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Guidelines on Appropriate Internal Control Measures for Juristic Persons to Prevent Bribery of State Officials, Foreign Public Officials and Agents of Public International Organisations

Guidelines on Appropriate Internal Control Measures for Juristic Persons

to Prevent Bribery of State Officials, Foreign Public Officials
and Agents of Public International Organisations

Message from the President of the National Anti-Corruption Commission

We are living in an increasingly integrated and borderless world in which businesses are constantly under pressure to meet market expectations and thrive under intense competition. These challenging global business conditions have prompted the international community to collectively step its efforts to combat transnational bribery, an unethical business practice that distorts market mechanisms and prevents fair competition.

One such regulatory approach to promote organisational cultures that encourage ethical conduct and corporate-wide commitment to compliance is the establishing of a system of strong anti-bribery compliance measures and internal control.

The National Anti-Corruption Commission (NACC) attaches great importance to cooperation with the private sector – a key engine for Thailand’s economic growth – and stands ready to take necessary legislative, policy and enforcement measures to support the promotion of corruption-intolerant business culture in Thailand. It is globally-recognised that private sector committed to upholding the principles of good corporate governance and transparency invariably improves a country’s overall trade and investment climate and contributes to its sustainable growth.

This guidance document, which sets out the fundamental elements of what constitutes effective internal control by a juristic person to prevent its employees and its associated persons from bribing public officials, is produced as part of a wider effort by the NACC to tackle the supply side of corruption. It is the practical product of an inclusive, open and constructive dialogue that spanned over 14 months and benefited invaluablely from broad input from over 500 stakeholders representing law enforcement agencies, regulators, chambers of commerce, industrial federations and professional associations.

The practical guidelines intend to provide a broad framework for companies to develop robust and effective anti-bribery programmes and internal control measures that are in line with international standards and best practices. Apart from ensuring legal compliance and limiting potential criminal liability of the juristic person, the adoption of effective and robust anti-bribery procedures entails other potential benefits. A carefully-designed internal control system, for instance, enhances the company’s overall ability to deter and detect abuse and misuse of resources by its employees or business partners.

On behalf of the NACC, I would like express my sincere appreciation for all the hard work and dedication provided by the editorial team and external experts representing the private and public sectors. The NACC eagerly looks forward to future collaboration with partners from all sectors to achieve the vision as set forth by the National Strategic Plan on Prevention and Suppression of Bribery, phase 3 (2017 – 2021) to create a “Zero Tolerance & Clean Thailand”.



Pol.Gen.

(Watcharapol Prasarnrajkit)

NACC President

21 August 2017

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Introduction

At present, bribery is a chronic problem in countries around the world. Rapid growth of communication, trade and investment beyond borders has evolved bribery from being a mere domestic problem. Such an issue spreads into international business transactions, consequently undermining fair market competitions and socio-economic conditions of those involved. In Thailand, bribery has been a major obstacle to the country's development, particularly, in the area of large scale public procurement due to its attractive interests. In the past, Thai laws were restricted to only offences of bribery of Thai state officials and did not include foreign public officials or agents of public international organisations. Despite enormous benefits gained from bribes, there was no clear legal provision regarding liability of juristic persons involved on the supply side.

“

To clarify and provide better understanding, the NACC has published these Guidelines to direct juristic persons on the establishment of appropriate internal control measures in conformity with the laws of the NACC and international standards”



Recognising the mentioned hindrance, the Organic Act on Counter Corruption, B.E. 2542 (1999) (as amended by (No. 3), B.E. 2558 (2015)) was amended to include section 123/5, which prescribes an offence of bribery of state officials, foreign public officials and agents of public international organisations, and enshrines liability for legal entities involving in such bribery. The new law imposes a fine of high value to compensate the state's loss, disgorge wrongdoers of the proceeds of wrongful conduct and deter future violations. In addition, such provision is adopted in compliance with international standards under 2003 United Nations Convention against Corruption (UNCAC) and 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Nonetheless, section 123/5 does not provide that the juristic person shall be strictly liable in all circumstances of bribery of state officials when a person relating to the juristic person involves in bribery of state officials. If the juristic person has in place appropriate internal control measures to prevent bribery, such entity will not be liable under this provision.

To clarify and provide better understanding, the NACC has published these Guidelines to direct juristic persons on the establishment of appropriate internal control measures in conformity with the laws of the NACC and international standards, e.g. handbooks of the United Nations Office on Drugs and Crime (UNODC), Organisation for Economic Co-operation and Development (OECD), Transparency International (TI), and ISO 37001.

The content of the Guidelines comprise 2 parts:

- ◆ Part 1: Explanation of section 123/5 and case studies on the application of section 123/5
- ◆ Part 2: Best practices for internal control measures and case studies on the implementation of measures to prevent bribery

Part 1 of the Guidelines aim to give readers the understanding of the fundamentals of section 123/5, and Part 2 intends to guide juristic persons in designing their internal measures to prevent bribery. The 8 principles provided are based on international standards and cover various aspects necessary for juristic persons to form and implement an anti-bribery programme. They are designed to be applicable to all kinds and sizes of businesses. However, to determine whether a juristic person has adequate or appropriate internal control measures, there might not be a conclusive method. That would rather depend on various factors of each particular entity, e.g. nature of business, level of risk of bribery of state officials, etc. It should be noted that implementation of internal control measures under the NACC's Guidelines is not an absolute guarantee against liability of bribery. Facts and supporting evidence would also be required in determining such liability in judicial courts. However, the adoption of principles in the NACC's Guidelines is beneficial for entities to have internal control measures which practically prevent bribery and are in line with international standards, resulting in sustainable business operation of such entity.

In addition, the NACC has established the Anti-Bribery Advisory Service (ABAS) to provide academic information and advice on anti-bribery measures and good international practices for juristic persons.

The NACC hopes that these Guidelines would be useful to readers, whether they are Thai or foreign juristic persons conducting business in Thailand, large or small and medium enterprises (SMEs), relevant public or private organisations, or those interested. Besides the earnest enforcement on state officials who solicit/accept bribes, the NACC believes in the importance of active participation and cooperation of the private sector in preventing and combating corruption and bribery. If all perform their duties to the best ability, it would help eliminate the problem, increase transparency and encourage fairness in business competition, which would further contribute to the sustainable growth of the economy and to our society as a whole.



The Organic Act on Counter Corruption, B.E. 2542 (1999) (as amended by (No. 3), B.E. 2558 (2015))

Section 123/5

“Whoever grants, offers to grant, or promises to grant any property or other benefits to any state official, foreign state official, agent of a public international organisation with intent to persuade such person to wrongfully perform, not perform or delay the performance of any duty in his office shall be subject to an imprisonment for a term not exceeding 5 years or a fine not exceeding Baht 100,000, or both.”

“If the offence under paragraph one is committed by any person related to any juristic person and the action is taken for the benefit of such juristic person, and the juristic person does not have in place appropriate internal control measures to prevent the commission of such offence, the juristic person shall be deemed to have committed the offence under this section and shall be subject to a fine of one to two times of the damages caused or benefits received.”

A person related to the juristic person under paragraph two shall mean an employee, a representative, an affiliated company, or any person acting for or on behalf of such juristic person, regardless of whether having the power or authority to take such action.”



Fundamentals

- ◆ Section 123/5 concerns with offences of bribery of state officials, foreign public officials and agents of public international organisations, and liability of juristic persons involving in such bribery.
- ◆ Both “individual” and “juristic person” may be held criminally liable under this section.
- ◆ A juristic person may be held liable if its personnel or business partners involve in bribery of state officials for the benefit of such juristic person.
- ◆ A juristic person shall not be liable if it has in place appropriate internal control measures against bribery.
- ◆ Appropriateness of measures depends on various factors, e.g. nature and structure of business, level or exposure of risk of bribery of state officials feasibility of actual implementation, etc. Appropriateness of measures, therefore, will be considered on a case by case basis.
- ◆ Penalty of “the bribe-giver” or “briber” is imprisonment of up to 5 years or a fine of up to Baht 100,000, or both, and penalty of the “juristic person engaging in bribery” is a fine of one (1) time to no more than two (2) times of the damages caused or benefits received



Remarks

- ◆ These Guidelines aim to direct juristic persons on the design and formation of internal control measures to prevent bribery of officials. Existence of measures in preventing bribery in line with the NACC Guidelines is not an absolute guarantee of non-liability of a juristic person in case of bribery. Juristic persons must earnestly implement the measures in conformity with its nature of business and level of risks to ensure that they are truly adequate.
- ◆ Principles in these Guidelines are applicable to all kinds and sizes of juristic persons as appropriate.
- ◆ These Guidelines, in the first publication, lay out fundamental principles of internal control measures to prevent bribery of state official as a primary model for juristic persons. They may be adapted occasionally in further publications to suit the changing circumstances and as appropriate. The drafting committee hereby apologizes for any error, if any, in these Guidelines.

