Bribery of Foreign Officials in International Business Transactions. OECD Doc. DAFFE/IME/BR(97)20.

13 *Id.* Paragraph 3.

14 Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* (Chicago: ABA Publishing, 2005), 98.

As of June 19, 2007, of the 37 countries that were signatories or acceded to the OECD Convention, 36 countries have implemented legislation prohibiting the bribery of foreign officials.¹⁵ The United States, the United Kingdom and Canada have ratified the OECD Convention.

2.3 UN Convention

The United Nations Convention Against Corruption (UN Convention)¹⁶ requires each signatory country to adopt legislation that makes it a criminal offence to promise, offer or give, *directly or indirectly*, an undue advantage to a public official or another person or entity to act or refrain from acting in the exercise of his or her official duties.¹⁷ The Interpretative Notes¹⁸ of the Convention do not provide any explanation for this Article. The UN Convention does state that knowledge, intent or purpose that is required as an element of an offence under domestic law may be inferred from objective factual circumstances,¹⁹ which indicates that circumstantial evidence is permitted. But the Convention does not directly speak to the standard of knowledge or to the concept of vicarious liability.

As of December 31, 2007, 140 countries had signed the UN Convention and 106 countries had deposited their instruments of ratification.²⁰ The United States, the United Kingdom and Canada have ratified the UN Convention.

3. Domestic Law

Sovereign nations that ratify multilateral treaties or conventions like the ones described above are legally required to enact and enforce domestic laws that implement the rights and obligations stated in the treaty. The treaties themselves do not impact individuals or corporate entities, only the signatory states. It is the domestic laws of each sovereign country, which flow from the treaty, that impact individuals and corporate entities. Therefore, it is necessary to analyze the domestic laws of signatory countries to understand how the principles enshrined in the treaties are applied. This is also the case for determining the obligations and liabilities under anti-bribery laws of companies that use local intermediaries in foreign countries.

This paper focuses on the domestic laws of three countries: the United States, the United Kingdom and Canada. They have close business ties and they share a common legal tradition. Companies from these jurisdictions move easily and regularly across each other's borders. One would thus think that similar rules would apply on how they do business, especially when they compete against each

15 See <http://www.oecd.org/dataoecd/59/13/1898632.pdf>

16 G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (2003), *reprinted in* 43 I.L.M. 37 (2004). (adopted on 31 October 2003 and entered into force on 14 December 2005)

17 *Id.* Article 15(a).

18 Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Corruption. UN. Doc. A/58/422/Add.1 (2003).

19 *Supra Id.* Article 28.

20 See <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>

other in foreign lands. That is not quite the case under international anti-bribery law.

3.1 U.S. Law

The U.S. law that prohibits the payment of bribes to foreign public officials is the *Foreign Corrupt Practices Act (FCPA)*.²¹ It predates all of the anti-corruption Conventions by nearly twenty years. The FCPA was first enacted in 1977 as a result of the Watergate scandal. It has broken ground on and influenced many of the principles established in international anti-bribery law.

A company subject to FCPA jurisdiction may be liable when it pays or authorizes the payment of anything of value to a third party *knowing* that all or a portion of such value is or will be offered, given or promised, *directly or indirectly*, to a foreign official in connection with the sale of its product or service or in the obtaining or retaining of business or an improper advantage.²²

The FCPA sets a standard that extends beyond actual knowledge of a third party's corrupt actions, which would include willful ignorance or a "head in the sand" approach. The FCPA prohibits making payments through intermediaries or third parties while "knowing" that all or a portion of the funds will be offered or provided to a foreign official. "Knowledge" is defined under the FCPA to be broader than actual knowledge. The FCPA deems that a person "knows" that a third party will use money provided by that person to make an improper payment or offer if he or she is aware of, but consciously disregards, a "high probability" that such a payment or offer will be made.²³

The InVision case offers some insight into how the SEC and the U.S. Justice Department seek to interpret the "knowledge" standard.²⁴ InVision, a manufacturer of devices that detect explosives, was alleged to have made illegal payments to third parties in China, Philippines, and Thailand. In all three countries, InVision "was aware of a high probability that its foreign sales agents or distributors paid or offered to pay something of value to government officials in order to obtain or retain business."²⁵ With respect to the payment in China, the SEC highlighted the fact that the distributor had informed InVision employees that it intended to offer foreign travel and other benefits to airport officials in order to avoid a penalty for late delivery.²⁶ Thereafter, the distributor requested financial compensation from InVision to pay for penalties and costs "it claimed"

21 Pub. L. 95-213, 91 Stat. 1494 (1977), as amended by *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. 100-418, Title V, Sec. 5003(c), 102 Stat. 1107, 1419 (1988)(codified at 15 U.S.C. 78m(b), 78dd-1,2, 78ff), and further amended by *The International Anti-Bribery and Fair Competition Act of 1998*, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

22 Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act* (New York: Practising Law Institute 2007), 4-36.

23 15 U.S.C. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B).

24 See *In the Matter of GE-InVision, Inc.*, S.E.C. Admin. Proc. Filing No. 3-11827 (Feb. 14, 2005); Non-Prosecution Agreement Between DOJ and InVision (Dec. 2004).

