

GUIDANCE NOTE

Bribery Act 2010

June 2011

This Guidance Note outlines the offences that will be introduced by the Bribery Act 2010 ('the Act') which comes into force on 1st July 2011 and the penalties for committing them. It also considers the procedures that organisations can put in place to prevent bribery.

The Bribery Act 2010 strengthens the existing anti-bribery and anti-corruption laws in the UK. The UK system has in the past been criticised for being weak and ineffective compared with the more robust regimes in other countries, such as the US.

There has been a lot of uncertainty surrounding the Act and complaints about the potential cost to businesses to comply. The Ministry of Justice has issued reassurance to businesses that the Act will be applied with common sense and that corporate hospitality will not be unduly restricted. Each organisation will need to assess the risks of bribery that affect it and tailor what steps it needs to take to prevent offences being committed.

There are four offences under the Bribery Act namely:

1. Offering, promising or giving a bribe to another person ("Bribing another person");
2. Requesting, agreeing to receive or accepting a bribe from another person ("Being bribed");
3. Bribing a foreign official; and
4. Failing to prevent bribery (the new corporate offence).

1. Bribing another person

A person will be guilty of this offence if they offer, promise or give a financial advantage or other advantage, to another person:

- to bring about improper performance of a relevant function or an activity; or
- to reward a person for the improper performance of a relevant function or an activity.

The types of function or activity that can be improperly performed include:

- all functions of a public nature;
- all activities connected with a business;
- any activity performed in the course of a person's employment; and
- any activity performed by or on behalf of a body of persons.

UK organisations and UK nationals will be liable for offences they commit anywhere in the world.

It may not matter whether the person offered the bribe is the same person that actually performs or performed the function or activity concerned.

The advantage can be offered, promised or given by the person themselves or by a third party.

An example of offering a bribe would be where someone associated with the organisation offers a potential client tickets to a major sporting event, but only if they agree to do business with the

organisation. This would be an offence of bribing another person as the offer is being made to gain a commercial or contractual advantage.

2. Being bribed

The recipient or potential recipient of the bribe will be guilty of this offence if they request, agree to receive, or accept a financial or other advantage to perform a relevant function or activity improperly. It does not matter whether it is the recipient, or someone else through whom the recipient acts, who requests, agrees to receive or accepts the advantage. In addition, the advantage can be for the benefit of the recipient or another person.

An example of being bribed would be, where a supplier gives a job to the son of a Company Director, but makes it clear that in return they expect the Director to use his influence to ensure the company continues to do business with the supplier. It would be an offence for the supplier to make such an offer and an offence for the Director to accept it as he would be doing so to gain a personal advantage.

3. Bribing a foreign public official

A person will be guilty of this offence if they intend to influence an official in their capacity as a foreign public official. The offence does not cover accepting bribes, only offering, promising or giving bribes. It does not matter whether the offer, promise or gift is made directly to the official or by a third party.

For example, if a person associated with the organisation arranges for the organisation to pay an additional payment to a foreign official to speed up an administrative process, such as clearing the organisation's goods through customs. This would be an offence as the offer is made to gain a business advantage for the organisation.

4. Failing to prevent bribery

This is a new corporate offence, which applies to charities and partnerships as well as companies. An organisation will be guilty of this offence if a person associated with it bribes another person, with the intention of obtaining or retaining business or a business advantage for the organisation. The offence can be committed in the UK or overseas.

A person is associated with an organisation if that person performs services for that organisation i.e. an employee or agent.

A business will be able to avoid conviction if it can demonstrate that it had adequate procedures in place designed to prevent bribery. The Ministry of Justice has now issued guidance on what "adequate procedures" are. The guidance is considered in detail below.

Penalties for committing an offence

The offences of bribing another person, being bribed and bribing a foreign public official are punishable on indictment either by an unlimited fine, imprisonment of up to ten years or both. Both a company and its directors could be subject to criminal penalties.

The new corporate offence of failure to prevent bribery is punishable on indictment by an unlimited fine. Businesses convicted of corruption could find themselves permanently debarred from tendering for public sector contracts.

A business may also be damaged by adverse publicity if it is prosecuted for an offence.

Guidance on ‘adequate procedures’

As set out at number 4 above, an organisation can be guilty of an offence if it fails to prevent a person associated with it committing bribery on its behalf.

