

6 Principles For Compliance With UK's Bribery Act

Law360, New York (April 21, 2011) -- On March 30, the U.K. Ministry of Justice released its much-anticipated guidance on “adequate procedures” for corporate compliance with the U.K. Bribery Act of 2010 (the guidance). The Bribery Act, scheduled to take effect July 1, makes it an offense for a company to fail to prevent bribery by “associated persons,” defined as those persons who provide services for or on behalf of the company.

The term presumptively includes the company’s employees, but it is not limited to employees and may also include agents, joint venture partners and other third parties — even those with whom the company has no direct contractual relationship.

This is a strict liability offense, subject to only one statutory defense: a showing that the organization had “adequate procedures” in place to prevent bribery by associated persons. The guidance is not prescriptive but rather offers six principles of general application to corporations implementing compliance programs (the principles).

The principles overlap significantly with the factors that the U.S. Department of Justice applies in criminally sentencing corporations, as reflected in Chapter 8 of the U.S. Sentencing Guidelines (the guidelines). Under the guidelines, a corporation that maintains an “effective compliance and ethics program” may face a substantial reduction in penalty.

Equally important, on a practical level, the implementation of many or all of the guidelines is frequently invoked by targeted corporations to convince the DOJ not to bring charges at all.

This article briefly compares the U.K. principles with the U.S. guidelines factors for maintaining an effective compliance and ethics program, advising companies that a compliance program in line with the U.K. principles may pay off in spades in negotiating a resolution to a criminal proceeding with the U.S. Department of Justice.

Proportionate Procedures: The U.K. principles emphasize that an organization’s procedures to prevent bribery should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the company’s activities. They should also be clear, practical, accessible, effectively implemented and enforced.

As the accompanying commentary observes, the level of risk an organization faces will vary depending on its size as well as the type and nature of its business, among other factors.

The commentary to the U.S. guidelines similarly advises organizations to assess the risk that criminal conduct will occur in light of “the nature of the organization’s business,” among other factors, and to tailor their compliance procedures to these risks. The standards and procedures that an organization must implement to establish a satisfactory compliance program will also vary depending on the size of the organization (a smaller company may employ “less formality and fewer resources”).

Top-Level Commitment: The U.K. principles require that the top-level management of an organization (whether a board of directors, the owners, or another equivalent body or person) be committed to preventing bribery by persons associated with the company. They must foster a culture within the organization in which bribery is never acceptable.

The U.S. guidelines likewise require an organization’s governing authority to be knowledgeable about the content and operation of its compliance program, and to exercise reasonable oversight of the implementation and effectiveness of the program. High-level personnel within the organization must promote an organizational culture that reflects a commitment to compliance with the law.

Risk Assessment: The U.K. principles provide that an organization should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and documented.

The U.S. guidelines similarly require an organization to assess periodically its risk of criminal conduct and to adapt its compliance procedures to reduce the risks identified.

Due Diligence: The U.K. principles require that an organization apply due diligence procedures, taking a proportionate and risk-based approach, with respect to persons performing services for or on behalf of the organization, in order to mitigate identified bribery risks.

A basic prerequisite to an effective compliance program under the U.S. guidelines is that an organization must “exercise due diligence to prevent and detect criminal conduct.”

Communication and Training: Under the U.K. principles, an organization must seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces.

The U.S. guidelines likewise require an organization to “take reasonable steps to communicate periodically and in a practical manner” its compliance standards and procedures to employees at all levels, “by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities.”

Monitoring and Review: The U.K. principles provide that an organization should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.

Similarly, under the U.S. guidelines, an organization must take reasonable steps to ensure that its compliance program is being followed, including monitoring and auditing to detect criminal conduct, and must evaluate periodically the effectiveness of the program.

Under the U.S. guidelines, a corporation is eligible for a three-level downward departure in its culpability score — which can substantially mitigate the range of fines it faces — if the corporation can demonstrate that it had in place an effective compliance program at the time of the offense.

In assessing the adequacy of a compliance program, the sentencer is required to consider “applicable industry practice or the standards called for by any applicable governmental regulation.” A company’s “failure to incorporate and follow” such practices and standards “weighs against a finding of an effective compliance and ethics program.”

The U.K. guidance may not strictly qualify as an applicable industry standard or government regulation in all circumstances. Nonetheless, U.S. companies would be wise to consider the U.K. principles in devising and monitoring their domestic and international compliance programs. This is true not only because of the broad extraterritorial reach of this part of the Bribery Act and the potential for criminal liability under U.K. law if compliance procedures are considered inadequate, as no other defense is available.

The principles are also instructive insofar as they overlap significantly with the factors set forth in the U.S. guidelines. Compliance with the principles may be a persuasive factor in U.S. proceedings in demonstrating that the company is a good corporate citizen that should not be judged harshly for the misdeeds of a few within the organization.

And the failure to maintain a compliance program in accordance with the principles may — especially in offenses involving bribery — be a factor that causes the DOJ or sentencing court to decline to credit a company with an effective compliance program.

Consequently, all U.S. companies — regardless of a U.K. presence — would be wise to factor the U.K. principles into their compliance programs.

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