

**BSI'S BRITISH STANDARD FOR AN ANTI-BRIBERY MANAGEMENT SYSTEM
(ABMS) VS. BRIBERY ACT GUIDANCE: WHAT IS NECESSARY TO SHOW
"ADEQUATE PROCEDURES"?**

On 30 November 2011, BSI Standards ("BSI") published a new British Standard entitled "Specification for an anti-bribery management system (ABMS)" (BS 10500:2011) (the "BSI Report"), compliance with which "can help establish that the organisation has implemented reasonable and proportionate measures designed to prevent bribery."¹ BSI, part of BSI Group, is the National Standards Body of the UK and represents UK economic and social interests through the development of business information solutions for British organisations of all sizes and sectors. BSI has a close working relationship with the UK government, primarily through the UK Department for Business, Innovation, and Skills ("BIS").

In creating the British Standard for ABMS, BSI states that it considered the requirements of the Bribery Act 2010 (the "Bribery Act" or the "Act") as well as internationally recognised good practices in developing its Report.² The BSI Report further states that its requirements are "generic and are intended to be applicable to all organisations (or parts thereof), regardless of type, size and nature of business, and whether in the public, private or voluntary sectors."³

In a number of respects, however, BSI's recommended standards go beyond the obligations of organisations as set forth in the Bribery Act and its accompanying guidance as published by the Ministry of Justice (the "Guidance"),⁴ particularly with respect to what is necessary to demonstrate "adequate procedures" in anticorruption compliance by a commercial organisation. This necessarily raises a number of questions and potential concerns for corporates looking to adopt the BSI's British Standard and whose ABMS meets the six principles outlined in the Guidance but may not meet all of the more stringent British Standard requirements.⁵

Secondly, the British Standard extends the definition of "Associated Person" for the purposes of section 7 of the Bribery Act. It states: "This British Standard specifies requirements for implementing an [ABMS]...which addresses the following bribery risks in relation to the organisation's activities: ... b) Bribery by the organisation, or by its personnel or others acting on its behalf *or* for its benefit."⁶ However, the Bribery Act defines an Associated Person as

¹ BSI Report at Introduction.

² *Id.*

³ BSI Report at § 1.3.

⁴ Ministry of Justice, "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)" (the "Guidance").

⁵ Guidance at pp. 20-31.

⁶ BSI Report at § 1.1(b) (emphasis added).

someone acting on its behalf and for its benefit. This extension may be important as the Bribery Act does not necessarily mean that an ABMS has to apply to all subsidiaries since the collateral benefit in the form of enhanced dividends may not be sufficient under section 7.⁷ Of course, there are other reasons for extending an ABMS to subsidiaries, as the recent SFO case against Mabey Engineering Holdings makes clear.

Additionally, whereas the Guidance is explicitly “not prescriptive” and “intended to be flexible and outcome-focused, allowing for the huge variety of circumstances that commercial organisations find themselves in,”⁸ the BSI Report takes a different approach and lays out in a “must”/“shall” (rather than “may”) form several components necessary to an effective ABMS. Compliance with the Guidance for an ABMS does not, therefore, automatically mean that an organisation would be in compliance with the British Standard. Of course, as the British Standard is more widely taken up for companies and ABMSs are extended to comply with its requirements, there is a risk that an enhanced ABMS comes to be seen as the relevant standard under the Bribery Act. In other areas of financial crime, we have seen regulatory creep where “best practice” becomes standard practice. Companies may therefore wish to consider whether the enhancements in the BSI Report are ones they should implement. This briefing therefore explores the potential differences between the BSI requirements and the Guidance.

The British Standard vs. The Bribery Act Guidance

- **Written policy requirement:** The British Standard states that an organisation “shall adopt *and record* an anti-bribery policy” as well as document its audit programme.⁹ Although written policy statements and procedures may be valuable and necessary for many organisations, not every business will require such a formal structure. Indeed, the published guidance to the Bribery Act, in articulating the six principles that should govern the procedures commercial organisations put in place to prevent bribery, specifically notes that “small organisations are unlikely to need procedures that are as extensive as those of a large multi-national organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.”¹⁰ Nor is there any other suggestion in either the Bribery Act or the Guidance that a “recorded” anti-bribery policy is a prerequisite to demonstrate adequate procedures. Principle 2 of the Guidance, which addresses top-level commitment, notes that under some circumstances, “[a] formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation,” but does not mandate such a statement in all instances.¹¹ Principle 5 of the Guidance, which addresses

⁷ Guidance at p. 17.

⁸ Guidance at p. 20.

⁹ BSI Report §§ 4.1.1, 5.2.4.

¹⁰ Guidance at p. 21, Principle 1, commentary 1.2.