If there is any lead on the violation, you may notify
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Online submission of complaint: www.nacc.go.th

For more information: Anti- Bribery Advisory Service (ABAS),
Bureau of International Affairs
www.nacc.go.th/abas

“ *Appropriateness of measures depends on various factors, e.g. nature and structure of business, level of risk of bribery of state officials, feasibility of actual implementation, etc.* ”



Chapter 1

“Understanding bribery offences and liabilities of juristic persons”

Paragraph 1 of section 123/5

(Offence of bribery of state officials, foreign public officials, and agents of public international organisations)

Paragraph 1 of section 123/5 “Whoever grants, offers to grant, or promises to grant any property or other benefits to any state official, foreign public official, agent of a public international organisation with intent to persuade such person to wrongfully perform, not perform or delay the performance of any duty in his office shall be subject to an imprisonment for a term not exceeding 5 years or a fine not exceeding Baht 100,000, or both.”

Remarks Paragraph 1 of section 123/5 is comparable to section 144 of the Criminal Code (offence on bribery of state officials)

1. The offence punishes the person who grants, offers to grant, or promises to grant.
2. “Bribes” are any property or other benefits as follows
 - ▶ Property means assets and incorporeal objects, susceptible of having a value and of being appropriated, e.g. money, houses, cars.
 - ▶ Other benefits, e.g. building of houses or decoration of such houses without any consideration, or with unreasonably low consideration, permission to stay at a rental home without any fees charged, discharge of debts, or taking ones on an excursion.
3. There is an intention to pay the bribe, and the person knows that the receiver of such bribe is a state official, a foreign public official or an agent of public international organisation.
4. It is a bribe paid to a state official, a foreign public official or an agent of a public international organisation.
 - ▶ “**State officials**” means a person holding a political position; a government official or a local official assuming a position or having permanent salaries; an official or a person performing duties in a state enterprise or a state agency; a local administrator and a member of a local assembly who is not a person holding a political position; an official under the law on local administration, including a member of a committee or of a sub-committee, an employee of a government agency, a state enterprise or a state agency; and person or group of persons exercising or entrusted to exercise the State’s administrative power in the performance of a particular act under the law, whether being established under the governmental bureaucratic channel, state enterprise or other state undertaking.
 - ▶ “**Foreign public officials**” means a person holding legislative, management, administrative or judicial post of a foreign state; and a person carrying out a public function

for a foreign state, or the state's public agencies or state enterprises, whether by appointment or election, with permanent or temporary post, and being entitled to salary or other compensation or not.

▶ **“Agents of public international organisations”** means a person performing duties in a public international organisation or is assigned by the public international organisation to work on behalf of the public international organisation.

5. The objective of payment of bribery (the motive) is to persuade such person to wrongfully perform, not perform or delay the performance of any duty in his office

6. To be considered as an offence under this section:

▶ The state official who accepts a bribe must “have the duty directly related to the action being persuaded”; for example, a manager of a construction company gives money to a Mayor of a municipality. The Mayor has the duty to consider granting construction permits in the municipality. The money was paid to induce such Mayor to promptly approve the construction permit whereas the documentation required for the application for such construction permit is insufficient to grant a permission. It is considered as a wrongful performance of his duty.

▶ The bribe must be given so as to induce the action which is “wrongful to his duty”, such as, making payment to a policeman for not arresting an offender .

▶ Bribery through an intermediary, e.g. a spouse (who is legally registered or not registered as a spouse), relatives, friends of state officials, or a juristic person hired as a business consultant, with the intent to give such bribe to a state official, is considered as an offence under this section, even though the briber is not giving the bribe to the state officials directly

7. The penalty under this section is an imprisonment for a term not exceeding 5 years or a fine not exceeding Baht 100,000, or both

The objective of payment of bribery (the motive) is to persuade such person to wrongfully perform, not perform or delay the performance of any duty in his office.



¹Kiatkajorn Wajanasawas, Criminal Law: Offences Chapter Book 1, 6th Publishing (as amended), p. 132

Paragraph 2 of section 123/5

(Liability of juristic persons involving in bribery of state officials, foreign public officials and agents of public international organisations)

Paragraph 2 of section 123/5 “If the offence under paragraph one is committed by any person related to any juristic person and the action is taken for the benefit of such juristic person, and the juristic person does not have in place appropriate internal control measures to prevent the commission of such offence, the juristic person shall be deemed to have committed the offence under this section and shall be subject to a fine of one to two times of the damages caused or benefits received.”

A person related to the juristic person under paragraph two shall mean an employee, a representative, an affiliated company, or any person acting for or on behalf of such juristic person, regardless of whether having the power or authority to take such action.”

Principles

1. The provision prescribes liability of a juristic person, when the person who commits the bribery offence is related to the juristic person and engages in wrongful action for the benefit or on behalf of the juristic person. If the juristic person does not have appropriate internal control measures to prevent the commission of such offence, such juristic person shall be liable under paragraph 2 of section 123/5.

2. The main objective of this provision is to encourage juristic persons to inspect performance of their employees, agents or persons related to the juristic persons to prevent commission of the offence. Due to the fact that corporate structures today are more complex, if an employee, an agent or a staff of any levels of a juristic person (regardless of whether such person is a representative of the juristic person) commits an offence by granting, offering to grant, promising to grant property or other benefits to a state official, a foreign public official or an agent of a public international organisation, with intent to persuade such person to wrongfully perform, not perform or delay the performance of any duty in his office for the benefit of the juristic person; the juristic person shall be liable for criminal penalties if it does not have appropriate internal control measures to prevent commission of the offence.

3. Elements of an offence

(1) The bribe giver is related to the juristic person period. Paragraph 3 of section 123/5 defines such person as an employee, a representative, an affiliated company, or any person acting for or on behalf of such juristic person, regardless of whether the person has the power or authority to take such actions; for example, an employee who is a driver

gives bribes to a foreign public official so the juristic person gets benefits in relation to the concession. Although the driver does not have the authority to execute an agreement or business transaction of the juristic person, the driver is the person who gives bribes for the benefit of the juristic person. Therefore, the juristic person shall be liable for criminal liabilities as well. To this end, the term “related person” covers more broadly than a representative of the company, whether such person has the duty for such action. If a subsidiary company pays bribes for the benefit of its parent company, the parent company shall also be held responsible.

(2) The bribe giver must act for the benefit of the juristic person, not for him/herself.

(3) The juristic person does not have an appropriate internal control measures to prevent commission of the offence. Appropriate internal control measures can serve as a defence in court to prove the innocence of a juristic person. The defense persists even if a person related to a juristic person bribes any state officials for the benefit of such juristic person. Therefore, a juristic person is recommended to put in place internal control measures in the forms of policies or internal regulations, announce the intention to combat corruption, and control the risks or factors that could lead to bribery. Those actions include not giving presents or gift hampers to state officials and implementing an appropriate internal control system. The detailed guidelines on how to develop the measures is in Chapter 2.

4. Penalty

Paragraph 2 of section 123/5 prescribes the fine for a juristic person without providing any specific amount. The fine ranges from one (1) time to no more than two (2) times of the damages caused or the benefits received.

Shall representatives of juristic persons, such as authorised directors, or persons having management functions, be held liable together with the juristic person?

According to section 123/5, these persons are not always held liable with the juristic person. Whether these persons will be held liable must be determined on a case-by-case basis. If the said person is involved in bribery, he shall be deemed to commit an offence under paragraph 1 of section 123/5. For example, an authorised director had signed to approve his employee to pay for the expenses on the entertainment for state officials with an intention to induce such state officials to wrongfully perform his duty for the benefit of his company; the authorised director is deemed to commit an offence. However, if the authorised director is not aware or involved in such approval, but the employee pays for hospitality expenditures in his own accord for the benefit of the company, the authorised directors shall not be liable.

