

The Bribery Act: What your business needs to know

Effective from 1 July 2011, the Bribery Act 2010 means that businesses need to ensure that they have adequate procedures in place to prevent acts of bribery and, should the worst happen, protect themselves in a legal dispute.

While the Act will affect some firms more than others, all organisations should review their existing policies and take action if required – failure to do so could result in a substantial fine or even imprisonment.

What is the Bribery Act?

Introduced towards the end of the last Parliament, the Bribery Act 2010 replaces the existing anti-corruption statute and common law. It covers bribery which takes place in the UK and overseas, by employees and third parties employed by the organisation.

The Act outlines four offences of bribery and introduces a new corporate offence of bribery. It also makes it easier to prosecute offenders. In summary, it provides:

- a general offence of active bribery, which prohibits giving someone a financial or other advantage to induce them to perform their duty improperly
- a general offence of passive bribery, which prohibits requesting, receiving or accepting a bribe
- an offence of bribing a foreign public official in order to win business, keep business or gain a business advantage for the organisation
- an offence relating to failure by a business to prevent a person associated with it from committing the above offences on its behalf in order to win business, keep business or gain a business advantage for the organisation

According to the Act, a person is guilty of bribery ‘if he offers or gives a financial or other incentive to someone with the intention of getting that person or a third party to perform a function or activity improperly or as a reward for an improper act’. He or she is also guilty if they know or believe that the offer or payment itself constitutes an improper performance of a relevant function or activity.

This factsheet provides a general overview. If you would like more detail, the Ministry of Justice (MoJ) has released comprehensive guidance on the Act, including advice for businesses on the new offence of corporate bribery. Copies can be found in the ‘Guidance’ section on the MoJ website: www.justice.gov.uk.

Some key terms

Relevant commercial organisation - The MoJ guidance defines a ‘relevant commercial organisation’ as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business. It may also be an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation.

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Persons associated - The Act provides a partial definition of an ‘associated person’ which includes an employee, agent or subsidiary but the definition would also extend to a joint venture partner.

Improper performance - ‘Improper performance’ covers any act or omission that breaches an expectation that a person will act in good faith or impartially, or is in a position of trust and fails to do so. It is determined through an objective test based on what a ‘reasonable person’ in the UK would expect in relation to the relevant activity.

The penalties

Those found guilty of an offence face significant penalties. From 1 July the maximum penalty for bribery rises from seven to 10 years imprisonment and/ or an unlimited fine. Disqualification from acting as a director for a substantial period of time may also arise in some cases.

Corporate hospitality

One of the areas of concern highlighted by businesses relates to the provision and receipt of corporate hospitality, promotional and other such business expenditure. Under the strict rules of the Act, it would appear that these activities may constitute bribery offences.

The MoJ has attempted to clarify this issue, stating that it is not the intention of the Act to criminalise bona fide, proportionate and reasonable hospitality and promotional expenditure ‘which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations’. For example, it will still be acceptable to take a client for a meal at a nearby restaurant, but disproportionately lavish gifts may be considered an offence under the new Act.

Facilitation payments

A ‘facilitation payment’ refers to the practice of paying a small sum of money to a public official (or other person) for performing routine functions which they were obligated to perform in any case.

Despite many objections, these payments are classified as bribes under the Act and are therefore illegal.

Defending your business

Adequate procedures and proportionate risk

An organisation will have a full defence against the corporate offence if it can show that it had ‘adequate procedures’ in place to prevent an act of bribery. The Act does not define the meaning of ‘adequate procedures’ and it is therefore open to interpretation. It is here that businesses will need to consult the MoJ guidance on the matter.

The guidance requires procedures to be proportionate to the organisation’s bribery risks. What counts as ‘adequate’ will therefore depend on the bribery risks faced by a business and its nature, size and complexity. The risk is likely to be increased if you operate overseas. For instance, a large organisation

employing 500 people with a number of overseas outlets will need to make more provisions than a self-employed plumber.

However, 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 states that ‘a small or medium-sized business which faces minimal bribery risks will require relatively minimal procedures to mitigate those risks’.

What do you need to do?

The MoJ guidance identifies the following six guiding principles for businesses wishing to prevent bribery from being committed on their behalf:

- Proportionate procedures
- Top-level commitment to ensuring the company is unified in preventing bribery
- Undertaking occasional risk assessments
- Applying due diligence procedures
- Communication and training
- Monitoring and review.

With these principles in mind, you will find a number of tips below designed to help your business prepare for the new bribery regulations.

1. Assess the risk

As a first step, you should review the current activities of your business and identify any particular areas where there is a risk of bribery being committed on behalf of your business. Some of the factors that you may want to consider include:

- Is yours a small, medium or large-sized business? Are you part of a group?
- Does the firm have complex operations?
- What sector does the business operate in and does this heighten the risk?
- Does the business operate outside of the UK? If so, which countries and are bribery and corruption known to be commonplace in any of these countries?
- Do you make use of agents?
- 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?

2. Review the strength of your existing anti-bribery procedures

Assess the strength of your existing bribery measures and, where an element of risk has been identified, determine whether further action needs to be taken. Even where you consider that your business is low risk, it is advisable to put in place some minimum procedures. As best practice, assign a senior member of the team to take responsibility for any action required.

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3. Update key policies

Update the business's key policies to demonstrate to staff and the key people who do business with you that you do not tolerate bribery within your business. This may involve reviewing the company's handbook and ethics/conduct codes, as well as updating whistleblowing, disciplinary and grievance policies.

Ensure that new recruits are briefed on the company's anti-bribery procedures and remember to update policies on an on-going basis. You may need to adapt your procedures as the business develops in the future.

4. Do you need to undertake any due diligence procedures?

How much do you know about the people who represent you in business i.e. overseas agents, employees and subordinates? Are they genuine? You might want to carry out additional checks on such persons to ensure that they are honest and can be trusted to work for you without bribing on your behalf.

5. Don't forget training and communication

Training should initially address key staff such as senior employees and those working in sales – it is vital that such persons are made aware of the corporate responsibility to prevent bribery. As a minimum, training should cover: what constitutes bribery; the areas of risk for the business; the potential corporate and individual liability; and the relevant policies and procedures.

You should also consider how you will brief staff and associated third parties (i.e. consultants, agency staff and contractors) on the firm's anti-bribery policies and procedures.

Please note, the information contained in this factsheet is intended as a summary only. For more detailed advice you should consult the guidance issued by the Ministry of Justice – available at www.justice.gov.uk.