

Global Anti-Corruption Compliance | May 12, 2010

The UK Bribery Act: is your anti-corruption programme an “adequate procedure”?

On 8 April 2010, the Bribery Act 2010 (the “**Act**”) was passed in the UK. It creates a number of new offences expected to come into force later this year, including a corporate offence of failing to prevent bribery punishable by up to an unlimited fine. That offence will apply to “relevant commercial organisations”, which includes any company or partnership carrying on a business or part of a business in the UK. The prosecution will not need to show any fault on the part of the company, but it will be a defence for the company to show that it had in place “adequate procedures” designed to combat bribery. This note will discuss such procedures and identify what businesses can be doing now to help ensure that they are well prepared.

Guidance on adequate procedures

The Act provides that the Secretary of State must publish guidance “about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing”. While such guidance will be welcome, it is unlikely to be available significantly in advance of the corporate offence going live.

Furthermore, the guidance is intended to be “indicative by setting out broad principles and illustrative good practice examples of ‘adequate procedures’ rather than detailed and prescriptive standards”. As such, the guidance is unlikely to go much beyond the substantial materials already available on such principles and practices. Those materials include:

- UK specific materials such as the Serious Fraud Office Guidance on Dealing with Overseas Corruption (the “**SFO Guidance**”);
- US specific materials such as the Department of Justice’s Opinion Procedure Release 2004-02 and the Federal Sentencing Guidelines (the “**Federal Sentencing Guidelines**”);
- International materials such as the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (the “**OECD Good Practice Guidance**”) and the Transparency International Business Principles for Countering Bribery (the “**TI Business Principles**”); and
- Industry materials such as those prepared at the request of BAE Systems by a committee chaired by Lord Woolf and the memorandum prepared on the Bribery Bill (as it was then) by the Association for the General Counsel and Company Secretaries of FTSE 100 companies (the “**GC100 Memorandum**”).

Existing compliance programmes

Many companies, particularly those doing business in the US, will already have detailed compliance programmes in place. However, with the enactment of the Act, companies doing business in the UK must review their current programme, particularly where it was drafted from the specific perspective of the US Foreign Corrupt Practices Act (the “**FCPA**”). The Act’s approach is different to that of the FCPA in a number of respects. For example, the UK Act contains no exception for facilitation payments and it covers commercial bribery.

Given the wide jurisdictional reach of many bribery laws (including the Act), companies operating internationally should have a single compliance programme applicable across the board and containing robust policies which meet the relevant legal standards that a company faces globally. The next section of this note will consider the main elements which should typically make up such a programme, not with particular reference to the Act, but rather drawing upon the literature referred to above and this firm’s wealth of experience with such programmes.

What makes an effective compliance programme?

An effective compliance programme should permit a company to achieve its business goals without violating any applicable laws and should create a culture that values compliance. The critical stages in building such a programme are determining what elements it should have, designing it, implementing it and then enforcing it.

In practice, the starting point is to conduct a comprehensive risk assessment of your business. The corruption risk you face is very unlikely to be uniform across all of your activities. Rather, it will typically

vary by matters such as individual business lines, which employees are in positions carrying the greatest bribery risk, your use of agents/intermediaries (including their contract terms) and any corruption issues you or others operating in similar markets have faced in the past.

A critical factor in risk assessment is geography. You should look at each country where you do business from two perspectives: (i) the corruption risk in that country by reference to internationally recognised standards; and (ii) the financial value of the business you do there annually. In this way, you can rank your markets by risk and identify areas of your business which require particular attention.

Once you have carried out such a risk assessment, you will have a much better understanding of what a practical anti-corruption programme should look like for your business and this will assist you with prioritising any areas of particular concern. The results of that risk assessment should be documented so that the anti-corruption programme can be fully explained and justified to any external party, such as a regulator or prosecutor.

When it comes to the actual content of an effective compliance programme, in our experience there is a reasonably broad consensus on the general elements which make up such a programme, the most important of which can be grouped under the following seven headings.

(1) Standards and procedures

The “standards” are a clear and concise articulation of the conduct the company expects from all of its directors, employees, officers, agents, subsidiaries and partners. As the SFO Guidance puts it, there should be “a clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate” and a “Code of Ethics”. Articulating general

standards which sit above the detailed procedures should assist with generating and maintaining an ethical culture, rather than one based on complying with the letter (rather than the spirit) of detailed rules.

