

Bribery Act 2010

The countdown begins

The long awaited guidance to accompany the Bribery Act has been published, with some considerable improvement to the draft version produced in September 2010.

At the same time, the Director of Public Prosecutions and the Director of the Serious Fraud Office (SFO) issued joint guidance for prosecutors setting out the issues that prosecutors must consider before seeking their consent to the prosecution of an individual or organisation for bribery.

As Shoosmiths predicted, there has been no change to the Act itself; instead the guidance has taken steps to allay some of the fears raised on problem areas such as facilitation payments and corporate hospitality, which it was said would make British business uncompetitive.

The guidance has remained goal setting and cannot be seen as 'one size fits all'. Its approach is one of common sense, which sits alongside the core principle of proportionality. Commercial organisations should therefore adopt a risk-based approach to managing bribery risks, with the procedures that are put in place being proportionate to the individual risks faced by that organisation.

Shoosmiths has previously compiled a *Compliance Plan* to assist organisations wanting to prepare for the implementation of the Act and ensure that their procedures were adequate so they, if necessary, provide a defence.

Key principles

As with the draft guidance, there remain six principles that should govern the procedures to be put in place.

Two, however, have been renamed from the draft guidance: Proportionate Procedures replaces Clear, Practical and Accessible Policies; while Procedures and Communication (including training) replaces Effective Implementation.

Proportionate Procedures

The Government has clarified that it expects organisations to put in place procedures and policies proportionate to the bribery risk that the organisations face. An initial assessment of risk across the organisation is a necessary first step to establish the risk posed to them. The risk will be linked to the size, nature and complexity of the organisation. When assessing the risk, it is important to consider the type of person associated with it. For example, the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and so require much more in the way of procedures to mitigate those risks.

The Government recognises that it may be difficult to apply procedures retrospectively to existing associated persons, but this should be done over time, adopting a risk based approach, with due allowance for what is practicable.

A list of suggested bribery prevention procedures have been given, all of which were incorporated in Shoosmiths' a *Compliance Plan* prior to the guidance being published.

Top-level Commitment

This principle has been amended slightly from the draft guidance, and now includes a requirement that there should be an appropriate degree of involvement of the management and/or board in developing bribery prevention procedures. The level of involvement will be dependant on the size of the organisation, but it is clear that no matter what its size, top-level involvement will be a key requirement.

The requirement for a public statement of commitment remains, and guidance has been given on what the statement could include.

Risk Assessment

This principle has been expanded further to give greater assistance to organisations in carrying out their risk assessment. In addition to the country, transaction and partnership risk identified in the draft guidance, sector and business opportunity risks have been identified as areas that could be of concern.

Due Diligence

The guidance is more practical than the draft in a number of areas and takes account of the fact that in certain countries, local law or convention dictates the need for a commercial organisation to appoint a local agent and how difficult it can be to extricate from such business relationships. It also recognises that in low risk situations there might be little need to take much action by way of due diligence.

Communication (including training)

Previously referred to as Effective Implementation in the draft guidance, it echoes the emphasis that a commercial organisation should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training. Such training should be proportionate to the risks it faces. The guidance makes clear that communications should convey a 'tone from the top', and include the implications for employees of any breaches.

The type of training undertaken should be proportionate to the risk faced by the organisation, but should be effective in firmly establishing an anti-bribery culture, whatever the level of risk, with more tailored training being given to those who perform higher risk roles.

Monitoring and Review

It is quite similar to the draft guidance, though there is a suggestion that organisations may wish to review their processes in response to other stimuli, for example, governmental changes in the countries in which they operate, an incident of bribery, or negative media coverage.

Problem areas

Facilitation payments

Under the draft guidance and previous commentary on the Act, the goal was to strive to eradicate facilitation payments. The guidance has relaxed this position slightly in that it now recognises the difficulty some organisations face in some parts of the world and/or certain sectors to eradicate these payments.

The guidance now states that it is a long term objective to eradicate such payments, requiring economic and social progress, and sustained commitment to the rule of law in the parts of the world where the problem is most prevalent. The guidance recognises that this commitment will require collaboration between international bodies and governments.

Whether there should be a prosecution in respect of the payment will be determined by prosecutorial discretion and whether the prosecution would be in the public interest. Key issues that may affect the public interest decision to prosecute will include large or repeated payments; planned payments or those that are accepted as a standard way of conducting business (pre-meditation); and payments that are in clear breach of robust company policies on facilitation payments.

Payments that are small or self-reported to the SFO through a proactive approach to anti-corruption, or made by those in a vulnerable position, will tend towards a public interest decision not to prosecute.

Corporate hospitality

In guidance foreword by Kenneth Clarke, he indicates that the purpose of the Act is not to stop organisations getting to know their clients by halting hospitality, such as trips to a Grand Prix or Wimbledon. The core principles are, once again, proportionality and taking a common sense approach.