25 Admin. Proc. File No. 3-11827.

26 *Id.* at ¶ 5.

would be incurred as a result of the delay.²⁷ InVision paid the distributor “aware of high probability” that the distributor intended to use part of the funds it received from InVision to pay for foreign travel and other benefits for airport officials. In the Philippines, InVision’s sales agent requested a commission and indicated that it intended to make gifts or pay cash to government officials to influence their decision to purchase InVision products.²⁸ Again, InVision paid the sales agent “aware of high probability” that the sales agent intended to use the commission to pay government officials.²⁹ Finally in Thailand, InVision paid a distributor after it indicated that it had offered to make gifts or payments to officials with influence over the Thai airport corporation.³⁰

The U.S. Department of Justice has identified a number of “red flags” that suggest such a “high probability” of a payment.³¹ This standard makes it critical for companies to be aware of such red flags in their dealings with third parties, such as an agent, representative, consultant, joint venture partner or any intermediary, and to respond to the presence of a red flag rather than simply ignoring it.³²

The result is that “conscious disregard”, “willful blindness” or “deliberate ignorance” is not a defence under the *FCPA*.³³ However, this knowledge requirement is not equivalent to “recklessness”, “simple negligence” or “mere foolishness.”³⁴ The difficulty is determining the dividing line between recklessness and willful blindness. There have been quite a number of U.S. bribery cases that involved intermediaries³⁵ but they are not helpful in clarifying this uncertainty on what kind of payments to intermediaries are at risk.

Given the large number of prosecutions of U.S. companies using intermediaries and the articulation of standards and “red flags” by the U.S. Department of Justice, U.S. business practice in this area sets the global standard.

3.2 UK Law

The United Kingdom has a number of laws that criminalize the payment of bribes to foreign government officials, including the common law, the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916 and the Anti-Terrorism, Crime and Security Act 2001. Corruption or bribery is not defined in any of these statutes. The word is therefore given its common or usual meaning. A leading English criminal law

27 *Id.* at ¶ 6.

28 *Id.* at ¶ 9.

29 *Id.* at ¶ 10.

30 *Id.* at ¶ 12.

31 *See*, U.S. Department of Justice, *Lay-Person’s Guide to FCPA* (updated version, Jun. 2001) <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> .

32 Low, *supra* *ibid.*

33 H.R. Rep. No. 100- 576, at 919-921 (1988) (Conf. Rep.).

34 *Id.*

35 *See*: In the Matter of Baker Hughes Incorporated, SEC Administrative Proceeding File No. 3-10572 (2001). SEC v. KPMG-SSH (Civil Action No. H-01-3105), S.D. Tex. (2001). United States v. Titan Corporation (Cr. No. 05-314), S.D. Cal. 2005. SEC v. Chiquita Brands International Inc. (Civ. No. 1:01-02079) D.D.C. (2001). SEC v. Monsanto Company (05-CV-14) D.D.C. (2001).

textbook defines bribery as "... the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his office, and incline him to act contrary to the known rules of honesty and integrity."³⁶

Unfortunately this does not offer much guidance. As stated by Professor Lanham in a UK Law Commission Report citation, the case law on the meaning of corruption is in "impressive disarray".³⁷ English law provides very little guidance on the standard of knowledge or on the vicarious liability associated with using intermediaries to pay bribes to foreign public officials.

The statutory and case law do not expressly refer to an improper payment being made through an intermediary. The 1906 Act does make it a criminal offence for an "agent" to corruptly accept or agree to accept any gift or reward as an inducement or reward for either doing or not doing an act or showing favor or disfavor to any person in relation to the agent's principal's affairs. Both the agent and the person making the corrupt gift or offer commit an offence. The definition of "agent" in subsections 1(2) & (3) of the 1906 Act is very wide and includes employees, whether of a private business or public authority.³⁸ Prosecutors could argue that a person who gives or offers a bribe to a foreign public official through an intermediary would be guilty of an offence because the offence is aimed at any person who corruptly "gives or agrees to give or offers any gift or consideration to any agent." The use of an agent by an offender will not necessarily allow the offender to escape criminal liability. The wide ambit of Section 1 of the 1906 Act is demonstrated by the passive provisions, which explicitly state "for himself or for any other person."³⁹

A UK prosecutor under present English law will have to prove beyond a reasonable doubt that the payment made by the person paying the intermediary was done with the intention that the intermediary would use the payment to make an improper payment on behalf of the initial payer. It would not cover the situation where an intermediary makes an independent decision to make a bribe to win business⁴⁰ or where the initial payer took no care to ensure that the agent did not make a corrupt payment. In a situation where the initial payer "closes his eyes to the problem", the prosecution would have to convince a jury or judge that there was some form of understanding between the primary payer and the intermediary that the intermediary would make a corrupt payment. As a result, there have so far been no prosecutions by UK authorities for the payment of bribes to foreign public officials, either directly or indirectly.

Because of much criticism from the OECD (including whether bribes paid through an intermediary are covered), Parliament put forth a Corruption Bill in

36 Russell on Crime (1964, 12th edition), 381.

37 D Lanham, "Bribery and Corruption" Essays in Honour of JC Smith (1987) 92, 104 cited in "Reforming Bribery, A Consultation Paper," (London: Law Commission Consultation Paper No 185, 29 November 2007), 6.

38 George Brown, "Laws Controlling Corruption – England and Wales," in *Controlling Bribery and Corruption in International Business*, ed. G. Brown (London: Nabarro Nathanson, 1999), 38.

39 Monty Raphael, "United Kingdom," in *Anti-Corruption in 21 Jurisdictions Worldwide*, ed. H. Moyer (London: Law Business Research Ltd., 2007), 107.

