

Thank you, but no thank you

Guidance for small and medium-sized businesses on the Bribery Act 2010

Much has been written in the run up to the introduction of the Bribery Act 2010 (the Act), which, despite delays in expected implementation, will take effect on 1 July 2011. A number of concerns have been raised along the way about the severity of the Act and the implications that it may have on the competitiveness of UK businesses.

Following the publication of detailed supporting guidance by the Ministry of Justice in March 2011, this factsheet provides a summary of the requirements of the Act itself and considers how it will affect small and medium-sized businesses in particular. It also includes a practical checklist to help you undertake a risk assessment for your own business, as well as to establish appropriate compliance procedures.

Background

The Bribery Act 2010 replaces, updates and extends the existing UK law against bribery and corruption.

The Act became law on 8 April 2010, although implementation was delayed until April 2011 and then delayed again until July 2011. Primarily this was because further clarity was needed in respect of a new 'corporate' offence of failing to prevent bribery that is introduced by the Act.

The bribery offences established by the Act are defined very broadly and the Act has significant extra-territorial reach in that it extends to acts or omissions which occur outside of the United Kingdom.

Who is affected by the new Act?

The Act applies across the UK and all UK businesses and overseas businesses carrying on activities in the UK are affected.

As noted above, the Act does have significant extra-territorial reach. Specific details about its jurisdiction can be found in the detailed guidance referred to under 'Ministry of Justice guidance' below, as well as in the Act itself.

Back to basics - what is bribery?

Bribery is a broad concept. In supplementary guidance published alongside the Act, it is very generally defined as 'giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so. So this could cover seeking to influence a decision-maker by giving some kind of extra benefit to

that decision-maker rather than by what can legitimately be offered as part of a tender process.'

The key offences

Under the new Act there are two general offences:

- 1 Active Bribery** – Section 1 of the Act prohibits offering, promising or giving a financial or other advantage (a bribe) to a person with the intention of influencing a person to perform their duty improperly.
- 2 Passive Bribery** – Section 2 of the Act prohibits a person from requesting, agreeing to receive or accepting a bribe for a function or activity to be performed improperly.

In addition, there are two further offences that specifically address commercial bribery:

- 3 Bribery of foreign public officials (FPO)** – Section 6 of the Act prohibits bribery of an FPO with the intention of influencing them in their official capacity and obtaining or retaining business or an advantage in the conduct of business.

- 4 Failure of commercial organisations to prevent bribery** – Section 7 of the Act introduces a new strict liability offence that will be committed if:

- bribery is committed by a person associated with a relevant commercial organisation
- the person intends to secure a business advantage for the organisation
- the bribery is either an active offence (section 1 of the Act) or bribery of an FPO (section 6 of the Act).

This means that a commercial organisation commits an offence if a person associated with it bribes another person for that organisation's benefit. This new 'corporate' offence is the most significant and controversial change to existing law and it is primarily this new offence that you must now consider and prepare your business for as necessary.

It is important to note however, that the Act also states, in section 7, that there is a defence available for commercial organisations against failing to prevent bribery if they have put in place 'adequate procedures' designed to prevent persons associated with them from bribing others on their behalf. The Secretary of State is required by the Act to publish guidance about such procedures. You will find more on this important defence and the relevant guidance below.

Other points to note

- The individual committing the bribery does not need to have been prosecuted successfully for bribery for the new corporate offence to apply.
- The corporate offence does not apply where a person commits a passive bribery offence, ie requests or receives a bribe.
- Senior officers of an organisation can also be held personally liable under the Act for other bribery offences committed by the organisation, ie the active and passive bribery offences as well as the bribery of an FPO, where the offence is proved to have been committed with their 'consent or connivance'.

'Senior officer' is widely defined in the Act to include directors, managers, company secretaries and other similar officers, as well as those purporting to act in such a capacity.

Key definitions and terminology

Inevitably, in order to fully understand the requirements of the new Act it is necessary to be familiar with a number of key definitions.

