For more information on this roadmap, and any of the others in our Global Compliance Roadmap series, please get in touch with the Osborne Clarke team here.
Introduction

The UK’s Bribery Act 2010 (UKBA) enacted a new corporate offence of failing to prevent bribery. The only defence to this offence requires a commercial organisation to demonstrate that it had adequate procedures in place to prevent bribery.

The starting point for any commercial organisation wishing to ensure that it has adequate procedures in place is to conduct an objective and comprehensive risk assessment to identify any ABC risks that it may face. That risk assessment should not be viewed as a one off exercise, but should be repeated at regular intervals, and whenever significant new business is undertaken that may alter the overall profile of the organisation.

Set out below is a ‘roadmap’ of questions designed to identify information that will enable a business to determine what ABC risks it may face.

Having answered these questions, an assessment can then be made of the ABC risks faced by the commercial organisation and the extent to which its policies and procedures adequately address those risks. Thereafter, any further necessary measures can be adopted and implemented with a view to ensuring that the business has adequate procedures in place that are UKBA compliant.
1. Assessing your external ABC risk

- Has your organisation undertaken any assessment or consideration of the ABC risks it faces and, if so, when was that assessment last undertaken?
- Is any of the business that you do it in any country in which you do business reliant on any permits, licences or other public body authorisations?
- Does the business make (or permit employees or others to make on its behalf) charitable and/or political donations?
- Could situations arise where employees of your organisation, or persons performing services for or on behalf of your organisation could be required to make potentially prohibited payments, commonly known as facilitation or grease payments?
- Do you make charitable donations? If so, where appropriate, do you undertake due diligence on the charities before doing so?

1.1 Sector/business risk

- How would your sector generally be perceived in terms of ABC risk: Highest: High: Medium: Low: Lowest
- Other than your principal areas of business, do you have any other business lines that ought to be considered for ABC risk, for example, human resources?

1.2 Country risk

- Which countries do you have an operational base in and what is the nature of that operation? (For example does it involve subsidiaries or joint ventures?)
- Which other countries do you transact/undertake business with? (For example do you have suppliers, agents or customers in those countries?)
- Are your ABC procedures consistent across jurisdictions in which you do business?

1.3 Transactional risk

- What business does your organisation transact/undertake in each of the countries identified above?
- Do any of those transactions involve public/government officials?
- Is any of the business that you transact/undertake reliant on any permits, licences or other public body authorisations in any country in which you do business?
- Does the business make (or permit employees or others to make on its behalf) charitable and/or political donations?
- Could situations arise where employees of your organisation, or persons performing services for or on behalf of your organisation could be required to make potentially prohibited payments, commonly known as facilitation or grease payments? By way of example only, payments sought by government officials to process a visa or to speed up a product approval?
- Do you make charitable donations? If so, where appropriate, do you undertake due diligence on the charities before doing so?

1.4 Business opportunity Risk

- How does your organisation identify and win new business?
- How does your organisation seek to retain and/or develop existing business?
- Do you use agents, consultants or other third parties to help you win, retain or undertake business?
- Are your officers, employees or any person performing services for and on behalf of the organisation authorised to give gifts and/or hospitality?

1.5 Business partnership risk

- Do you have any business partners, for example joint venture entities, who would be regarded as performing services for or on behalf of your organisation?
- Do you undertake due diligence on any prospective business partner before entering into a business relationship with them?
- Are you aware of any business partner having any direct, or indirect, links with any individual who would be classed as a Politically Exposed Person (PEP)?

1.6 Supplier risk

- Do you undertake due diligence on any supplier, whether of goods or services, before undertaking business with such suppliers?
- Do the contracts your organisation enters into with any supplier contain ABC provisions?

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2. Assessing your current approach to ABC

2.1 Policies and procedures

☐ Do you have:

(i) An ABC policy?
(ii) A Code of Ethics?
(iii) A Supplier Code of Ethics?

☐ Any other policies which may assist the business in preventing the giving or receiving of bribes (for example, an expenses policy, delegation of authority policy, conflicts of interest policy, or a specific reference to ABC or ethical contraventions in the disciplinary policy)?

☐ Is compliance with the procedures set out in any of the above policies recorded and monitored?