40 The 1906 Act uses the word "knowingly".

2006 to address much of the weaknesses seen in the laws of England and Wales. The British government then released a Consultation Paper in November 2007 as a result of criticism of the 2006 Corruption Bill. The government plans on producing a final Report along with a revised Corruption Bill by the autumn of 2008.

3.3 Canadian Law

As a result of ratifying the OECD Convention, Canada enacted the *Corruption of Foreign Public Officials Act* (CFPOA)⁴¹ in 1998. Section 3(1) of the CFPOA states:

“Every person commits an offence who, in order to obtain or retain an advantage in the course of business, *directly or indirectly* gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official

(a) as consideration for an act or omission by the official in connection with the performance of the official’s duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.”

The CFPOA states that a bribe which is given *directly or indirectly* to a foreign public official *or to any person for the benefit of a foreign public official* is an offence, but the concepts of “knowledge” or “vicarious liability” are not clearly enunciated. Given that there is no specific “knowledge” test, Canadian courts must therefore turn to common law principles to determine the degree of *mens rea* required. Under Canadian law, when a crime, such as the bribery offence under the CFPOA, is silent as to the requisite *mens rea*, the courts will presume that subjective *mens rea* was intended by the Canadian Parliament. Subjective *mens rea* is normally satisfied by proving the prohibited act was committed “intentionally or recklessly, with knowledge of the facts constituting the offence, or with willful blindness to them.”⁴² Proof of negligence is not sufficient.

Other than in exceptional circumstances, the courts in Canada have not imposed vicarious criminal liability on corporations. Rather, the courts have used the “identification theory” where the acts and states of mind of senior officers of a company (its “directing minds”) are deemed to be the acts and state of mind of the corporation. In comparison to the English experience, Canadian courts are willing to locate the directing mind at a lower level in the corporation.⁴³

41 *Corruption of Foreign Public Officials Act, S.C. 1998, c.34.*

42 *R. v. Sault Ste. Marie* (1998), 3 C.R. (3d) 30, at 40 (S.C.C.).

43 For a thorough discussion of this area of law, please refer to: G. Ferguson “Corruption and Corporate Criminal Liability” which was prepared for the Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business Transactions, 5 February 1999, Vancouver, British Columbia.

There has been only one conviction to date under the CFPOA, which resulted from a guilty plea.⁴⁴ The facts of that case had nothing to do with intermediaries. As a result, there is presently no Canadian judicial interpretation under the CFPOA with regards to establishing a “knowledge standard”, the extent of corporations’ vicarious liability or the standards of conduct expected of Canadian companies that retain intermediaries in foreign countries.

4. Best Business Practices

4.1 Introduction

Given that the consequences of inappropriately using local consultants to a multinational corporation can be quite severe, companies need to establish clear standards on how to recruit, retain and manage local consultants. US companies subject to the FCPA have developed the most comprehensive standards. It makes sense for companies of other nationalities to consider using such standards since they may be subject to investigation and prosecution under the FCPA as a result of some business nexus to the United States. But more importantly, multinational corporations from other jurisdictions need to follow best practices in order not to get caught up in corruption or bribery, either through their own direct actions or through the actions of their intermediaries, because of the significant reputational risks involved.

This thinking is reflected in the Rules of Conduct⁴⁵ of the International Chamber of Commerce that deal with bribery in business. Article 3 of those Rules deals exclusively with the use of agents:

“Enterprises should take measures reasonably within their power to ensure:

- (a) that any payment made to an agent represents no more than an appropriate remuneration for legitimate services rendered by such agent;
- (b) that no part of any such payment is passed on by the agent as a bribe or otherwise in contravention of these Rules of Conduct; and
- (c) that they maintain a record of the names and terms of employment of all agents who are retained by them in connection with transactions with public bodies or State enterprises. This record should be available for inspection by auditors and, upon specific request, by appropriate, duly authorized governmental authorities under conditions of confidentiality.”

Another indication that multinational companies are embracing best practices in recruiting, retaining and managing intermediaries is the diverse corporate membership of TRACE from many jurisdictions throughout the world. TRACE is

44 In January 2005, Hydro Kleen Group Inc. pleaded guilty to violating section 3 of the CFPOA as a result of making payments to a U.S. Immigration and Naturalization Service official in Calgary, Alberta to facilitate the issuance of work permits to its employees for travel to the U.S. and to raise obstacles to the entry into the U.S. of its competitors' employees. The U.S. official was convicted of accepting secret commissions contrary to section 426 of the Canadian *Criminal Code*. After serving his six month term in a Canadian prison, the U.S. immigration official was extradited to the United States where he served a further prison term for breaching U.S. law.

45 International Chamber of Commerce, *ICC Rules of Conduct: Extortion and Bribery in International Business Transactions* (Paris: ICC Publishing, 1999 Revised Version).

a non-profit membership association that assists companies in the vetting and training of intermediaries.⁴⁶

4.2 Process

Companies should therefore establish and follow a clearly defined process on how they are going to recruit, retain and manage intermediaries beginning with this basic question: Does the company really need to retain an intermediary? If the answer is no, don't hire one. If the answer is clearly yes, then a number of items need to be addressed in the company's decision to retain an intermediary in order to reduce the likelihood of corruption and the resulting liabilities. There is no guarantee that the following process will result in intermediaries conducting themselves in an ethical or legally compliant manner, but it will make the risk more manageable. The following items need to be addressed in the vetting process:

- Clearly establish the business justification for retaining an intermediary;
- Research for the best qualified intermediary;
- Conduct an independent due diligence on the prospective intermediary;
- The contract retaining the intermediary must have an anti-bribery clause;
- Provide the intermediary a briefing on the company's bribery policy and ongoing training on anti-bribery laws and best practices;
- The final review and decision for retaining the intermediary should be done in the executive suite; and
- Document all of the above. This ensures that the process has been done correctly. It will also be the primary defence relied upon by a company if, despite all its efforts, the intermediary does the wrong thing and the company is investigated.

