

SAFEGUARDS

SGS CONSUMER TESTING SERVICES

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MINISTRY OF JUSTICE LAUNCHES CONSULTATION ON BRIBERY ACT 2010

In line with its previous commitment, the UK Ministry of Justice (MoJ) has launched a public consultation relating to the development of “adequate procedures” to identify and mitigate bribery risk. Under Section 7 of Bribery Act 2010, there is a new corporate offence of failing to prevent bribery and companies will need to rely on the development of such “adequate procedures” if they are to be able to defend their position.

Full details of the consultation documents can be found [here](#).

The consultation runs until 8th November and the guidance itself will be formally published in January 2011, well ahead of the effective date of the legislation next April.

OUTLINE OF DRAFT GUIDANCE

As expected, the draft guidance is principle-based rather than prescriptive in its approach. It does not seek to create an additional set of rules but to identify best practices that will help organisations develop systems that suit their specific needs. In doing this, it is particularly concerned to ensure that SMEs do not feel obliged to develop unnecessarily complex systems .

It thus establishes “Six Principles for Bribery Prevention”:

1. Risk assessment
2. Top-level commitment
3. Due diligence (particularly with respect to business partners and associates)
4. Clear, practical and accessible policies and procedures
5. Effective implementation
6. Monitoring and review

These principles reflect very closely those underpinning similar guidance, such as that issued by Transparency International. However, our view is that the guidance could go further in helping SMEs in particular to address the requirements of the new Act and



we will be inputting this feedback into the consultation process. We also feel that further support could be provided to help smaller organisations understand how best to undertake due diligence of potential overseas partners as this has proved to be one of the highest-risk areas when it comes to managing bribery risk.

SGS

SGS believes that it will be best for organisations to adopt a management-systems based approach to bribery issues, ensuring that all necessary monitoring and control measures are integrated into a business's existing management processes.

GUIDANCE FROM THE SERIOUS FRAUD OFFICE (SFO)

The Serious Fraud Office (SFO) will have lead responsibility for investigating and prosecuting offences under the Bribery Act. It will issue its own prosecutorial guidance before the Act becomes effective, providing further indications to all organisations on how best to manage their bribery risks.

One area of focus for the SFO is self-referral, encouraging organisations to report themselves where they believe offences may have been committed. In return, the SFO undertakes, where possible, to seek civil rather than criminal settlement of the case (although this would obviously depend on the case's own merits).

For the reporting company, this would avoid the worst effects of criminal conviction, particularly disbarment from EU procurement activities.

The SFO has recently been reported in some newspapers as promising a "zero tolerance approach" towards companies involved in bribery. In fact, both the MoJ and the SFO have publicly stated that they do not believe that there will be a significant increase in the number of companies prosecuted for bribery offences under the new Act, precisely because they believe that implementation of "adequate procedures" will improve practices across the board.

To illustrate this, the MoJ's impact assessment of the effect of the new Act foresaw only an average of 2.3 prosecutions each year under Section 7 (the corporate offence of failing to prevent bribery). The SFO's position will become clearer once the prosecutorial guidance is published and will do much to settle remaining concerns regarding facilitation payments and hospitality.

NEXT STEPS

As stated above, the MoJ consultation closes on 8th November. The guidance will be published sometime in January 2011 and the Act will take effect in April 2011. This will be followed by the prosecutorial guidance issued by the SFO.

Once the guidance is finalised, SGS will organise a further webinar to help companies address adequate procedures and plan an effective response to the new Act.

We are also developing a gap analysis for companies which already have control and monitoring systems that have been designed to comply with the US Foreign Corrupt Practices Act and this too will be published once the MoJ guidance is finalised. This will identify the key areas that companies with established systems will need to address in order to comply with UK law, in particular with respect to bribing representatives of private organisations and the use of facilitation payments.

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