The UK Bribery Act 2010 ("the Act") reforms criminal law and introduces a new strict liability offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf. There is a defence of having in place adequate policies and procedures to prevent bribery. The Guidance aims to give commercial organisations a steer as to how they ought to be working to prevent bribery and what the Serious Fraud Office (the "SFO") will expect them to have done to be compliant with the law. As the Act will be extraterritorial and carry criminal sanctions, it will have far-reaching implications for UK businesses and multinationals operating in the UK. The Act will come into force on 1 July 2011.

Yesterday the Government published its guidance on the Bribery Act 2010. Below are some preliminary comments and a summary of the Principles.

**Scope of Jurisdiction**

The scope of the jurisdiction of the Act has not been significantly narrowed by the Guidance. The message from the SFO and the Guidance is that companies need to be mindful that the Courts will ultimately decide the jurisdictional scope. The Guidance confirms that any organisation doing business in the UK will be captured by the Act for any acts of bribery committed anywhere in the world.

Having entered into discussions with the SFO on this topic this week it is confirmed that this could mean a parent company located abroad, but with a subsidiary in the UK, being held liable for the actions of a sister subsidiary committing acts of bribery elsewhere in the world. However, the Guidance clarifies this further, saying that there needs to be a demonstrable business presence in the UK and simply having a subsidiary here will not necessarily be sufficient. It is apparent that the level of control over the subsidiary will be one of the key factors in deciding if there is a business presence. In addition, the Guidance specifically says that simply being listed on the stock exchange will not be sufficient to say that business is being carried on in the UK.

In essence there should be a common sense approach to the jurisdictional scope of the Act but the Court will be the final arbiter in that, as in other respects. This is something that the SFO has repeatedly stressed. One comfort to industry is that there is continual reference to the need for there to be a public interest in any prosecutions brought.

**Associated Person**

As to the definition of "associated person" the Guidance advises that the definition goes beyond employees, agents and subsidiaries to include suppliers and joint ventures. It advises that a commercial organisation will be responsible for the activities carried out on its behalf by suppliers but limits this to, for instance, the main contractor where there is a main contractor and a number of sub-contractors.

In relation to Joint Ventures, where the joint venture is a separate legal entity it is less likely to be seen as an associated person to any commercial organisation involved in the joint venture. If it is a contractual joint venture then the degree of control over that joint venture will need to be considered.
Facilitation Payments

The Guidance goes into detail as to the detrimental effect of the facilitation payments on the global economy and particularly on third world countries. Facilitation payments are illegal under the Act, and remain so. However, the Guidance says that there will be careful consideration before any prosecutions are brought in relation to facilitation payments and, in addition, where there are health and safety situations, the common law defence of duress might be available.

Hospitality

In relation to hospitality, the Guidance states that careful consideration has to be given as to whether any prosecution will be brought in relation to hospitality or promotional expenditure. Where a certain level of hospitality is normal and commensurate in a particular sector then that is deemed to be acceptable.

Foreign Public Officials

Where written local law allows foreign public officials to be influenced by additional investment or benefits, then there is no breach of the Act. The example given is, where tenders are being placed for government contacts and there is a legal requirement for the foreign public official to give weight to additional added value such as the provision of charitable organisations or the building of public facilities. It would not be acceptable if there was no legal allowance for such additional benefit, there is a personal benefit to a foreign public official or where the local law is silent on the matter.

In relation to hospitality given to foreign public officials, the Guidance makes it clear that there will be no advantage seen to be given where the cost of accommodation and travel have been paid for if the alternative would have been that the relevant foreign official would have had to pay. In addition, where the hospitality is commensurate with the reasonable and proportionate norms of a particular industry then it is not deemed to be bribery. The example given is of dinner and tickets to an event.

Six Principles

There are no surprises in relation to the Principles. The Government is clear that it understands that small and medium size businesses will not necessarily be able to achieve the same changes as larger organisations. Top level commitment by board members and senior management to all six principles is required across all sectors. This is caveated by the statement that there is an expectation that changes made will be proportionate to each particular sector, industry and organisation.