Case studies

on the application of section 123/5

Case study 1:

A Juristic person bribes an official (a legal representative is the person giving bribe or involves in the bribe.)

Board of directors of a Thai company has approved to pay a bribe to a state official in Thailand to wrongfully perform his duty by issuing a license to the company when, in fact, the company does not meet the requirements of such license. Therefore, the directors commit an offence under paragraph 1 of section 123/5, while the company is deemed to commit an offence under paragraph 2 of section 123/5.

Case study 2:

A person related to a juristic person, e.g. an employee, bribes an official and the juristic person does not have any appropriate measures against bribery.

Mr. A is an employee of a foreign company doing business in Thailand. Mr. A pays bribe to a state official in Thailand so that the official will wrongfully perform his duty by awarding a procurement project with the government to the company. Therefore, Mr. A commits an offence under paragraph 1 of section 123/5, while the company may be considered as committing an offence under paragraph 2 of section 123/5 if the company does not have appropriate internal control measures to prevent bribery, such as top-level executive does not have a clear policy against bribery, or does not monitor actions taken by the employee when he contacts the state official.

As regards a legal representative of the juristic person, if such person takes part in the order to act or involves in the payment of the bribe, he shall be deemed to commit an offence under paragraph 1 of section 123/5.

Case study 3:

A person related to a juristic person, e.g. an employee, gives bribe to a state official, and the juristic person has appropriate internal control measures against bribery.

Mr. C is a salesperson of a company engaging in business in Thailand. Mr. C aims to boost his sales, so he decides to bribe a state official to wrongfully perform his duty by purchasing products from Mr. C's company. The company already has clear and appropriate measures to prevent bribery, such as there is a clear policy directing employees not to pay a bribe to any state officials, or the company must conduct thorough audits. Therefore, Mr. C is deemed to commit an offence under paragraph 1 of section 123/5, while the company will not be found guilty of this offence.

As regards a legal representative of the company, if such person does not take part in the order to act, or involve in the payment of the bribe, he will not be found guilty of this offence.



“ *The adoption of principles in the NACC’s Guidelines is beneficial for entities to have internal control measures which practically prevent bribery and are in line with international standards, resulting in sustainable business operation of such entity.* ”



Chapter 2

“Fundamental Principles of
Appropriate Internal Control
Measures for Juristic Persons to
Prevent Bribery of State Officials,
Foreign Public Officials and
Agents of Public International
Organisations”

8 Fundamental Principles of Appropriate Internal Control Measures for Juristic Persons to Prevent Bribery of State Officials, Foreign Public Officials and Agents of Public International Organisations

1. Strong, visible policy and support from top-level management to fight bribery
2. Risk assessment to effectively identify and evaluate exposure to bribery
3. Enhanced and detailed measures for high-risk and vulnerable areas
4. Application of anti-bribery measures to business partners
5. Accurate books and accounting records
6. Human resource management policies complementary to anti-bribery measures
7. Communication mechanisms that encourage reporting of suspicion of bribery
8. Periodic review and evaluation of anti-bribery prevention measures and their effectiveness

Principle 1

Strong, visible policy and support from top-level management to fight bribery

1

“If top-level management does not have an intention to combat bribery or disapprove of the development of anti-bribery measures, a juristic person cannot succeed in the formation of such measures.”

Principle

1 Strong, visible policy and support from top-level management to fight bribery

“ *If top-level management does not have an intention to combat bribery or disapprove of the development of anti-bribery measures, a juristic person cannot succeed in the formation of such measures.* ”

Persons in top-level management (In these Guidelines, they shall include board members, Chief Executive Officers (CEO), business owners, or equivalent groups of persons) have an important role in the initiation and support of a juristic person's formation of internal control measures to prevent bribery of state officials. If top-level management does not have an intention to combat bribery or disapprove of the development of anti-bribery measures, a juristic person cannot succeed in the formation of such measures.

Moreover, top-level management has major influence in shaping corporate cultures to prevent bribery of state officials, also known as “Tone from the Top”. That means policy from top-level management is a guideline for lower-level executives and all employees in the organisation.

Top-level management of a juristic person must express strong, clear and visible intention to fight bribery through its policies and business operations. In addition, it should be the main decision maker on activities with risks of bribery.

Good practices

The roles of top-level management to prevent bribery comprise two major elements:

1. A zero tolerance policy against bribery of state officials Top-level management shall demonstrate the commitment to combat all types of bribery at all times, whether direct or indirect, which includes:

- ▶ Top-level management's actions and behaviours that set good examples and reflect anti-bribery commitment
- ▶ Declarations or official statements that reflect intention, policies and measures to prevent bribery of state officials implemented in the company's business operation; and

- ▶ Encouragement and support for juristic person's involvement in anti-bribery initiatives

Such intention should also be communicated to those who are related to or affiliated with the juristic person through internal and external activities, e.g. employee trainings, shareholders' meetings, conferences, or online media. Effective implementation of policy and internal control measures reflects credible and concrete commitment of top-level management.

2. Participation of top-level management in preparation and implementation of internal control measures to prevent bribery Internal control measures should be driven by consistent support from top-level management throughout the process. Participation of top-level management can be accomplished through various activities as follows:

- ▶ Putting in place a written policy prescribing clear responsibilities, appropriate guidelines and rules on procedures to prevent bribery of state officials on all types of business activities.

- ▶ Ensuring that all levels of employees in the company and persons affiliated with the company abide by the company's anti-bribery culture. The role of top-level management may vary depending on the size of a particular juristic person. For example, in large organisations, top-level management may have responsibilities to form anti-bribery policy and delegate the authority to lower-level managers or heads of departments to oversee and monitor policy compliance. For small and medium enterprises (SMEs),



top-level management may have better opportunities to oversee and monitor policy compliance directly.

- ▶ Supporting critical actions relating to determination of internal control measures to prevent bribery; for example, conducting risk assessment on bribery of state officials as part of internal control measures of a juristic person, issuing a Code of Conduct, making decisions on activities with high risk of bribery, as well as having a measure to monitor the violation of anti-bribery measures.

- ▶ Allocating adequate resources to develop internal control measures so as to establish an effective anti-bribery programme. This includes selection of qualified personnel to be responsible for determination of the measures. It is also possible to hire experts to advise on the establishment and implementation of the programme. Allocation of financial resources to drive the programme and reach the objectives of anti-bribery is also an important element.

Small and Medium Enterprises (SMEs)

Top-level management in SMEs are likely to have closer relationship with its employees than large companies. According to “Tone of the Top” principle, top-level management of SMEs must be particularly careful on communication, decisions and behaviours as they may easily have an influence on the employees of the SMEs or persons affiliated with the SMEs. Top-level management must express strong, clear, and visible anti-bribery commitment through its actions, for example:

- ▶ Clear communication on anti-bribery commitment to all employees and business partners;

- ▶ Allocation of resources to support the determination and implementation of the measures to prevent bribery;

- ▶ Praising employees who refuse to engage in business transactions involving bribery; and

- ▶ Taking serious actions on any persons violating company’s anti-bribery measures.

Principle 2

Risk assessment to effectively identify and evaluate exposure to bribery

2

“The opportunity of each juristic person to engage with state officials is different. Therefore, risk assessment on bribery of state officials will help each juristic person in determining appropriate internal control measures to prevent bribery that suit each of their nature of business.”

Principle

2

Risk assessment to effectively identify and evaluate exposure to bribery

“The opportunity of each juristic person to engage with state officials is different. Therefore, risk assessment on bribery of state officials will help each juristic person in determining appropriate internal control measures to prevent bribery that suit each of their nature of business.”

Each juristic person is different, whether in size, structure, type, location of operation, and nature of the business. All of these components may affect the degree of engagement between a juristic person and state officials and the risks involved. To this end, there is no one-size-fits-all anti-bribery programme that is effectively applicable to all types of juristic person. Therefore, risk assessment that identifies and evaluates bribery exposure is an essential fundamental principle that would help a juristic person design appropriate internal control measures that suit its business.