Relevant commercial organisation

The new corporate offence can be committed by a 'relevant commercial organisation', which broadly includes:

- any body which carries on a business and is incorporated under, or is a partnership which is formed under, any UK law, regardless of where it carries on business
- any body corporate or partnership, wherever it is incorporated or formed, which carries on business in the UK.

We will refer to those affected by this corporate offence as 'businesses'.

Persons associated

The new corporate offence also refers to a person 'associated' with a commercial organisation. While there is not an absolute list of all who could be included, we are told that this is a person who performs services for, or on behalf of, the organisation, regardless of the capacity in which they do so.

Accordingly, this term will be construed broadly and while examples are given of an employee, agent or subsidiary, it could also cover intermediaries, joint venture partners, distributors, contractors and suppliers.

Guidance issued by the Ministry of Justice (see below) acknowledges that the scope of 'persons associated' is broad and states that this is so as to 'embrace the whole range of persons connected to an organisation who might be capable of committing bribery' on its behalf.

Improper performance

The passive and active bribery offences both refer to the 'improper performance' of a function or activity. 'Improper performance' covers any act or omission that breaches an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This is an objective test based on what a reasonable person in the UK would expect in relation to the performance of the relevant activity.

Ministry of Justice guidance

The Act requires the Secretary of State to publish guidance for commercial organisations about procedures that they can put in place to prevent persons associated with them from bribing. This is important guidance in respect of providing a defence against the new 'corporate offence'.

The Ministry of Justice (MoJ) has issued the following formal, statutory guidance:

- The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010).

It has also produced non-statutory guidance for small businesses, providing a concise introduction to how they can meet the requirements of the new Act:

- The Bribery Act 2010 – Quick start guide.

Whilst the guidance is not prescriptive and does not set out an absolute checklist of requirements

for businesses to follow, it does aim to clarify the practical requirements of the new legislation. Illustrative case studies, which do not form part of the guidance issued under section 9 of the Act, are also included.

The guidance was published on 30 March 2011. Copies can be found on the 'Guidance' section on the MoJ website at www.justice.gov.uk

Defending your business against failing to prevent bribery

As you can see from the new legislation, all businesses will need to pay some attention to the new corporate offence of failing to prevent bribery. How much you will have to do will depend on the bribery risks facing your business.

If a business can show that it had 'adequate procedures' in place to prevent bribery then it will have a full defence against the corporate offence. The meaning of 'adequate procedures' is not defined in the Act and it is here that the MoJ guidance should be considered.

The guidance requires procedures to be tailored to the individual circumstances of a business, based on an assessment of where the risks lie. Therefore, what counts as 'adequate' will depend on the bribery risks faced by a business and its nature, size and complexity.

The MoJ guidance does recognise that the Act is not there to impose the 'full force' of criminal law upon well run businesses for an isolated incident of bribery. It also recognises that no business is capable of preventing bribery at all times. The 'quick start' guidance for smaller businesses comments that 'a small or medium-sized business which faces minimal bribery risks will require relatively minimal procedures to mitigate those risks'.

How should you begin to determine the approach needed in your business? The MoJ guidance identifies six guiding principles for businesses wishing to prevent bribery from being committed on their behalf (see the panel to the right). These principles are not, however, prescriptive.

Other important matters

Corporate hospitality

A potential area of concern under the new Act is the provision and receipt of corporate hospitality, promotional and other such business expenditure and how this might be perceived. While this may not be a significant issue for your business, especially when you consider your own level of such expenditure, it may be an important consideration for others.

The MoJ guidance states 'Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes.'

The guidance goes on to say 'It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.' Where it is thought that hospitality is really a cover for bribing someone, guidance indicates that the authorities would look at such things as:

- the level of hospitality offered
- the way in which it was provided
- the level of influence the person receiving it had on the business decision in question.

Facilitation payments

Facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform, are bribes and are therefore illegal under the new Act.

The six principles that should guide anti-bribery procedures

1 Proportionate procedures: A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

2 Top-level commitment: The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

3 Risk assessment: The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

4 Due diligence: The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

5 Communication (including training): The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

6 Monitoring and review: The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

We have applied these principles to the action checklist that can be found at the end of this factsheet which will help you plan an approach for your business.

