

BRIBERY ACT UPDATE: MINISTRY OF JUSTICE INVITES CONSULTATION ON GUIDANCE FOR COMMERCIAL ORGANISATIONS IN THE PREVENTION OF BRIBERY

22 September 2010

To Our Clients and Friends:

On 14 September 2010, the Ministry of Justice published a consultation paper seeking public views on the guidance the Government will publish early in 2011 regarding procedures that commercial organisations can put in place to prevent bribery. The consultation paper is significant as the Ministry proposes a set of principles which can be applied to formulate appropriate corporate anti-bribery procedures and to protect companies from corporate liability under the U.K. Bribery Act 2010 (“Bribery Act”). The consultation closes on 8 November 2010.

Section 7 of the Bribery Act, which is scheduled to come into force in April 2011, holds a commercial organisation criminally liable if a person associated with the organisation commits bribery intending to obtain or retain business or an advantage in the conduct of business for the organisation. The Act provides a defence if the commercial organisation can show it had “adequate procedures” in place to prevent bribery. Under section 9 of the Bribery Act, the Secretary of State is required to publish guidance about procedures that commercial organisations can put in place to prevent persons associated with them from committing bribery on their behalf.

The purpose of the consultation is to offer businesses which will be affected by the Act and non-governmental organisations the opportunity to share their views on the draft guidance with the Government.

THE PROPOSED GUIDANCE

The consultation paper includes draft guidance based on six general principles. The principles are “designed to be of general applicability across all sectors and for all types and size of business. [They are] not intended to be prescriptive or standard setting, or impose any direct obligation on business.” The principles are intended to be flexible so that each commercial organisation can tailor its policies and procedures to its particular size, circumstances and activities.

The six principles and the key points from the commentary are as follows:

Principle 1: Risk assessment. *The commercial organisation regularly and comprehensively assesses the nature and extent of the risks relating to bribery to which it is exposed.*

The first principle recognises the fundamental need of a corporation to fully understand the risks it faces before it can attempt to mitigate those risks by designing and implementing an effective anti-bribery programme.

Principle 2: Top level commitment. *The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery. They establish a culture within the organisation in which bribery is never acceptable. They take steps to ensure that the organisation's policy to operate without bribery is clearly communicated to all levels of management, the workforce and any relevant external actors.*

The draft guidance emphasizes the importance of setting the “tone from the top”, and suggests that effective leadership may include communicating to subsidiaries and business partners that the commercial organisation has a zero tolerance policy towards bribery. The guidance also proposes that appointing a senior manager to oversee the development and implementation of the organisation's anti-bribery policies and procedures signals a top level commitment.

Principle 3: Due diligence. *The commercial organisation has due diligence policies and procedures which cover all parties to a business relationship, including the organisation's supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the commercial organisation does business.*

The draft guidance suggests due diligence might focus on (i) the location where the organisation seeks a business relationship (including the types of bribery most commonly encountered there, the most effective preventive actions and the local laws and procedures for reporting bribery); (ii) the risks that a particular business opportunity raises; and (iii) whether the individuals or other entities involved in the business relationship have any history of bribery or corruption. Enquiries also should be made regarding business partners' own anti-corruption policies and procedures.

Principle 4: Clear, practical and accessible policies and procedures. *The commercial organisation's policies and procedures to prevent bribery being committed on its behalf are clear, practical, accessible and enforceable. Policies and procedures take account of the roles of the whole work force from the owners or board of directors to all employees, and all people and entities over which the commercial organisation has control.*

The draft guidance suggests three aspects to this principle. The first relates to the content of the company documentation with respect to its anti-bribery policies and procedures. Among other things, the draft guidance offers that such documentation could include (i) “a clear prohibition on all forms of bribery including a strategy for building this into the decision making processes” of the company; (ii) “guidance on making, directly or indirectly, political and charitable contributions, gifts and appropriate levels and manner of provision of bona fide hospitality or promotional expenses to ensure that the purposes of such expenditure are ethically sound and transparent”; (iii) advice on applicable laws and regulations; and (iv) guidance on steps to take when faced with blackmail or extortion, including an escalation process. The guidance further suggests issuing a code of conduct that contains an anti-corruption element which employees must agree as part of their employment contract.

