mfw chartered accountants

Ashford (01233) 504954
Cranbrook (01580) 714111
Dover (01304) 204006
Herne Bay (01227) 373271
Maidstone (01622) 683627
Sittingbourne (01795) 479111

Bribery Act 2010

The Bribery Act 2010 (the Act) applies across the UK and all businesses need to be aware of its requirements. The Act includes a 'corporate' offence of 'failure of commercial organisations to prevent bribery'. The defence against this offence is to ensure that your business has adequate procedures in place to prevent bribery. To help ensure this we recommend that you undertake a risk assessment for your own business and establish appropriate compliance procedures.

What action should you take?

- familiarise yourself with the guidance issued by the Ministry of Justice
- review the current activities of your business and assess the risk of bribery occurring
- assess the strength of the measures that you currently have in place to prevent bribery
- make any necessary updates to your staff handbooks: for example, your human resources manual
- consider whether specific anti-bribery staff training is required
- consider if changes are needed to other policies and procedures, for example, expenditure approval and monitoring processes
- communicate the changes that you have made to your policies and procedures
- consider if you need to undertake any due diligence procedures.

The Bribery Act 2010

The Act replaced, updated and extended previous UK law against bribery and corruption. It applies across the UK and all UK businesses and overseas businesses carrying on activities in the UK are affected.

The offences established by the Act are defined very broadly and the Act has significant extraterritorial reach in that it extends to acts or omissions which occur outside of the United Kingdom. Specific details about its jurisdiction can be found in the detailed guidance referred to under 'Ministry of Justice guidance' below, as well as in the Act itself.

What is bribery?

Bribery is a broad concept. In supplementary guidance published alongside the Act, it is very generally defined as 'giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so. So this could cover seeking to influence a decision-maker by giving some kind of extra benefit to that decision-maker rather than by what can legitimately be offered as part of a tender process.'

The key offences

Under the Act there are two general offences:

Active bribery – Section one of the Act prohibits offering, promising or giving a financial or other advantage (a bribe) to a person with the intention of influencing a person to perform their duty improperly.

Passive bribery – Section two of the Act prohibits a person from requesting, agreeing to receive or accepting a bribe for a function or activity to be performed improperly.

In addition, there are two further offences that specifically address commercial bribery:

Bribery of foreign public officials (FPO) – Section six of the Act prohibits bribery of an FPO with the intention of influencing them in their official capacity and obtaining or retaining business or an advantage in the conduct of business.

Failure of commercial organisations to prevent bribery – Section seven of the Act introduces a strict liability offence that will be committed if:

- bribery is committed by a person associated with a relevant commercial organisation
- the person intends to secure a business advantage for the organisation
- the bribery is either an active offence (section one of the Act) or bribery of an FPO (section six of the Act).

This means that a commercial organisation commits an offence if a person associated with it bribes another person for that organisation's benefit. This 'corporate' offence is the most significant and controversial change to existing law and it is primarily this offence that you must now consider and prepare your business for as necessary.

It is important to note, however, that the Act also states that there is a defence available for commercial organisations against failing to prevent bribery if they have put in place 'adequate procedures' designed to prevent persons associated with them from bribing others on their behalf. The Secretary of State is required by the Act to publish guidance about such procedures.

Senior officers of an organisation can also be held personally liable under the Act for other bribery offences committed by the organisation, i.e. the active and passive bribery offences as well as the bribery of an FPO, where the offence is proved to have been committed with their 'consent or connivance'.

'Senior officer' is widely defined in the Act to include directors, managers, company secretaries and other similar officers, as well as those purporting to act in such a capacity.

Key definitions and terminology

Inevitably, in order to fully understand the requirements of the Act, it is necessary to be familiar with a number of key definitions.

Relevant commercial organisation

The corporate offence can be committed by a 'relevant commercial organisation', which broadly includes:

- any body which carries on a business and is incorporated under, or is a partnership which is formed under, any UK law, regardless of where it carries on business
- any body corporate or partnership, wherever it is incorporated or formed, which carries on business in the UK.

We will refer to those affected by this corporate offence as 'businesses'.

Persons associated

The corporate offence also refers to a person 'associated' with a commercial organisation. While there is not an absolute list of all who could be included, we are told that this is a person who performs services for, or on behalf of, the organisation, regardless of the capacity in which they do so.

Accordingly, this term will be construed broadly and while examples are given of an employee, agent or subsidiary, it could also cover intermediaries, joint venture partners, distributors, contractors and suppliers.

