

There are a wide range of complex legal and regulatory requirements that companies must comply with. It is therefore important that members understand the statutory duties and obligations that they must adhere to. This section talks about general obligations members should be aware of and how to best manage your duties.

- ✓ Bribery Act
- ✓ Freedom of Information Act 2000

Bribery Act

The Bribery Act came into force on 1 July 2011. To comply with the Act, companies must have a policy in place to deal with potential bribery and corruption.

Although it has always been illegal to bribe a public official, the Act created a new criminal offence of 'failure to prevent bribery'. This offence is committed by the company rather than the individual. A company guilty of an offence under the Act will be liable for an unlimited fine and the maximum sentence for an individual committing an act of bribery is now ten years imprisonment.

Members should assess their levels of exposure to bribery risks and put in place appropriate procedures to ensure compliance with the Act.

The Legal & Commercial team have prepared the following documents to help members achieve compliance with the Act:

- ✓ **Bribery Policy** Anti-corruption and bribery policy precedent (to be communicated to staff and "associated persons")
- ✓ **Bribery Act 2010 checklist** 'Checklist' of anti-bribery procedures to consider in managing the risk of bribery
- ✓ **Bribery Act 2010** supplier questionnaire

Due diligence questionnaire (to be issued to third parties performing services on your behalf)

Contact a BESA **Legal and Commercial Adviser** for more help on this issue.

What are the offences under the Act?

General offences

Under sections 1 and 2 of the Act, it is an offence for a person to:

- promise, offer or give (**active**)
OR
- request, agree to receive or accept (**passive**) an advantage (financial or otherwise), in circumstances involving the improper performance of a relevant function or activity.

[POINTS TO NOTE: "Relevant function or activity" means a public or business activity, which a reasonable person in the UK would expect to be performed in good faith or impartially. "Improper performance" means a breach of that expectation.]

Corporate offence

This offence applies where a commercial organisation fails to prevent bribery being committed by an "associated person" in connection with its business.

[POINTS TO NOTE: "Associated person" is defined in the Act as any person performing services for or on behalf of a commercial organisation.]

According to the Guidance, this definition is deliberately broad and could include contractors and suppliers where they are performing services for a commercial organisation.



However, with regard to supply-chains, it is likely that only the contractor or supplier with whom the commercial organisation has a contractual relationship will constitute an "associated person" (ie, not sub-contractors).

Penalties

Penalties under the Act are severe. There is a maximum penalty of 10 years imprisonment for all offences, except the corporate offence under section 7, which carries an unlimited fine. There is also a risk that companies convicted could be debarred from tendering for public contracts.

The defence of adequate procedures

Adequate procedures

A commercial organisation will have a defence to this criminal offence if it can show that adequate procedures to prevent bribery have been put in place. No definition of "adequate procedures" is provided. Rather, the Government agreed to provide guidance in order to enable companies to determine what sort of bribery-prevention procedures should be introduced.

The Guidance is designed to be of general application (and is therefore not prescriptive). To achieve this, the Guidance is formulated around six guiding principles.

The 6 principles

The six principles for bribery prevention that a company should apply to assist it in establishing 'adequate procedures' have been slightly revised from the form they took in the draft guidance previously published. These principles are:

1. Proportionate procedures

A commercial organisation should have in place clear, practical, accessible, effectively implemented procedures that are proportionate to the bribery risks it faces and to the nature, scale and complexity of its activities. It follows that SMEs are unlikely to need procedures that are as extensive as those of a large multi-national organisation.

Smaller organisations may even be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.

2. Top-level commitment

The top-level management are committed to preventing bribery and foster a culture within the organisation in which bribery is never acceptable. Whatever the size, structure or market of a commercial organisation, top-level management commitment to bribery prevention is likely to include

- communication of the organisation's anti-bribery stance, and
- an appropriate degree of involvement in developing bribery prevention procedures.

3. Risk assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery. Commonly encountered external risks would include risks inherent in construction contracts, particularly where you are delivering a high value project involving many contractors or intermediaries. Internal risk factors may include lack of financial controls, deficiencies in employee training and/or a bonus culture that rewards excessive risk-taking

4. Due Diligence

Applying due diligence procedures to those persons who perform or will perform

services for or on behalf of the organisation, taking a proportionate and risk-based approach. For example, the organisation may wish to incorporate in its recruitment procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

5. **Communication (including training)**

The commercial organisation should ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation. The nature of communication will vary between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities. Here are some examples:

- **Internal communications** should convey the 'tone from the top' but are also likely to focus on the implementation of the organisation's policies and procedures and the implications for employees. For example, policies on decision-making, financial control, hospitality and promotional expenditure.
- **External communications** should involve dissemination of bribery prevention policies through a statement or codes of conduct. For example, sanctions for non-compliance, results of internal surveys and rules governing recruitment, procurement and tendering.
- **Training** may take the form of raising awareness of the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular and the various ways it is being addressed.