However, it is not enough simply to have a high-level set of standards. Rather, there must be underlying detailed procedures which apply the general standards to individual situations, dealing with matters such as the following items singled out by the OECD Good Practice Guidance: gifts, hospitality, entertainment, expenses, customer travel, political contributions, charitable donations, sponsorship, facilitation payments, solicitation and extortion. The procedures should take into account any relevant industry standards and reflect the legal standards (including the Act) to which the company is subject.

The procedures are most likely to be workable ones if the team responsible for drafting them includes appropriate people from the front line business, in addition to compliance experts. Different parts of the business can assist with different aspects of the policy. For example, sales and marketing will be particularly concerned with matters such as partner/agent due diligence and contract terms. On the other hand, finance and controls would focus more on matters such as internal controls and due diligence of existing contracts. By involving the business from the outset, they will be full stakeholders in the process and the resulting policy is far more likely to be a workable one, in language that resonates with them, rather than in dense legalese which may be hard to apply in practice and difficult to translate accurately into other languages.

(2) Assign compliance responsibility

“Tone at the top” is a critical part of an effective compliance programme. As the OECD Good Practice Guidance puts it, there should be “strong, explicit and visible support and commitment from senior

management to the company’s internal controls, ethics and compliance programmes or measures....”. The company board should therefore formally adopt the standards, have oversight of the anti-corruption programme and be responsible for overall implementation of the detailed procedures.

In addition, although everyone in the business will have a role to play in the company’s anti-corruption efforts, specific responsibilities need to be given to specific individuals within the relevant business units. As the Federal Sentencing Guidelines suggest, “[s]pecific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program” and “[s]pecific individual(s) within the organization shall be delegated day-to-day operational responsibility” for that programme. The individuals selected for these responsibilities must be credible not only internally to the business, but also externally to third parties such as regulators.

As regards the day-to-day team, it is important that they have sufficient resources and authority to carry out the job properly. Furthermore, if you do business around the world, it is also usually necessary to have local compliance personnel operating in the relevant time zones.

(3) Third party diligence

It is important that you know that you can trust people who are in positions which carry corruption risk. Depending upon the nature of your business, it is typically necessary to carry out due diligence on individuals and companies such as existing employees, new hires, agents, sales representatives, distributors, suppliers, service providers and joint venture partners.

A risk-based approach should be applied to due diligence. For example, employees who deal direct with government officials should usually be subject to

a higher degree of scrutiny than those who do not. The Federal Sentencing Guidelines talk about “reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, *or should have known through the exercise of due diligence*, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program” (emphasis added).

Appropriate due diligence measures will vary depending upon the nature of the person or entity being vetted, but can include matters such as requiring and taking up references, running internet searches and using corporate databases. If “red flag” issues emerge from that process, they should be investigated. Typical red flag issues for overseas agents include the following: the agent is related to or referred by the customer or a government official, the agent lacks experience/references or his requested payment terms are excessive or success based. There should be written reports of compliance vetting, particularly for personnel with substantial authority or in high-risk situations.

On a related note, “[c]onsideration should be given to the contracts which are entered into between the company and its business partners to contain anti-corruption contract terms, and whether or not they should provide express contractual obligations and penalties in relation to corruption. Particular care should be taken when agents are being used.” (the GC100 Memorandum).

(4) Communicate effectively

Communication of the programme through the provision of training and information is critical. Compliance materials should be widely distributed, readily available at any time of the day via several media and in all relevant languages. Actual guidance

on specific situations should be available as they arise, for example by having a live compliance hotline.

Training on the programme should be practical, interactive and use role-plays to illustrate the procedures being applied in practice. It should be periodic and participation in it properly documented. Typically, there will be a core training element which applies to everyone and then specialist training modules for particular business units. For example, the sales team need to be trained specifically on how to do business in countries where corruption is prevalent, while the legal team need to be trained (for example) on how to oversee the compliance programme and answer questions raised by other parts of the business. The training must keep up as the procedures are updated or an individual’s responsibilities change. The training participant’s understanding of the compliance issues covered should be tested and managers should be incentivised to ensure that their team fully participates in such sessions.

Furthermore, such communication and training should not be limited to employees, officers and directors. As the TI Business Principles state, “[t]he enterprise should publicly disclose information about its Programme, including management systems employed to ensure its implementation” and “[w]here appropriate, contractors and suppliers should receive training on the Programme”.

(5) Monitor and audit

The company must be able to show that its compliance programme is an integral part of its day-to-day practices, not merely a handbook given to all staff members. To that end, “[t]he enterprise should establish feedback mechanisms and other internal processes supporting the continuous improvement of the Programme. Senior management of the enterprise should monitor the Programme and periodically review the Programme’s suitability, adequacy and

effectiveness, and implement improvements as appropriate.” (the TI Business Principles).