The responsibility for this process should be split within a company. Project or sales managers who usually propose the use of intermediaries should not be expected to carry out the functions of recruiter, advocate, researcher, and judge. Their role should be confined to presenting a clear, justifiable business case why an intermediary should be retained and for being a proponent for their candidate. Their business justification and an acknowledgment that they are not aware of any reputational, business or other reason that would make the intermediary unsuitable should be documented in writing. The due diligence process must be conducted independently. In addition, the decision to hire a consultant must be done independently within a company, preferably by an independent committee of senior people in the organization, based upon qualified legal advice. This ensures good business judgment and impartiality around the decision making process.

⁴⁶ See the TRACE website at www.traceinternational.org for more details. TRACE is a tremendous resource for both companies and credible intermediaries that offers its services at a reasonable fee. TRACE has also published a very good reference manual on how best to retain agents. See, *The TRACE Standard: Doing Business with Intermediaries Internationally*. (Washington DC: Trace International, Inc., 2002) authored by its President, Alexandra Wrage.

4.3 Applicability

The first issue for a company is when and where it needs to conduct such a process since it takes significant resources to do it properly. Companies can use a risk management approach in determining that only intermediaries in countries that are at high risk of corruption should have an anti-bribery due diligence conducted on them. This can be ascertained by using such criteria as the annual Transparency International Country Perceptions Index (CPI).⁴⁷ Each company using this approach will need to determine what risk level it considers appropriate in classifying countries high risk.⁴⁸

The next issue to address is what kind of intermediaries need to be put through such a process. There are a number of different terms that are used for intermediaries, including: business or commercial agent, consultant, contractor, and business or sales representative. A very common one is the foreign sales representative. This is where a self-employed foreign individual or contractor assists a company to solicit business for the sale of the company's products or services within a specified territory or to specific customers. The usual form of compensation is on a contingency basis, by commissions calculated as a percentage of the sales price of the product or service sold by the sales representative. A variation is the commercial agent who has continuing authority to negotiate and finalize the sale or purchase of goods (but not services) on behalf of the company. A commercial agent is generally compensated by commission.⁴⁹ The extractive industry often retains consultants or local representatives to assist in the obtaining of mining, oil & gas or forestry concessions. Compensation may be in the form of a commission or on a per diem or per hour charge.

Intermediaries would also include people and firms that provide a variety of services such as customs brokerage, obtaining immigration visas, and legal and political advice. Some of these intermediaries are more at risk than others as indicated by the increasing number of investigations of these kinds of intermediaries.

An intermediary may also be a distributor of products manufactured by a foreign company. A distributor purchases merchandise for its own account and independently contracts with its own customers for the resale of the product. Since the passage of title is not relevant to the establishment of vicarious liability, distributorship arrangements should be analyzed in the same manner as agency relationships.⁵⁰

Finally, a word about joint venture arrangements. When companies form a joint venture, they usually appoint an operator to act on their behalf to carry out

⁴⁷ See, TI website at www.transparency.org for details on annually updated surveys.

⁴⁸ A good rule of thumb is to consider countries at the 7 score and below on the CPI at high risk. See also: *TRACE Survey of Corporate Anti-Bribery Programs 2004* (Washington DC: Trace International, Inc., 2004) at p. 22 where it appeared that American companies applied more resources to high risk countries and non-US companies tended to apply resources more evenly.

⁴⁹ Zarin, *supra id* at 6-5 to 6-9.

⁵⁰ Zarin, *supra id* at 6-5 to 6-9.

operations for the joint venture group. The concept of vicarious liability and the standard of knowledge expected of non-operators within the joint venture group are the same as in the principal-agent relationship. Therefore, the expectations around a due diligence process for selecting joint venture operators should be the same. However the dynamics of the relationship between a principal and its agent and amongst non-operators and their operator are quite different, and therefore the vetting process, contracts, dialogue, training, etc. are also quite different. This is a separate topic on its own and will not be addressed in this paper.

Overall, it is not the label or title used to describe the intermediary that is important.⁵¹ Rather, it is how much they interact with public officials in countries at high risk for corruption, how they function and how they are compensated that determines whether they should be put through a rigorous due diligence process.

4.4 Selecting Intermediaries

Similar to any other business process, the objective in searching for an intermediary is to find the most qualified one. This would include individuals who are persuasive, well connected and tenacious; characteristics that you would expect of any good sales person or representative. However, they need more than that. They must know the business. They must be honest and display integrity in their business dealings. Companies need to keep in mind that if the individual they choose as their representative in a country is perceived as being dishonest, so is the company. If an intermediary has no business advantages apart from personal connections, serious questions concerning the appropriateness of that individual must be addressed and answered.

The company manager advocating a particular candidate should, based upon their interviews and inquiries, document the expertise and resources that candidate will bring to the job and that he or she has a good reputation in the community, understands the company's business values and will conduct the company's business with those same values.