Penalties

The penalties associated with the Act are significant. On conviction for one of the main bribery offences, an individual may face up to ten years' imprisonment and/or an unlimited fine. A business faces an unlimited fine.

The senior officers of a business could also be liable to a prison sentence if bribery was perpetrated with their 'consent or connivance'. Disqualification from acting as a director for a substantial period of time could also arise.

Bribery Act 2010 – Action Checklist

The steps to be taken to prevent bribery will vary from business to business and not all businesses will need to put in place complex procedures to deal with the requirements of the new Act. The MoJ guidance emphasises the need for a common sense approach.

There are, however, a number of sensible steps that can be taken and we have summarised these in the checklist below. We have included relevant MoJ guidance tips for smaller businesses on the principles to remember. Your responses will help you plan for any action that you need to take before the Act takes effect on 1 July 2011.

Remember! Not all of the matters below will need to be addressed by all businesses. A key point noted in the ‘quick start’ MoJ guidance is that ‘there is a full defence if you can show you had adequate procedures in place to prevent bribery. But you do not need to put bribery prevention procedures in place if there is no risk of bribery on your behalf.’

| 1. Review the current activities of your business. Can you identify any particular areas where there is a risk of bribery being committed on behalf of your business? Consider risk factors noted below. | Response / Action |
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| <p>Assessing the risk of bribery occurring in your business</p> <p>While it is not possible to provide an exhaustive list of all risk factors to consider, we have summarised some of the key factors for small and medium-sized businesses to consider below. Add to this list as applicable for your own business.</p> <ul style="list-style-type: none"> • Is this a small, medium or large-sized business? • Is it part of a group? Does it have complex operations? • What sector does the business operate in? Does this increase risk? • Does the business operate outside of the UK? • Does the business require licences or permits to operate? • Does the business make use of agents? • Is the business involved in any joint ventures? • Is the business about to enter into a new business relationship? • Could the type and levels of corporate gifts, hospitality or promotional expenditure be considered to be disproportionate to the size of the business, its market and its needs? • Might current policies and procedures be lacking in the light of the Bribery Act 2010? | <p>The MoJ guidance states that ‘bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets.’</p> <p>If your business does operate outside of the UK:</p> <ul style="list-style-type: none"> • Which overseas countries does it operate in? • Are bribery and corruption known to be commonplace in any of these countries? • What is the value of overseas business? • Is an overseas agent used to assist with this business? • Do overseas operations involve the use of foreign public officials (FPOs)? • Is the business involved in high value projects, or projects involving many contractors or intermediaries? <p>Use your answers to the above questions to inform your decisions on the anti-bribery policies and procedures needed in your business. Keep a record of this process.</p> |
| <p>2. Assess the strength of the measures that you currently have in place to prevent bribery.</p> <p>This is clearly important where you have identified any particular risk areas above. Where you consider that your business is low risk, would you be more comfortable with some minimum procedures in place? Remember the ‘adequate’ procedures defence available in the Act.</p> <p>If you do wish, or need, to take some action, allocate responsibility for this to a sufficiently senior person who will ensure that your procedures are communicated and adhered to.</p> | |
| <p>MoJ guidance: Proportionality. The action you take should be proportionate to the risks you face and to the size of your business.</p> | |
| <p>3. Begin to plan for any necessary updates to your staff handbooks, for example, your human resources manual.</p> <p>Consider how you can demonstrate to all staff and the key people who do business with you that you do not tolerate bribery within your business. You may wish to consider including / updating the following:</p> <ul style="list-style-type: none"> • a clear global anti-bribery and corruption policy that indicates that bribery and corruption will not be tolerated in your business • your disciplinary and grievance policies to reflect the action that will be taken should bribery occur, for example, to refer to bribery as an example of gross misconduct • your whistleblowing policy and procedure, so those who come across bribery in the business know what to do and how to raise their concerns in a safe and confidential manner • your gifts and hospitality and promotional expenditure policies so that they are clear in relation to what is acceptable and what is not. This applies to both receipt and provision of gifts and hospitality and other promotional expenditure • if applicable, the same as regards any sponsorship, political and charitable donations policies • revisions to contracts of employment to explain your anti-bribery and corruption policy and associated procedures, for example, to make reference to gross misconduct • revisions to associated third party contracts, for example, agency and supplier contracts • covering this subject in your induction procedures • other: | |
| <p>MoJ guidance: Top Level Commitment. Those at the top of an organisation are in the best position to ensure their organisation conducts business without bribery. If you are running a business, you will want to show that you have been active in making sure that your staff and the key people who do business with you and for you understand that you do not tolerate bribery.</p> | |