The second aspect of this principle involves considering how best to use existing procedures to deter bribery, such as financial and audit controls, disciplinary procedures, performance appraisals and selection criteria. The draft guidance also suggests offering sales incentives for refusing orders where bribery is suspected and establishing a confidential means by which employees can report allegations of bribery.

The final aspect addressed in the draft guidance relates to the need to establish procedures to deal with incidents of bribery should they occur. Such procedures must afford a prompt, consistent and appropriate response.

Principle 5: Effective implementation. *The commercial organisation effectively implements its anti-bribery policies and procedures and ensures they are embedded throughout the organisation. This process ensures that the development of policies and procedures reflects the practical business issues that an organisation’s management and workforce face when seeking to conduct business without bribery.*

The appropriate implementation strategy will vary depending on the nature and size of the relevant organisation. However, training on the bribery risks the organisation faces and the policies and procedures it has designed to combat those risks is a key element of internal communication. The draft guidance suggests that larger organisations may offer or even require that their business partners participate in these training courses.

Principle 6: Monitoring and review. *The commercial organisation institutes monitoring and review mechanisms to ensure compliance with relevant policies and procedures and identifies any issues as they arise. The organisation implements improvements when appropriate.*

The draft guidance recommends that large organisations should consider reporting periodically to the Audit Committee or the Board of Directors, and that these leaders may in turn conduct independent assessments of the adequacy of the company’s anti-bribery programme and

report the conclusions and any recommendations for improvement to shareholders in the company's annual report.

The draft guidance raises the need for senior management of higher risk and larger organisations to evaluate whether to “commission external verification or assurance of the effectiveness of anti-bribery policies” or to seek to join an independently verified anti-bribery code monitored by industrial sector associations or multilateral bodies. The draft guidance advises that independent review of an organisation's anti-bribery policies and procedures can be particularly useful in situations where an organisation is undergoing structural change or entering new markets.

The draft guidance also confirms independent review offers a means to enhance the credibility of an organisation or restore market confidence following discovery of bribery.

HOSPITALITY, PROMOTIONAL EXPENDITURE AND FACILITATION PAYMENTS

Following the explanation of the six principles, the consultation paper includes a brief section containing further information about the Bribery Act. Here the Government provides some insights into the way hospitality and promotional expenditure may be viewed under the Act.

The consultation paper is noteworthy in that it acknowledges at the outset that, while hospitality and promotional expenditure can be used improperly, “reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business.”

The consultation paper is careful to withhold any view on whether a particular expense will constitute a bribe under section 1 (general bribery offence) or section 6 (bribery of a foreign public official)¹ but does indicate it is “unlikely” that a “routine and incidental business courtesy where the advantage involved is of small value, or where hospitality is standard, will have any impact on decision making in the context of a business opportunity of high value and therefore engage section 6.” The paper also distinguishes between providing a foreign public

¹ For a fuller discussion of the section 1 and 6 offences, see our client update of 19 May 2010. Available at: <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=07f6795e-10bf-43e6-8bc5-3d3add8e331>

official with “ordinary travel and lodgings” to visit a company’s overseas site and “a five-star holiday which is not specifically related to the work of the business.” The more lavish the hospitality or expenditure extended to a public official, the greater likelihood that a corporation runs foul of section 6.

Therefore, companies and partnerships will continue to need to exercise very careful judgment in determining appropriate hospitality and promotional expenditure policies and procedures. The above references may be helpful in providing some guidance as to the likely application of the Bribery Act.

The consultation paper takes a less flexible approach to facilitation payments, reiterating the previously stated Government view that such payments are not exempt under the Bribery Act (contrary to the exception that exists in the U.S. Foreign Corrupt Practices Act). The rationale for refusing to create an exception for facilitation payments is that “[e]xemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and business partners, and have the potential to be abused.”

THE WAY FORWARD

The ultimate guidance that is published early next year following the consultation may differ in form and content from the draft just released, but one reasonably can expect that the basic premises expressed in the six principles will persist. Companies should act now to review their anti-bribery programmes and consider improvements that may need to be made in order to bring their policies and procedures in line with the principles set forth in the Government’s draft guidance.

The consultation is open to the public at large and we welcome the opportunity to discuss with our clients and friends their views and feedback on the draft guidance.

Please feel free to contact any of us if you have any questions.

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