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3. Adequate Procedures: UK Guidance

The UK’s Ministry of Justice and Serious Fraud Office (SFO) have issued guidance relating to adequate procedures and, separately, the SFO has a section in its Operational Handbook detailing what it would view as constituting an effective ABC compliance policy. Each document refers to, and stresses the importance of six principles:

3.1 Proportionate Procedures

☐ Objectively, would your organisation be viewed as having adopted ABC procedures that are proportionate to the risks that you face?

3.2 Tone from the Top

☐ To what extent, and in what ways, does your Board/senior management provide leadership to the business on the approach to ABC (for example consideration of ABC risk assessments and policies, consideration and direction on specific issues, ensuring appropriate resourcing, firm wide communications)?

Is this message communicated externally, for example via a statement on corporate values?

☐ Is there a member of senior management or a director who is responsible for ABC compliance (or compliance more generally)?

☐ Have you assigned ABC support functions clearly (i.e. finance, legal, compliance)?

☐ How often does the Board/senior management discuss ABC issues?

☐ What resources has your organisation committed to ABC?

☐ Is the Board/senior management updated as to changes in relevant laws related to ABC?

3.3 Risk Assessment

☐ Are your risk assessment procedures overseen by senior management?

☐ Does your organisation allocate appropriate resource to risk assessment, proportionate to the scale of your business and the risks that you may face?

☐ Do you utilise relevant internal and external information sources when conducting risk assessments?

☐ Are your risk assessment exercises, and the conclusions reached, recorded in detail?

☐ Are the results of your risk assessment exercises, including relevant employee input, used to improve your ABC procedures and policies?

3.4 Due diligence

☐ What processes do you have in place to undertake due diligence (ABC specifically and/or more generally) on, and assess the risk of, new and existing third parties who you do business with?

☐ Does your due diligence on any party who does, or may, perform services for or on behalf of your organisation, include media and social media screening?

☐ Do you use any independent third party due diligence service providers (entities who perform independent checks on third parties for you, such as TRACE)?

☐ Does your due diligence on any party who does, or may, perform services for or on behalf of your organisation include, when appropriate, a search against relevant sanctions lists?

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3. Adequate Procedures: UK Guidance

What steps do you take to address or manage the ABC risk arising through third parties?

For example, does your organisation:

(i) Have a systematic approach for engaging third parties consistently across the business?

(ii) Have ABC or other contractual clauses in your contracts with third parties to mitigate against ABC risks (such as requiring them to comply with applicable laws, comply with a supplier code of conduct, provide a right of audit, provide a right of termination)?

3.5 Communications

Does your organisation provide ABC training to all relevant employees?

(i) Is that training tailored so that appropriate staff get specific training relative to their roles?

(ii) How often is the training provided/repeated?

(iii) Does this differ for personnel who may face the most obvious ABC risks?

(iv) Is the training evaluated and/or is a pass mark required to be achieved?

(v) Are training records compiled and retained?

(vi) If so, does it record when the training took place, what form of training was given and who took part?

Do you require personnel to provide a signed confirmation that they have read and understood your ABC policy?

Other than through training and, if relevant, the provision of the ABC policy, does your organisation communicate ABC risks to relevant personnel (for example, though compliance reminder emails or discussion at team meetings)?

Does your organisation have a whistleblowing procedure and, if so, is this overseen by a member of senior management?

Are all personnel made aware of the whistleblowing policy, if any, and how it may be utilised?

3.6 Monitoring and review

What steps does your organisation take to monitor its exposure to ABC risk (such as updating your ABC risk assessment at set intervals)?

What information is collected to assess compliance with your ABC policy (for example, training undertaken and % pass rate, gifts and hospitality register, number of whistle-blower reports)?

What financial controls does your organisation have in place to prevent ABC issues arising and/or monitor compliance with ABC policies (for example third party payment authorisations, expenses controls, gift and hospitality register).

Who is responsible for dealing with any whistleblower reports and what records are required to be kept?

Is information detailing ABC compliance provided to a member of the senior management team?

Is compliance with the ABC policies reviewed by the Board, and, if so, is it a regular agenda item?

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4. Specific concerns

☐ Have any potential ABC issues (red flags) been identified as part of any internal or external audits conducted within the past 5 years? If so, how were these dealt with?

☐ Have any whistleblower reports referred to potential ABC issues within the past 5 years? If so, how were these dealt with?

☐ Are you aware of any allegations, inquiries, investigations, prosecutions or other actions by a State regulator or prosecutor which may indicate an ABC issue connected to your organisation or a third party that performs services for or on your behalf?

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