¹¹ Guidance at p. 23, Principle 2.

communication of bribery prevention policies and procedures, implies that more formal policies and procedures may be appropriate in many circumstances, but recognizes that the nature of those policies and procedures (*e.g.* whether written or oral) may “vary enormously between commercial organisations.”¹²

- **Communication of Policy and ABMS:** The British Standard is also more prescriptive than the Bribery Act with regard to how an anti-bribery policy and an ABMS must be communicated. The British Standard requires top management of the organisation to (i) make a statement regarding the adoption and implementation of, and support for, the anti-bribery policy and ABMS; (ii) communicate the policy “to all the organisation’s personnel, and...publish[] [it] on the organisation’s intranet and public website (if it has these)”; (iii) implement procedures under which “*all* personnel read the anti-bribery policy and agree to comply with it (compliance declaration)”; (iv) maintain records of “all personnel” who have received the policy, made the compliance declaration, and “*not* made such a declaration”; and (v) tailor training and/or guidance “to all personnel who will be responsible for implementing parts of the ABMS or who could encounter bribery in relation to their duties” to understand, among other things, “the circumstances in which bribery can occur in relation to their duties, and how to recognize these circumstances.”¹³ Although the Bribery Act’s Guidance does emphasize top-level commitment (Principle 2) and communication and training (Principle 5), the Guidance offers organisations greater flexibility in determining how best to achieve these goals. Similarly, requiring “all personnel” to read the standard is excessive. For large companies, there may be a significant number of employees who have no ability to pay bribes. For example, a mining company would not have to train miners whose job is solely working down in the mine and who are not exposed to bribery risk.
- **Supervision of the ABMS:** Whereas the Bribery Act recognizes that a top-level commitment to anti-bribery compliance is necessary,¹⁴ the British Standard takes top-level commitment a step further by both mandating that an organisation appoint a compliance manager to oversee and implement the ABMS and prescribing that manager’s role and responsibilities.¹⁵ Although a compliance manager may serve a critical and necessary function for many organisations, the Guidance does not similarly mandate that each organisation create such a function in order to meet the “adequate procedures” standard. Similarly, the British Standard sets forth a requirement that each organisation “establish a decision-making process” for any decisions that present a risk of

¹² Guidance at p. 29, Principle 5, commentary 5.2.

¹³ BSI Report sections 4.2 and 4.3 (emphases added).

¹⁴ See Guidance at p. 23, Principle 2, commentary 2.3 (noting that a demonstration of top level commitment may include “key individuals and departments involved in the development and implementation of the organisation’s bribery prevention procedures”).

¹⁵ BSI Report §§ 4.4.2, 5.1(b).

bribery¹⁶ and create an independent audit function for internal audits if these are not covered by the compliance manager.¹⁷ Although many organisations may find such procedures and functions helpful and even necessary to execute an ABMS, such procedures may not be appropriate for every organisation.

- Risk Assessment:** The Bribery Act Guidance encourages a risk-based approach to due diligence. Principle 3 (Risk Assessment) emphasizes the importance of having “proportionate” risk assessment procedures that are appropriate to the organisation’s “size and structure and to the nature, scale and location of its activities.”¹⁸ Principle 4 (Due Diligence) recommends a “risk-based approach” to due diligence taking into account risk factors such as location, industry sector, nature of the transaction, and the use of third-party intermediaries.¹⁹ In practice, organisations may often face high-risk transactions that require due diligence and additional safeguards to reduce the risk of corrupt behaviour. The British Standard acknowledges that an ABMS must be “reasonable and proportionate having regard to the nature and extent of bribery risks which the organisation faces.”²⁰ However, other recommendations are more prescriptive. For example, the British Standard states that due diligence should be undertaken for any business associate that might pose “a more than negligible bribery risk” (defined as “very unlikely that the business associate will participate in bribery and, if it does, the consequent loss and damage to the organisation is likely to be very low”²¹). In our view, this is a very low threshold. It also recommends that organisations terminate, discontinue, or withdraw from any transactions or projects that do not meet the BSI’s standard of an “acceptable level” of risk (defined as where “the risk of bribery appears to be sufficiently low that it is reasonable to allow the transaction or project to proceed or continue.”²²). The SFO might therefore determine that an organisation fails to have adequate procedures if it enters into a transaction that has a high degree of risk instead of withdrawing altogether because the bribery risk is “more than negligible.”
- Whistleblowing:** Most whistleblowing policies will seek to give assurances that the whistleblower’s identity will be protected whenever possible. However, guarantees of confidentiality can be problematic and may conflict with disclosure obligations in the event employees who are dismissed following a whistleblower’s allegations commence employment actions or High Court proceedings. However, the British Standard requires organisations to implement procedures that offer assurances that identities will be protected and kept confidential, even though this may not always be possible depending on local law.²³

¹⁶ BSI Report § 4.12.

¹⁷ BSI Report § 5.2.6.

¹⁸ Guidance at p. 25, Principle 3, commentary 3.1.

¹⁹ Guidance at pp. 27-28, Principle 4.

²⁰ BSI Report § 3.2.

²¹ BSI Report §§ 4.7.1, 4.7.2 Note 2.

²² BSI Report § 4.6.6.

²³ BSI Report §§ 4.16(h)(4), -(6); 4.17(b) Note.

Although compliance with the British Standard is not required by the Bribery Act and cannot guarantee immunity from prosecution under the Act, it is possible that the Serious Fraud Office will take an organisation's efforts to meet the British Standard's ABMS requirements into account in determining whether it has met "adequate procedures" in evaluating a potential section 7 offence under the Bribery Act. Although helpful in many respects, to the extent that the British Standard becomes the *de facto* standard or the comparative example for the SFO, many organisations that have taken steps to develop an ABMS that complies with the Guidance's six principles may nevertheless be at a disadvantage before the SFO for not matching their programs more particularly to the prescriptions of the British Standard.

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