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ICC Third Party Guidelines

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International Chamber of Commerce
The world business organization

Policy statement

Prepared by the ICC Commission on

Corporate Responsibility and Anti-corruption

ICC Guidelines on Agents, Intermediaries and Other Third Parties

Summary

These ICC Guidelines on Agents, Intermediaries and Other Third Parties voluntary guidelines provide companies with advice on how to choose and manage third parties.

Third Parties can sometimes present the "weak link in the chain" in terms of an enterprise's anti-corruption policies and practices. That is why these Guidelines are presented as a useful guidance tool for enterprises to help them manage third parties and reduce the risk of reputational damage to the enterprise.

It is envisaged that these Guidelines are to be referred to only where a structured risk management approach indicates that one is confronted with a sensitive choice in the vetting or managing of a Third Party.

It should be emphasized that these Guidelines are voluntary, and not prescriptive, and offer a benchmark for companies to adapt to their particular circumstances if they wish. They are of a general nature on what is considered good commercial practice, without any legal or binding effect. It is paramount that enterprises are able to retain flexibility in the manner they may choose to seek guidance from these ICC Guidelines.

These Guidelines refer to the provisions of the ICC Rules for Combating Extortion and Bribery, indicating that enterprises should take measures within their power to ensure that agents agree explicitly not to pay bribes and that enterprises maintain records of all agents retained.

The Guidelines indicate that in selecting a due diligence process, it is for the enterprise to choose the process that is appropriate to it unique circumstances. This process can include an objective review of the Third Party candidate.

On the scope of due diligence, the enterprise can categorize its own Third Party relationships, based on a structured risk management approach, to have a clear understanding of its vulnerabilities. An enterprise's interests are best served if the due diligence process itself is a thoughtful, comparative process, not a "check the box" exercise. The role of sponsoring and reviewing departments is important in connection with the vetting of the Third Party.

In carrying out anti-bribery due diligence, companies need to be sensitive to circumstances that suggest bribery risks or "red flags" that may suggest commercial, legal, financial, ethical or other irregularities.

After an enterprise has vetted a Third Party, it may be helpful to put the terms of the relationship in writing, as verbal contracts pose greater business and legal risks to enterprises. Finally, as with all company anti-corruption policies and programs, it is useful for enterprises to communicate their anti-corruption policies to Third Parties that they engage, as well as to their own employees.

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I. Introduction

Many enterprises use intermediaries to obtain or retain business opportunities. Agents, consultants, intermediaries and other Third parties, hereinafter referred to as "Third parties", are an effective means of developing, expanding and maintaining an enterprise's international business. Even very large businesses need in a globalised economy to have recourse to Third parties in order to allow them to reach all the areas and to market all the products and services they want to cover. Third parties can, however, if not carefully selected or if inappropriately managed, create considerable risk and damage to the enterprise.

These Guidelines, which are for voluntary application by enterprises, provide enterprises with advice on how to select, remunerate and manage Third parties, so as to obtain the best possible result without harm to the enterprise's reputation. The Guidelines are of a general nature constituting what is considered good commercial practice but are without legal effect. They are the result of numerous consultations with input from many segments of business. These Guidelines are intended for enterprises which have recourse to Third parties or intend to do so, but they should also induce all public officials to abstain from any form of extortion or solicitation directed to Third parties.

A large number of Conventions and implementing national legislation criminalize bribery in all its forms, direct bribery as well as indirect, and trading of influence, and sanction infringements by individuals and enterprises with heavy penalties. In addition, more and more criminal law provisions require enterprises to install in their organizations effective preventive systems, which should aim at avoiding any occurrence of bribery. An increasing number of States, inside and outside the OECD area, are increasing their enforcement resources and efforts in order to detect, identify and punish bribery, exposing enterprises to extensive liability under a variety of anti-bribery laws.

Third parties include a broad range of entities and individuals that act on an enterprise's behalf, including agents, business development consultants, sales representatives, customs agents, general consultants, resellers, subcontractors, franchisees, lawyers, accountants or similar intermediaries, even if these Third parties themselves are not subject to the anti-bribery laws. The common factor is that Third parties are subject to the control or determining influence of the enterprise and thus within its proper sphere of responsibility. It follows from the definition above that Third parties do not include service or goods providers. Third parties may act on the enterprise's behalf in connection with marketing or sales, in the negotiation of contracts, the obtaining of licenses, permits or other authorizations; or any other actions that benefit the enterprise or as subcontractors in the supply chain.

