

Business Bulletin

May 2011

BRIBERY ACT 2010 – PLAN BUT DON'T PANIC

Businesses of all sizes which operate in the UK should be aware that the Bribery Act 2010 will come into force on 1 July 2011.

The introduction of the Bribery Act has created a media storm, with businesses concerned the harsh new measures will put them at an unfair disadvantage when competing for overseas work against non-UK companies. *So where do businesses stand and what can they do to protect their work?*

The Act creates several new criminal offences:

- Bribing another person (section 1)
- Requesting, receiving or agreeing to receive a bribe (section 2)
- Bribing a foreign public official (section 6)
- Failure of a commercial organisation to prevent bribery (section 7)

The section 1, 2 and 6 offences can be committed by an individual or a company. If committed by a company with the consent or connivance of a senior officer of the company or a person purporting to act in such a capacity, that person is also liable to be prosecuted personally.

An individual found guilty of a bribery offence can be fined up to £5,000, imprisoned for up to 10 years, or both. A company found guilty can be fined an unlimited amount and prevented from tendering for public contracts.

However, a business has a full defence to the section 7 offence if it can prove that it had in place adequate procedures designed to prevent anyone associated with it from undertaking bribery. All businesses should therefore review their policies before July 2011 to ensure they can take advantage of this defence should the need arise.

The Government has published its long-awaited official Guidance on how organisations should conduct business so as to minimise the risk of prosecution for any of the bribery offences. The full text can be found on the Justice Department website, but the main points, and the implications for businesses, are summarised below.

Jurisdiction

The Act does not just cover bribery offences committed in the UK. Section 1, 2 or 6 offences committed outside the UK by

an offender who, at the time of the offence, had a close connection with the UK may also be prosecuted here. An individual has a close connection with the UK if they are a British national or ordinarily resident in the UK. A business has a close connection with the UK if it is incorporated in the UK or is a Scottish partnership.

Businesses will be more concerned with the lack of territorial restrictions for the section 7 offence: there is no requirement for any part of the offence to have been committed in the UK or for the offender to have a close connection with the UK. Organisations which are incorporated or formed in the UK, or which carry on a business or part of a business in the UK, can be prosecuted in the UK under section 7 for an offence committed anywhere in the world.

The Guidance attempts to soften this line somewhat by suggesting that a company incorporated outside the UK would not be considered as carrying on a business in the UK by the mere fact that its securities are traded on the London Stock Exchange. Similarly, an overseas company with a UK subsidiary will not necessarily be liable for the independent acts of its subsidiary.

Associated Persons

A business is potentially liable under section 7 for the acts of any person associated with it.

Associated persons include employees, agents, subsidiaries and anyone else performing services for or on behalf of the business. This is a broad concept which will be determined by all the relevant circumstances. It may even cover, on the facts, contractors and suppliers.

For example, a business operating as part of a joint venture may or may not be held to be an associated person of the rest of the participants, depending on the structure of the joint venture and the intention of the offender.

A sub-contractor in a supply chain may only know it is performing services for its immediate contractor, and not be aware of the identity of the prime contractor. It may therefore only be associated with its immediate contractor. However, businesses will want to mitigate their risk exposure by adopting suitable due diligence procedures in respect of their contractors, and requiring their contractors to take a similar approach with any sub-contractors.

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Six Principles

The Guidance sets out six principles to guide businesses towards implementing adequate procedures to prevent bribery (and thereby raise the section 7 defence). The principles are intended to be flexible and outcome-focused, varying according to the different challenges faced by businesses.

1. *Proportionate procedures*: businesses should put anti-bribery policies in place and implement them in a manner proportionate to the size, nature and complexity of their business and the type and nature of the persons associated with it. The policies and procedures should be clear, accessible and effectively enforced.

2. *Top-level commitment*: businesses should establish a top down commitment to a zero-tolerance culture towards bribery and corruption. Senior managers need to take the lead in communicating the business's anti-bribery stance, both internally and externally, and developing anti-bribery procedures.

3. *Risk assessment*: businesses should carry out regular, informed and documented assessments of the bribery risks they face. These risk assessments should be proportionate to the size and structure of their business and to the nature, scale and location of their work. External risk factors may include business activities in a perceived high risk country or using intermediaries in transactions with foreign public officials. Internal risk factors may include deficiencies in employee training, a bonus culture that rewards excessive risk taking or a lack of clarity in hospitality or promotional expenditure policies.

4. *Due diligence*: businesses should carry out due diligence on the persons performing services on their behalf in a proportionate and risk-based manner. This covers employees and all associated persons.

5. *Communication (including training)*: businesses should ensure their anti-bribery policies and procedures are embedded in their organisation and communicated both internally and externally. The content and extent of this communication and the training required for employees should be proportionate according to the size and nature of the business and the risks faced.

6. *Monitoring and review*: businesses should keep their anti-bribery policies and procedures under review and improve them as necessary. This will involve regular monitoring as well as specific reviews in response to external events, such as an incident of bribery or a change of government in a country in which the business operates. Internal financial control mechanisms, for example, will help to demonstrate how well the anti-bribery measures are working.

Corporate hospitality and promotional expenditure

The new bribery offences are so widely drafted that it appeared businesses may leave themselves open to prosecution for simply taking a supplier to dinner or a sporting event.

The Guidance recognises this is a major area of concern, and one that could put UK businesses at a substantial disadvantage when competing for work in a tough global economy. It stresses that bona fide, reasonable and proportionate hospitality and promotional expenditure which aims to improve an organisation's image or commercial relations is an established and important part of doing business, and the Act is not intended to criminalise such behaviour.

The main factor that may push hospitality over the edge towards bribery is intent. Did the business *intend* the hospitality to bring about an improper advantage for itself? The test is what a reasonable person in the UK would think. A business inviting clients to, for example, an Olympic event or an annual party in order to cement good relations or celebrate a deal is highly unlikely to fall foul of this test.

To protect themselves, businesses should consider (in accordance with the six principles) issuing guidance on appropriate hospitality, gifts and expenditure. Any expenditure, given or received, should be fully and transparently documented. Senior management approval may be required over an upper limit. This guidance should be also be communicated internally and externally.

Are your policies and procedures adequate to protect your business?

Are you ready for 1 July 2011?

When did you last review your anti-corruption policy? Do you have a whistle-blowing policy? Are anti-bribery measures embedded throughout your policies and procedures, from recruitment to termination?

Is your business participating in or considering a joint venture? Have you updated your due diligence procedures? How may the structure of the joint venture affect your potential liability for the activities of your fellow members?

For a complete review of all your policies or further advice on an area of specific concern to your business, contact



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