4.5 Due Diligence

If the justification for retaining the intermediary is acceptable, another group within the company (such as legal, compliance or security) should conduct a due diligence on the candidate. Until that review is complete and final approval provided, the company needs to instruct the prospective intermediary not to undertake work on behalf of the company. It is not helpful if an intermediary starts acting on behalf of a company based upon an oral agreement or takes a personal initiative to prove his or her value to the company, especially if the company is subsequently accused of paying bribes because of something the intermediary did.

⁵¹ This does not appear to be the perception in many companies where there is great variation applied in the due diligence of intermediaries depending on their category or label. See: *TRACE Survey of Corporate Anti-Bribery Programs 2004* (Washington DC: Trace International, Inc., 2004) at p. 38.

Due diligence is the most important, most intrusive and potentially the most offensive part of the entire process of retaining an intermediary. The company needs to first decide on whether it collects this information by itself using investigative firms or request the intermediary to provide the information along with granting permission to independently verify its accuracy. The latter approach is much preferable. It is usually faster, more accurate and more transparent to the intermediary. It also throws up a red flag if the proposed intermediary objects to the process.

An important item to clarify in the due diligence process is whether the intermediary will be retained in an individual capacity or on a corporate basis. It is quite legitimate in many circumstances to retain corporate intermediaries if there are valid business reasons. But if the corporate entity is incorporated in a tax haven for the sole purpose of evading taxes or to ensure the anonymity of payments to the intermediary, then it is best to deal with the intermediary on an individual basis in their country of residence. If the agreement is directly with an individual, then the due diligence is much simpler since it is just focused on that individual. If the intermediary wants to use a corporate entity, then a more complex due diligence requiring information around the ownership of that entity will be needed.

Having determined all of those matters, a due diligence investigation should then be conducted using standardized questionnaires as much as possible to establish the background, status and qualifications of the intermediary. The first set of items listed below applies to all due diligence inquiries. A corporate intermediary requires further investigation to determine ownership and who ultimately is representing the company, as shown in the second set of items below.

Contact Information: Obtain the full name, address, telephone & fax numbers and email address of the company (and its principals) or individual.

References: Intermediaries should provide three independent business references and one financial reference. Conduct character and financial reference checks on the intermediary's effectiveness, reputation, government relations' expertise and business ethics. Ask questions to get a "yes" or "no" response followed by an opportunity to elaborate in order to avoid purely subjective assessments. Wherever possible, confirm that the intermediary does not possess a criminal record.

Qualifications: Confirm the education and professional qualifications of the proposed intermediary or its management personnel.

Affiliations: Confirm the business and government affiliations of the proposed intermediary, his or her family and close associates.

Reputation: Investigate the reputation of the proposed intermediary or its management personnel who will perform the requested services.

Disclosures: Intermediaries should disclose prior bankruptcies, criminal convictions or pending investigations for bribery, tax evasion, and all civil and criminal litigation in which they are or have been defendants.

Conflicts: Determine whether the intermediary has any business conflicts that may make it an unsuitable candidate for business reasons, even though it may be suitable from a compliance perspective.

Media Search: Search a global media database (such as Google, Yahoo, etc.) for the name of the intermediary, its owners, principals, partners, key employees, and third parties. This is a simple and cost effective way to determine if an intermediary is possibly involved in corruption. This can pop up in a newspaper, a website or someone's blog. The information may only be an allegation or even some offensive mud racking, but a company needs to be aware of these things in order to make informed decisions and not be caught by surprise.

Additional Due Diligence for Corporate Intermediaries:

Company Structure: Determine the organizational structure of the corporate intermediary. One can narrow the questions around ownership if the corporate structure of an intermediary, such as a partnership or corporation, is known.

Company Description: Corporate intermediaries should provide a brief history of their company and their qualifications, including years in business, number of employees, business experience and facilities. Check out their website if they have one, since a lot of information can be found there.

Ownership Information: Confirm the stockholders, partners or other principals of the proposed intermediary. Confirm if any of them are government officials, political party officials, political candidates or related to or close associates of any of them. A good rule of thumb is to identify ownership interests of 5% or more for publicly traded companies.⁵² Complete beneficial ownership should be acquired for privately held firms. This ensures that people are identified, not holding companies or hidden trusts, and that those people are not public officials. Each person having an ownership interest in a privately held corporate intermediary should disclose his or her employment by the government and of any immediate family member and provide a CV. They should also be asked to provide information on other companies in which they are officers or directors or where they have a 5% or more interest. Even if the intermediary has no apparent ties to government, another company with the same ownership might have made illegal payments.

Management Information: Confirm the directors, officers and the management team of the proposed intermediary. Confirm if any of them are government officials, political party officials, political candidates, or any relative or close associate of the foregoing.

⁵² See, Alexandra A. Wrage, *The TRACE Standard: Doing Business with Intermediaries Internationally* (Washington DC: Trace International, Inc., 2008).

Employees and Third Parties: Corporate intermediaries should identify the key employees and third parties that they will use to act on behalf of the company. Intermediaries (and ultimately their clients) are responsible for the actions of their employees, independent contractors and subcontractors.

Financial Information: Examine the audited, or where unavailable the unaudited, financial statements of the proposed intermediary to confirm its ability to perform the services requested. If audited financial statements are not available, ask the financial reference about the length of the intermediary's relationship with it. Their answer can provide confirmation on the intermediary's financial stability as well as whether the intermediary banks locally rather than in another country where there may be less banking transparency.

