Guidance on preventing bribery (Bribery Act 2010)

On 14 September 2010 The Ministry of Justice (“MOJ”) released a ‘Consultation on guidance about commercial organisations preventing bribery.’ The consultation closed for public comment on 8 November 2010, with final guidance to be published early in 2011. The draft Guidance produced by the MOJ is not as extensive or definitive as many would have hoped for, particularly given the uncertainty that exists over how commercial organisations will be able to rely on the defence under Section 7 of the Bribery Act 2010 that they had “adequate procedures” to prevent bribery. It is however what many expected. So, what does the MOJ’s draft Guidance say commercial organisations need to do to establish “adequate procedures”?

Six Principles

The Guidance sets out six principles and adherence to these principles may provide organisations with a defence to a charge of failing to prevent bribery under Section 7 of the Act. It will be the responsibility of each defendant organisation to show, on the balance of probabilities, that such procedures were in place and in use. It remains to be seen how or whether any criminal court will accept that those procedures were “adequate” given that they will have failed by the very fact that an incident of bribery must have occurred for there to be a Section 7 charge in the first place. A précis of the six principles is given below:

1. **Risk Assessment:** Companies should regularly and comprehensively assess the nature and extent of bribery risks associated with their market. Internal risks such as deficiencies in employee knowledge and training should also be monitored. Only adequately skilled persons should undertake the assessment, so external risk assessment professionals may need to be considered.

   Ongoing risk assessment should occur over the following areas:

   1) **Country Risk:** Corruption league tables and the presence of anti-bribery legislation should be considered, such as Transparency International’s Corruption Perceptions Index. This reveals that the UK’s rating over the last 7 years is getting worse whereas Qatar’s is getting better and for 2010 was better placed than the UK;

   2) **Transaction Risk:** Transactions at a high value or involving political connections may involve a high risk;

   3) **Partnership Risk:** Examples would include transactions involving public office holders in higher-risk jurisdictions.

2. **Top Level Commitment:** Top-level managers (for example directors or owners) should foster a ‘culture of integrity’ in which bribery is never acceptable. These managers should be personally involved in developing a code of conduct and a zero tolerance policy towards bribery. The policy should be clearly articulated both internally to all levels of the workforce and externally to any external agents, consultants or distributors. The publication of a statement of commitment to counter bribery is prudent, warning employees of the risks and consequences for breaching the provisions.

3. **Due Diligence:** Due diligence checks and investigations are required to enable the organisation to accurately identify bribery risks associated with the parties to any existing and new business relationship in all markets the organisation operates in. Relevant parties include the organisation’s supply chain, agents and intermediaries and all forms of joint venture. The same three main focus areas Country, Transaction and Partnership Risk are relevant.
4. **Clear, Practical and Accessible Policies and Procedures:** Organisations must communicate anticorruption policies and procedures to its employees. The policies must be clear, accessible, enforceable, and documented.

Policies and procedures should take into account the roles of the whole workforce, from the owners and board of directors to all employees, people and entities over which the commercial organisation has control. The policies should cover matters such as political and charitable contributions, gifts and hospitality, promotional expenses, facilitation payments (which are not permitted) and “whistle-blowing.”

Specific procedures may involve modifying sales incentives to give credit for orders despite their being lost by adhering to the anti-corruption policy, implementing ‘speak-up’ procedures to allow any employee to report allegations of bribery in a confidential manner and designating a senior manager to deal with incidents of bribery in a prompt, consistent and appropriate way.

5. **Effective Implementation:** A program must be effectively implemented and embedded through all areas of the business, from recruitment to training. Policies and procedures must be ‘implemented through the allocation of roles and responsibilities and by setting milestones for delivery’. It is also advisable to make external communications as to the company’s policy on bribery, e.g. when submitting bids.

6. **Monitoring and Review:** An effective compliance program requires on-going maintenance and review in order to ensure compliance with policies, identify issues as they arise and make improvements. Larger organisations should put auditing and financial controls in place and regularly report to the Audit Committee or Board of Directors. Independent, external reviews of company procedures are recommended, particularly during any structural change or entry into a new market. These reviews may also be useful in identifying areas for improvement.

**Illustrative Scenarios:** The draft Guidance also included hypothetical scenarios and suggested questions that a commercial organisation should ask itself to work out how a risk should be handled. The questions illustrate the practical application of the 6 listed principles. The scenarios included using agents providing hospitality and incurring promotional expenditure, forming a joint venture and making political and charitable donations.

**What are the key messages coming out of this which point the way forward?**

It is a huge task, but these are some key points:

1. The starting point is the appointment of a senior executive responsible for driving the project of establishing an ethical culture and the procedures and structures that implement it.

2. Next, risk assessments need to be carried out of your current areas of operation to assess the degree of corruption risk. Look at country, type of business and who you have to deal/work with.

3. Set up internally an infrastructure for communication, training, reporting, monitoring, testing and carrying out due diligence procedures and document this.

4. Draw up a business-wide written ethical code of conduct expressing zero tolerance of corruption. Publish on intranet and website and publish it internally and externally.

5. Refer to your ethical code of conduct in HR disciplinary policy and staff training.

6. For each new transaction/contract do your due diligence and include a documented sign off before contracts are issued/entered into.
7. Ensure code of conduct covers policy on hospitality and other payments and benefits to customers and introducers.

8. Have an internal procedure for confidential reporting of suspected bribery.

9. Review and amend bonus and performance incentive structures so that they are not indirectly encouraging unethical behaviour.

10. Include ethical code of conduct as part of recruitment, induction, training, testing, assessment and appraisals.

11. Consider audit and financial controls and reporting to board level as to compliance. Consider external advice to review company procedures.

12. Keep thorough records of all checks made, all training provided, all issues resolved. This paper trail is going to be absolutely vital to prove any defence.

How effective will the Guidance be in avoiding Section 7 criminal liability?

The difficulty is that this is a strict liability offence and while the guidance and the MOJ comments on the offences under the Act talk of “flexibility” and “prosecutorial discretion” and hint that minor indiscretions are less likely to be prosecuted as not being in the public interest, how does that help commercial organisations in the preparations they need to be making now urgently in advance of the April 2011 commencement date?

The Guidance has yet to be finalised and the MOJ are planning events to communicate the principles. But in reality little will come from that to alter what is known already about the Act and so this should not be an excuse for businesses to delay their preparations which are likely to be time-consuming to complete.

Government review

In early 2011 the Growth Review established by the Coalition Government have been asked to revisit the Act with a view to alleviating the impact of the Act on commercial organisations. A spokesperson for the Ministry of Justice has confirmed that further review of the Act is part of the Government’s broader efforts to ease the regulatory burdens on businesses and promote economic recovery. It has been reported in the press that Government has been lobbied by business to allow some exemptions, such as “facilitation payments”, in the express terms of the Act so as to permit a level playing field when British businesses are competing overseas. Such amendments to the Act itself we believe are extremely unlikely.

Michael Archer
Partner, Beale and Company Solicitors LLP

For further information, please contact Michael on email: m.archer@beale-law.com, or by telephone on: 020 7240 3474.

January 2011