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| <p>4. Begin to plan if you consider that specific staff training will be required.</p> <p>Consider:</p> <ul style="list-style-type: none"> • is this necessary in so far as it is a proportionate response to the size and type of your business and the results of your risk assessment? • which level(s) of employee will this be needed for? Will it also be needed for associated third parties? • what format should the training material take? Can you provide this or should you consider an external training product? • how often will the training need to be repeated or updates sent out and how will you monitor its success? • other: | |
| <p>5. Might changes be needed to other policies and procedures?</p> <p>You may wish to consider your:</p> <ul style="list-style-type: none"> • expenditure approval and monitoring processes, especially to third parties but also for expenses including gifts and hospitality and promotional expenditure, and other relevant accounting procedures • third party contracts - should any anti-bribery contractual protections be included? Will procedures for resolving any potential problems be needed? Will a Bribery Act policy be necessary when tendering for certain contracts? • other: | |
| <p>6. Communicate the changes that you have made to your policies and procedures in good time.</p> <p>The new Act comes into effect on 1 July 2011. Consider:</p> <ul style="list-style-type: none"> • how senior people within the business will become aware of the new law and their role in ensuring implementation of your anti-bribery measures • how you will inform staff and associated third parties of necessary information and your policies and procedures. Include, for example, consultants, agency staff and contractors who perform services on your behalf as applicable • other: | |
| <p>MoJ guidance: Communication. Communicating your policies and procedures to staff and to others who will perform services for you enhances awareness and helps to deter bribery by making clear the basis on which your organisation does business.</p> | |
| <p>7. Do you need to undertake any due diligence procedures?</p> <p>Consider:</p> <ul style="list-style-type: none"> • do you know enough about the people who represent you in business, for example, any overseas agents but also employees and subordinates in roles perceived to be more risky? Are they genuine and can you trust them to work for you without bribing on your behalf? Might you need to find out further information about them or undertake any checks on them? Could recruitment policies need to be adapted? • should you require annual certifications regarding compliance with your anti-bribery policies from associated third parties? Might it be necessary to audit their practices to ensure compliance with your policies and procedures? • if you go to do business in a new country, will you need to undertake due diligence in order to identify risks specific to that country? • if you plan to merge with, or acquire, another business have you considered the implications of the Bribery Act? • will you need to undertake extra checks on the practices of those who will be dealing with FPOs on your behalf? • other: | |
| <p>MoJ guidance: Due Diligence. Knowing exactly who you are dealing with can help to protect your organisation from taking on people who might be less than trustworthy.</p> | |
| <p>8. Keep your policies and procedures up to date and monitor compliance.</p> <p>A low risk assessment for your business today may change in the future as your business changes. Bear in mind the requirements of the Bribery Act 2010 as your business grows and if you enter new markets and business relationships, especially those outside of the UK. You may need to adapt your procedures in the future.</p> <ul style="list-style-type: none"> • Keep risk under review and repeat the above actions as necessary. • Review actual compliance with your anti-bribery policies and procedures. If considered appropriate to your business, appoint a formal compliance manager. • Other: | |
| <p>MoJ guidance: Monitoring and Review. The risks you face and the effectiveness of your procedures may change over time.</p> | |

Contact us

We hope that the information contained in this factsheet, along with the checklist provided, will help you prepare for the implementation of the Bribery Act 2010. You should also consider the guidance issued by the MoJ.

Clearly the Act will have a more significant effect on certain businesses as opposed to others, depending on their risk profile. Assessing the risk in your business is the key first step to take. If you would like to discuss the implications of the Act for you and your business in more detail please contact us.