

“ Plain speaking legal advice ”

## Bribery Act 2010

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**Avoid committing a criminal offence – ensure compliance with the new Bribery Act 2010**

The Bribery Act 2010 should, depending on the new government's timetable, come into force later this year. It is required because the UK's law on bribery was outdated and unsatisfactory, unclear and difficult to enforce. These inadequacies were discovered as a result of the BAE Systems investigation. The new Act sets out the following offences:-

- Bribing another person (section 1)
- Being bribed (section 2)
- Bribing a foreign public official (Section 6)
- Commercial organisations failing to prevent bribery (section 7)

It is the possibility of a section 7 offence which has created the greatest concern from commercial organisations and will be the focus of this article.

**How does the Act affect me and my business?**

With the current economic climate there is increased pressure on businesses and employees to meet targets meaning that employees and companies are more likely to behave inappropriately. When the Act comes into force the issue of bribery by, and within business, will once again be very much in the spotlight.

The penalties for committing an offence are severe and include:

- Permanent prohibition from tendering for public-sector contracts
- Adverse publicity and poor PR if prosecuted for an offence
- Criminal sanctions including fines and possible imprisonment for senior officers of the company – liability is strict, meaning senior officers will be on the hook for the actions of subordinates
- Further fines under pre-existing regulatory powers.

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**Failing to prevent bribery**

Section 7(1) of the Act provides that a relevant commercial organisation is;

“guilty of an offence if a person associated with the organisation bribes another person, intending to obtain or retain business or a business advantage for the organisation”

An ‘associated person’ has been widely defined and includes people who perform services for, or on behalf of your company. So could include:

- Employees
- Agents
- Subsidiaries
- Joint venture partners
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There are concerns as to how in practice companies can be expected to control the behaviour of for example the employees of a JV company – it is hoped that further guidance on this will soon be provided by the Government. As matters currently stand the application of the Act and the possibility of a breach is potentially very wide.

**Practical Steps : what should you do now to protect your business? – Do you have adequate procedures?**

Section 7(2) provides a defence to firms if they can show that they had in place “adequate procedures” designed to prevent bribery. In addition failure to maintain ‘adequate procedures’ could of itself leave directors of a company liable to a civil claim.

The government is obliged to provide guidance as to what would constitute ‘adequate procedures’ but has not yet done so. In the meantime the following measures are suggested as being a minimum:-

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### **Risk Assessment**

Undertake a risk assessment now and identify areas/departments or individuals within your business that are more likely to be a risk. For example the following industry sectors are considered to present a greater risk that ‘associated persons’ will engage in bribery:

- Construction
- Pharmaceuticals
- Energy, oil, gas
- Defence and Aerospace
- Mining
- Heavy manufacturing
- IT
- Financial services.

Whilst routine and inexpensive corporate hospitality is not likely to be considered as bribery – setting out guidelines to staff and other associated persons on hospitality may be a sensible idea.

### **Top-Down Approach**

Senior management need to be aware of the Act and establish a culture that bribery is not acceptable, especially as it is they who could be held to be personally liable and face criminal charges.

It is suggested that one procedure that should be in place is the formation of a firm wide committee or working group to oversee compliance with the new Act.

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### **Procedures for dealing with third parties**

Given the wide scope of the definition of “associated person”, your company needs to ensure compliance with the Act, so far as is possible, by your partners, suppliers, and customers:

- Contracts – You should review your standard form agreements and consider including anti-corruption provisions.
- Agents and distributors – You should undertake background checks
- You should enforce a supply chain management procedure
- Controls – Processes should be in place to ensure that certainly for high risk deals that these are undertaken by senior management

### **Acquisitions and joint ventures**

When acquiring companies there will be a need for extra rigorous due diligence. It would also be a good idea to subject any existing joint ventures and joint venture partners to retrospective due diligence.

### **Policies and Procedures**

You should review existing policies and procedures to prevent bribery. These policies need to be clear and understood by all staff and include a protocol as to what must be done if staff are subject to or make a bribe.

If your firm operates in one of the higher risk areas/sectors then compulsory training for staff should be considered as should provisions in employment contracts explaining the consequences of making or accepting a bribe. Your companies’ whistle blowing policies should also be reviewed.

Accounting systems should be reviewed to see whether any unusual payments can be quickly identified.

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**Summary**

Whilst government clarification about the Act is required, the potential seriousness of the sanction for a breach means that companies should not be waiting for clarification but reviewing their current procedures and policies now, thereby doing all they can to protect it and its directors when the Act comes into full force later this year.

Bribery and corruption is once again very much in the spotlight and it is likely that companies who do nothing or turn a blind eye are in danger of facing considerable penalties and damage to their reputations which in the current economic climate few can afford.

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