Principle 1 – Proportionate procedures

Principle 1 sets out that an organisation’s anti-bribery procedures should be "clear, practical, accessible, effectively implemented and enforced." Procedures are termed to include both the prevention policies and the procedures to implement these policies. The question of whether such procedures are proportionate depends on the assessment of risk, which is in turn linked to the size of the company. Where the risk is considered to be extensive, and the size of the organisation large, the procedures must be proportionate to that. Conversely, where the risk of bribery is considered minimal, and the organisation small, the degree of procedures required will be greatly reduced. For example, smaller organisations may be able to implement their “procedures” simply in periodic oral communications with staff, whereas larger organisations will need to implement these policies with extensive written communications. Principle 1 of the Guidance provides an indicative list of topics which organisations should consider when putting together their procedures.
Principle 2 – Top-level commitment

Top-level commitment is emphasised as the best way of ensuring an organisation is unified in tackling bribery. The Guidance suggests that formal statements issued from senior managers are an effective way of showing such commitment, and provides a list of examples of what such communications might include. Top-level commitment is couched in terms of proportionality in respect of the size of the organisation, and the involvement expected of the senior members. In every case, policies and procedures should remain under periodic review.

Key points:

• For smaller organisations, top-level commitment should involve senior managers.
• For large organisations, top-level commitment should involve the board of directors.
• Communications to the organisation may include the following examples (a more extensive list can be found at Principle 2 of the Guidance):
  - consequences of employees’ breach of the organisation’s procedures
  - consequences of an associated persons’ breach of the organisation’s procedures
  - reference to the organisation’s involvement in collective action against bribery within the business sector

Principle 3 – Risk assessment

Organisations are expected to carry out periodic risk assessments in relation to bribery and should keep records of the processes and conclusions reached. These may form part of a more general risk assessment carried out in relation to business objectives or may be specific to bribery. Risk assessment procedures should be proportionate to the organisation’s size and structure and to the nature, scale and location of its activities.

Key points:

• Ensure senior management oversee the risk assessment.
• Employ resources appropriate to the organisation.
• Identify information sources and carry out due diligence (see Principle 4).
• Keep records of the risk assessment and its conclusions.
• Adapt to the evolution of the business – e.g. when entering new markets.
• External risks – categories to consider:
  - Country risk
  - Sectoral risk
  - Transaction risk
  - Business opportunity risk
  - Business partnership risk
• Internal risks – factors to consider:
  - Is more employee training needed?
  - Does bonus culture reward excessive risk taking?
  - Are there clear policies and procedures for hospitality, promotional expenditure, and political or charitable contributions?
  - Are there clear financial controls?
  - Does senior management communicate a clear anti-bribery message?

Principle 4 – Due diligence

Due diligence in relation to associated persons forms part of bribery risk assessment (see Principle 3) but is also significant as a means of mitigating risk so is included as a separate Principle. Due diligence procedures should reflect a proportionate and risk based approach.
Key points:

• "Associated person" is broadly defined to include any person performing services for a commercial organisation – intermediaries, employees etc.
• Proportionate approach – an IT service provider may be low risk whereas an intermediary in foreign markets will require a higher level of due diligence.
• Thorough due diligence is essential for certain business relationships – e.g. where local law dictates the use of local agents; mergers and acquisitions.
• Risk-based approach – higher risk situations may require indirect investigations and continued monitoring.
• More information is required from companies than individuals.
• Incorporate due diligence into recruitment and human resources procedures except for lower risk posts.

Principle 5 – Communication (including training)

Appropriate communication both internally and externally demonstrates an organisation’s commitment to avoid bribery and may have a deterrent effect. Training ensures that the organisation has the necessary knowledge and skills to deal with bribery-related issues.

Key points:

• Communication and training will vary according to the bribery risks faced, size of organisation, and the scale and nature of its activities.
• Appropriate policies and procedures should be communicated from the top level down.
• Put in place whistle-blowing procedures and sources of advice.
• Consider making training mandatory for new employees and agents. Keep training under review.
• Organisations may wish to encourage high risk associated persons to adopt bribery prevention training.

Principle 6 - Monitoring and review

Emphasis is placed on the need for organisations’ policies and procedures to be monitored and reviewed. The message is that it is insufficient to put in place procedures and then forget about them. If the procedures implemented appear inefficient, these should be re-evaluated.

Key points:

• Establish internal financial control mechanisms and systems to alert the organisation of any failings.
• Conduct staff surveys and feedback forms.
• Set aside a date for a formal periodic review.
• Seek external verification of internal policies and procedures.

Clyde & Co is hosting a presentation on the Guidance on 7 April 2011 in association with Transparency International. Please click here for further details.