

DBULLETIN

Guidance on the Bribery Act: What it means and how to use it

In an update on our previous publication on the Bribery Act 2010 (the Act), the Coalition Government has now confirmed that the Act (introduced by the Labour Government) will come into force on 1 July 2011. The Act required that guidance be published to assist commercial organisations on the 'adequate procedures' employers can implement to defend the corporate liability bribery offence. This was published on 30 March 2011, providing a three month buffer period before the Act is implemented.

As a recap, a commercial organisation (broadly defined) can commit an offence under the Act where a person associated with it bribes someone else with the intention of obtaining or retaining business or advantage for the organisation. The organisation will have a defence where it can show that it had put in place 'adequate procedures' designed to prevent bribery.

What does the Guidance say?

Corporate hospitality

There had been concern amongst businesses that the Act was draconian and that it would mean the end for corporate hospitality. The guidance has tried to assuage those concerns by making clear that corporate hospitality is not automatically bribery. For 'active' bribery to be committed there needs to be evidence of either an intention to induce or reward improper performance or the knowledge or belief that merely accepting the hospitality will constitute improper performance. However the more lavish the hospitality, the greater the inference that it is intended to encourage or reward improper performance.

Adequate procedures

The concept of proportionality is felt throughout the guidance. Proportionality means that the procedures implemented will depend on factors

such as the size of the organisation; the type and nature of persons who it is associated with; and where it operates (both in terms of geography and business market). It will be used to assess whether hospitality has crossed the line into bribery and is the underlying theme of six principles which inform the 'adequate procedures' that should be put in place to prevent bribery. These are:

1. Proportionate procedures
2. Top-level commitment
3. Risk assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

What action should organisations be taking?

Whilst the guidance is just that – guidance – it is still a useful steer to organisations considering what they should put in place. 'Adequate procedures' require more than just lip-service to a generic bribery policy but organisations that already have comprehensive and effective policies and procedures in place stand in good stead to face the new regime.

The first step for any organisation is to assess what bribery-related risks it faces. Where is the

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organisation exposed?

The results of this risk assessment will determine what needs to be implemented to mitigate those risks. A bribery policy is an obvious organisation-wide step but have risk assessments and due diligence identified anything which requires specific measures? For example, if involved in property acquisition, is there a risk of 'enhanced commission' being paid to ensure sale to a particular party? Gifts and hospitality are other areas that should be looked at – consider maintaining records of what is given and received and a management approval requirement for anything above a particular threshold. Proportionality will influence what that threshold should be.

Contracts should also be reviewed – organisations should consider including anti-bribery provisions in commercial contracts and also conduct due diligence on those who are associated with the organisation, e.g. consultants and agents. Organisations should also look at their own recruitment practices and terms and conditions. Could the bonus scheme incentivise bribery or reduce the likelihood of it being reported?

Whatever is introduced and implemented needs to be communicated internally (and externally if appropriate) to ensure that it is understood throughout the organisation. Training, and the demonstrated involvement of senior staff and officers, will also help to instil the anti-bribery culture and emphasise how critical the procedures are. Staff should understand how to raise concerns about bribery and the consequences of being found to have committed bribery or breaching the procedures put in place to prevent it. They should also be reminded of the whistle-blowing procedure and bribery should be added as an example of

gross misconduct in disciplinary policies. Staff who may be required to investigate bribery allegations will need training.

Finally it is not simply a case of completing the above and deeming bribery to have been dealt with as an issue. There should be a process of monitoring and reviewing which highlights the effectiveness of procedures and how further improvements can be made. Risk assessments should be ongoing.

If an organisation does find that someone associated with it has committed bribery despite having anti-bribery procedures in place, there is prosecutorial discretion. The willingness to co-operate in any investigation and provide full disclosure will be taken into account, as well as the public interest in bringing a prosecution. It is only at the point of prosecutions being brought that we will see how the courts apply the guidance.

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