The types of risks that a juristic person should take into consideration could be risks associating with external factors, for example, nature of business activities of the juristic person, as well as location of operation, type and size of a project or business partners. These factors could affect the probability of a juristic person to contact or involve with state officials. In addition, risks may stem from internal factors, for example, lack of committed cooperation from top-level management, lack of communication and training on anti-bribery programme, or company’s policy on bonus. A juristic person should take into account both external and internal factors when conducting risk assessment to better determine appropriate preventive or corrective measures for its business.

Good practices

When a juristic person conducts risk assessment on bribery, it can take the following steps:

1. Preparation of work plan

During the first step of determining internal control measures to prevent bribery, top-level management should encourage the inclusion of risk assessment as part of the anti-bribery programme. The actions in this step also include allocation of financial resources, appointment of responsible personnel, as well as supervision by top-level management to ensure that it progresses as planned.



Upon approval of the executives, the person responsible for conducting risk assessment will then start formulating work plan and procedures for risk assessment, such as determination of sources of information, design of tables to be used for data collection, and determination of method of risk assessment whether it is high, moderate or low risk, or by using numeric values or percentage.

2. Data collection and analysis A company can collect data for risk assessment from both internal and external sources, including reports from internal audit department, expense accounts, internal reports on the incidents, example of previous bribery cases, reports on risks of bribery of state officials in the country or municipality of operation, as well as workshops, interviews, and surveys on related persons to gather hands-on opinions and experiences from those who face risks of bribery directly.

3. Identification of risks A company should identify all possible risks of bribery, which may occur in the operation of its business, regardless whether a juristic person already has in place any preventive or corrective measures.

A number of factors can contribute to bribery of state officials, and the forms of bribery are different. Therefore, identification of risks could be divided into categories by identifying risk factors and the risks of bribery resulting from those factors.

- ▶ Risk factor shall mean internal and external situations, including circumstances of a juristic person which lead to the risk of bribery, for example, entering into a bidding of a government procurement project, expansion of business into other areas, import and export of products, a corporate policy which directs employees to achieve sales target.

- ▶ Risk of bribery shall mean any incident or action which contributes to the risk of bribery, for example, having been asked or demanded by a state official to make facilitation payments, giving of gifts and entertainment, bribing a state official by a representative of a juristic person with an objective to being awarded a government contract.



4. Assessment of level of risks is to assess the probability of occurrence of an action or incident which contributes to risks of bribery, and the impact of occurrence resulting from bribery.

- ▶ Probability of occurrence of an action or incident which contributes to the risks of bribery: The assessment may use previous cases in the organisation, number of transactions that requires communication with state officials in each activity, number of personnel whose actions involve risks of bribery, related personnel and entities who are involved in the audit of such transactions or actions, complexity of procedures, as well as the norms of business operations in any particular location of operation.

▶ The impact of occurrence: This includes legal, financial and reputational effects, such as the amount of fine incurred from the commission of an offence, the possibility of losing employees and clients.

Once the two sets of data mentioned above are assessed, they will be used in an analysis to determine the level of risk exposure of the activities of the company. The level of risk can be categorized as high risk, moderate risk and low risk, or calculating by numeric values.

5. Collection of data relating to existing risk control measures and assessment of remaining risks Following the determination and assessment of all risks associated with a company, a company will, in this step, examine the existing measures that can be used to reduce risks in any particular activities and record them in the same tables. The tables should indicate: what the existing measures are, the effectiveness of those measures (whether they are highly, moderately, and least effective), and level of the remaining risks of bribery (high, moderate or low). For example, there is a high risk that salespersons of a company will pay for hospitality expenditures for state officials expecting business benefit in return. However, the company has a good guideline, provides regular trainings to its employees, and sets up a channel for report on violations such as hotline or e-mail address. Considering these factors, the company is considered to have implemented highly effective measures, and the remaining bribery risk exposure is, therefore, low.

6. Use of risk assessment data to establish appropriate internal control measures and reports When a company becomes aware about its remaining risk exposure, it should consider whether any additional anti-bribery measures are required for any activities, and which activities should be prioritised.

Results of risk assessment should be recorded for further utilization. In addition to having the tables used in recording the data collected from the foregoing exercise, an Executive Summary may prove to be useful. It can serve as tool to keep the executives informed of risks of bribery associated the organisation so that they can make informed decisions or form an important policy for the organisation accordingly.

Small and Medium Enterprises (SMEs)

SMEs may be exposed to similar risks of bribery as large companies. The negative consequences from bribery on SMEs are not necessary lower than those of larger companies. Therefore, SMEs should also conduct risk assessment to establish appropriate internal control measures to prevent bribery of state officials that suit its business. The risk assessment will also help SMEs, which are likely to have limited human and financial resources, identify its priority to tackle high risk activities.

SMEs can choose risk assessment method and risk assessment criteria which it deems appropriate and adequate, considering its size and limited resources, e.g. SMEs may choose to categorize risks as high, moderate, and low, instead of using calculations by numeric values.

In addition, to collect data for risk assessment, SMEs are also advised to conduct research from publicly available sources, seek advice from relevant agencies responsible for SMEs oversight, as well as collaborate with companies operating in the same type of business. In addition, SMEs in the same geographical location may also collectively discuss on how to conduct risk assessment.

Remarks: Risk assessment can be one of important elements to be considered by law enforcement authorities in determining whether a juristic person has appropriate internal control measures to prevent bribery. For example, a juristic person identifies that a particular activity is considered as high risk, but it does not allocate any resources or attention, or establish any internal control measures which is strict enough for the level of risk. If bribery occurs, the juristic person may still be liable. This is because although the juristic person may claim that it has internal control measures to prevent bribery, such measures may not be suitable for the level of risks. In such case, a mere existence of internal control measures to prevent bribery is not an absolute guarantee against liability. The important element is the internal control measures must be appropriate and suitable for the level of risks of such juristic person.

Principle 3

Enhanced and detailed
measures for high-risk
and vulnerable areas

3

“Facilitation payments, gifts, hospitality expenditures, donations, etc. bear high risks of bribery. Therefore, juristic persons should prescribe detailed policies, including visible and clear procedures for approval and monitor of these particular actions”

Principle

3

Enhanced and detailed measures for high-risk and vulnerable areas

“ *Facilitation payments, gifts, hospitality expenditures, donations, etc. bear high risks of bribery. Therefore, juristic persons should prescribe detailed policies, including visible and clear procedures for approval and monitor of these particular actions* ”

Circumstances with high risk of bribery, which a juristic person should establish detailed measures, include facilitation payments, gifts, hospitality expenditures, charitable donations and donations to political parties, etc. These payments are considered as high risk because it is difficult to determine whether they are given according to common practices, culture, social etiquettes or it is, in fact, bribe.

Good practices

When establishing measures concerning high risks circumstances, a company should take into consideration the following criteria:

- ▶ The company should conduct research on Thai and foreign laws related to the expenses associated with high risk activities to determine appropriate internal control measures that are applicable to its local laws and business risks. For example, if a company has a parent company in a foreign country, the company may implement an anti-bribery programme developed by its parent company. However, it must be noted that the applicable laws, culture, and standards relating to these types of expenses could be different from those in Thailand (e.g. the value of gifts or hospitality expenditures permitted to be given to state officials or legitimacy of facilitation payments). As such, it is necessary to amend or adapt such measures to the company's business as appropriate.

- ▶ To have clear measures, the company's anti-bribery programme should be in writing with the following details:

- > Internal regulations and guidelines for high risk areas should include definitions, details, or examples of the cases where a company can approve such payment. For example, a company may limit the permitted amount of hospitality expenditures, limit the number of times for the payment, or set out rules used to determine whether

the hospitality expenditures would be appropriate. It must be emphasised that these expenses must not be paid to induce state officials to perform any action in contrary to their duties, or make any decision for the business benefits of the company.

Moreover, if a company wishes to prohibit such expenses, such company should prescribe clear prohibitions, such as prohibition for employees to offer any gift to or entertain state officials, pay any facilitation payments to state officials, or make donations to political parties, etc.

- Establishment of detailed procedures to obtain an approval before any actions can be taken. This includes having the requirements for approval of disbursement, maintaining records on such expenses, and having procedures for informing the Office of the National Anti-corruption Commission (NACC) when bribery of state officials is discovered.

