

Bribery Act 2010

Government publishes 'adequate procedures' guidance

On 30 March 2011, the Ministry of Justice published its much anticipated guidance on 'adequate procedures' and announced that the Bribery Act 2010 will now come into force on 1 July 2011. At the same time the Director of Public Prosecutions and the Serious Fraud Office issued joint guidance for prosecutions under the Act.

What does the guidance say?

Businesses will be relieved that common sense had prevailed with regards to hospitality, promotional and other business expenditure. The guidance makes it clear 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"*.

The offences

Apart from the offences of paying and receiving bribes and bribing foreign public officials, there's a new corporate offence of a commercial organisation failing to prevent a bribe being paid on its behalf. This strict liability offence applies to any relevant commercial organisation which is defined in the Act as a UK company or partnership or a foreign company or partnership that carries on all or part of its business in the UK.

This means that a UK company will be liable if an employee, subsidiary, parent, agent or other third party bribes another person anywhere in the world on the company's behalf. Equally, a foreign company which carries on part of its business in the UK could be prosecuted for failure to prevent bribery, even where the bribery takes place overseas and is not connected with any business undertaken in the UK. The Act does not define what carrying on 'part of a business' means, but it may include a UK subsidiary or even a UK listing: this will need to be tested in the Courts.

The Act is more stringent than the US Foreign Corrupt Practices Act (FCPA) as it applies to both public and private sectors and the definition of a bribe is given a very wide definition to include facilitation (or grease) payments, hospitality and charitable and political donations. This means that simply being FCPA compliant is no longer the global benchmark. If you're a commercial organisation, this means you'll have to put in place additional measures to ensure that you are Bribery Act compliant too.

The penalties

The penalties under the Act are severe: e.g. unlimited fines for companies, up to ten years in prison for individuals involved and debarment from tendering for public contracts within the European Union. There will also be the danger of adverse publicity where a company is investigated and prosecuted.

Possible defence

A charge of failure to prevent bribery may be defended on grounds that the commercial organisation had 'adequate procedures' in place at the time of the offence. Accordingly, having adequate procedures in place will be critical if you're going to protect your organisation, both by mitigating the risk of bribery occurring in the first place, and by helping to limit the damage if it occurs – particularly in relation to the way in which the prosecuting authority will deal with your company and any subsequent investigation.

The guidance

The guidance is based on six broad management principles, which reflect UK and international good practice. You'll need to use this as a flexible guide for your organisation to determine what procedures are right for you.

The guidance makes it clear that "*The objective of the Act is not to bring the full force of the criminal law to bear upon well-run commercial organisations that experience an isolated incident of bribery on their behalf*". In addition, "*The commercial organisation's willingness to cooperate with an investigation under the Bribery Act and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings*". So, it's imperative that you think about whether your procedures are adequate to seek to prevent bribery, but also to detect any instances of bribery so that you can make a full disclosure to the Serious Fraud Office.

The six principles are:

- **Proportionate procedures** – ensuring the anti-bribery procedures are proportionate to the bribery risks faced by your organisation and the nature, scale and complexity of your organisation's business. The procedures should also be clear, practical, accessible, effectively implemented and enforced.
- **Top level commitment** – establishing a culture across your organisation in which bribery is never acceptable. This includes ensuring that your anti-bribery policy is clearly communicated to all levels of management, your workforce and any relevant external bodies.
- **Risk assessment** – regular and comprehensive assessments of the bribery risks in the your sector and market.
- **Due diligence** – you must know who is doing business on your behalf; know why, when and to whom they are releasing funds and seek reciprocal anti-bribery policies. This includes subsidiaries, agents, intermediaries and all forms of joint ventures and similar relationships.
- **Communication** – anti-bribery must be embedded in your organisation's internal controls, recruitment and remuneration policies, communications and training. Mere 'paper compliance' will not be sufficient.
- **Monitoring and review** – you must ensure that your auditing and financial controls are transparent, with regular reviews of your policies and procedures, and should consider whether external verification is appropriate.

Are you at risk?

You're at risk of prosecution under the Act if you're incorporated in the UK or carry on part of your business in the UK and:

- you use intermediaries (e.g. agents, distributors, consultants, facilitators, market researchers, lobbyists, lawyers, etc)
- you do business in high risk countries or regions (e.g. China, South East Asia, India, Russia, Africa, the Middle East, South and Central America, Central, Eastern and Southern Europe)
- you do business with government (including central, regional and local government and state-owned or state-controlled companies and institutions), or
- you have other interactions with government (e.g. import/export, obtaining licences, building or operating facilities, obtaining visas, navigating regulations concerning business operations, legal disputes, tax affairs, political donations, and lobbying).

What should you be doing?

You'll need to consider conducting a risk assessment and implementing a comprehensive anti-bribery programme. This would include, among other things, a review of your current governance, risk and compliance procedures, your risk and compliance training programme and your gifts and hospitality policy. If you don't already have these things in place you may want to seek appropriate advice to assist you to implement such a programme.

Why PwC Legal?

The joined-up approach of the PwC international network of firms, of which PwC Legal is a member, means that you can take advantage of unrivalled experience across the PwC network in advising UK and global clients on anti-bribery programmes under the protection of legal privilege.

For more information, please contact:

Agnes Quashie
020 7212 1511
agnes.quashie@pwclegal.co.uk

Ben Cooper
020 7804 2108
ben.cooper@pwclegal.co.uk

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers Legal LLP, its members, employees and agents do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

© 2011 PricewaterhouseCoopers Legal LLP. All rights reserved. PricewaterhouseCoopers Legal LLP is a member of PricewaterhouseCoopers International Limited, each member firm of which is a separate legal entity. Lit007