4.6 Tiered Due Diligence

The list of due diligence items provided above can be overly extensive and burdensome when a company wants to sell a few low cost items using a local sales agent for a small commission or wants to use service providers such as accounting & law firms, real estate agents or public relations firms in high risk countries. A tiered approach is therefore appropriate to address various business situations, kinds of intermediaries and levels of risk.

The level of due diligence required is determined by the nature, function and level of risk associated with the intermediary rather than its label or title. The following risk factors⁵³ should be used to set the appropriate level of due diligence:

- Purpose for retaining the intermediary.
- Whether the intermediary has direct contact with public officials on behalf of the company and the nature and frequency of that contact.
- Size or value of a concession or contract awarded by a government.
- Whether the intermediary sells or markets the company's products or services to government or business customers.
- Volume and value of the company's sales in the country or territory assigned to the intermediary.
- Amount and type of compensation paid by the company to the intermediary.

A company can use either two or three tiers or levels of due diligence by varying the kind of information compiled and how it is collected. Those items would be:

- Whether independent interviews are conducted on the intermediary.
- Information on all or some of the owners, directors and employees of corporate intermediary.
- Information on outside ownership interests, directorships or employment of intermediary.
- Information on intermediary's position in political parties or campaigns.

⁵³ As an example, See: TRACE's Resource Center located at www.traceinternational.org which is accessible to TRACE members only.

- Information on family members of intermediary who are public officials.
- Information on government contracts held by intermediary.
- Number of business and financial references checked.
- Requirement of audited financial statements or financial references as opposed to a self-certified financial position.
- Review of local laws by either relying on the intermediary, using the TRACE service described below or by using local counsel.
- Using TRACE and/or an investigative firm to conduct the due diligence.

Another item to consider is the frequency of due diligences. Most companies update their due diligences every 2-3 years, which usually coincides with the renewal of an intermediary's contract. Some companies renew their due diligences on an annual basis; quite often by varying the rigor and amount of detail in each annual review. The minority of companies that do conduct due diligences restrict it to the time of hiring the intermediary.⁵⁴ Best practice in this area would expect at a minimum that the company would update the due diligence at contract renewal (assuming a 2-3 year contract) and that an annual refresher would be best with a more thorough and complete due diligence done every 2-3 years or when the company was made aware of an alleged improper payment.

TRACE provides an excellent two tier due diligence process to its members.⁵⁵ Their basic due diligence service, called TRACEcheck, allows member companies to pre-pay a modest fee for it. TRACE then issues an electronic code to the company who can provide it to their intermediary candidate. The intermediary can then go to the TRACE website, enter the code and input the requested information in an electronic questionnaire. TRACE conducts a media search and confirms that the information submitted is legitimate. TRACE then issues its report, which would highlight any red flags found during the process, to the company who would then decide to either act upon the report or follow up with more due diligence if appropriate.

4.7 Due Diligence Service Providers

Companies are usually not able to carry out extensive due diligences on their own. They will therefore need to outsource much of the due diligence work. The first source to consider is TRACE, which provides multiple due diligence reports for an annual corporate fee to its members. Its two tier due diligence service described above provides a very good process for the retention of most intermediaries. Where a company is retaining an intermediary to help on a very large government contract, it may also want to retain an investigative firm to provide a more extensive and detailed background check on the individual or principals being considered. In addition to investigative firms, companies may need to use law firms to advise on local law where appropriate. In many cases, the TRACE service described in the "Local Law" section below will be sufficiently adequate to confirm the legitimacy of retaining agents in a particular country.

54 See: *TRACE Survey of Corporate Anti-Bribery Programs 2004* (Washington DC: Trace International, Inc., 2004) at p. 40.

55 See, TRACE website at www.traceinternational.org for more details.

4.8 Compensation

There are two basic ways to compensate intermediaries: 1) a commission or contingency basis, or 2) a time basis such as monthly, daily or hourly fees. Both forms of compensation are legal in most cases. However, intermediaries compensated on a pure contingency basis present a much higher risk. When their payment is triggered by the awarding of a government contract, there is significant pressure to pay a bribe to a public official to ensure success. Intermediaries paid a flat hourly, daily or monthly fee have less incentive to make an illegal payment in order to secure business since their income is not immediately tied to obtaining or retaining business. Whatever the form of compensation, intermediaries in high risk countries still need to be vetted. However, some forms of compensation are more at risk than others and thus need more vetting.

Ideally, intermediaries should first state the range of commissions or fees that they want and how appropriate it is for the region. The company then needs to confirm whether the level of compensation is reasonable given the experience of the intermediary, the country where the services are to be performed, the expected results, and the amount and difficulty of the work to be performed. Some benchmarks must be determined in order to justify the compensation package. This is usually not easy to do; especially for unique, difficult and large projects where the intermediary is paid on a contingency basis. It can be easier to justify the amount of compensation for time based fee structures. TRACE has done a survey on ranges of reasonable contingency fees but it is very general in nature and scope and does not lend much assistance in determining reasonable rates by country or industry.⁵⁶

4.9 Local Law

Prior to retaining an intermediary, companies need to confirm whether local law requires, permits or prohibits the retention of an intermediary.⁵⁷ This can be verified in several ways. Firstly, TRACE provides its members an extensive database on its website of approximately seventy countries that includes information on whether agents are permitted or prohibited, and if so, under what circumstances.⁵⁸ Secondly, a company can request the intermediary to identify the laws and regulations that apply to their industry in their home country. This allows the intermediary to show its willingness to research and comply with governing laws. Thirdly, a company's legal department can obtain an opinion from