In addition, the company should have reporting, control and examination procedures to ensure that the expenses have been made in accordance with the company's policies, not as bribes. For example, if an employee has to make such payment, the employees should be informed of the procedures, e.g. to whom the employee should report, from whom an approval should be sought, and what details should be included in the report, etc. Executives of the company should take part in the approval or review of the payment relating to these expenses.

- ▶ The company should communicate its policies and procedures of actions, for example, approval procedures, reporting procedures, and how to avoid or refuse to give bribes when being solicited by state officials, etc. The aim is to inform personnel of the organisation and persons having business relationship with the organisation policies and procedures so that everyone knows how to proceed or react. The communication should be made through easily accessible channels and the content should be easy to understand.



▶ The company should maintain clear and accurate records of expenses to avoid the concealment of bribery. Although the expenses are made in good faith, they should not be recorded as other types of expenses, e.g. in making donations, the receiver should be clearly identified; or in the record of hospitality expenditures, they should not be recorded as trainings expenses or consultant fees.

Small and Medium Enterprises (SMEs)

Small and Medium Enterprises (SMEs) may also implement the foregoing good practices. Executives of SMEs should establish clear policies and measures relating to these types of payments. Moreover, SMEs should organise training to prepare its employees or its business partners if they are solicited for bribe. In addition, it is recommended that SMEs share its experiences and find solutions together with other SMEs.

Areas with high risks of bribery

Facilitation Payments

Internationally accepted principle defines the term “facilitation payments” as small payments paid unofficially to a state official to secure or expedite the performance of a procedure, which discretion of a state official is not required and is the lawful performance of his/her duty. Moreover, the procedures shall be the rights to which the payer (the company) of the facilitation payments is legally entitled, e.g. obtainment of a licence, an application for a certificate, or entitlement to public services.¹

However, for juristic persons engaging in business in Thailand, they should not pay any facilitation payments to state officials in any case. In addition, there should be clear and thorough communication on prohibitions against such payment to all personnel within the organisation and persons having a business relationship or affiliated with the juristic persons. This is because the permission to allow the juristic persons’ personnel to pay facilitation payments to state officials carries high risks of bribery. Refusal to make facilitation payments would decrease unnecessary costs concerning business operations, encourage transparency in the business operation, and promote fair competition.

Foreign juristic persons engaging in business in Thailand, or juristic persons having business relationship with foreign juristic persons should thoroughly study relevant

¹International Chamber of Commerce, Rules on Combating Corruption, 2011 and UNODC, An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide, 2013

Thai and foreign laws. This is because treatment of facilitation payments varies in different countries. For example, one of the most prominent legislations is the US Foreign Corrupt Practices Act 1977 (FCPA) which defines and prescribes specific rules for facilitation payments, i.e., if the payment is made in accordance with the rules specified under the FCPA, the payments shall not be regarded as an illegal payment². On the other hand, the UK Bribery Act 2010 considers facilitation payments as illegal³. The international standard also gears toward considering facilitation payments illegal because this type of payment induces bribery of state official⁴.

Hospitality Expenditures and Gifts

Hospitality expenditures and gifts are expenses associated with a company's business operations to build or maintain a good relationship or, in some occasion, paid as part of social etiquette. Hospitality expenditures include payments for accommodations and travel expenses for a site visit, a study tour, food and beverage expenses. As for gifts, they could be in various forms e.g. cash, goods, services and gift vouchers. These types of payments could be considered as bribes if they are paid to induce a state official to wrongfully perform his duty. These payments are frequently concealed



²Under the US Foreign Corrupt Practices Act 1977 (FCPA), facilitation payment is not a bribe if it is a consideration for a routine action of such state official (For more details, see the Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, 2012, page 25)

³The UK Bribery Act 2010 Guidance (2011), paragraph 44, it can be summarised that the facilitation payment may lead to the offence of bribery to state officials under Section 6 and the offence of relation juristic person under Section 7.

⁴OECD, Recommendation on the Council for Further Combating Bribery of foreign Public Officials in International Business Transactions, 2009

in accounting books by recording inaccurate items, e.g. as expenses for training, consultant fees, or marketing expenses.

Thai laws do not prescribe any specific value as a limit for hospitality expenses and gifts to which a juristic person may give a state official. However, several important factors should be taken into account when a company pays for hospitality expenditures or offers gifts, for example:

- ▶ There is no intention to induce a state official to wrongfully perform his/her duty for benefits of the company
- ▶ The value or price should be reasonable and the payment/gift should be only as necessary. For example, if a juristic person sponsors a study tour in a foreign

country, the purpose of the visit must be to enhance the efficiency of work, not for leisure or entertainment. Payments for a state official's family members should also be prohibited.

- ▶ Timing and frequency of payment/gifts could reflect the intention of bribery, e.g. entertaining state officials when the company is in the process of bidding for a government project.
- ▶ Accurate records of expenses should be maintained by entering actual expenses accompanied by receipts or other supporting evidence.

In addition, a company should conduct research on law concerning acceptance of property or other benefits on an ethical basis of state officials under section 103 of the Organic Act on Counter Corruption, B.E. 2542 (1999) and the Notification of the National Anti-corruption Commission Re: Rules of the Acceptance of Property or Other Benefits of State Officials, B.E. 2543 (2000), which prescribe the value of property or benefit that a state official, as the receiver, is entitled to accept on an ethical basis, i.e., an acceptance based on a traditional, customary, or cultural occasion or on an occasion



that the manners practised in the society⁵. In this regard, a juristic person may use such laws as guidelines to determine the policy on payments of hospitality expenditures and offering of gifts.

Charitable Contributions and Political Contributions

While charitable contributions can be a part of corporate social responsibility activities, it can also be a channel for bribery, e.g. donation made to a charitable event organised by a state official with intent to induce such state official to provide undue advantage to the juristic person. Although, like other high risk payments, Thai laws do not prescribe the maximum value of charitable contributions made by donors, a juristic person should consider, among others, the following elements:

- ▶ The intent of the juristic person who makes charitable contributions is an important factor in determining whether the contributions are made as subterfuge for bribery.
- ▶ Due diligence the recipient of contributions should be conducted, notably when the recipient is directly related to or has close relationship with a state official. Due diligence on objectives and operation of the recipient should be conducted to ensure transparency.
- ▶ Books and accounting records should accurately and fairly reflect the transactions.

⁵Under section 103 of the Organic Act on Counter Corruption, B.E. 2542 (1999) and Clause 3 of the Notification of the National Anti-corruption Commission Re: Rules of the Acceptance of Property or Other Benefits of State Officials, B.E. 2543 (2000), “the acceptance of property or other benefits on an ethical basis” shall mean to receive property or any other benefit from any relative or from any person on a traditional, customary, or cultural occasion or on an occasion that the manners practiced in the society require that giving, provided that, in this guideline, it shall include hospitality expenses and gifts.

The notification prescribes on the value and procedures for accepting property or other benefits under clause 5, 6, 7. In summary, the hospitality expenses and value of the gifts shall not exceed Baht 3,000 with an exception (state officials can accept property or other benefits having a price or value exceeding Baht 3,000) for the acceptance of property or other benefits received from abroad or the acceptance is required to maintain a good relationship between persons, provided that the approval from the supervisor is required for both cases.

Political contributions can induce a person holding a political position to wrongfully perform his duty. A person holding a political position is a state official under the Organic Act on Counter Corruption, B.E. 2542 (1999) as amended⁶. Although Thai laws do not prohibit a juristic person from making political contributions, the juristic person is advised to get acquainted to Thai laws concerning rules on political contributions, e.g. the Organic Act on Political Parties, B.E. 2550 (2007) which prescribes restrictions for the political party on acceptance of political contributions (value of contributions received and criteria of juristic persons from which the political parties may accept political contributions⁷).



⁶Section 4 of the Organic Act on Counter Corruption, B.E. 2542 (1999), as amended

⁷The Organic Act on Political Parties, B.E. 2550 (2007), Part 3, Political Contributions

Principle 4

Application of anti-bribery measures to business partners

4

“A company’s internal control measures to prevent bribery must be applied not only to its employees, but also outsiders who have business relationship with the company.”

Principle

4

Application of anti-bribery measures to business partners



A company's internal control measures to prevent bribery must be applied not only to its employees, but also outsiders who have business relationship with the company.