Bribery risks also may arise while employing Third parties who act in the private sector. A growing number of mandatory international and national legal provisions make commercial bribery a criminal offence. It is therefore recommended for enterprises who are subject to such legal provisions to apply Guidelines to intermediaries acting not only in the public but also in the private sector. Enterprises also should consider applying the principles of the Guidelines to intermediaries who are not employed in the sales phase, but at a later stage of a transaction, such as customs agents or claim managers, since bribery risks also may arise during the implementation phase of a contract or project.

It is the purpose of these Guidelines to provide guidance on due diligence processes on Third parties that are designed to ensure that, to the extent possible, enterprises engage, or do business with, only reputable and qualified Third parties who will act with integrity, and in compliance with all applicable laws and enterprise policies. After entering into a relationship with a Third party, the enterprise should have effective controls in place to mitigate the risks of non-compliance.

These Guidelines set out some due diligence processes and additional safeguards that enterprises may wish to consider when dealing with Third parties and are directed to all enterprises who engage or wish to engage Third parties. Small and medium enterprises may use them as a basis for creating their own internal Guidelines; large enterprises may wish to benchmark their own rules.

Many enterprises that use the services of numerous and varied types of Third parties find that a tiered due diligence program allows an enterprise to devote more resources to Third parties that present a high level of bribery risk while ensuring that all Third parties are appropriately reviewed. Under a tiered system, higher risk Third parties are subject to a more stringent review while lower risk Third parties undergo a less comprehensive review. The first step in creating a due diligence protocol that is comprehensive as well as efficient and cost-effective is to create a complete and accurate inventory of the types of Third parties (and activities performed on behalf of the enterprise by such Third parties) and their relations (with public officials or private to private), to identify levels of risk, red flags and exposure for the enterprise and, finally, to define appropriate degrees of reviews.

II. ICC Rules regarding Third Parties

Under Article 2 of the ICC Rules:

Enterprises should make their anti-corruption policy known to all agents and other intermediaries and make it clear that they expect all activities carried out on their behalf to be compliant with their policy. More particularly, enterprises should take measures within their power to ensure:

a) *that any payment made to any 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;*

c) *that agents agree explicitly not to pay bribes. Enterprises should include in their contracts provisions to terminate agreements with agents if a bribe is paid, except for agreements with agents performing routine administrative or clerical tasks;*

d) *that they maintain a record of the names, terms of employment, and payments to all agents who are retained by them in connection with transactions with public bodies, state or private enterprises. This record should be available for inspection by auditors and by appropriate, duly-authorized governmental authorities under conditions of confidentiality.*

The foregoing provisions should be applied to all agents or other intermediaries used by the enterprise to obtain orders and permits, including sales representatives, customs agents, lawyers, and consultants.

These principles in the ICC Rules are an integral part of these Guidelines.

III. Selecting a Due Diligence Process

There is no standard due diligence process that is suitable for all enterprises. Rather, an enterprise should choose a due diligence process that is appropriate to its unique circumstances, including its size, resources, and risk profile.

An enterprise's first step in developing an appropriate due diligence process is to define the scope of the process broadly enough to capture the enterprise's exposure to Third party risks (see chapter IV below). This step involves defining the categories of Third parties that can create potential liability for the enterprise, and deciding which of these categories of Third parties must be subjected to a due diligence review prior to retention. In doing so, an enterprise should be careful not to elevate form over substance, and should focus on the activities performed by and not on the title of the Third party. For example, an enterprise may need to re-categorize Third parties—someone called a "distributor" may act more like a "sales agent". Additionally, enterprises operating in industries or geographical areas where bribery is prevalent should consider conducting due diligence on Third parties that are typically considered low-risk in other contexts.

