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Roderick Macauley
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By e-mail

Dear Roderick

Bribery Act Guidance

The ICAEW is pleased to respond to your *Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

APPROPRIATE PROCEDURES FOR THE PREVENTION OF BRIBERY

Memorandum of comment submitted in November 2010 by ICAEW, in response to the Ministry of Justice consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010) published in September 2010.

Contents **Paragraph**

Introduction 1

Who we are 2 - 3

Major points

- Need for clarity on Interpretation of the Act 4 - 8
- Areas of Concern over Interpretation and Implementation 9 - 13
- Proliferation of Guidance on Corporate Crime and Governance 14 - 16

Responses to Specific Questions

Other matters: The Illustrative Scenarios

INTRODUCTION

1. The ICAEW welcomes the opportunity to comment on the Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010) published by the Ministry of Justice.

WHO WE ARE

2. The ICAEW operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, we provide leadership and practical support to over 134,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. We are a founding member of the Global Accounting Alliance with over 775,000 members worldwide.

3. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. We ensure these skills are constantly developed, recognised and valued.

MAJOR POINTS

Need for Clarity on Extent and Interpretation of Act

4. ICAEW supports the full implementation of the Bribery Act, which we believe will assist in the control of bribery both in the UK and other jurisdictions, which is unacceptable and damages economic performance and a fair competitive position. The implementation of the Act will do much to ensure that the UK will have the strongest and most rigorous anti-bribery legislation, both on the statute book and enforced, and hence promote the reputation of the UK as a leader in the fight against corruption globally.

5. We have encountered some considerable concern, however, that the interpretation of the Act will go further than intended, and lead to both UK companies and foreign companies which do business in the UK to assume that it will prevent them from conducting normal commercial activities intended to promote their business while not intending to induce any form of improper performance. This may lead to over-implementation by commercial organisations wishing to control their legal and reputational risk, and therefore result in them incurring unnecessary costs and restrictions to their business.

6. The aspects of the Act where we have encountered most doubt over interpretation are on the following matters:

- the meaning of “associate”;
- the treatment of extortion, and how it should be distinguished from bribery;
- the treatment of promotional expenditure, and how it should be distinguished from bribery.

We are also concerned that there is little or no guidance given on how businesses should answer persistent demands for bribes, nor how to react to knowledge that their competitors are gaining business through the payment of bribes.

7. If the intended extent of the Act is not clarified, this could needlessly restrict the economic development of the UK, including not just a reduction of the export opportunities for UK organisations (including especially Small and Medium Sized Entities - SMEs) but also the willingness of foreign entities to do business in the UK for fear of drawing themselves into the scope of the corporate offence. This could restrict inward investment, as well as the free and

liberal trade in goods and services which we believe will best protect both UK interests and the development of the world economy.

8. Clarification of these matters could be given in an extended and amended section of the statutory guidance, equivalent to that headed “Further Information about the Act” in the consultation version. It is essential that this is clearly identified as part of the statutory guidance. We do not think that this would be outside the natural scope of Section 9 of the Act, and to give it a lesser status would considerably reduce its value. In giving guidance on interpretation, the Ministry of Justice will not be impinging on the freedom of the Courts to make their own interpretation, nor setting a precedent since this has already been done by a number of government departments.

Areas of Concern over Interpretation and Implementation

9. The definition of “associate” could be interpreted as including a number of persons or entities over which a commercial organisation could not reasonably be expected to have any form of control. We do not believe that section 8 of the Act should be interpreted as extending beyond entities which genuinely provide services for or on behalf of an organisation. Neither entities providing goods or services to the organisation, nor customers purchasing its goods or services should be included, unless these arrangements are clearly set up to obscure a relationship where they are, in fact, providing services for or on behalf of the entity. This is especially important for SMEs, which cannot expect to have any control over the behaviour of other participants in their supply chain.

10. For example, though we recognise that some due diligence over members of a supply chain may be of value, in order to assess risk, it should be clearly distinguished from the due diligence and other forms of control which might be expected over those acting for and on behalf of the organisation. This should be clarified in the guidance given under Principles 3 and 4. Similarly, the term “business partner” should be avoided, as it is not a defined term, and is sometimes taken to include bodies with a contractual relationship of supply to or purchase from an organisation, which does not involve any element of carrying out services on its behalf.

11. We share the concern expressed by a number of organisations over the lack of clarity about the treatment of promotional and business development costs, including corporate hospitality and customer educative initiatives. Besides more appropriate guidance on these matters, we suggest that the guidance introduces the concept of “undue” payments to foreign public officials, as used in Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

12. We are also concerned over the lack of guidance on the distinctions between bribery and extortion. The Act rightly does not prohibit the payment of demands for payments under extortion, but there is a sizeable grey area between bribery and extortion. We would not like to see the aims of the Act undermined by less scrupulous organisations exploiting it.