However, it will have a full defence if it can prove that it had ‘adequate procedures’ in place to prevent persons associated with it committing bribery. The guidance published by the Ministry of Justice sets out six principles which should be considered by an organisation when deciding what procedures are necessary and adequate for its business. The Guidance can be found at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>. ‘Adequate procedures’ should be proportionate to the risks of the business; thus the procedures for a low risk profile may be limited by comparison to those expected of a business with operations or sales in high risk countries or sectors. The six principles are summarised below:-

1. Proportionate Procedures

The procedures ought to be proportionate to the level of risk that is faced by the organisation. The level of risk is likely to be linked to the nature of the organisation’s business, its size and the type of person associated with it. Small and medium-sized enterprises will inevitably have fewer resources to counter bribery than larger companies but the steps that need to be taken to comply with its obligations under the Act will be the same as for larger organisations where the assessment shows that the level of risk is high.

2. Top-Level Commitment

It is important that senior management lead the anti-bribery culture of the business and show that they are committed to preventing bribery. An effective way of doing this may be for the directors to issue a formal statement expressing the organisation’s zero tolerance towards bribery and commitment to carry out its business fairly.

This Firm has prepared an Anti-Corruption and Anti-Bribery Statement that we can tailor to your business requirements. Please contact one of the Employment Team for information.

An organisation should ensure that all senior managers and directors are aware that they could be personally liable under the Act for offences committed by the business.

3. Risk assessment

The organisation should ensure that it understands, and documents, the nature and extent of the risks the business may be exposed to. For example, certain industry sectors (such as construction, energy, oil and gas, defence and aerospace, mining and financial services), countries and transactions present a greater risk, than others.

Consideration should be given to the types of transactions the business engages in, who the transactions are with and how the organisation undertakes the transaction. High-risk transactions include:

- procurement and supply chain management;
- involvement with regulatory relationships (for example, licences or permits); and
- charitable and political contributions.

The organisation should review and document how the business entertains potential customers, especially those from government agencies, state-owned enterprises or charitable organisations. Routine or inexpensive corporate hospitality is unlikely to be a problem, but there should put clear guidelines in place. This is addressed below.

If the business operates in foreign jurisdictions, local laws should always be checked.

4. Due Diligence

The organisation will be liable if a person associated with it commits an offence on its behalf. It should therefore review all existing relationships with any partners, suppliers, agents and customers. For example, if an agent or distributor uses a bribe to win a contract for the business, the business could be liable. The organisation must also ensure that background checks are carried out on any agents or distributors before it engages them.

5. Communication (including training)

The organisation's bribery prevention policies and procedures should be clear, practical, accessible and apply to the entire business. The policies should be communicated internally and externally throughout the organisation. We have prepared an Anti-Corruption and Anti-Bribery Policy that we can tailor to your business requirements. Please contact one of the Employment Team for more information.

The organisation should consider introducing a compulsory training programme for all staff. If only a few of its employees operate in a high-risk area, the training can be targeted at them.

6. Monitoring and review

The organisation should regularly monitor and review its bribery prevention policies for compliance and effectiveness. The organisation should be aware of any change to the bribery risk of the business and change its policies and procedures accordingly.

Practical Points

- **Corporate Hospitality**

The guidance states that good faith hospitality and promotion which seeks to improve the image of an organisation, better present the products of the business or establish good relations will not breach the Act. The Act will be applied with common sense and is not intended to prohibit reasonable and proportionate hospitality. To be convicted of an offence under the Act it would need to be proven that there was a specific intention by the organisation, or person associated with it, to induce or reward

improper behaviour. The more lavish the hospitality, especially where it is directed at a decision maker, the more likely it is that an intention to induce improper behaviour will be inferred.

- **Facilitation Payments**

Facilitation payments, i.e. small payments made to facilitate government action overseas such as moving goods through customs, are prohibited under the Act. The organisation must be committed to preventing such payments. However, it is recognised that, in certain extreme circumstances, it may not be possible to stop payments immediately.

The principles set out in the guidance discussed above are not intended to be prescriptive and it is the responsibility of each individual organisation to ensure that it has, and can prove that it has, adequate procedures in place that are proportionate to the level of risk faced by its business. This Firm has prepared an Anti-Corruption and Anti-Bribery Policy. The Policy will be tailored to individual business requirements. If you would like assistance in putting in place an Anti-Corruption and Anti-Bribery Policy, please contact one of the Employment Team.

The comments in this Guidance Note are of a general nature only. Full advice should be sought on any specific problems or issues.

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