Next, an enterprise will need to decide on a suitable due diligence process (see chapter V below). Such process can be designed to provide an objective review of the candidate Third party, and to collect information, subject to compliance with applicable personal data protection legislation, about the candidate Third party and the transaction from the Third party itself, the enterprise's own employees, and other sources. Enterprises should consider inquiring about the Third party's status (e.g., to determine whether they, or their beneficial owners, or directors, managers or employees are themselves officials), background (e.g., qualifications for the services to be provided), and reputation. Enterprises should also respond to "red flags" (e.g., reputation for cutting corners) that will alert enterprises to the risk that a Third party will make improper payments (see chapter VI below). This process can be as simple as requiring Third parties and enterprise employees to submit forms containing relevant information and verifying that information through internet research and conversations with references. Enterprises facing significant Third party risks, however, may wish to subject Third parties to reviews of greater depth, which could include interviews, consultations with outside attorneys, or hiring independent investigators such as law firms or providers that specialize in due diligence services.

Additionally, an enterprise might – at least where a certain risk for bribery is feared - establish a process for the due diligence review and approval of Third party transactions that requires the participation of a designated function independent from the business unit that may have an interest in engaging the Third party ("the Sponsoring Department"), e.g. Compliance or Legal ("the Reviewing Departments") (see chapter VII below). For small to medium sized enterprises that do not have the internal resources to support an independent Compliance or Legal organization, the due diligence review and approval process could be managed by individuals who are independent of the Sponsoring Department. Some enterprises may consider involving outside legal or compliance or accounting experts in the due diligence process.

Finally, an enterprise may wish to implement safeguards to protect itself from Third party risks going forward. In particular, an enterprise may require written contracts (including anti-corruption provisions; see chapter VIII below), provide anti-corruption training to enterprise employees and Third parties (see chapter IX below), monitor Third parties (see chapter X below), and develop Guidelines for making payments to Third parties (see chapter XI below).

IV. Scope of Due Diligence

While each enterprise can review and categorize, on the basis of a structured risk management approach, its own Third party relationships to gain a clear understanding of its vulnerabilities, certain categories of Third parties tend to expose enterprises to greater risks than others.

These categories of high risk Third parties, and any others identified by the enterprise, can be subjected to a thorough due diligence review prior to retention:

- Any Third party that will be engaged to deal directly with a public official on behalf of the enterprise where that official has discretionary authority over some matter impacting or involving the enterprise, and, in particular, such Third parties that are located or doing business in a country with high levels of bribery;
- Any Third party engaged to interact with public officials that is compensated on the basis of their success in securing a contract, permit or increased business;
  Similarly, the enterprise will also try to identify the circumstances in which Third parties are the most exposed to private-to-private bribery.
- Any Third party that is engaged to seek information that is not publicly available;
- Any Third party that may be, or may have been, a public official or an enterprise in which a public official holds an economic interest (e.g., as an owner, shareholder, employee, or director);
- Any Third party who is or may be a relative or close associate of a present or former official, or a Third party that has a relative of a present or former official as an owner, shareholder, employee, director; and
- Any Third party that is owned or controlled by or closely linked to a government agency.

The scope of a due diligence review should be sufficient to assess whether the Third party is unsuitable; that is, whether the Third party is likely to engage in any improper practices that could expose the enterprise to liability or that otherwise may be inconsistent with the enterprise's business practices and ethics principles. If the Third party is suitable, the due diligence review should confirm that the proposed transaction with the Third party is legal under applicable law and provide a reasonable record supporting the presumption that the Third party will not use its influence with the government, public entities or the private sector in order to corruptly obtain or retain business, other authorizations or permits or other improper advantage in the conduct of business. The amount of time and effort required for the review will depend on the number and complexity of the issues raised during the course of the review.

V. Due Diligence Process

An enterprise's interests are best served by a due diligence process that is effective and efficient. Due diligence is a thoughtful, collaborative process, not a "check the box" exercise. Such process can either be conducted inside the enterprise or outside of it by external qualified due diligence service providers. In the latter case, the final decision to retain or not the candidate Third party should be taken by the enterprise and not outsourced. If the process is conducted inside, all employees involved in a Third party transaction should be equally responsible for the success of the process. Specifically, the Sponsoring Department should provide the Reviewing Departments with the factual background required to complete the due diligence process. The Reviewing Departments, in turn, should work quickly to identify issues and to try to resolve them in a manner that protects their enterprise from risk while facilitating its efforts to compete in the marketplace.

In performing a due diligence review, enterprises may wish to collect and verify detailed information from prospective Third parties, internal sources, and other reliable sources outside of the enterprise.