It is inevitable that a company will engage in business relationship with others as it expands its business. It may have to rely on those persons to act for or on behalf of the company. Persons having business relationship with a juristic person, including affiliated companies, joint ventures, agents, advisors or other intermediaries, etc. If any business partner bribes a state official for the benefit of the company, the company may be held liable. Therefore, the juristic person should also implement its anti-bribery programme on its business partners. Although a company may not have enough degree of control over its business partner to require that the business partner also implements its anti-bribery measures, the company is encouraged to use its best efforts to require its business partner to implement anti-bribery standards comparable to the company's.

“Person having business relationship with the juristic person” under this principle focuses on business partners, any person acting for or on behalf of the juristic person, or any person under the control of the juristic person. The juristic person may be held liable if such person bribes a state official “for the benefit of the juristic person”. For example, a customer offered goods or provide services which is provided by a juristic person to a state official for the benefit of the customer, not for the juristic person. In this case, the juristic person will not be held responsible.

Persons having business relationship with a juristic person may include the following persons:

1. An affiliated associated or subsidiary company, or a juristic partnership⁸ or any other person under the common control of the juristic person

A subsidiary company or a juristic partnership has close relationship with its parent company. In general, the parent company has effective control over the operation,

decision making, orders, approval of transactions, and appointment of executives of subsidiary companies. With such control, the juristic person should consider taking the following actions:

- ▶ A parent company should require its subsidiary company to also implement an anti-bribery programme;
- ▶ A parent company should provide assistance and support on an anti-bribery programme, including allocation of sufficient human resources and funds for the formation of such programme, by providing the parent company's personnel to support on trainings regarding guideline on prevention of bribery and submitting evaluations to the parent company;
- ▶ A parent company should take part in an audit of accounts of persons having business relationship with the parent company; and
- ▶ A parent company should set up a reporting channel for bribery incidents which is directed to the parent company to prevent bribery paid by executives of subsidiary company or partnership, etc.

⁸Section 39 of the Revenue Code defines "affiliated companies or juristic partnerships" as two or more companies or juristic partnerships having relationship in any of the following manners:

- (1) More than one half of the same shareholders or partners in a juristic person constitutes more than a half of the number of the shareholders or partners in another juristic person;
- (2) The shareholders or partners holding more than fifty per cent of the value of the total capital of a juristic person are also the shareholders or partners holding more than fifty per cent of the value of the total capital of another juristic person;
- (3) A juristic person is a shareholder or partner holding more than fifty per cent of the value of the total capital of another juristic person;
- (4) Persons constituting more than one half of the number of the directors or partners controls the management of a juristic person are also directors or partners who controls the management of another juristic person.

2. A joint venture⁹

A joint venture is a joint business operation of two or more parties, which may be registered as a separate legal entity or operate in the existing legal entity. If a juristic person wishes to take part in an already established joint venture or initiate such operation, the juristic person should proceed as follows:

- ▶ Conduct due diligence;
- ▶ Include in a written agreement concerning a requirement on the formation of internal control measures to prevent bribery. If a company is the dominant venturer or investor, or the person having control, the company would have negotiation power to implement the anti-bribery programme by a Joint Venture mandatory. If the company does not have dominant control, the company should encourage implementation of efficient anti-bribery measures and keep monitoring to ensure transparency in its business operation to demonstrate best efforts to combat bribery of state officials.

3. Agents, consultants and other intermediaries

Agents, consultants and other intermediaries could be an individual or a juristic person assisting a company in its business operation, e.g. sales, legal or accounting advisory, application for a permit, etc. Such action may be done for or on behalf of the juristic person. Therefore, the juristic person may be held liable for bribery offence committed by such persons. Moreover, in many cases, a company uses such middle person as a channel to give a bribe to a state official. Although a company may not have direct control, it should consider establishing measures to prevent bribery which can be applicable to intermediaries, notably by conducting due diligence.

Good practices

In addition to the remarks on implementation of measures on persons having business relationship with a juristic person, as mentioned above, a company may consider implementing the following guideline by adapting to relationship between or level of control over its business partners. For example:

- ▶ **Due Diligence** A juristic person should conduct due diligence on its potential business partner to identify existing issues and risks of bribery

⁹Section 39 of the Revenue Code defines “a joint venture” as an activity of operating in a commercial or profitable manner, between a company or juristic partnership on one hand and companies, juristic partnerships, individuals, non-juristic body of persons, ordinary partnerships on the other hand.

concerning such partner. Level of comprehensiveness of due diligence may depend on risks of bribery arising from activities engaged by such business partner. The due diligence may include the following elements:

- > What is business partners' legal and financial status?
- > Who are the key executives or majority partners and whether they have any relationship with any state official?
- > Do the executives express commitments in prevention of bribery?
- > What is business partner's reputation regarding transparency in such business and how reliable?

- > What is their anti-bribery policy?
 - ▶ **Requiring commitment on anti-bribery of state officials** Before engaging in any business transactions, a company may require its business partners to give commitment in writing that they will adhere to and abide by relevant laws and anti-bribery internal control measures of the company, or implement the business partner's internal measures of equivalent standard to confirm both sides' mutual understanding and intentions on anti-bribery.

- ▶ **Providing support to persons having business relationship with the company to implement anti-bribery measures** A company may organise activities or initiatives for its business partners to foster knowledge and understanding so that they are able to comply with anti-bribery measures, e.g. providing a channel for consultancy and trainings.

- ▶ **Periodic monitoring of the operations of persons having business relationship with the company** Due to constant changes in business operations, a company should regularly monitor the operations of its business partners by ensuring whether its business partners are complying with anti-bribery policy or internal control measures, or checking on the relationship between business partners and their customers or state officials. By doing so would allow the company to promptly alleviate the risk of bribery and to be able to determine the measures that are appropriate to the changing circumstances.

A juristic person should conduct due diligence on its potential business partner to identify existing issues and risks of bribery concerning such partner.



▶ **Applying incentives for compliance or penalty for non-compliance of anti-bribery measures** A company may consider supporting business partners who comply with anti-bribery measures with transparency, e.g. awarding contract renewal or offering business opportunities.

On the other hand, if a business partner violates internal anti-bribery provisions or have high risk of bribery but do not take any corrective measures within the prescribed period, the company may consider applying commercial sanctions on such business partners, e.g. termination of contract or exclusion from business opportunities.

Small and Medium Enterprises (SMEs)

Application of anti-bribery programme to business partners is equally important for SMEs as for large companies. However, due to their smaller size and lesser economic power, SMEs' choices of actions may be limited, for example, SMEs may not be able to impose termination provisions, which is conditional upon the violation of anti-bribery measures by its business partners, or to require a warranty regarding anti-bribery measures. Nonetheless, SMEs may consider the following options:

▶ Conduct due diligence on persons having business relationship with SMEs. SMEs that lack expertise in due diligence may engage external consultants to conduct the initial risk assessment.

▶ SMEs are mostly seen as agents or being under the control of larger companies, facing requests for compliance with large companies internal control measures. To this end, it is advisable that the SMEs and large companies collectively organise anti-bribery trainings.

▶ SMEs can engage in collective actions with other SMEs to reduce costs or expenses associating with the formation of its anti-bribery programme.

Remarks: As regards relationship between a juristic person and persons having business relationship with the juristic person that occurs before section 123/5 entered into force, there may not be any anti-bribery measures in place at the time. However, the juristic person should apply the measures as applicable in the relevant circumstances, e.g. agreeing to an amendment prescribing a provision regarding the application of anti-bribery measures or putting in place a monitoring measure.

Principle 5

Accurate books and accounting records

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“Having an accurate and transparent accounting system, as well as an independent audit, will help prevent the concealment of expenses paid as bribes.”

Principle

5

Accurate books and accounting records

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Having an accurate and transparent accounting system, as well as an independent audit, will help prevent the concealment of expenses paid as bribes.

”

In business operation, complexity of accounting systems is often used as a tool to conceal expenses paid in connection with bribery. Therefore, an important factor leading to effective internal control measures to prevent bribery includes procuring or developing accurate and transparent accounting systems, as well as a financial audit mechanism, to regulate and ensure good financial reporting system

Good accounting system begins at a company's policy. Top-level executives must priorities on having an accurate, transparent and accountable accounting system and take part in the audits of financial reports in order to detect any financial irregularity.