13. There is little or no guidance given, on how commercial organisations should conduct themselves after having refused a demand for a bribe. The commercial interests of the UK will not be served, if organisations are given no strategies for furthering the fight against bribery by promoting their own ability to do business without having paid the bribes demanded. The UK needs to ensure that embassies and high commissions abroad, as well as appropriate officials in the UK, are ready to discuss conditions in specific jurisdictions and ways in which demands for bribes can be avoided or reports of them escalated. Again, this is especially important for SMEs, which cannot be expected to have sufficient weight of themselves, to be able to continue to provide their goods and services against determined resistance from frustrated public officials or commercial agents who have been refused bribes.

Proliferation of Guidance on Corporate Crime and Governance

14. The six principles for the prevention of bribe paying are appropriate not only for the mitigation of the risk of an organisation having bribes paid on its behalf but also for a wide range of other legal and criminal risks experienced by commercial organisations and indeed for general risk control. Especially with the increased emphasis currently being put on the formulation and enforcement of corporate criminal liability, it is very important for the burdens on business not to be increased by the production of different, and possibly slightly divergent, guidance by a number of different government departments and other bodies.

15. It is also important that guidance given in the UK should be consistent with authoritative guidance given internationally, and so far as possible should avoid duplicating it.

16. We suggest that the best way of managing these potential duplications would be to give a single government department overall control of guidance on criminal and other corporate governance matters. The most appropriate department might be the Department for Business Innovation and Skills (BIS) with input from its Better Regulation Executive. The Ministry of Justice could then comply with its responsibilities under Section 8 of the Act by cross reference to BIS guidance.

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Question 1: Are there principles other than those set out in the draft guidance that are relevant and important to the formulation of bribery prevention in commercial organisations? If so what are they and why do you think they are important?

We have no suggestions for additional principles that are important to the formulation of bribery prevention in commercial organisations, but see above for our comments on the unhelpfulness of the proliferation of slightly divergent guidance on similar issues by a number of different government departments and other bodies.

We suggest that “Principle 3 – Due Diligence” is re-worded to avoid giving the impression that due diligence procedures should cover every entity in the organisation’s supply chain, including all customers and suppliers. At the very least, the wording should be changed to cover “all relevant and material parties to a business relationship, on a risk basis”.

Question 2: Are there any procedures other than those set out in the draft guidance that are relevant and important to a wide range of commercial organisations? If so what are they and why do you think they are important?

We would not wish the suggested procedures, as set out under each principle in the consultation draft, to be greatly extended. Rather the suggested procedures should be kept short and clear, as at present.

However, we do have a number of suggestions for improvements to the clarity and content of the current formulation of the procedures, as follows:

Risk Assessment

- Risk assessment procedures – First bullet.
    - The qualifications for those undertaking internal risk assessment should include objectivity as well as whether they are adequately skilled and equipped.
    - The current wording suggests that the use of external professionals is an alternate to internal risk assessment, which would not be appropriate – organisations should always consider their own risk, though this may also be augmented and supported by the use of external professionals. A better form of wording could be “The use of external professionals could assist in providing the appropriate skill set and objectivity to the risk assessment procedures for which management is responsible”.

- Key bribery risks

- Transaction risk should include transactions or payments where the purpose, business rationale or cost and value structure is unclear.
- "Partnership" risks. The term "partnership" has a very specific meaning in many contexts, and is insufficiently wide to include many risk areas. "Employee, associate and third party risk" might be a better term. This issue repeats throughout the paper.

Top Level Commitment

The only senior management actions suggested are the preparation of a statement of commitment, involvement in developing a Code of Conduct, and the appointment of a senior manager to oversee the development of an anti-bribery programme and ensure its implementation. These are not sufficient to ensure an appropriate level of corporate governance of the business, let alone adequate anti-bribery commitment. We suggest that at least the following should be included:

- Board or proprietor level consideration of the Bribery Risk Assessment, as part of their general consideration of the risks facing the business;
- Board or proprietor level consideration of planned and actual response to breaches of the organisation's anti-bribery policy, especially where senior management might be implicated in the payment of bribes;
- Periodic feedback to the Board, on compliance with anti-bribery and other corporate anti-crime responsibilities of the organisation.

In this section as well as in the rest of the document, it is important to stress the responsibility of top level management. The first paragraph under Principle 2 starts: 'Those at the top of an organisation are in the best position to foster a culture of…'. This should be replaced with 'Those are the top…are *responsible for fostering* …' If management is not leading the policy of the organisation on anti-bribery, it is unlikely to succeed. This point should be stressed in the introduction of the guidance, too.