1. Enterprises can collect information from the Sponsoring Department by:

Requiring the Sponsoring Department to complete an application form. Often, the employee proposing the engagement of a Third party has an interest in the hiring of the candidate Third party or the success of the deal. Because such interests have the potential to obscure the risks posed by a particular Third party, this employee alone should not be allowed to make the final decision on the engagement of the candidate Third party. Thus, a first step in the process should be to require the Sponsoring Department to submit written information regarding the candidate Third party. Such information can be provided in a form that sets forth the business need for employing a Third party, the business justification for the proposed compensation, an evaluation of the commercial and technical competence of the candidate Third party (e.g. his knowledge of the enterprise's products and services), specific information regarding the candidate Third party's reputation for integrity, details on how the candidate Third party was identified, whether any other Third parties were considered, and why the candidate Third party was proposed. The form can also contain a confirmation by the employee that, to the best of his or her knowledge, the candidate Third party is qualified and suitable for engagement. The form can also provide information on the services that the candidate Third party shall provide; the main terms of the contractual arrangement to be entered into with the candidate Third party; a description of the amount of the proposed compensation payments; and an assessment of why the proposed compensation is reasonable and appropriate in relation to the services to be performed.

2. Enterprises can collect information directly from the candidate Third party by:

Requiring the candidate Third party to complete a questionnaire and provide documentation supporting the answers. The topics covered by such questionnaires can include the candidate Third party's basic information and qualifications (e.g., the candidate Third party's principal officers, facilities and staff, principal product lines, and the nature and history of the candidate Third party's business); ownership and other business interest (e.g., other enterprises affiliated with, or owned or represented by the candidate Third party); status (e.g., whether any of the candidate Third party's owners, directors or employees are or previously were public officials); other connections with public officials (e.g. familial or other relationships); financial data; any current and previous litigation involving the candidate Third party's activities; information about current and previous criminal investigations, sanctions, debarment and convictions under the criminal law of the territory or abroad for facts related to bribery, corruption, money laundering or violations of laws or regulations governing enterprises; and contact information for business references (one should pay attention to possible restrictions arising from mandatory local law, e.g. data privacy issues with regard to the candidate Third party's employees). Supporting documentation should for example include excerpts from the commercial registry, where available, as well as the candidate Third party's articles of association.

Interviewing the candidate Third party, in person if feasible. Although not practical for all retentions, interviews conducted in person are generally more effective in assessing the responses to these inquiries, and provide a better setting to ask the often delicate questions necessary. Such in person interviews, particularly when conducted on-site, can aid enterprises in verifying the information in the candidate Third party questionnaire, following up on any "red flags" that have come to light, determining the candidate Third party's business credibility, determining the candidate Third party's ability to provide the types of services contemplated and to comply with the ethical standards of the enterprise. Such interviews can also be used as an opportunity to train the candidate Third party regarding enterprise policies and procedures, and to communicate the enterprise's commitment to complying with applicable anti-bribery laws and its own anti-bribery policies, its intent to monitor the candidate Third party throughout the relationship, and its requirement that the candidate Third party will provide services without making any improper payment to an official. Ideally, such interviews should be conducted by or together with the Reviewing Departments, and the interview should be summarized and recorded in a memorandum and included in a due diligence file that should be kept in the enterprise's records.

3. Enterprises can collect information from the business units by:

Gathering further information regarding the candidate Third party from internal sources other than the person who has proposed to engage the candidate Third party. Such sources can provide the enterprise with information about the candidate Third party's past dealings with the enterprise, including the scope of any other agreements with the enterprise, amounts of past payments made by the enterprise to the candidate Third party and the potential amount of total payments to the candidate Third party under all agreements between the enterprise and the candidate Third party, and the candidate Third party's background and reputation.

Comparing the candidate Third party's proposed compensation to internally prepared compensation Guidelines and any external benchmarks that are available. Such comparisons can assist enterprises in determining whether the proposed compensation is appropriate remuneration for the services rendered by a Third party. Compensation Guidelines can take into account the services to be performed, past performance of the candidate Third party, the candidate Third party's competence and resources, the complexity of the activities involved, the duration and nature of the contract with the customer, and prevailing rates for such services in the market served.

