

## Bribery Act 2010 - Adequate procedures guidance published

### The UK Government guidance advocates a risk-based and proportionate approach

The Bribery Act 2010 (not yet in force) is intended to modernise UK anti-corruption legislation and bring it into line with the OECD Anti-Bribery Convention. It also introduces new offences aimed at making it easier for prosecutions to be brought against corporate offenders, senior management who connive in the paying of bribes by their company to win business contracts, and in situations where bribes have not been paid directly but through intermediaries.

The Act contains two general offences covering the offering, promising or giving of a bribe (section 1) and the requesting, agreeing to receive or accepting of a bribe (section 2). In addition, there is a discrete offence of bribing a foreign public official (section 6).

The Act also introduces a new offence committed by a corporate which fails to prevent bribery by its employees and agents (section 7). This is a strict liability offence, subject only to one statutory defence, that is if an organisation can show that it had “adequate procedures” in place to prevent bribery.

While the issue of whether or not an organisation had “adequate procedures” is ultimately a question for the courts, the Act mandates the Government to introduce guidance on what “adequate procedures” means. In practice it is difficult to envisage that an organisation which can demonstrate that it complied with such Government guidance would be convicted of this corporate offence.

For this reason the Government’s guidance has been eagerly anticipated by company executives and corporate advisers alike. The Government issued draft guidance as part of a mini-consultation process last year. Although the final guidance was originally timetabled to be published in January, whether or not in response to a degree of lobbying by business and the

media at the beginning of the year, the Government pushed back the date for publication and announced it would be reviewing the guidance carefully. A Government spokesman said: “*We have been working with business on the guidance to make it practical and comprehensive.*”

The guidance on “adequate procedures” (the “**Guidance**”) was finally published today (30 March 2011). The Justice Secretary, Kenneth Clarke, also announced today that the Act itself will come into force on 1 July 2011. The Serious Fraud Office and Director of Public Prosecutions today published joint guidance for prosecutors in relation to the Bribery Act in tandem with the Guidance published by the Ministry of Justice.

The Guidance, rather than being prescriptive, is designed to be of general application and is formulated around six principles. The emphasis is on the need for a risk-based approach to managing corruption risk and for procedures that are put in place to be proportionate to the corruption risk faced by an organisation. These aspects did feature in the draft guidance previously issued but now have much greater prominence. Indeed, the need for proportionate procedures is now introduced as a new first principle.

The overall focus on a proportionate and risk-based approach can certainly be seen as an attempt to answer the concerns that small and medium business would be required to take on an excessively time-consuming and expensive burden of compliance measures. But senior management should be aware that the emphasis on risk assessment and proportionality cuts both ways. It will be for management to review carefully the potential risks to which their business is exposed (for example, risk profile of their industry sector, location of operations, use of agents and other intermediaries, requirement for operating or import/export licenses, contracts with overseas Governments) and introduce appropriate measures to counter such risks.

The six principles are:

1. **Proportionate procedures:** a commercial organisation's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They should also be clear, practical, accessible, effectively implemented and enforced.
2. **Top level commitment:** the top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) should be committed to preventing bribery by persons associated with it. They must foster a culture within the organisation in which bribery is never acceptable.
3. **Risk assessment:** the commercial organisation should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and documented.
4. **Due diligence:** the commercial organisation should apply due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.
5. **Communication (including training):** the commercial organisation must seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.
6. **Monitoring and review:** the commercial organisation should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.

Additionally, the Government has provided specific guidance on certain other aspects of the Act.

### Self-reporting

While the Guidance does not include any form of safe harbour, some comfort can be drawn from the section on Government policy in relation to the new section 7 offence (corporate liability for failing to prevent bribery on its behalf) where the link is made between the adoption of bribery prevention procedures and the self-reporting to the appropriate authorities of any bribery concerns which come to light. This is not exactly a safe harbour, but it seems clear that a commercial organisation which has done its best to address its exposure to bribery risk should expect to be dealt with leniently.