Due Diligence

The undertaking of appropriate due diligence will only be useful as a defence to a charge of corporate bribery if it is adequately documented. The comments made under Principle 4 on documentation should therefore be repeated under this principle.

Where goods and services are sourced or provided in free, liquid and extensive markets, then bribery is much less likely to be a significant problem. It should be clear that due diligence is not required for individual entities within a supply chain, where this is not necessary on a risk related basis and the suppliers are not providing services for the organisation.

Clear, Practical and Accessible Policies and Procedures

- Policy and procedure *documentation*. In very small organisations, the production of written documentation may be onerous and unnecessary. In larger organisations, policies and procedures can hardly be clear without them. Though we agree that appropriate documentation provides good evidence of an organisation's procedures, it should be clear that the lack of them will not necessarily be indicative that appropriate policies and procedures do not exist.

- We agree that policies on reaction to blackmail and extortion (as well as where business is completely halted in the absence of facilitation payments) should be addressed in the policies and procedures. More guidance on where the bribery/extortion boundary lies, and what would be likely to be the Law Enforcement judgement on that boundary, would be most useful. This could be added to the section of the guidance on Further Information about the Act.

- Management of incidents of bribery – The Guidance here is worded weakly. The management of actual bribery incidents is a key procedure in preventing their reoccurrence, and to omit to plan for them suggests an inappropriate level of complacency. Even the smallest organisation

should have considered what they would do in that unfortunate event, and to have failed to plan for it is a clear indicator that insufficiently firm action might result.

Effective Implementation

There are a number of bullet points providing detailed examples for larger organisations while there is nothing for small organisations. Considering that the risk of bribery and the punishment are the same for large and small organisations, there should be as much guidance for small organisations as for larger organisations.

Monitoring and Review

Internal monitoring and review mechanisms –

- Para 2 – "In smaller organisations, this might include effective financial and auditing controls…". Many small organisations fall under the Companies Act audit exemption limit, and any suggestion that an audit is required may lead to an assumption that unnecessary costs should be incurred. For most small organisations, a senior manager or owner's close understanding of, and involvement in, the business, and constant awareness of the risks of bribery, will frequently be enough. We also suggest that the meaning of 'auditing controls' needs to be clarified.
- The procedures outlined for "smaller organisations" might be more suitable for medium sized businesses.
- In para 5, the list of possible trigger events for a review of bribery risks includes "corruption convictions". Criminal convictions typically follow the actual event long afterwards. The trigger for a risk review should be when allegations first arise (though with the understanding that they represent a risk increase, not proven misconduct).

Transparency – additional guidance on how to promote transparency within organisations would be useful.

External verification –

- The sentence "senior management … may wish to consider whether to … seek membership of one of the independently verified anti-bribery codes monitored by industrial associations or multilateral bodies" should be reworded – it is not the anti-bribery codes that should be monitored, but their implementation.

- It should be clear that external verification helps to emphasise the seriousness and commitment of an organisation to its anti-bribery policies and procedures and confirm their adequacy. It is not a necessary part of them.

External suppliers and contractors – Guidance should also be given on the monitoring and review of the conduct of contractors and suppliers who conduct services for or on behalf of the organisation.

Question 3: Are there any ways in which the format of the draft guidance could be improved in order to be of more assistance to commercial organisations in determining how to apply the guidance to their particular circumstances?

The most important point on the format of the guidance as a whole is that the guidance currently included under "Further Information about the Act" and similar guidance about matters of interpretation should be clearly included as part of the statutory guidance provided under Section 9 of the Act.

Question 4: Are there any principles or procedures that are particularly relevant and important to small and medium sized enterprises that are not covered by the draft guidance and which should be? If so what are they and why do you think they are they important?

Question 5: In what ways, if any, could the principles in the draft guidance be improved in order to provide more assistance to small and medium sized enterprises in preventing bribery on their behalf?

Where our comments are particularly relevant to SMEs we have identified that fact under our comments above.

OTHER MATTERS: THE ILLUSTRATIVE SCENARIOS

The 5 scenarios seem aimed at analysing situations in which bribes have been paid, and what could have been done, or should now be done to prevent repetition. None of them appear to address active situations, with a view to assisting employees faced with a position where they are under heavy pressure, for example, to pay a facilitation payment to prevent loss or damage to goods held in an unguarded customs import area, or from competition with entities paying bribes (or whose national government appears to be paying bribes on their behalf). Guidance on such matters would be helpful.

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