

## Risk Management Briefing

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### Guidance on the Bribery Act 2010

Revised – April 2017

#### Introduction

The offence of bribery has existed for a considerable period in the UK, but prior to 2011 proved difficult to enforce against businesses, particularly where the commission of the offence occurred overseas. The Bribery Act 2010, which came into force on 1 July 2011, was intended to enable prosecutions to be more easily brought within the UK, wherever in the world the bribery occurred.

The importance of this piece of legislation has been highlighted in 2016, when the construction and professional services company Sweett Group PLC pleaded guilty to a charge of failing to prevent an act of bribery intended to secure and retain a contract with Al Ain Ahlia Insurance Company (AAAI), contrary to Section 7(1)(b) of the Act. The bribery was committed by Cyril Sweett International, a wholly owned subsidiary, without the involvement or knowledge of Sweett Group PLC. However the bribery was treated as being for the benefit of the PLC, and it was ordered to pay £2.25 million as a result of its conviction. The judge described the offence as a system failure and said that the offending was patently committed over a period of time. He said:

‘The whole point of section 7 is to impose a duty on those running such companies throughout the world properly to supervise them. Rogue elements can only operate in this way – and operate for so long – because of a failure properly to supervise what they are doing and the way they are doing it.’

This Briefing explains:

- i. The offence of “failing to prevent bribery” under section 7 of the Act which aims to create this ethical environment; and

- ii. What the UK Government expects businesses to do in devising and implementing anti-corruption procedures. This is contained in Guidance issued by the UK Ministry of Justice.

Along with the Act the Government also published guidance on appropriate procedures and how they should be implemented: [‘Bribery Act 2010: Guidance to help commercial organisations prevent bribery’](#) issued by the Ministry of Justice (“the Guidance”). This Guidance remains current at the time of revising this Risk Management Briefing.

### **Offence Concerning “Associated Persons”**

#### Failure to Prevent Bribery

Section 7(1) of the Act provides that a relevant commercial organisation is guilty of an offence if a person associated with it bribes another person, intending to obtain or retain business or a business advantage for that commercial organisation. The offence can be committed in the UK or overseas.

This is of particular concern to businesses as they may be held to be accountable for the actions of persons associated with them, not just their own employees. So, it is not enough for a business to feel confident about how ethically it runs its own business. It needs to have that confidence about those “associated persons” with whom and through whom it conducts its business.

In the Act, an “associated person” is defined as one who performs services for or on behalf of the business (Section 8(i)). The meaning of performing services is vague. The Act states that it will be determined by reference to all the relevant circumstances. However, it is clear that it can cover those that provide services to the business (e.g. advisory services outside the normal field of operations of the business) as well as those, like sub-contractors and sub-consultants, where the business has delegated the performance of its own functions.

The effect of the section 7 offence is that where “services” are carried out by a third party on a company’s behalf, it will need to ensure that the third party is aware of and commits itself to the company’s anti-bribery policies; that it is made aware of and adopts ethical standards of business; and that it is subject to appropriate due diligence and monitoring. That is to state the requirements at their most basic level. Depending on the perceived level of risk of bribery, the requirements may well need to be considerably more sophisticated, as is explained below under the heading “Adequate Procedures”.

#### **Defences to a Prosecution**

Under section 7(2), a company prosecuted under section 7 has a defence if it can show that it had in place ‘adequate procedures’ designed to prevent bribery. These procedures are introduced in section 9 and are explained in the Guidance. Proportionality is emphasised, and so the benchmark for compliance with the procedures is lower for small or medium sized organisations with more limited resources. This theme of proportionality is often repeated in the Guidance in a deliberate attempt to allay fears that every business whatever their size will become tied up by unnecessary internal bureaucracy and additional cost in seeking to comply with the Act.

So, what does the Guidance say commercial organisations need to do to devise and implement anti-corruption procedures that are going to meet the required standard of “adequate procedures” and so provide a defence under the Act?

#### **“Adequate Procedures”**

The Guidance sets out a series of principles which it suggests businesses follow:

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 in larger organisations, although this is not compulsory.