56 TRACE International, Inc. has conducted a contingency fee survey which is available only to its corporate members.

57 The Hilmarton arbitration case involved the retention of an Algerian agent by a European company which maintained that the agent's agreement was invalid because Algerian law prohibited using agents to gain business from the Algerian government. There were allegations of bribery. The sole arbitrator found the contract null and void. The Swiss courts overturned this decision and appointed another arbitrator who found the contract valid. Collection of ICC Arbitral Awards (1991-1995) 220. ASA Bull. 1993, 247; Rev. arb 1993, 327; Riv. Dell' Arbitrato 1992, 773; Yearbook Comm. Arb'n XIX (1994) 105 (in English).

58 See the Country Bulletins in TRACE's Resource Center located at www.traceinternational.org which is accessible to TRACE members only.

local counsel. Individual intermediaries or owners of corporate intermediaries should also provide citizenship information. There are a number of countries that restrict the role of non-citizen intermediaries. Companies need to ensure that these local laws are not breached. All or some of these techniques can be used to determine if the country where business will be conducted requires, permits or prohibits intermediaries.

4.10 Employee Certification

Where a company does not retain intermediaries on a regular basis, a good technique to use is to require employees who propose the retention of an intermediary to certify in writing that the intermediary has been personally interviewed by that employee and that there is no reason to believe that the intermediary has violated or will violate anti-bribery laws or the company's policy on improper payments regarding any activities on behalf of the company. This makes employees think twice before they make such a proposal and limits the retention of intermediaries only to situations where it makes good business sense.

4.11 Red Flags

Investigative officials have identified a number of "*red flags*" that indicate potential risks.⁵⁹ Any red flags that are identified in the due diligence process should be noted and investigated. The more red flags and the more serious they are, the greater the risk with the intermediary. All of which must be considered in the approval process. Red flags do not necessarily result in an intermediary being rejected. But they do require significant additional investigation so that a company can clarify the facts and properly assess the risk before making its decision. A list of red flags to consider is provided below.

General Red Flags

The following are general red flags that do not by themselves indicate specific liability risks on a particular transaction. They indicate areas where the risks are heightened.

- A company has received an "improper payment" audit in the past five years.
- Payment in a country with widespread corruption or a history of bribery violations occurring in that country.
- Widespread news accounts of payoffs, bribes, or kickbacks.
- The industry involved has a history of bribery violations. These include the defense, aircraft, energy and construction industries.

Transaction Red Flags

⁵⁹ See, U.S. Department of Justice, *Lay-Person's Guide to FCPA* (updated version, Jun. 2001) <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>. See also Deming, *supra id.* at 355.

- An intermediary refuses to provide confirmation that it will abide by applicable bribery laws, or is ignorant of or indifferent to local laws and regulations.
- Family or business ties of an intermediary with a government official.
- The intermediary has a bad reputation or is the subject of credible rumors or media reports of inappropriate payments. This is a significant flag.
- The intermediary requires that its identity not be disclosed.
- A foreign government official recommends the intermediary. This could suggest a co-ordinated scheme to divide a payoff.
- An employee recommends the intermediary with enthusiasm out of proportion to qualifications.
- Lack of appropriate facilities or qualified staff.
- Insolvency or significant financial difficulties.
- Use of shell companies that obscure ownership without a credible explanation or refusal to disclose owners, partners or principals.
- Lack of experience or track record in the industry.
- Misrepresentation or inconsistencies in the intermediary's representations found through the due diligence process.
- A business reference declines to respond to questions or provides an evasive response.
- Any other odd request by an intermediary that arouses suspicion.

Payment Red Flags

- Excessive or unusually high compensation. The appropriate compensation will vary depending upon the extent of the intermediary's obligations, the risk that the intermediary must incur, whether it is committing its own capital to the venture, or if it is incurring high documented expenses.
- Requests for unusual bonuses or extraordinary payments.
- Requests for an unorthodox or substantial up front payment or a request that invoices be backdated or altered.
- Payment through convoluted means.
- Over-invoicing (e.g., the intermediary asks you to cut a cheque for more than the actual amount of expenses).
- Requests that cheques be made out to "cash" or "bearer", that payments be made in cash, or that invoices be paid in some other anonymous form.
- Requests for an unusually large credit line for a new customer.
- Requests for increase in compensation during the contract term.
- Requests for payments to a bank account in a country other than the intermediary's country of residence or the country of the business activity, into a numbered account or to third parties or their bank account.

4.12 Approval

After the completion of the due diligence, the legal or compliance team should write a report or memo summarizing the review process with a conclusion that the intermediary is or is not an appropriate choice. The memo should be reviewed and approved by senior management with no direct interest in the retention of the intermediary on the following basis:

- There is a clear business justification for retaining an intermediary.
- The person or organization being proposed is well qualified and is the most suitable candidate to act as an intermediary for the company.
- The level and form of compensation for the intermediary is reasonable and appropriate for the services being performed.
- The services of the intermediary are clearly defined and are valid under all applicable laws. This would include the domestic laws applicable to the company and the intermediary and the domestic laws of the countries where the business activity is occurring.

