

The Bribery Act 2010

WHAT'S IN THIS WHITE PAPER?

What is the Bribery Act 2010 and who does it concern?

What are the consequences of not having adequate procedures in place?

Where does the risk come from?

What can I do to protect my business?

Just because you've always done it doesn't mean you can anymore.

Policies and their implementation.

Encouraging people to come forward.

Help is at hand.

Case Study 1.

Case Study 2.

THIRD PARTY RISK AND "ADEQUATE PROCEDURES"

"Bribery poses a very serious threat to sustained economic progress worldwide. The Bribery Act 2010 responds to this threat and the myriad ways bribery can be committed."

So what is the Bribery Act 2010, and who does it concern?

Bribery poses a very serious threat to sustained economic progress worldwide – something the global community can ill afford at the current time. The introduction of the new Bribery Act signals a new Government effort to tackle bribery and corruption in world trade. The Bribery Act 2010 was created to respond to these threats and the myriad ways bribery can be committed.

The Ministry of Justice has been tasked with addressing and reducing occurrences of bribery and has published clear guidance for companies to follow to ensure they are Bribery Act compliant.

The Bribery Act 2010 creates a new offence under section 7, for which commercial organisations, failing to prevent persons associated with them from committing bribery on their behalf, can be prosecuted.

The Act does recognise however that, particularly in the case of large

multinational corporations, detecting every instance of bribery or wrongdoing would be almost impossible. Therefore the Act provides the opportunity for an organisation to protect itself by proving "adequate procedures" are in place to prevent bribery being committed on its behalf. Should this be the case, the organisation will have a strong defence in a court of law to any section 7 offence committed.

What are the consequences of not having "adequate procedures" in place?

The penalties for committing a crime under the Act are a maximum of 10 years' imprisonment, an unlimited fine and the potential for the confiscation of property under the Proceeds of Crime Act 2002. In addition, directors may also be disqualified under the Company Directors Disqualification Act 1986.

The Act has a near-universal jurisdiction, allowing for the prosecution of an individual or company with links to the United Kingdom, regardless of where the crime occurred.

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“...companies must ensure they carry out a thorough risk assessment to identify any areas of vulnerability in their organisation.”

What can I do to protect my business from bribery?

While it's commonplace for companies to engage in fully transparent and lucrative relationships with partners across the world, a certain level of unknown risk will always be associated with third-party colleagues. This risk has the potential to deliver devastating financial and reputational damage to large and small operations alike.

Recent victims have suffered due to, amongst other things: product safety oversights, non-compliance with foreign bribery laws and human rights violations, resulting from the actions of their third-party associates.

Given the considerable consequences to an organisation found guilty of not preventing bribery being committed on its behalf, knowing exactly what to do to protect your company from falling foul of the Act is essential.

Identifying the risk

First and foremost, companies must ensure they carry out a thorough risk assessment to identify any areas of vulnerability in their organisation. Any procedures put in place to protect against this risk should be proportionate with the risk posed. For example a smaller company dealing primarily with other businesses within the UK may be exposed to less risk than a large company operating globally. Risk is not always relative to the size of a company however, and a smaller operation dealing primarily with businesses in a country where bribery is known to be rife should consider putting more robust “adequate procedures” in place to protect itself.

To help illustrate the kinds of risk a company may face, we have included some theoretical case studies as appendices to this white paper (see pages 6 & 7).

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“...corporate hospitality is one area many companies are now finding they have to be particularly careful about.”

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Risk posed to a company isn't always as obvious as you might think. For example there are certain grey areas you may think are perfectly acceptable that are now outlawed by the Act.

Corporate hospitality for example is one area many companies are now finding they have to be particularly careful about. According to the official Bribery Act guidance from the Ministry of Justice, hospitality and/or gifts are acceptable as long as they are proportionate to the business opportunity presented by the recipient. Of course one person's opinion of what is proportionate may differ from another's, so to be on the safe side, the guidance refers back to those good old “adequate procedures”. If you can provide a court of law with evidence that you have kept records of every gift or instance of corporate hospitality bestowed on a client, you'll have a much stronger defence in the event any crimes are committed under sections 1 & 6 of the Act.

So in essence, it's all about due diligence

and communication. Good clear records of any gifts or hospitality bought for an existing client (and potential client as long as it is clearly not a bribe to win or to retain business), and a willingness to share these records with the Ministry of Justice, should the need arise, will go a long way to ensure you are Bribery Act compliant. Facilitation payments have been more or less outlawed by the Act which views them as nothing less than a bribe. However in recognition of the fact that in many countries across the globe, they are currently a regular feature of day to day business, the guidance states that any investigations instigated regarding facilitation payments will be tried on a case by case basis.

Again as with corporate hospitality, as long as no potentially dubious activities appear to have been covered up or hidden from view by the offending company, they will have a strong defence should their actions be brought before a court. Your defence will be even stronger if you can demonstrate that every effort has been made to educate your staff about the rules regarding corporate hospitality and facilitation payments ([see policies and their implementation below](#)).