### Corporate hospitality and promotional activity

The Guidance states that:

*“Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes.”*

Nevertheless, the Guidance acknowledges that hospitality and other promotional activities can be used as a bribe. The Guidance envisages that organisations may wish to review policies on corporate hospitality and promotional activities to ensure that they are seen to be acting both “*competitively*” and “*fairly*”. The Guidance recognises that different business sectors may apply different standards and leaves it for individual businesses or business representative bodies to determine what those standards might be. The Guidance does make the point, however, that even if the corporate hospitality/promotional activity was in accordance with industry standards that in itself would not be sufficient evidence on its own that bribery had not occurred, particularly if those standards were “*extravagant*”.

### Facilitation payments

Small bribes paid to facilitate routine Government action, so-called “facilitation payments”, could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7. As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments.

The Guidance reveals a slightly softer approach in relation to facilitation payments which indicates a move away from the previously expressed “zero tolerance” approach, with the Government saying it recognises the problems that commercial organisations face in some parts of the world and in certain sectors, and that it views the eradication of facilitation payments as a long-term objective.

Where facilitation payments have been made, the Serious Fraud Office and Director of Public Prosecutions joint guidance for prosecutors sets out factors tending in favour of prosecution. These include large or repeated payments, facilitation payments that are planned for or accepted as part of a standard way of conducting business, indications of an element of active corruption of the official in the way the offence was committed, and circumstances where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these procedures have not been correctly followed.

On the other hand, the guidance for prosecutors states that a single small payment is likely to result in only a nominal penalty. The guidance for prosecutors also states that other factors such as, for example, whether the payer was in a vulnerable position arising from the circumstances in which the payment was demanded will be taken into account.

### Jurisdictional reach

Since the Act was published, businesses based outside the UK have been asking what is meant by “*carry on a business or part of a business in the UK*”? The UK Government had previously been very resistant to providing any clarification as to what these words mean. The Guidance indicates that this so-called

“business presence test” should still be a matter for the UK courts to be determined on the facts of each particular case, but it advocates a common sense approach emphasising that only those organisations which have a “*demonstrable business presence in the UK*” would be subject to the section 7 offence.

In stark contrast to the Government’s previous approach, the Guidance provides some examples as to when the Government would not expect the business presence test to be satisfied. Two examples are provided: (1) the listing/trading of a companies securities on a UK Exchange – on its own, it is said that this would not satisfy the business presence test; and (2) having a UK subsidiary – again, on its own, this would not satisfy the business presence test and so expose an overseas parent company to prosecution in the UK for the section 7 offence. It is said that the UK subsidiary may conduct business independently of its parent – whether it does or not is a question of fact, but it is somewhat doubtful whether this will often be the case in practice, particularly where accounts are consolidated on a group basis. The examples provided are useful and highlight the scope for jurisdictional challenge – perhaps something the UK law enforcement agencies will not relish.

### Associated persons

The Guidance confirms that the definition of “associated persons” (section 7 offence) is intended to have very broad scope. The draft guidance has been criticised as seemingly making it a requirement to carry out bribery risk due diligence on all business counterparties whether or not they perform services for or on behalf of an organisation. The finalised Guidance indicates that such due diligence should be carried out on all those business counterparties who provide, or might provide services on behalf of an organisation (i.e. if they are capable of falling within the statutory definition of an “associated persons”). In the Guidance this is tempered by the need to take a risk based and proportionate approach. In relation to existing relationships, the Guidance recognises that it may not be possible to take any particular steps, but it does expect all that is practicable to be done. Again, this is within the overarching framework of a risk based/ proportionate approach.

## Joint Ventures

Joint venture arrangements can give rise to liability for the new section 7 offence and there is helpful guidance as to how the structuring of these arrangements may decrease/increase exposure to a section 7 offence.

## A potential defence – duress?

The Guidance states that it is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The Guidance notes that “*the common law defence of duress is very likely to be available in such circumstances.*”

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