4. Enterprises can collect information from other sources outside the enterprise by:

- Contacting, as far as possible, Third party's references (e.g., commercial and bank references);
- Searching publicly available news sources or local press clippings;
- Searching internet databases or obtaining reports from independent enterprises that compile financial and other information about commercial entities;
- Searching government databases of parties subject to sanctions;
- To the extent possible, consulting with embassy staff or other government sources about the candidate Third party and the region in which the candidate Third party operates;
- Engaging an enterprise that specializes in performing due diligence;
- Seeking a local law opinion where there is an issue of whether the arrangement between an enterprise and a Third party is permissible under local law and under the terms and conditions of the relevant customer contract; and
- In addition, an enterprise may consider collecting or verifying information from independent sources.

Additionally, an enterprise should observe its due diligence review and keep its information current. This can be accomplished by:

- Documenting, compiling, and maintaining the information gained during the review in a due diligence file; and
- Periodically updating the due diligence performed on the candidate Third party, at least when the contract with the Third party is being renewed or updated.

VI. Anti-Bribery "Red Flags"

In conducting anti-bribery due diligence, it is important that enterprises be sensitive to circumstances that suggest bribery risks. Circumstances that may indicate a Third party's propensity to make illegal payments to public or private sector officials or employees are commonly referred to as "red flags." Indeed, any fact that suggests commercial, financial, legal or ethical irregularity can constitute a "red flag." "Red flags" can arise at any stage of a Third-party relationship, including during an enterprise's selection of the Third party, during contract negotiations, in the course of operations, or at termination. "Red flags" that do not present serious issues at one stage of a relationship may pose significant risks of liability when they appear at a different stage or in combination with a different overall set of facts. Thus, enterprises may wish to evaluate the significance of "red flags" in the context of all of the facts, rather than in isolation. However, depending on the nature of their business and their enterprise policies, enterprises can define one or several of these "red flags" as general showstoppers.

Although such "red flags" may not themselves constitute violations of the anti-bribery laws, they are warning signs that need to be taken seriously and investigated. The presence of one or more "red flags" does not necessarily mean that the transaction cannot go forward, but it does suggest the need for a more in-depth inquiry and the implementation of appropriate compliance safeguards. Any red flags must be addressed to the satisfaction of the enterprise engaging the Third party prior to entering into the relationship.

Red flags that warrant further review when selecting or working with a Third party are varied and numerous. The following are a few examples:

- A reference check reveals the Third party's flawed background or reputation, or the flawed background or reputation of an individual or enterprise represented by the Third party;
- The operation takes place in a country known for corrupt payments (e.g., the country received a low score on Transparency International's Corruption Perceptions Index).
- The Third party is suggested by a public official, particularly one with discretionary authority over the business at issue;

- The Third party objects to representations regarding compliance with anti-corruption laws or other applicable laws;
- The Third party has a close personal or family relationship, or business relationship, with a public official or relative of an official;
- The Third party does not reside or have a significant business presence in the country where the customer or project is located;
- Due diligence reveals that the Third party is a shell company or has some other non-transparent corporate structure (e.g. a trust without information about the economic beneficiary);
- The only qualification the Third party brings to the venture is influence over public officials, or the Third party claims that he can help secure a contract because he knows the right people;
- The need for the Third party arises just before or after a contract is to be awarded;
- The Third party requires that his or her identity or, if the Third party is an enterprise, the identity of the enterprise's owners, principals or employees, not be disclosed;
- The Third party's commission or fee seems disproportionate in relation to the services to be rendered;
- The Third party requires payment of a commission, or a significant portion thereof, before or immediately upon the award of a contract;
- The Third party requests an increase in an agreed commission in order for the Third party to "take care" of some people or cut some red tape; or
- The Third party requests unusual contract terms or payment arrangements that raise local law issues, payments in cash, advance payments, payment in another country's currency, payment to an individual or entity that is not the contracting individual/entity, payment to a numbered bank account or a bank account not held by the contracting individual/entity, or payment into a country that is not the contracting individual/entity's country of registration or the country where the services are performed.