6. **Monitoring and review**

The procedures designed to prevent bribery are monitored and reviewed using existing internal checks and balances and improvements are made where necessary. Examples include financial monitoring and periodic reviews.

Case study

The following case study demonstrates the application of the six principles:

An SME H&V installer assesses the nature and extent of its exposure to potential external and internal risks of bribery including lack of financial controls, deficiencies in employee training and/or a bonus culture that rewards excessive risk-taking.

One of the risks it identifies is that it relies to varying degrees on independent consultants to enhance the company's prospects of being included in tender and pre-qualification lists and of being selected as main or sub-contractors. These consultants are engaged 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 reliance on consultants and, in particular, difficulties in monitoring expenditure which sometimes involves cash transactions has been identified by the SME as a source of medium to high risk of bribery being undertaken on the company's behalf. In seeking to mitigate these risks, the SME could consider any or a combination of the following:

- ✓ *Communication of a policy statement/code of conduct by top level management committing it to transparency and zero tolerance of bribery in pursuit of its business objectives. The statement could be actively communicated to the SME's employees, known consultants and external contacts and attributed to the top level management of the SME thus demonstrating top level commitment within meetings (as opposed to passively disseminated by email)*
- ✓ *Performing due diligence checks 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 revising the terms of the consultants' contracts so that they reflect a commitment to zero tolerance of bribery through incorporation by reference to a code of conduct/policy which 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 a code of conduct 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*
 - ✓ *providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf via the SME's HR function.*

What is the position regarding corporate hospitality?

Guidance to the Act acknowledges that hospitality is an established and important part of doing business. It also highlights that corporate hospitality will not fall foul of the Act unless all of the elements of an offence are proven.

By way of illustration, in order to proceed with a case under the section 1 offence based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce the recipient of the bribe to breach an expectation (ie, that a person will act in good faith, impartially, or in accordance with a position of trust).

This would be judged by what a reasonable person in the UK thought. Therefore, for example, an invitation to a client to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations is extremely unlikely to engage section 1, as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.

Although this may provide some degree of comfort to companies, this would only apply to hospitality that is considered "reasonable and proportionate". In this regard, the standards or norms applying in a particular sector may be relevant. It follows that the more lavish the hospitality or expenditure, the greater the inference that it is intended to encourage or reward improper performance.

Freedom of Information Act 2000

An Act of the United Kingdom Parliament, the FOI created a public 'right of access' to information held by public authorities. In effect, this means that the public (including companies) have the right to information relating to the activities carried out by public authorities, publicly owned companies and designated bodies performing public functions. These types of entities include local councils, schools, colleges and universities, health trusts, hospitals and doctors' surgeries, amongst others.

Not all information can be obtained, however. There are two types of situations where a freedom of information request can be rejected:

- **'Absolute exemptions'** are requests that would have no public interest test attached. There are eight types of absolute exemptions:
 1. information available elsewhere
 2. information related to security matters
 3. information contained in court records

4. where disclosure of the information would infringe parliamentary privilege
5. information held by the House of Commons or the House of Lords
6. where disclosure would prejudice the effective conduct of public affairs
7. information that (a) the applicant could obtain under the Data Protection Act 1998, or (b) where release would breach the data protection principles
8. information provided in confidence and when disclosing the information is prohibited by an enactment, incompatible with an EU obligation, or would commit a contempt of court.

- **'Qualified exemptions'**, where the information falls within a qualified exemption, it must be subject to a public interest test. Thus, a decision on the application of a qualified exemption operates in two stages: a public authority must determine whether information is covered by an exemption, and then, even if it is covered, the authority must disclose the information - unless the application of a public interest test indicated that the public interest favours non-disclosure.

Qualified exemptions can be sub-divided into two further categories - 'class-based exemptions' covering information in particular classes, and 'harm-based exemptions' covering situation where disclosure of information would be liable to cause harm.

Additionally, requests can be turned down if it is felt that the cost(s) to obtain and process the information will exceed £450, or if the request is deemed vexatious (ie, "*obsessive or manifestly unreasonable*").

What BESA can do

BESA can help you in preparing requests for information to send to public bodies. We will guide you through the process and prepare the necessary documentation alongside you, as well as analyse any information provided in the responses. Please contact a [Legal and Commercial Adviser](#).