



The Bribery Act 2010

Keeping you up to date with recent developments



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The Bribery Act received Royal Assent on 8 April 2010, and after several postponements it was announced on 30 March this year that it will come into force on 1 July 2011. Its aim is to replace antiquated law on this subject and to ensure that the UK comes into line with the majority of other countries. You need to be prepared for this, and we are here to help you if needed.

The provisions of the Act will affect all commercial businesses. All must be prepared for it, particularly in respect of your ability to prevent bribery.

This briefing outlines the provisions of the Act, from which you can see that the Act not only reiterates the illegality of paying and receiving bribes, but also requires you to take steps to prevent its occurrence in connection with your businesses anywhere in the world.

Although as a firm we cannot give legal advice about specific situations, we are able to suggest preventative methods of ensuring compliance with the Act. Please take the opportunity to contact us once you have had time to consider the briefing to discuss any potential issues.



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Overview

There are four criminal offences under the Act:

(a) Paying bribes (s.1)

Offering, promising or giving a financial or other advantage with the intention of inducing a person to perform a 'relevant function or activity' 'improperly' or to reward that person for doing so.

(b) Receiving bribes (s.2)

It is an offence to receive a financial or other advantage intending that a 'relevant function or activity' should be performed 'improperly' as a result.

(c) Bribery of a foreign public official (s.6)

This offence is committed if a person offers or gives a financial or other advantage to a foreign public official with the intention of influencing the foreign public official and obtaining or retaining business.

(d) Failure of a commercial organisation to prevent bribery (s.7)

This offence can be committed only by commercial organisations (companies and partnerships) that are based in the United Kingdom or carry on business in the UK. It is committed where:

- a person associated with a relevant commercial organisation (which includes not only employees, but agents and external third parties) bribes another person (i.e. commits one of the offences above) intending to obtain or retain a business advantage; and
- the organisation cannot show that it had adequate procedures in place to prevent bribes being paid.

Penalties

A corporate body found guilty of one of the above offences may face an unlimited fine.

An individual found guilty may face imprisonment for up to ten years or an unlimited fine, or both.

The fines imposed could be severe. Under the pre-2010 legislation, a large insurance company was fined over £5 million by the Financial Services Authority for 'failing to assess the risks involved in dealing with overseas businesses'.

A business will be criminally liable if anyone associated with it pays a bribe in order to win work (in the UK or abroad).

Interpretation

Offences (a) and (b) overleaf are similar in substance to the previous law.

'Relevant function or activity' includes any function of a public nature and any activity connected with a business. The person performing that activity must be expected to perform it in good faith or impartially or be in a position of trust.

'Improper performance' will be judged by whether it breaches the expectation of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned. However, the function or activity need have no connection to the UK.

These definitions are complex and were deliberately widely drafted, so there is a potential risk that they could catch certain types of normal business conduct. This may well encourage an initial round of litigation when offences start to be prosecuted.

All of the offences have extra-territorial application – i.e. a UK national or company, or an overseas company with business interests in the UK, can commit the offences abroad as much as in the UK. This makes the value of adding offence (c) questionable.



Impact on businesses

The main impact of the Bribery Act on businesses in the UK is from offence (d) (see page 1) which is the most controversial. This offence is intended to reverse the current rules under which a company is likely to be guilty of a bribery offence only if very senior management is involved. Under this corporate criminal offence, the company or partnership may be guilty even if no one within it knew of the bribery.



A business will be criminally liable if anyone associated with it pays a bribe in order to win work (in the UK or abroad). It is not yet clear how widely the term 'associate' will be interpreted by the courts, or indeed what is included in the definition of a bribe. In theory this could include:

- paying a premium to secure business;
- promising return business;
- providing excessive corporate hospitality.

The advice to all businesses should be to have procedures well-established in advance of the Act's implementation to monitor the activities of any of their employees, contractors or agents who may be in a position to gain work in a way that could be interpreted (however remotely) as bribery.