In addition, during audit process and preparation of an annual financial report, a company should have plans and internal and external audits which are complementary to the company's anti-bribery system.

Good practices

The following practices would support a good accounting system and prevent bribery of state officials

- ▶ List of assets and liabilities as well as the company's transactions must be accurately and fairly recorded in company's books and records. It should contain details and supporting evidence and be recorded in correct chronological order.

- ▶ Off-the-book records are prohibited because the expenses that are recorded off the books cannot be verified in the company's financial reports, risking the concealment of bribery.

- ▶ The company's books and records, kept in any forms, should be safeguarded to prevent intentional or unintentional alternations or destruction. It should not be destroyed prior to the expiry of any time limit imposed by legal regulations to prevent the concealment of bribery.

- ▶ Every transaction should be consistently recorded from the origin to completion.

- ▶ The selected auditors must be independent, neutral and possess knowledge and understanding on risks and activities engaged by the company. The audit reports must be reported to executives and relevant persons.

- ▶ Company's audit system must be independent, whether it is the audit by internal personnel or external independent auditors.

- ▶ Any expenses paid as bribes should not be recorded as deductible expenses for the calculation of net profits.



Principle 6

Human resource management
policies complementary to
anti-bribery measures

6

“Intention to combat bribery
can be reflected through
human resources management”

Principle

6

Human resource management policies complementary to anti-bribery measures

“

Intention to combat bribery can be reflected through human resources management

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Human resource management plays an important role in creating anti-bribery corporate culture. Juristic persons should push forward internal personnel’s consciousness and cooperation in line with the juristic persons’ internal control measures to prevention bribery. Commitment to combat bribery can be reflected through human resource management, from the processes of recruitment, promotions, performance evaluation, compensations, as well as trainings to encourage knowledge and compliance with the company’s measures.

Good practices

A juristic person may take into account the following human resource management guideline to promote anti-bribery measures:

- ▶ Through the recruitment process, a company should conduct background check on the applicants and recruit the applicant who is ready to commit him/herself to the company’s anti-bribery commitment. Additionally, in employment contracts, employees should be required to comply with the company’s anti-bribery policies, rules and regulations.

- ▶ When anti-bribery policies or rules are violated, the company should have appropriate and visible disciplinary procedures or other suitable actions.



▶ The company's policy should not punish an employee who causes the company to lose business opportunities resulting from refusal against bribery. Moreover, the company should have protective measures in place for those who report a violation or suspicion to prevent such persons from hostility or being punished.

▶ A company should create incentives for compliance with the company's anti-bribery programme by offering rewards or using company's anti-bribery activities as one of performance evaluation criteria, e.g. participation and performance in compliance trainings, level of support of such measures, or knowledge and understanding of the company's values.

▶ The policy on bonus or commission may induce employees to give bribes in order to achieve business targets. Therefore, a company may prescribe conditions for such payments that any businesses obtained from bribery is excluded from the calculation of bonus or commission.

▶ All employees should be appropriately and regularly trained regarding the company's internal control measures. A company should communicate and provide trainings on company's anti-bribery policies and measures for its personnel, and executives should take part in providing guidance to the organisation of such activities. Moreover, contents communicated to and trainings provided for employees should be adapted to suit unique functions and levels of target audience. It should also cover policies and procedures, e.g. approval procedures for hospitality expenses, gifts, and facilitation

payments, as target audience would generally find it more interesting to listen to the topics tailored for their functions. Consequently, the company's anti-bribery measures should be accurately and efficiently implemented.

In addition, all internal personnel and business partners should have access to company's information on anti-bribery programme. Method of distribution of information can be varied, e.g. publication of a company's Code of Conduct to be physically



distributed to all persons related to the company, distribution through the company's website, as well as having a channel for consultation on issues related to compliance of anti-bribery programme. More importantly, the company's Code of Conduct should not be seen as a paper tiger. A company should seriously and continuously encourage compliance and consistently revise its Code of Conduct to reflect changes in business operation environment.

- ▶ A company may consider arranging for a test on knowledge and understanding on the company's Code of Conduct and anti-bribery programme to evaluate the effectiveness of trainings provided and to ensure that employees will correctly implement such measures.

- ▶ The company should be open for comments or recommendations as they could be valuable for future development of the company's internal control measures.

Small and Medium Enterprises (SMEs)

Small and Medium Enterprises (SMEs) may consider the following alternatives:

- ▶ Preparation of Code of Conduct to clearly communicate company's policies to its personnel. Business associations or groups of SMEs operating in the same type of business may consider preparing a model Code of Conduct that could then be tailored to suit expertise area of business of a particular company.

- ▶ Trainings could foster knowledge and understanding and play a key role in effective implementation of anti-bribery measures. In addition to providing in-house trainings and education, if SMEs have business relationship or are part of a supply chain of larger companies having better resources, the SMEs may seek to participate in anti-bribery trainings of such larger company. Moreover, government authorities and business associations could be a useful source of information and may offer specialists who could provide assistance on trainings for SMEs.

- ▶ Public and private anti-bribery and anti-corruption organisations generally have projects and documents to provide education on anti-bribery and anti-corruption free of charge. SMEs may consider using such communication tools or resources in their organisations.

Principle 7

Communication mechanisms
that encourage reporting of
suspicion of bribery

7

“A juristic person should encourage reporting
of violations and implement protective
measures for those who submit complaints in
order to encourage and promote confidence
for full cooperation”

Principle

7

Communication mechanisms that encourage reporting of suspicion of bribery

“

A juristic person should encourage reporting of violations and implement protective measures for those who submit complaints in order to encourage and promote confidence for full cooperation

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Reporting of violations and suspicious cases, including reporting of weaknesses in internal control measures on anti-bribery is the main element can help a juristic person prevent bribery in due time or limit damage which could have been more severe had the violation remain uncured. One of the main obstacles that prevent company’s personnel from disclosing information on violations is the fear of retaliation or hostility from others within the organisation, e.g. being harassed, dismissed, or pressured by others. Therefore, a juristic person should encourage reporting of violations and implement protective measures for those who submit bribery-related complaints to encourage and promote confidence for full cooperation.



Good practices

- ▶ A company should create corporate values that reporting of violations is appreciated. Top-level executives should announce a clear policy that the company encourages disclosure of information on corruption and bribery, and employees and business partners will not be retaliated as a result of a good faith report.

- ▶ A company shall designate a responsible person for accepting complaints. Such person may be an individual or a department within the organisation. Alternatively, a company may hire an external services provider to accept complaints in the initial stage to ensure the protection of reporting persons' identities.

- ▶ A company may maintain several reporting mechanisms that is easily accessible, concealing the identity of the persons making complaint (if the person indicated so), and allow the person submitting the complaint to monitor the progress, e.g. establishing a hotline or a computer system.

- ▶ When a lead or information has been submitted, a company should promptly and seriously investigate facts, which may include a specific timeline for performance of each course of action and keep the information confidential to ensure effectiveness and reliability of its management to reporting persons.

Reporting of violations may be used to retaliate others. Therefore, there should be a screening and an initial fact finding investigation procedure to determine whether the complaint is made in good faith, or whether the complaint results in a reasonable belief in violation. If not, the juristic person may choose to terminate the complaint. On the other hand, if the complaint is made in good faith or there is a reasonable ground to believe that there is a violation, the juristic person should establish a procedure to handle such complaint, including determination of penalty, internal disciplinary actions, cooperation with state officials in the investigation and interrogation, or giving of information leading to a prosecution of the offender.

- ▶ A company should determine protective measures for reporting persons who act in good faith to ensure that such persons will not be subject to hostility, retaliation, dismissal, or adverse effect resulting from his/her cooperation to give information on violations.

- ▶ A company may organise trainings to foster knowledge and understanding on reporting of violations.

Small and Medium Enterprises (SMEs)

SMEs normally have smaller number of employees, therefore, the probability of detecting violations are better than larger organisations. SMEs may, therefore, consider the following measures:

- ▶ SMEs should create corporate culture based on trust and honesty by relying on a strong policy initiated from top-level management;
- ▶ Executives should encourage employees to seek guidance or consultation if there are suspicious cases related to bribery; and
- ▶ SMEs may consider reporting to the Office of the National Anti-Corruption Commission for further proceedings.