The best feedback will typically come from those on the frontline using the policy. It is therefore important to ask for their feedback and to provide secure and confidential ways for people to raise concerns (“whistle-blowing”) without fear of reprisal. The training sessions also provide an excellent opportunity to obtain feedback from those using the policy.

Even if concerns are not raised, the programme should be reviewed regularly to ensure that it has kept up with changes in the business, applicable law and industry standards and to ensure that informal exceptions and “work-arounds” have not developed. One effective monitoring tool is regular transaction sampling (“spot-checks”). This involves taking a random selection of situations falling within the remit of the programme and ensuring that the relevant procedure was followed in each case. There should also periodically be anti-corruption audits, i.e. testing of corruption controls coupled with compliance interviews of relevant personnel.

(6) Disciplinary mechanisms

When breaches of the relevant anti-corruption measures occur, they should be taken seriously and appropriate disciplinary measures applied consistently across all officers, employees and directors, however senior they may be. There should be a clear, graduated scale of disciplinary measures for such non-compliance, designed in conjunction with the company’s human resources department.

(7) Respond appropriately

When things go wrong, it is very important that the company can show that it responded appropriately, both in terms of dealing with the incident at hand and more generally. The Federal Sentencing Guidelines

state that “[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program”. Recently proposed amendments to the Federal Sentencing Guidelines explain that such reasonable steps will vary according to the circumstances, but may include responses such as self-reporting to the relevant authorities and retaining an outside professional advisor to assist with assessing the anti-corruption programme and implementing any changes required to it.

There is no anti-corruption programme that can prevent or detect every offence. However, there must be a plan in place to ensure that as many incidents as is reasonably possible are promptly detected and escalated to the appropriate level quickly.

Investigations should be carried out in such a way that they have external credibility and timely disclosures should be made to the relevant authorities.

Going forward, there should be a thorough review of what went wrong and what lessons can be learnt. Procedures should be modified and new people appointed to supervisory positions, as required. Refresher training and further communications should also be considered.

Conclusion

Any company carrying out a business in the UK should look again at its anti-corruption programme now. The corporate offence under the Act is expected to come into force later this year and so there is currently an opportunity to take steps, with the general principles set out above in mind, to check that your systems are robust and up to the job. A company which diligently applies itself to taking the type of measures set out in this note in light of the individual circumstances it faces, and which commits proper resources to doing

so, is likely to have a strong foundation for an “adequate procedures” defence to the corporate offence under the Act.

With over 30 years of active practice in the area of anti-corruption, Shearman & Sterling’s experience in this area is broad and deep. In 1976, pursuant to a consent decree, the SEC appointed our chief of litigation as Special Counsel to investigate and report on Lockheed Aircraft Corporation’s foreign marketing practices. This investigation, together with the report we generated, was an impetus to the FCPA’s adoption in 1977. Since then, we have represented parties in many of the largest investigations involving potential violations of anti-corruption laws of many countries around the world. Non US-clients of our practice have included Norsk Hydro, Volvo Group, ABB Ltd and Nokia Oy.

In addition, we are currently independent compliance monitors for Baker Hughes and York International pursuant to DOJ deferred prosecution agreements and SEC consent orders. The monitorship role involves reviewing a company’s compliance programme and its implementation to ensure that it meets the required standards. Our role as monitor gives us a powerful insight into the current views of the enforcement community and compliance best practices as they evolve.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this memorandum, you may contact your regular Shearman & Sterling contact person or any of the following:

Richard Kelly
London
+44.20.7655.5788
richard.kelly@shearman.com

Josanne Rickard
London
+44.20.7655.5781
jrickard@shearman.com

Stephen Fishbein
New York
+1.212.848.4424
sfishbein@shearman.com

Danforth Newcomb
New York
+1.212.848.4184
dnewcomb@shearman.com

Philip Urofsky
Washington, DC
+1.202.508.8060
purofsky@shearman.com

Patrick D. Robbins
San Francisco
+1.415.616.1210
probbins@shearman.com

Richard H. Kreindler
Frankfurt
+49.69.9711.1420
rkreindler@shearman.com

Markus S. Rieder
Munich
+49.89.23888.2119
markus.rieder@shearman.com

Robert Treuhold
Paris
+33.15.389.7060
rtreuhold@shearman.com

Rob Ellison
São Paulo
++55.11.3702.2220
robert.ellison@shearman.com