VII. Approval of Third Party Transactions

Because of the potential for conflicts of interest described above, persons with responsibility or accountability for approving relationships with Third parties may need to be situated outside of the Sponsoring Department because of the potential for conflicts of interest as described above in chapter V.1. In addition, it may be useful for persons with this type of responsibility to have direct access to the CEO or the Board of Directors to ensure their independence and accountability. As a result, enterprises may want to nominate Reviewing Departments to be responsible or accountable for all decisions regarding the approval of Third parties that present bribery risks. Alternatively, enterprises could appoint a committee of individuals who are independent of the sponsoring entity or employee and, at minimum, comprised of representatives from e.g. the finance and legal/compliance departments.

VIII. Written Agreement in Advance of Services being Provided by the Third Party

After an enterprise has vetted a Third party through a due diligence review and the Third party has been approved by the relevant department but before any services are performed, it may be helpful to reduce the terms of the relationship to writing. Oral contracts pose considerably higher business and legal risks to enterprises, and should be avoided. Enterprises might wish to engage Third parties pursuant to a written contract that includes a provision which ensures compliance with applicable anti-bribery laws. Such contracts might be for a fixed term, describe in detail the services to be performed and the compensation to be paid, and contain termination rights for breaches by the Third party. In particular, enterprises might consider including the following anti-corruption provisions, representations, warranties, and covenants in contracts with Third parties:

- The Third party is not a public official, and does not have any official status. The Third party will notify the enterprise of any changes to these representations;
- The Third party does not have any relationship with a current official or any immediate relative or close associate of an official who would be in a position to influence a decision in favour of the enterprise, and the Third party will notify the enterprise of any changes to this representation;
- The Third party will comply with all applicable anti-corruption and anti-money laundering laws;
- The Third party is not and has not been the subject of a criminal investigation and has not been convicted under the laws of the relevant countries for facts related to bribery, corruption, money laundering or for violations of laws or regulations in force governing business enterprises;

- The Third party will comply with the enterprise's codes and Guidelines, in particular, the enterprise's rules on gifts and hospitality or has its own code or Guidelines with equivalent standards and will comply therewith;
- The Third party represents that no payments, offers, or promises to public officials or other third party beneficiaries have been, or will be made, directly or indirectly, for an improper purpose;
- The Third party agrees to comply with enterprise Guidelines and limits for reimbursement of expenses;
- The enterprise has the right to suspend or terminate the contract immediately upon unilateral good faith concern that there has been a violation of any applicable anti-corruption law or provision of the agreement without paying any compensation to the Third party, and the Third party agrees to indemnify the enterprise for expenses related to violations of the anti-corruption laws;
- The Third party agrees to a clearly defined scope of work that limits the Third party's ability to act on the enterprise's behalf;
- The Third party agrees to regularly report on its activities on the enterprise's behalf, and to provide detailed invoices and detailed supporting documentation for its expenditures;
- The Third party agrees to provide audit rights to the enterprise related to activities undertaken on the enterprise's behalf in the previous three years;
- The Third party agrees to submit the retention of subcontractors or other persons or entities designated to perform similar services to the enterprise for prior approval, if the subcontracted activity is of a 'high risk' nature, as defined in chapter IV above;
- The Third party is prohibited from assigning the contract or the compensation to be paid;
- The Third party agrees to payment provisions that include the safeguards identified in chapter XI below.
- The Third party is required to update the information supplied during the due diligence review;
- The Third party is required to maintain accurate books and records and appropriate internal controls; and
- The Third party is required to cooperate with any investigation into alleged breaches of the compliance provisions, including the requirement to provide access to documents and personnel.

Enterprises facing higher risks in connection with Third parties may wish to consider the following additional safeguards:

- Require the Third party to submit certain actions to the enterprise for prior approval (e.g., interactions with public officials);
- Include provisions that limit the Third party's ability to act on the enterprise's behalf in relation to government contracts; and
- Require, as appropriate, provisions for transparency of the relationship to local authorities.

IX. Raising Awareness for Third Parties and Training Employees

Because Third parties can expose enterprises to liability, it is desirable for enterprises to communicate their anti-corruption policies to the Third parties they engage and to their own employees. For all Third parties, a basic level of awareness can be accomplished by providing information on anti-corruption laws (e.g. of the country of origin or of the country of operation) and the enterprise's compliance policies and by using printed and/or web-based training programs. Such information ideally should be supplemented by raising anti-corruption awareness in-person at least for higher-risk Third parties. Enterprises may consider running such sessions for the owners, director, officers and employees of the Third party providing services to the enterprise, as appropriate to the nature of the Third party. For example, with a small, privately held sales agency or similar Third party it is recommended that the owners be trained. In some jurisdictions, the company will want to take into account co-employment risk in determining the modalities of the training, which will be provided to the Third party's employees.