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Policies and their implementation

Once the level of risk posed to a company has been identified, the next step is to write a risk appropriate anti-bribery policy that clearly sets out the company's stance on bribery and then communicate this company-wide. Involvement of the company's top management is paramount to the success of an anti-bribery policy.

Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. Since they will be responsible in part for disseminating this policy to their staff, it also makes sense for them to be co-authors of the policy.

Once top level management are on board, the next task is to ensure that the policy is communicated to every member of staff within the company. The way this is done will depend largely on the size of the company. Smaller companies will be able to rely more on verbal instruction and HR procedure to ensure the policy is adopted, whereas larger companies will have to consider more extensive written communication.

Encouraging people to come forward

One of the major obstacles in the prevention of bribery is not knowing exactly how much of it goes on. The reason for this lack of knowledge is that no-one wants to risk the repercussions of being revealed as an informant.

If the perpetrator of a crime happens to be further up your line of management, are you really going to risk jeopardising your future career prospects to report someone else's wrongdoing? Probably not.

Which explains why the Ministry of Justice is so keen to encourage the uptake of whistleblowing hotlines. In fact, in the official guidance notes on the Bribery Act (under Principle 1: Proportionate Procedures) the Ministry of Justice has actually recommended "The reporting of bribery by means of 'speak up' or 'whistle blowing' procedures".

If you knew that your concerns about another person's behaviour were being reported in complete confidence to an independent party, wouldn't you feel more comfortable?

Help is at hand

Industry experts, Expolink can advise you how best to manage and adapt to this new legislation, ensuring your business remains compliant, secure and profitable for years to come. We can guide you through how our independent whistleblowing service can not only benefit you and your employees but any third party who deals with your company. For example, by communicating the Expolink whistleblowing service to your supply chain, you can clearly demonstrate your stance on bribery and corruption. You can include the number on your contracts, invoices, statements of work and other external interaction whilst doing local and global business – demonstrating true transparency. And this is just a small part of what we do.

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A small to medium sized installation company is operating entirely within the United Kingdom domestic market. It relies to varying degrees on independent consultants to facilitate business opportunities and to assist in the preparation of both pre-qualification submissions and formal tenders in seeking new business. Such consultants work on an arms-length-fee-plus-expenses basis. They are engaged by sales staff and selected because of their extensive network of business contacts and the specialist information they have. The reason for engaging them is to enhance the company's prospects of being included in tender and pre-qualification lists and of being selected as main or sub-contractors. The reliance on consultants and, in particular, difficulties in monitoring expenditure which sometimes involves cash transactions has been identified by the company as a source of medium to high risk of bribery being undertaken on the company's behalf. In seeking to mitigate these risks the company could consider any or a combination of the following:

- Providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf.
- Communication of a policy statement committing it to transparency and zero tolerance of bribery in pursuit of its business objectives. The statement could

“Providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf is essential.”

- be communicated to the company's employees, known consultants and external contacts, such as sectoral bodies and local chambers of commerce.
- Firming up its due diligence before engaging consultants. This could include making enquiries through business contacts, local chambers of commerce, business associations, or internet searches and following up any business references and financial statements.
- Consider firming up the terms of the consultants' contracts so that they reflect a commitment to zero tolerance of bribery, set clear criteria for provision of bona fide hospitality on the company's behalf and define in detail the basis of remuneration, including expenses.
- Consider making consultants' contracts subject to periodic review and renewal.
- Drawing up key points guidance on preventing bribery for its sales staff and all other staff involved in bidding for business and when engaging consultants
- Periodically emphasising these policies and procedures at meetings – for example, this might form a standing item on meeting agendas every few months.

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Case Study 2

A small export company operates through agents in a number of different foreign countries. Having identified bribery risks associated with its reliance on agents it is considering developing proportionate and risk-based bribery prevention procedures. The company could consider any or a combination of the following:

- Making sure staff have a confidential means to raise any concerns about bribery.
- Using trade fairs and trade publications to communicate periodically its anti bribery message and, where appropriate, some detail of its policies and procedures.
- Oral or written communication of its bribery prevention intentions to all of its agents.
- Adopting measures designed to address bribery on its behalf by associated persons, such as:
 - Requesting relevant information and conducting background searches on the internet against information received.
 - Making sure references are in order and followed up.
 - Including anti-bribery commitments in any contract renewal.
- Using existing internal arrangements such as periodic staff meetings to raise awareness of 'red flags' as regards agents' conduct, for example evasive answers to straight forward requests for information, overly elaborate payment arrangements involving further third parties, ad hoc or unusual requests for expense reimbursement not properly covered by accounting procedures.
- Making use of any external sources of information (UKTI, sectoral organisations) on bribery risks in particular markets and using the data to inform relationships with particular agents.



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