Guidance issued by the Ministry of Justice (see below) acknowledges that the scope of 'persons associated' is broad and states that this is so as to 'embrace the whole range of persons connected to an organisation who might be capable of committing bribery' on its behalf.

Improper performance

The passive and active bribery offences both refer to the 'improper performance' of a function or activity. 'Improper performance' covers any act or omission that breaches an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This is an objective test based on what a reasonable person in the UK would expect in relation to the performance of the relevant activity.

Ministry of Justice guidance

The Act requires the Secretary of State to publish guidance for commercial organisations about procedures that they can put in place to prevent persons associated with them from bribing. This is important guidance in respect of providing a defence against the 'corporate offence'.

The Ministry of Justice (MoJ) has issued the following formal, statutory guidance:

- The Bribery Act 2010 – guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section nine of the Bribery Act 2010). Whilst the guidance is not prescriptive and does not set out an absolute checklist of requirements for businesses to follow, it does aim to clarify the practical requirements of the legislation. Illustrative case studies, which do not form part of the guidance issued under section nine of the Act, are also included.

It has also produced non-statutory guidance for small businesses, providing a concise introduction to how they can meet the requirements of the Act:

- The Bribery Act 2010 – quick start guide.
- Insight into awareness and impact of the Bribery Act 2010 among small and medium sized enterprises (SMEs).

Defending your business against failing to prevent bribery

All businesses will need to pay some attention to the corporate offence of failing to prevent bribery. How much you will have to do will depend on the bribery risks facing your business.

If a business can show that it had 'adequate procedures' in place to prevent bribery then it will have a full defence against the corporate offence. The meaning of 'adequate procedures' is not defined in the Act and it is here that the MoJ statutory guidance should be considered.

This guidance requires procedures to be tailored to the individual circumstances of a business, based on an assessment of where the risks lie. Therefore, what counts as 'adequate' will depend on the bribery risks faced by a business and its nature, size and complexity.

The MoJ guidance does recognise that the Act is not there to impose the 'full force' of criminal law upon well run businesses for an isolated incident of bribery. It also recognises that no business is capable of preventing

bribery at all times. The 'quick start' guidance for smaller businesses comments that 'a small or medium-sized business which faces minimal bribery risks will require relatively minimal procedures to mitigate those risks'.

How should you begin to determine the approach needed in your business? The MoJ guidance identifies six guiding principles for businesses wishing to prevent bribery from being committed on their behalf (see the panel below). These principles are not, however, prescriptive.

The six principles that should guide anti-bribery procedures

1. **Proportionate procedures:** A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also 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) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.
3. **Risk assessment:** The commercial organisation assesses 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 is periodic, informed and documented.
4. **Due diligence:** The commercial organisation applies 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 seeks 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 monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Other important matters

Corporate hospitality

A potential area of concern under the Act is the provision and receipt of corporate hospitality, promotional and other such business expenditure and how this might be perceived. While this may not be a significant issue for your business, especially when you consider your own level of such expenditure, it may be an important consideration for others.

The MoJ guidance states: '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 guidance goes on to say: 'It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.'

Facilitation payments

Facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform, are bribes and are therefore illegal under the Act.

Penalties

The penalties associated with the Act are significant. On conviction for one of the main bribery offences, an individual may face up to ten years' imprisonment and/or an unlimited fine. A business faces an unlimited fine.

The senior officers of a business could also be liable to a prison sentence if bribery was perpetrated with their 'consent or connivance'. Disqualification from acting as a director for a substantial period of time could also arise.

Conclusion

The steps to be taken to prevent bribery will clearly vary from business to business and not all businesses will need to put in place complex procedures to deal with the requirements of the legislation. The supporting guidance issued by the MoJ emphasises the need for a common sense approach.

A key point noted in 'quick start' guidance is that 'there is a full defence if you can show you had adequate procedures in place to prevent bribery. But you do not need to put bribery prevention procedures in place if there is no risk of bribery on your behalf.'

How can we help

We believe the above summary will help you understand the implications of the Bribery Act 2010. If you would like to discuss the implications of the Act for you and your business in more detail please contact us.

For information of users: This material is published for the information of clients. It provides only an overview of the regulations in force at the date of publication, and no action should be taken without consulting the detailed legislation or seeking professional advice. Therefore no responsibility for loss occasioned by any person acting or refraining from action as a result of the material can be accepted by the authors or the firm.