


# Adequate evidence of adequate procedures

## Bribery Act 2010: Clarity arrives in time for July implementation



The Justice Secretary, Kenneth Clarke, announced on 30 March 2011 that The Bribery Act 2010 will come into force on 1 July 2011. That announcement was accompanied by the publication of the long-awaited guidance for businesses on adequate procedures to prevent bribery. To coincide with this announcement, the Director of Public Prosecutions (DPP) and the Director of the Serious Fraud Office (SFO) issued joint guidance on what will influence their decision to prosecute.

### The new framework

By way of reminder, the Bribery Act 2010 introduces a new set of criminal offences which are considerably wider than those under existing UK law and the US Foreign Corrupt Practices Act.

The Act sets out four offences:

- Offering, promising or giving a bribe.
- Requesting, agreeing to receive or accepting a bribe.
- Bribing a foreign public official.
- Failure of a commercial organisation to prevent bribery (the Corporate Offence).

### The Corporate Offence

It is this new offence which commercial organisations have been particularly concerned about. It is a strict liability offence and the prosecution will not have to prove that the business knew anything about the bribery – just that it had failed to prevent it. There is a broad jurisdictional reach covering the failure to prevent bribery by anyone associated with the company anywhere in the world.

### Associated person

Of particular note for corporate organisations is they can be found guilty if an 'associated person' carries out an act of bribery on its behalf. An 'associated person' is defined as someone who performs services on behalf of the principal – a deliberately vague definition intended to embrace the full range of people connected to an organisation who might be capable of committing bribery on its behalf.

Businesses will need to make sure that they have stringent risk assessments in place for all subsidiaries, joint ventures, partners and members of their supply chains in order to avoid criminal liability for their acts. It is expected that there will be heavy emphasis on due diligence when entering new markets which may have a significant impact for businesses looking at acquisitions and new business opportunities, and those entering into partnerships and joint ventures.

### Guidance on the Corporate Offence

The guidance recognises that no bribery-prevention regime will be completely watertight. To assist businesses there is a defence of having 'adequate' procedures in place to protect themselves from committing the Corporate Offence. The guidance suggests that businesses should adopt a proportionate and risk-based approach. It promotes six fundamental principles that organisations should follow to protect themselves from prosecution:

- 1 Proportionate procedures – proportionate to the bribery risks that the organisation faces.
- 2 Top-level commitment – a commitment to compliance from the highest level.

- 3 Risk assessment – the risks of bribery in your organisation and its ‘associates’.
- 4 Due diligence – vetting those organisations you do business with.
- 5 Communication – so that bribery prevention policies and procedures are embedded and understood throughout the organisation.
- 6 Monitoring and review – having a system to ensure that the procedures are reviewed and amended to catch new risks as they arise.

### Reaction from businesses

The guidance does not provide a ‘one-size-fits-all’ approach. Instead, businesses should apply the principles to their own circumstances with the underlying theme of proportionality to the risks faced by the business. Small businesses will be relieved to hear that they can avoid implementing unnecessary controls, and the resultant costs, if they do not foresee a risk of bribery in their company.

### Corporate hospitality

- There is helpful guidance that reasonable and proportionate corporate hospitality is viewed as part of business, where it seeks to cement relationships or showcase products or services. For example, taking a client to a sporting event, or paying for a foreign public official to travel abroad for a site visit and then providing a meal and entertainment, would not breach the Act if that were reasonable and proportionate for the business.

### Facilitation payments

- The guidelines make it clear that payments to government officials to perform their normal responsibilities, remain unlawful with very limited grounds for defence in the event of breach. However, the prosecuting authorities retain the discretion as to whether or not to prosecute

based upon the public interest and if reasonable steps were taken to try to avoid facilitation payments a prosecution is less likely to be in the public interest. The guidance does recognise the problems that businesses face in some parts of the world and in certain sectors and the intention to eradicate them through international co-operation.

### Clarity or uncertainty?

The guidelines bring greater clarity on a number of issues, including what constitutes ‘acceptable hospitality’. However, some will take the view that further clarity is still required. Larger businesses in particular may need further guidance of what procedures are deemed ‘adequate’ for them.

Questions remain about how the legislation will be enforced and, in particular, how prosecutorial discretion will be exercised by the SFO and CPS. The current UK public spending cuts may also restrict their ability to fully investigate suspected bribery, particularly ones which are primarily based abroad.

The waiting period is now over, and businesses have until July to revise their anti-bribery policies ready for the Act’s implementation.



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