

## Bribery Act 2010 Update

# Corporate offence Consultation period: Deadline 8 November

The Bribery Act received Royal Assent in April 2010 but is not scheduled to come into force until April 2011. Section 7 of the Act creates a new corporate criminal offence of a failure to prevent bribery on the part of commercial organisations. However, Section 7 also provides a statutory defence for those commercial organisations that can show that they had put in place so-called 'adequate procedures' to prevent bribes being paid.

Section 9 of the Act requires the Secretary of State to publish guidance about the procedures that commercial organisations can put in place to prevent persons associated with them from bribing.

### The consultation

On 14 September this year the Ministry of Justice (MoJ) opened a consultation period on the nature of the guidance to be issued under Section 9. As part of the consultation process the MoJ issued draft guidance and has invited comment. The consultation period runs for eight weeks (the closing date is 8 November) and is deliberately short to allow a final version of the guidance to be issued early in the new year.

Further details on the consultation process can be found at the MoJ's [web-site](#).

Grant Thornton UK LLP will be responding to the consultation on behalf of its clients. If you have thoughts or concerns that you would like to share with us on this subject we would be delighted to receive them either through our dedicated anti-corruption site [Decision Time](#) or by email to [askoncorruption@uk.gt.com](mailto:askoncorruption@uk.gt.com).

The guidance, which is summarised below, in our view does little to assist companies with some of the more difficult issues raised by the Act such as how to treat corporate hospitality and facilitation payments and as with previous official communiqués, prosecutorial discretion is advanced as the mechanism by which fairness is to be assured. For many, relying on the discretion of prosecutors and crafting language which reflects this in a policy and related procedures, is simply not an option that they are comfortable with..

In our view, the guidance fails to address the responsibilities of middle managers to discharge better oversight and supervision (a secondary and pervasive control) for their business units. It also fails to challenge companies to consider doing business differently to mitigate corruption risk such as through Collective Action initiatives (see [www.fightingcorruption.org](http://www.fightingcorruption.org)).

### The draft guidance

The draft guidance sets out six principles which it describes as for 'general application' which reflects the non-prescriptive nature of the guidance. The draft guidance explicitly states that the onus is on the commercial organisation to prove that its procedures are adequate.

The six principles are:

- 1 Risk assessment
- 2 Top level commitment
- 3 Due diligence
- 4 Clear, practical and accessible policies and procedures
- 5 Effective implementation
- 6 Monitoring and review

#### 1 Risk assessment

the need for organisations to keep up to date with the bribery risks faced by them in their sector and markets.

#### 2 Top level commitment

concerns the establishment of a culture across an organisation in which bribery is unacceptable. The guidance notes that the central theme is to send a clear message to all staff and business partners.

### 3 Due diligence

relates to ensuring that the identity and nature of all those entities an organisation does business with are known and that all business relationships are transparent and ethical.

### 4 Clear, practical and accessible policies and procedures

the guidance notes that these should effectively control all the bribery risks and cites examples such as political contributions and gifts and hospitality.

### 5 Effective implementation

a tick-box approach will be insufficient and an anti-bribery culture must be embedded within the organisation.

### 6 Monitoring and review

consideration of external verification should be made as well as regular review of policies and procedures to ensure they continue to mitigate an entity's bribery risks.

In addition to the principles set out above the draft guidance also attempts to address some of the more difficult areas of interpretation, notably, hospitality and promotional expenditure, facilitation payments and prosecutorial discretion.

#### Hospitality and promotional expenditure

The draft guidance draws a distinction between bribery generally (Section 1 of the Act) and bribery of a foreign public official (Section 6). It notes that the Section 6 offence is unlikely to be triggered if there is not 'sufficient connection' between the financial advantage given and the intention to influence. In respect of the Section 1 offence, the draft guidance notes that it must be intended to induce a person to perform a function improperly.

As to what constitutes 'sufficient connection' the guidance concludes that:

"...the higher the expenditure and the more lavish the hospitality or expenditure provided to a public official the greater the inference that it is intended to influence the official..."

But reasonable and proportionate hospitality in itself is unlikely to trigger the Section 1 offence."

In our view the above guidance does little to assist commercial organisations in designing their procedures. The essential questions remain unanswered such as what constitutes lavish? How will what is proportionate and reasonable be assessed?

#### Facilitation payments

The draft guidance affirms that small bribes paid to facilitate routine government action (facilitation payments) can trigger both the Section 1 and Section 6 offences where there is an intention to induce improper conduct.

#### Prosecutorial discretion

The guidance notes that prosecutors must apply a two stage test, firstly is there sufficient evidence and secondly is a prosecution in the public interest. It concludes that:

"In cases where hospitality, promotional expenditure or facilitation payments do on their face trigger the provisions of the Act the exercise of prosecutorial discretion provides the degree of flexibility required to ensure the just and fair operation of the Act."

### The Grant Thornton Survey

In many respects, the draft guidance does little to allay the fears of many companies which participated in our [Decision Time](#) survey. The key issues for them were:

- 1 **A sense of unfairness** – overall the Act was welcomed, but UK companies believed that they are bearing the brunt of addressing the corruption dilemma. Many stated that the UK government is not doing enough to assist them in complying with the Act or to force foreign governments to change their ways.
- 2 **Competitive edge put at risk** – there was concern that compliance with the Act may damage UK companies competitiveness abroad.

#### How we can help

We are experienced business advisors helping companies mitigate the risks of bribery and corruption through a bespoke and measured strategy, which will include a corruption risk assessment, alignment of policies and

procedure, support for implementation including awareness training to embed the appropriate culture, anti-corruption audits, and systems and controls testing.

As a team, we are international, specialist and experienced. in cross-border work including dealing with cases under the Foreign Corrupt Practices Act (FCPA). In addition, our working relationships with prosecution and regulatory agencies are extensive, meaning we can provide an up to date and comprehensive service.

We can help our clients focus on urgent anti-corruption requirements and more broadly we offer proactive risk and ethics management as well as reactive investigation services.

For more information please contact:



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