

The Countdown on Corruption: Bribery Act 2010 to come into force on 1 July 2011

By 1 July 2011, all commercial organisations need to have taken steps to protect themselves against commission of offences under the Bribery Act 2010. The Ministry of Justice has published Guidance and a Quick Start Guide to assist with this process.

Summary

In summary, the Act:

- completely replaces the previous laws on bribery and corruption and widens the definition of bribery;
- introduces a new corporate offence, making an organisation liable for any bribery on the part of an employee or other associated person if it fails to put in place adequate anti-corruption procedures; and
- has extra-territorial effect, requiring UK standards of propriety in business carried out in foreign jurisdictions.

Furthermore, the Guidance:

- introduces a new Principle 1, being that of “Proportionality”, which expressly recognises that whilst some action will be required by all organisations, an elaborate risk analysis and detailed anti-corruption policies will not always be necessary;
- confirms that gifts and hospitality which are proportionate, reasonable and which seek to improve business relations are not intended to be criminalised by the Act; and
- confirms that an organisation must carry out due diligence on the person that performs services for it, or on its behalf, but that due diligence on persons further down the supply chain will not always be necessary.

Scope

In simple terms, the Act creates four new offences which can be summarised as follows:

- 1 **Giving a bribe:** It is an offence for a person to offer, promise or give a financial or other advantage to another person, where that advantage is intended to induce that other person to perform his functions or activities improperly, or reward that person for improper performance.

- 2 **Receiving a bribe:** It is an offence for a person to request or accept a financial or other advantage if it is intended that, as a result of receiving that advantage, he will perform his functions or activities improperly.
- 3 **Bribing a foreign public official:** It is an offence to offer or provide a financial or other advantage to a foreign public official with the intention of obtaining or retaining business or an advantage in the conduct of business.
- 4 **The “Corporate Offence”:** An offence will be committed by a commercial organisation if any of the bribery offences described above are committed by a person “associated” with (i.e. anyone performing services on behalf of) the organisation, with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation. However, it is a defence for the organisation to show that it had in place “adequate procedures” designed to prevent persons associated with it from committing acts of bribery.

Bribes can include any advantage, including gifts, sponsored travel and hospitality. However, it is important to point out that proportionate and reasonable gifts and hospitality provided by or to a business will not constitute bribes. In order for there to be a bribe, the advantage must be intended to induce or reward impropriety on the part of the recipient.

The offences of bribing, receiving bribes, and bribing a foreign public official can be committed by individuals or companies. They can be committed directly or through third party intermediaries. They can be committed in the UK or even overseas if they are committed by a person with a “close connection” to the UK (e.g. a UK resident, a British citizen, a UK company etc.).

The Corporate Offence can also be committed by an overseas entity or partnership so long as it carries on business in the UK.

The “Adequate Procedures” Defence

The Guidance on “adequate procedures” was published by the Ministry of Justice on 30 March 2011, which is available here: <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>. This is accompanied by a useful “Quick Start Guide” which can be found here: <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf>.

The Guidance identifies six key principles that should shape the procedures that you put into place in order to protect against the commission of the corporate offence being, Proportionate Procedures; Top-level Commitment; Risk Assessment; Due Diligence; Communication (including training); and Monitoring and review.

The Quick Start Guide confirms the Principle of Proportionality: it confirms that some businesses may need to do very little in order to ensure compliance with the Act, whereas others may need to look at their policies and procedures in more detail.

Reducing the risks

We advise you to analyse the Guidance and the Quick Start Guide (links are above) in order to understand the scope of the Act and determine what, if anything, is required to be done to ensure compliance. Following this, you should consider taking the following steps:

- 1 **Coordination:** Appoint a person (e.g. compliance officer) to be responsible for leading efforts to ensure that you have proportionate and adequate procedures in place. This person should report directly to senior management and may also be given the task of being the primary point of contact for corruption issues.
- 2 **Engagement from the top:** Draft and issue an all-staff memorandum from senior management setting out a zero tolerance approach to corruption by or on your behalf.
- 3 **Risk assessment:** Carry out a documented risk assessment programme in order to identify key areas of vulnerability and high risk practices (e.g. business dealings in higher risk jurisdictions). Draft a report setting out these risks, what risk mitigation measures you currently have in place, and what further action needs to be taken.
- 4 **Policies and procedures:** Draft and disseminate a clear, overarching bribery policy document. Such a policy may refer to existing procedures and policies (e.g. policies on gifts and hospitality). Update existing policies where necessary (e.g. employee code of practice).

- 5 **Contract review:** Review existing and proposed contractual arrangements and amend where necessary in order to specifically prohibit corruption and include as a ground for termination (e.g. sub-contractor contracts).
- 6 **Due diligence:** Conduct additional due diligence of associated persons, especially if they may be considered to pose a higher risk of corruption (e.g. agents located in higher risk jurisdictions).
- 7 **Training and awareness:** Develop a training and awareness programme to be delivered to relevant staff.
- 8 **Whistleblowing and investigation:** Develop whistleblowing and investigation mechanisms to ensure that corrupt activities can be safely reported to a nominated individual who will be able to instigate an independent and comprehensive investigation.

Burges Salmon has produced a Self-Assessment Questionnaire to help organisations prepare for the Act. For a copy, please email: thomas.webb@burges-salmon.com

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