Shoosmiths has taken the view from the outset that sensible and reasonable hospitality, gifts and promotional expenses that are not aimed at influencing performance or decision making, will remain outside of the Act. Only where a payment, gift or hospitality offer is extraordinary or lavish, or has the ability to influence or reward improper performance, will the payment be considered to have infringed the Act.

The Joint Guidance for Prosecutors has indicated that lavishness will be just one factor that may be taken into consideration in determining whether an offence has been committed under section 1 or 6. However, the full circumstances of each case will be considered, and other factors will include whether the hospitality or expenditure was not clearly connected with legitimate business activity or was concealed.

Associated persons

There has been further clarification to assist with the definition of who is deemed to be an 'associated person' for the purposes of the Act as organisations can be held responsible should those persons commit a bribery offence which benefits that organisation, even without the organisations knowledge. The capacity in which a person performs services for or on behalf of an organisation will take into consideration all the relevant circumstances, and is intended to give a broad scope so as to embrace a whole range of persons connected to an organisation who may be committing bribery on their behalf.

This means that contractors could be associated persons to the extent that they are performing services on behalf of the organisation. Furthermore, if a supplier is performing services on behalf of an organisation rather than simply acting as the seller of goods, they may also be deemed to be associated persons.

Supply chains

It is likely that where there is a supply chain with several entities or a project with a main contractor and numerous sub-contractors, an organisation is only going to exercise control over its contractual counterparty. Indeed, in some circumstances, organisations may not even know who the sub-contractors are. The guidance has made it clear that any sub-contractors will be performing services for the counterparty and not necessarily for other parties in the contractual chain. The guidance has indicated that an organisation may want to ask their counterparty to ensure that any subsequent contractors adopt a similar approach to anti-bribery procedures.

Joint ventures

The guidance recognises that joint ventures come in many different forms and sometimes operate through a separate legal entity. The existence of a joint venture entity will not in itself mean that it is 'associated' with any of its members. A bribe paid on behalf of a joint venture entity by one of its employees or agents will not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture.

The situation is likely to be very different, however, where the joint venture is conducted through a contractual arrangement because of the degree of control that a participant may have with regard to services performed for or on its behalf. It should be remembered that an offence is only committed if there is an intention to obtain or retain business or an advantage in the conduct of business for the organisation. The mere fact that an organisation may benefit indirectly from a bribe is in itself very unlikely to amount to proof of a specific intention required by the offence.

Parent companies

The guidance has clarified the position we had anticipated in that just because a parent company has a UK subsidiary it does not, in itself, mean that a parent company is carrying on business within the UK, since a subsidiary may act independently of its parent or other group companies.

Again, without proof of the required intention under the Act, liability will not accrue simply through corporate ownership or investment or the payment of dividends to a parent company. This is so even though the parent company may benefit indirectly from the bribe.

What is a 'presence' in the UK?

There has been media speculation that the application about who would be deemed a 'relevant commercial organisation' may be relaxed to take into consideration companies with a presence within the UK – i.e. listed on the London Stock Exchange – but not said to be carrying out business in the UK. The guidance has clarified the position.

A common sense approach has been taken, so the mere fact that a company may be listed on the London Stock Exchange does not necessarily mean that it is carrying on a business or is part of a business in the UK, and therefore may not fall within the meaning of a 'relevant commercial organisation' as defined in the Act.

What is a commercial organisation?

Whilst this is defined by the Act itself, in order to avoid problems with interpretation there has been clarification in relation to UK organisations pursuing primarily charitable or educational aims or purely public functions. These organisations will be caught if they engage in commercial activities, irrespective of the purpose for which the profits are made.

Commercial organisations committing offences under sections 1 and 6

A number of articles have indicated that a company cannot be prosecuted for an offence other than the corporate offence of failing to prevent bribery.

Shoosmiths has always said this is incorrect, and the guidance has clarified the position by confirming that the section 7 offence of failing to prevent bribery does not displace the liability which may arise under sections 1 or 6 of the Act, where the commercial organisation itself commits an offence by virtue of the common law principle of a natural person who is the 'directing mind or will' behind the organisation and bribes on its behalf. That person will also commit an individual offence.

Summary

The primary legislation remains unchanged, and speculation that the Act itself would be changed or dropped altogether has proved to be very wide of the mark.

Whilst some may argue that the Joint Prosecution Guidance to Prosecutors has watered down the legislation, this is not the case. Primarily, it now ensures a consistent approach to the public interest test, which was always seen by Parliament as acting as an important brake on disproportionate enforcement.

However, organisations cannot afford to be complacent, and even if they have policies and procedures in place to combat bribery, they would be well advised to review them in the light of the guidance.

Those without such policies or procedures in place now have only three months in which to get their house in order. Having already assisted numerous clients with their compliance plans, we are firmly of the opinion that those yet to start implementation will struggle to meet the time limit.

For more information please contact:

Ron Reid (03700 863317) or Rachael Darwen (03700 863243)