Procedures – guidance

S.7 (2) of the Act says that ‘adequate procedures’ designed to prevent bribery, and in particular offence (d), from being committed are a valid defence. This effectively creates a burden on businesses to ensure that their anti-corruption procedures are sufficiently robust to stop any employees, agents or other third parties acting on their behalf from committing bribery.

As required by s.9 of the Act, the Ministry of Justice has in March 2011 issued guidance about such procedures. What counts as adequate will vary with the size of the business and the extent of the risk of bribery that it incurs (depending on the nature of its trade). The guidance suggests that because the risk of bribery is lower if business is undertaken primarily in the UK, it is unnecessary to put complex procedures in place where this is the case.

The guidance sets out six principles which it believes will help businesses to decide the extent of any procedures that they take.

1 Proportionality

The larger and more complex the business, the more needs to be done to prevent bribery, in terms of both identified risks and unethical conduct by associates.

2 Top level commitment

Those at the top of a business are in the best position to ensure that their organisation conducts its business without bribery. There needs to be a commitment from the top and an articulation of procedures in place which are clearly communicated to all staff and associates.

3 Risk assessment

Businesses should research the markets in which they will operate, especially if these are overseas. Risks can be categorised as external (country, industry sector, type of transaction, business opportunity and business partnership) or internal (employees, bonus culture, lack of clear policies, lack of financial controls, lack of anti-bribery message from management).

4 Due diligence

Businesses should carry out appropriate checks to be sure of knowing the people that they are dealing with. The extent of these depends on the nature, location and complexity of the transactions concerned.

5 Communication

All staff should know what risks their business is facing. Additional training or raising of awareness could be appropriate, tailored to the various levels of responsibility within the business.

6 Monitoring and review

Businesses should keep an eye on their anti-bribery procedures as risks may change over time. The guidance suggests that there is a wide range of internal and external review mechanisms which could be considered.

Specific action

If the above six principles seem bland and obvious, they need to be translated into specific actions that businesses can take. The Ministry’s Guidance provides an Appendix with eleven case studies showing how the principles might be applied in practice.

Most professional firms and organisations who are already ‘relevant persons’ under the Money Laundering Regulations 2007 should have most of the risks covered in their existing anti-money-laundering procedures.

However, all businesses need to be aware of the risks and the necessary procedures which they may need to put in place, depending on the nature and complexity of each business.

These could include:

- an anti-corruption code of conduct
- adequate training (and therefore awareness) of all key staff
- screening processes for new customers and suppliers, including service providers
- a review of financial risks and controls
- a confidential whistle-blowing procedure
- a policy for corporate hospitality
- a code of enforcement, detailing disciplinary procedures for breach.



What can Chantrey Vellacott DFK do to help?

Review of procedures

For audit clients, International Auditing Standards require us to assess the risk of fraud and to review the controls that each client has in place to minimise those risks. This review will include the measures to prevent bribery which are needed to comply with the Act, and will include:

- the level of risk of your business being affected by bribery
- existing anti-bribery procedures
- your policy on corporate hospitality
- methods of getting new business (in the UK and overseas)
- your business's use of associates, contractors, agents and intermediaries.

For both audit and non-audit clients we will be pleased to carry out additional advisory work, if necessary, on implementing anti-bribery measures and procedures, such as those mentioned previously on page 3, which will be appropriate to your business and to the level of risk.

In complex cases we may recommend that you seek legal advice.

General assessment of risks and controls

As a separate exercise we are able to carry out a more general assessment of the risks of fraud in your business, including money laundering and bribery, and the safeguards and controls that you have in place.

Further information and training

Please do not hesitate to get in touch with your normal contact at Chantrey Vellacott DFK if you have any queries or would like to discuss our suggestions.

If you would like us to arrange a training session for your staff, please contact David Duvall, Training Manager (dduvall@cvsdfk.com).



Who to Contact

For further information or advice, please contact the author of the relevant article, your usual Chantrey Vellacott DFK partner or one of the following:

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