4.13 Contract

After obtaining internal approval, a company should only retain an intermediary using a written agreement with the following provisions:

- A precise definition of the scope of the intermediary's duties.
- The intermediary acknowledges that it understands the provisions of the company's policy on improper payments and agrees to comply with its terms as well as with any provisions of applicable law.
- The intermediary acknowledges that the contents of the agreement may be disclosed by the company to third parties as appropriate.
- The intermediary provides representations and warranties that neither it nor any of its principals, staff, officers or key employees are public officials, candidates of political parties, or other persons who might assert illegal influence on the company's behalf, and that it will promptly inform the company of any changes.
- The intermediary will promptly advise the company of any accession to an official position.
- The company expressly states that its choice of intermediary was made after considering factors that support a belief that the applicable law and its policy will not be violated.
- Assignment of the agreement by the intermediary is prohibited without the company's prior written consent.
- Payment will be by cheque made out in the intermediary's name or by wire transferred to a bank account that is registered in the name of the intermediary and agreed upon by the company.
- Travel, entertainment and other miscellaneous expenses will not be paid without the company's prior written approval. The intermediary will keep detailed records of those expenses.
- The company has the right to audit the intermediary's records, including the expenses and invoices of the intermediary.
- The agreement provides for automatic termination without compensation in the event of an improper payment in violation of applicable law or the company's policy.
- The intermediary will make annual certifications of its compliance with applicable law and the company's policy and that none of the payments made to it by the company have been directed towards a public official.

Corporate intermediaries present an extra challenge around potential future changes in the shareholder structure of the corporate intermediary. Since a company always wants to know who is acting on its behalf, it should consider requiring, in addition to the consultant agreement, a shareholder agreement signed by all the shareholders of the corporate intermediary and itself that restricts the ability of the corporate intermediary and its shareholders from changing its share structure without the prior approval of the company.

A good precedent agreement to consider for retaining intermediaries, especially for the extractive industry, is the *Model Consultant Agreement for Business Development in a Host Country* (second edition) issued by the Association of International Petroleum Negotiators in 2008.⁶⁰

4.14 Documentation

It is very important for companies to keep detailed written records of their entire process of recruiting and retaining intermediaries. This would include interviews, the due diligence documentation, written recommendations, approvals, training programs and contracts. These records should be available to the company's internal and external auditors and, upon specific request, by authorized government authorities under conditions of confidentiality.

Such evidence can reduce criminal and civil liabilities and mitigate reputational damage if a company is the subject of a bribery investigation and prosecution, since it documents that the company took all reasonable steps to prevent the payment of a bribe.

4.15 Managing Intermediaries

The management of the relationship with an intermediary and its associated risks is not a single event. It is an ongoing process. The company (through its employees who manage the relationship with the intermediary) should take reasonable measures within its power to ensure that on a go forward basis:

- Any payment made to an intermediary represents no more than an appropriate remuneration for legitimate services rendered by that intermediary.
- No part of those payments is passed on by the intermediary as a bribe in contravention of applicable law or the company's policy.
- The intermediary will provide an annual certification of its compliance with applicable law and the company's policy and will certify that none of the payments made to it by the company have been directed towards a public official.
- The intermediary is fully briefed on the company's policy and the company's business practices to ensure that it is in complete alignment and agreement with the company on how it will represent the company and assist it in obtaining or retaining business.

⁶⁰ See AIPN website at www.aipn.org.

- The intermediary is trained in the anti-bribery laws of the company's and the intermediary's country.⁶¹ Companies can provide the training for intermediaries themselves or can require the intermediary to acquire proper training from a qualified organization such as TRACE.
- The intermediary will become and will maintain a membership in TRACE.
- It maintains a record of the names and terms of employment of all intermediaries who are retained by it in connection with transactions with public bodies or state enterprises. This record will be available for inspection by the company's auditors and, upon specific request, by appropriate, duly-authorized governmental authorities under conditions of confidentiality.
- The activities of the intermediary are appropriately monitored to ensure that there is no breach of applicable law or the company's policy.

Many of the above requirements can be made conditions subsequent in the intermediary's contract. What is most important is that the company ensures that those requirements are managed and met on an ongoing basis.

5. Conclusion

The proper retention of local consultants or intermediaries in foreign lands can be a lengthy, complex and somewhat costly exercise. However, the risks and costs associated with getting it wrong vastly outweigh the upfront effort in getting it right. This can only be done properly when a company's board and management fully support the right process of recruiting, retaining and managing intermediaries. As eloquently stated by the President of TRACE:

"No amount of vetting, training and auditing of intermediaries will protect a company from violations of anti-bribery laws if the corporate culture does not place a premium on ethical conduct and if ultimate responsibility for compliance does not reside with its senior executives."⁶²

Finally, it must be emphasized that this process is not a matter of checking the boxes even though this article has described many of them. Unfortunately, many companies manage this issue with more and more boxes each year. At the end of the day what is important is to complete a thorough of analysis of the ascertainable facts and to exercise independent judgment around the decision to retain an intermediary. Ultimately you need to step back, analyze the situation for what it is and determine whether you are hiring an honest person or organization that will not pay bribes. It is often this lack of analysis and exercise of independent judgment that is at the root of a future problem.

61 See: *TRACE Survey of Corporate Anti-Bribery Programs 2004* (Washington DC: Trace International, Inc., 2004) at p. 28. It indicates that less than half of all companies surveyed provide training to intermediaries and that it was primarily given at the time of hiring.

62 Wrage, *supra id.* at 4.