Principle 8

Periodic review and evaluation of anti-bribery measures and their effectiveness



“Risks of bribery can always change, therefore, a juristic person must periodically review and evaluate the implementation of anti-bribery prevention measures to adapt the measures to suit the changing circumstances”

Principle

8

Periodic review and evaluation of anti-bribery measures and their effectiveness

“

Risks of bribery can always change, therefore, a juristic person must periodically review and evaluate the implementation of anti-bribery prevention measures to adapt the measures to suit the changing circumstances

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A juristic person faces constant changes to internal and external factors during its business operation, resulting in changes in environment and risks of bribery, such as changes in organisational structure, business model, trade and investment environment, business partner, or applicable laws and business standards. Therefore, top-level executives should conduct periodic review and evaluation of the implementation of anti-bribery prevention measures on appropriateness, adequacy, efficiency and effectiveness to determine whether the existing anti-bribery measures need to be modified and how to make such modification.

Good practices

The methods of review and evaluations of anti-bribery measures may include the followings:

- ▶ Various methods can be used to conduct review of anti-bribery measures, whether it is an internal or external audit mechanism. For example, the review of results of internal and external financial audits, review of feedback from employee trainings, employee survey, comparison of practices among other companies' operating in the same type of business. These reviews must be conducted periodically.
- ▶ A company should designate specific persons responsible for review and evaluation, and the persons must be absolutely independent, e.g. external auditors.
- ▶ The evaluation criteria may include appropriateness, adequacy, efficiency and effectiveness of anti-bribery measures to determine whether the existing anti-bribery measures need to be modified or improved and how to make such modification or

improvement. For example, a company may already have internal control measures which are appropriate for risks of bribery and the measures are widely-accepted by its employees. However, the implementation of the said measures may result in high costs and repetition with other measures. Therefore, the company may consider making some modification or improvement to eliminate the repetition and use other measures which are more appropriate. The result would lead to more efficiency and effectiveness of total measures.

- ▶ Once the review and evaluation of anti-bribery prevention measures are completed, the results must be reported to board of directors or persons of equivalent position or disclosed to stakeholders.

Small and Medium Enterprises (SMEs)

SMEs may face constraints in term of resources, e.g. personnel, time and budget. However, the follow-up review and evaluation to improve the measures (so that they are more appropriate) will help reduce overall costs as it would lessen unnecessary exploitation of SME's resources. SMEs may also consider implementing simple review methods, such as:

- ▶ Collecting information and feedback from employees and business partners;
- or
- ▶ Conducting review of financial reports and other relevant documents.



Case studies

on the implementation
of measures to
prevent bribery



Case studies on the implementation of measures to prevent bribery

The following case studies are hypothetical situations created as a guideline for juristic persons to implement the principles elaborated in the Guidelines to determine appropriate internal control measures to prevent bribery of state officials. The examples of measures presented do not have any legal consequences, are not legally binding and are not definite answers to all juristic persons.

Case study 1

Hospitality expenses and gifts

A Co., Ltd., a company incorporated in Thailand, engages in the manufacture and distribution of pharmaceutical products by having sales persons selling the company's products to officials working in government hospitals located in different areas within Thailand. Based on bribery risk assessment conducted, the company faces high risk of bribery in the form of providing entertainment and offering gifts by its sales persons. As such, A Co., Ltd., may consider taking the following actions to prevent bribery:

- ◆ A Co., Ltd. should conduct due diligence on candidates applied for sales persons position before offering a position to them. This is because persons in this type of position often have opportunities to provide entertainment, offer gifts or have direct contact with state officials on behalf of the company. The company may consider:
 - ▶ interviewing the applicant on his/her perspectives towards bribery, covering his/her views on offering entertainment or gifts to state officials;
 - ▶ conducting background check on the applicant if he/she has involved in bribery of state officials. An employment certification letter from former employees could be one of the documents that the company may consider;



- ▶ looking into relationships between the applicant and state officials.
- ◆ Top-level management should communicate company's policies on hospitality expenditures and offering of gifts to state officials to all sales persons in all areas, whether the policy prohibits such actions or allow their employees to do so but with restrictions and threshold on value. Managers and heads of departments should also be reminded to reiterate such policy.
- ◆ Top-level management should encourage the establishment of Code of Conduct, particularly regarding practices on the sale of the company's products which also include issues regarding entertainment and gift offering, so that sales persons are able to comply with the company's policies.
- ◆ The measures should include clear and detailed information on hospitality expenditures and gifts, including:
 - ▶ criteria on hospitality and gift expenditures (e.g. value, timing and frequency);
 - ▶ approval procedures; and
 - ▶ accurate books and record.
- ◆ The company should routinely organises trainings on anti-bribery policies to sales persons, particularly on hospitality expenses paid for and gifts offered to state officials due to its high risk of bribery. It is also advised to test its employees on the company's anti-bribery policies and report the results to executives.
- ◆ A compensation policy which is calculated based on the volume of sales or sales targets should be clearly stipulated that such sales must not involve bribery, to prevent sales persons from offering entertainment or gifts to state officials to induce them to wrongfully perform their duty.
- ◆ The employment contract should include a provision which states that the company is entitled to terminate the contract if employees involve in bribery of state officials.

Case study 2

Joint ventures

B Co., Ltd., a company incorporated in Thailand, wishes to engage in a joint venture with Z Co., Ltd., a foreign company, by incorporating a separate entity (a joint venture company), to tender a bid for construction of public utilities to a government. B Co., Ltd., may consider implementing in the following measures to prevent bribery:

- ◆ Conduct due diligence:
 - ▶ B Co., Ltd, conducts risk assessment to assess the level of risk of bribery if the company enters into this joint venture project; and
 - ▶ As the joint venture project could lead to numerous contacts with state officials and it is of high value, it may be necessary to conduct thorough due diligence on Z Co., Ltd., including collection of documents, interviews, submission of inquiries to relevant entities in order to seek additional information or verify information at hand.
- ◆ Prior to the commencement of joint venture, the companies may reach an agreement on the following issues:
 - ▶ Appointment of a representative of B Co., Ltd. as a member of the executive board of the joint venture company; and
 - ▶ Procurement of written commitment to abide by laws relating to anti-bribery and to implement appropriate and effective internal control measures to prevent bribery;
 - ▶ Establishment of joint venture's internal control measures to prevent bribery, which cover important issues such as, hospitality and gift expenditures, due diligence of business partners, accounting audits, trainings for employees, and establishment of help hotline; and
 - ▶ Prescribing sanctions, for example, termination of contract if the contracting party involves in bribery of state officials.
- ◆ During the business operation:
 - ▶ Monitoring business operation and implementation of the joint venture's anti-bribery programme on an on-going basis, including conducting due diligence on relationship of customers who are state officials and contracts between business partners and the joint venture that the business partners will act for or on behalf of the joint venture.



Case Study 3

Reporting violations

C Co., Ltd., a medium-sized enterprise incorporated in Thailand, engages in trading business. The company will have more opportunities to enter into public procurement; therefore, top-level management of the company is looking to develop systems and increase the channels to report violations to prevent bribery. The company may consider the following actions:

- ◆ Top-level management communicates to all levels of employees, encouraging them to combat bribery and report violations, suspicious cases, or weaknesses of anti-bribery measures that need improvement, as well as to assuring the reporting person that he/she will receive protection and confidentiality of information will be protected.
- ◆ Executives should designate personnel responsible for the receipt of report on violations or hire an external service provider to establish a programme or act as an ombudsman to receive reports of violations in order to keep reporting persons' identity confidential
- ◆ Establish guideline or documents on the reporting of violations, which covers the following matters:
 - ▶ actions which could be considered as violations or suspicious cases;
 - ▶ reporting channels and methods of making complaints;
 - ▶ procedures for handling the reported matters;
 - ▶ assurance on confidentiality of reporting persons
- ◆ Provide appropriate and effective reporting channels, e.g. a hotline or an online reporting system;
- ◆ Organise trainings for employees to foster knowledge and understanding on reporting procedures, including having posters explaining reporting procedures placed in clearly visible area.
- ◆ Establish a policy encouraging reports of violations by providing protection to reporting persons that they will not be punished, dismissed or retaliated if the report was done in good faith.
- ◆ Conduct evaluation on the appropriateness of the company's reporting system.