

Reform of Bribery Offences in the UK and the Recent Guidance Provided by the UK Ministry of Justice

Introduction

On 14 September 2010, the UK Ministry of Justice issued its proposed guidance (Guidance) for commercial organisations in anticipation of the April 2011 entry into force of the UK Bribery Act. The Guidance sets forth “adequate procedures” which organisations must have in place to mount a defence from liability under the Act for failure to prevent acts of bribery committed by their associated persons.

The Guidance contains broad principles of good practice to help relevant commercial organisations decide which bribery prevention procedures to institute. A commercial organisation may claim a defence to bribery if it can show that it has adequate bribery prevention procedures implemented. U.S. and other global companies with UK operations should take note that the Guidance provides extremely general information and leaves many jurisdictional and substantive questions unanswered.

Synopsis of the Bribery Act

The Act will make it a criminal offence to accept, agree to receive, request, give, offer or promise a financial or other advantage to induce or reward improper performance of a “relevant function or activity,” or to bribe a foreign public official (FPO). Relevant functions or activities include any function of a public nature, any activity connected with a business, trade or profession, any activity performed in the course of a person’s employment, and any activity performed by or on behalf of a body of persons, whether corporate or unincorporated. Additionally, a commercial organisation may be prosecuted under a standard of strict liability for failing to prevent a bribe being paid on its behalf by employees, agents, intermediaries, distributors, introducers, subsidiaries, joint venture partners and other persons performing services for and on behalf of the organisation.

The Act imposes criminal liability on bribes made or accepted in the UK, or outside the UK by those with a “close connection with the UK.” Persons subject to liability include British citizens, individuals who ordinarily reside in the UK, businesses formed under the laws of the UK, and non-UK organisations which carry on a business or part of a business in the UK.

Offences under the Act are punishable by unlimited fines and individuals may be sentenced to up to ten years’ imprisonment. Unlike anti-bribery legislation in other jurisdictions, there is no *de minimus* exception under the Act.

Guidance

The Guidance provides “Six Principles for the Prevention of Bribery,” which set forth the adequate procedures necessary to establish a defence for strict liability under the Act. While providing a defence for corporate liability for failure to prevent bribery, these procedures will not serve as a shield for paying or receiving a bribe.

Principle One: Risk Assessment

Organisations should regularly and comprehensively assess the nature and extent of the bribery risks to which they are exposed. These assessments will depend upon the organisation’s size, activities, customers and

operational markets. Each organisation should evaluate whether those undertaking the risk assessment are adequately skilled and equipped to do so. Larger organisations may need to employ external professionals to conduct risk assessments. An organisation should be cognisant of both internal and external risk factors. Internal risk factors could include deficiencies in employee knowledge or training and lack of clarity in the organisation's policy on expenses, or a remuneration structure that incentivises corruption. External risk factors may include country, transactional, and partnership risks and take account of whether the country lacks anti-bribery legislation, transactions involving public procurement, high value deals with numerous agents or political contributions, and associations with public office holders.

Principle Two: Top Level Commitment

Top level management must establish a culture in which bribery is never acceptable and take steps to ensure that the organisation's anti-bribery policy is clearly communicated to all employees and any relevant external actors. This includes a publicised "zero-tolerance" policy that clearly establishes and enforces the consequences of breach. Senior managers should be involved in developing, overseeing and implementing anti-bribery policies and procedures.

Principle Three: Due Diligence

Due diligence policies and procedures should be created which cover all parties to a business relationship (including agents, intermediaries and others in supply chains), all forms of joint venture and similar relationships, and all markets in which business is conducted. Specific due diligence inquiries should include: location, namely regarding the risk of bribery in a particular country; risks of particular business opportunities; and business partner research on reputation and past prosecutions and investigations, especially where politically exposed persons and prominent public office holders are involved.

Principle Four: Clear, Practical and Accessible Policies and Procedures

Bribery prevention policies and procedures should be clear, practical, accessible, and enforceable, with the capacity to deal with incidents of bribery in a prompt, consistent, and appropriate manner. A policy should include a clear prohibition against all forms of bribery and a strategy for building this into the decision making process. It should also contain guidance or information on such topics as: making legal contributions; what action should be taken if faced with blackmail or extortion; employment law protection for whistle-blowers under the Public Interest Disclosure Act of 1998; and anti-corruption programmes relevant to the organisation's operating sector. In addition, organisations may wish to consider how existing procedures (e.g., financial and auditing controls, disciplinary procedures, performance appraisals, and selection criteria for employees and business partners) may be adapted for bribery prevention purposes. Support and operational procedures may include modification of sales incentives to give credit for orders refused where bribery is suspected and "speak up" policies encouraging employees to report incidents safely and confidentially.

Principle Five: Effective Implementation

Anti-bribery policies should be effectively implemented and embedded in the organisation and reflect the practical business issues faced by management and employees. It should be clear: who will be responsible for implementing the policies; how they will be communicated internally and externally; the nature and roll-out of training and follow-up testing; internal reporting of progress to top management; engagement of external

assurances processes; arrangements for monitoring compliance; a schedule for implementation; a clear statement of penalties for breach; and the date of the next review. Larger organisations should consider implementing anti-bribery procedures through external communication and training. This could involve offering or even requiring business partners to participate in training.

Principle Six: Monitoring and Review

Monitoring and review mechanisms should be instituted to ensure ongoing compliance with relevant policies and procedures. Effective financial and auditing controls should be used to detect potential and actual irregularities. Employees and key business partners should be able to share their views so that policies can be continually updated and improved. Larger organisations may make their audit committees and boards of directors responsible for assessing the adequacy of policies and procedures and disclose such findings in their annual reports. Larger organisations should also consider whether to commission external verifications of their anti-bribery policies.

Uncertainty Surrounding the Act

The Guidance remains silent on what constitutes carrying on a business or part of a business for purposes of the jurisdictional reach of the strict liability offence of failing to prevent bribery for commercial organisations. While examples are included in the Guidance, these only provide information with regard to UK-based organisations; thus, it is still uncertain what types of connections with the UK will subject an organisation to strict liability.

Also undefined is what constitutes a financial or other advantage, which is left to the discretion of the Serious Fraud Office (SFO) in determining which cases to pursue. As a precautionary measure, this phrase should be widely interpreted to include anything beneficial or of value.

Moving Forward

Organisations with business in the United Kingdom should, without delay, design and implement appropriate policies and procedures before the Act's April 2011 entry into force. The Guidance, rather than being prescriptive, leaves it to the organisation to determine what is sufficient for its size and type of business. The final guidance on adequate procedures is scheduled for publication in early 2011. The Director of Public Prosecutions and the SFO will publish further guidance to the Act in early 2011.

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