Regarding an enterprise's own employees, at a minimum, the enterprise might choose to provide training and compliance materials to all employees who work with Third parties; employees who review and approve requests for Third party relationships; employees who review, approve and process payments to Third parties; and internal auditors, to ensure they adequately identify and respond to "red flags" during the relationship. Other groups of employees who interface with government agencies may also need training in anti-bribery compliance. Again, training could include the provision of written information on applicable laws and the enterprise's anti-corruption policies and procedures, web-based training, and in-person training sessions.

It is desirable to provide all such training programs and materials in the local language. Enterprises also can increase the effectiveness of training programs by providing periodic follow-up trainings.

X. Monitoring the Third Party's Activities

Once an enterprise has retained a Third party, it might monitor the Third party's activities and expenses to ensure continued compliance with all applicable laws and enterprise policies. If a Third party makes or promises an improper payment, an enterprise may be held liable under certain anti-bribery laws even if it did not authorize the payment. To guard against such liability, employees could:

- Insist on documentation of the services actually rendered before paying the contractual compensation and expenses;
- Review and approve payment requests and payments;
- Question unusual or excessive expenses;
- Refuse to pay a Third party and notify compliance or legal personnel when the employee suspects that the Third party has or will make or promise illicit or questionable payments or gifts, or when the employee discovers or comes to suspect the existence of any of the "red flags" listed above;
- Audit the Third party on a risk-based, periodic basis and promptly if suspicions arise;
- Establish periodic anti-corruption internal audits to review the retention, and monitoring of and payments to Third parties; and
- Require periodic, or annual, certifications of compliance by the Third party.

XI. Payments to Third Parties and Record-Keeping

Parties to a business relationship should be free to negotiate the reasonable, arms-length form and amount of compensation to be paid for the services of a Third party. There may be good and sufficient business justifications for many different types of compensation arrangements, including so-called success fees or similar incentive payments. Whether or not a success fee constitutes a Red Flag will depend on the circumstances, the existence of other Red Flags such as the CPI of the country where the services will be provided, and the identity and reputation of the agent or intermediary. For example, success fees are a traditional form of compensation in investment banking arrangements and if the intermediary is a well known and respected investment banking firm performing services in an OECD country with a high CPI, the anti-bribery risks are different than if the recipient of a sizeable success fee is a relatively unknown local agent without a well established reputation for integrity and whose task is to get a discretionary permit from a government official.

However, when engaging an agent or other intermediary the type and amount of compensation to be paid for the Third party's services may constitute a Red Flag that needs to be carefully analyzed and mitigated before engaging the intermediary. Compensation unrelated to hourly fees for documented time worked can constitute such a Red Flag and a "success fee" or "success bonus" will, in some situations, constitute such a Red Flag. Although these Guidelines do not recommend the complete avoidance of success fees in all cases, it is recommended that there should be special consideration given to the reasonableness and the commercial justification for any such success fees or other similar lump sum compensation not tied to fees for hours of work. Careful documentation of the legitimate business case for the engagement of the intermediary and for the nature and extent of such compensation is a recommended safeguard to be employed along with the other anti-bribery safeguards recommended in these Guidelines for higher risk situations.

Enterprises may wish to establish clear Guidelines for the review and approval of payment requests and payments, including currency and place of payment to the Third party. Enterprises might decide that all payments should be by bank transfer or check payable to the Third party at its principal place of business in the country in which the services are to be performed or the Third party's well-established headquarters. It may be helpful to keep full and accurate records of all payments and the reasons therefore, and enterprises may decide to prohibit cash payments and ensure that all payments are accurately recorded in the enterprise's books and records. This would include keeping accurate records of all transactions with Third parties, including the amounts paid, expenses reimbursed, evidence of the services rendered, etc.

For high risk Third parties, it might be necessary to request certification of compliance with anti-corruption laws and enterprise policies and procedures by the Third party in conjunction with each invoice for payment or reimbursement of expenses.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.

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