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
- 2) Transaction Risk: Transactions at a high value or political contributions may involve a high risk
- 3) Partnership Risk: These include transactions with public office holders in higher-risk jurisdictions

*Practical Implementation:* The following steps are recommended by the Guidance:

- Simple internet searches to find out about the levels of corruption or bribery in the relevant geographical location.
- Consultations with UK diplomatic posts or UK Trade and Investment [[www.ukti.gov.uk](http://www.ukti.gov.uk)] (now Department for International Trade [[www.gov.uk/government/organisations/department-for-international-trade](http://www.gov.uk/government/organisations/department-for-international-trade)]), or business representative bodies here and in the relevant country for up to date local knowledge.
- Viewing the Business Anti-Corruption Portal (aimed at small and medium sized businesses involved in overseas trade). [[www.business-anti-corruption.com](http://www.business-anti-corruption.com)]
- Reconsidering the effect of any bonus or commission system that rewards staff or agents for excessive risk taking.

The Guidance mentions that there is no duty on businesses to employ an external adviser to help in assessing the risks that may be faced, what procedures should be adopted and what due diligence should be undertaken. No external verification of the procedures put in place is necessary, although adequate and appropriate documentation of the risk assessment and its conclusions should be made.

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 and disseminating 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 should warn employees of the risks and consequences of breaching the policy.

Particular attention should be given to the selection and training of senior management, engagement with relevant associated persons and external bodies such as sectoral organisations. Feedback should be given to the board on levels of compliance.

3. **Due Diligence:** Due diligence is required to enable the organisation to accurately identify bribery risks associated with all parties to a particular business relationship and all markets the organisation operates in. Relevant parties include the organisation's supply chain, agents and

intermediaries and all forms of joint venture. Three main areas of focus for due diligence are listed:

- I. Location (Country Risk)
- II. Business Opportunity (Transaction Risk)
- III. Business Partners (Partnership Risk)

Practical Implementation: An approach proportionate to the size of the business is emphasised by the Guidance:

- Businesses need only do due diligence on persons who will actually perform services for them, or on their behalf.
- The level of due diligence required will depend on risk assessment. If the risk of bribery is low then a business need only be satisfied that the party performing services for them is genuine and trustworthy.
- High risk business partners may be inspected by viewing financial statements, accounts references and individuals' CVs.
- Where a business relationship exists with an associated person of high risk there should be due diligence and monitoring both before and after contractual agreements are entered into.

4. **Communication:** Organisations must communicate anticorruption policies and procedures to employees. The policies must be clear, accessible, enforceable, and documented.

Scope: Policies and procedures should take into account the roles of the whole work force, 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 and "whistle-blowing."

Specific procedures: may involve modifying sales incentives to give credit for orders where bribery is suspected; 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.

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'. For larger organisations, examples of effective compliance include continuing implementation strategies such as training and monitoring compliance. It is also advisable to publish externally the company's zero tolerance attitude to bribery.

Practical Guidance: The Guidance makes the following qualifications:

- There is no need for extensive written documentation or policies, particularly in small businesses. Proportionate procedures may already be in place through existing controls over company expenditure, accounting and commercial or agent contracts.
- In very small businesses it may be enough to provide simple oral reminders to key staff about the organisation's anti-bribery procedures.

5. **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.

*Practical Guidance:* Staff surveys, questionnaires and feedback from training can provide an important source of information for the continuing improvement of anti-bribery policies. Internal financial control mechanisms may also be valuable in large organisations. Periodic reviews and reports from and to top-level management should be part of the internal procedures.

- 6. Record Keeping:** The Guidance itself does not give much emphasis to the importance of keeping records of the risk assessments and due diligence carried out. However, it will be essential for businesses to be able to demonstrate compliance with its own published procedures if and when an incident occurs. In such a situation the business will be expected to cooperate with investigating bodies and their willingness to do so will influence the decision of the Serious Fraud Office in deciding whether to proceed with a prosecution. Having the records to show what efforts were made will be vital in this and in putting forward a defence should a prosecution be brought. The business will need to decide in what location and on what media these records should be kept and appropriate checks made to ensure that the appropriate office has complied with these requirements.

### **Information Available**

The task for each business to review and implement procedures will no doubt be a time consuming one. The Guidance however is a good starting point to understand what is expected. In addition, there is a substantial amount of material available for free online which will inform anyone tasked with devising, implementing or reviewing the procedures in their organisations.

### **Contractual liability**

It should be noted that this briefing note deals only with liability under statute. In addition, a party may enter into a contract that includes terms relating to the prevention of bribery, and acquire a civil liability that reflects its statutory duties. In some cases the contractual duties could be more extensive than the duties imposed by the Bribery Act, but this would of course depend on the particular terms.

**This *Risk Management Briefing* is for general guidance only and legal advice should be sought to cover any particular situation.**

This briefing was originally compiled by Michael Archer of Beale and Company Solicitors LLP and subsequently amended by the CIC Liability Panel.

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