

## **The Bribery Act 2010 - Frequently Asked Questions**

The Bribery Act 2010 came into force on 1 July 2011 following a consultation period and a reworking of the guidance issued by the UK government. Many businesses decided to put on hold their review of business operations until the final guidance had been published.

As anticipated and indicated by the Justice Secretary, there has been no ‘watering down’ of the Act, which remains as before, and there has been no change in government policy towards bribery and corruption. The UK government remains committed to its international obligations to ensure that its anti-bribery legislation is in line with that of other Western economies.

The guidance has addressed the concerns of industry and clarifies the intention of the Act in a number of areas, although some aspects of the Act will ultimately need to be tested by the courts through test cases. Any organisation that believes it can operate on the fringes of the law by pushing the boundaries, unwittingly or otherwise, will be at risk. The law on bribery is now clear. Any organisation that is not genuinely committed to tackling bribery from within will be liable to prosecution if an act of bribery does occur. Every company should satisfy itself that they have measures in place to prevent bribery, to the best of its ability.

### **Frequently Asked Questions**

#### **Has the final guidance altered the Act in any way?**

No. The Act remains exactly as before and will be interpreted by the courts as it stands. The Guidance provides a more detailed explanation of what is and is not intended under the Act and has been designed to help address concerns raised by the business community.

A high-level summary of the four categories of offences contained in the Bribery Act is provided below.

#### **1. *Bribing another person***

It will be an offence to offer, promise or give an “advantage” to someone:

- With the intention of inducing that person to behave improperly;
- As a reward for that person to behave improperly; and
- Knowing or believing that the recipient’s acceptance of the “advantage” would constitute improper behaviour.

#### **2. *Being bribed (as the recipient of the bribe)***

It will be an offence for a person to receive a bribe if that person requests, agrees to, or receives an “advantage” to act in an improper manner. It does not matter whether the recipient receives or accepts the advantage directly or through a third party or whether it is for the recipient’s benefit or that of another. It also does not matter, in most cases, whether the recipient even knows his or her acceptance constitutes a bribe.

#### **3. *Bribing a foreign public official***

It will be an offence to bribe a foreign public official by offering an “advantage” to the official, which is not permitted or required by the written law applicable to that official, with the intention of obtaining or retaining a business advantage. Unlike the above offences, there is no requirement that the advantage offered or given was “improper.”

#### 4. Failure to prevent bribery

A company or partnership will be automatically liable for any bribe offered or given in connection with its business unless it can effectively demonstrate that it has in place adequate procedures designed to prevent such bribery.

##### Does the guidance have any basis in law?

No. The courts and prosecution authorities may or may not take into account the guidance. Ultimately, it is upon the offences created under the Act itself that courts will make decisions, taking into account the totality of the evidence. Companies that were awaiting final guidance before taking appropriate steps should note that 'adequate procedures' have been only slightly changed from the version that appeared in the original consultation document. The guidance is not a compliance requirement - it simply advocates the types of procedures and controls that a company would be expected to have in place if it is committed to preventing bribery.

##### Does compliance with FCPA constitute "adequate procedures"?

It depends on how you comply with the requirements of FCPA and whether your current compliance programme covers the key elements of the UK Bribery Act.

It is important to note that the Bribery Act is significantly broader than the current U.S. FCPA, and features stricter scrutiny and enhanced criminal penalties.

The following are the key differences between the Bribery Act and the FCPA:

- The FCPA focuses on anti-corruption of foreign governmental officials whereas the Bribery Act also covers non-governmental officials (i.e., private citizens). The Bribery Act makes *any* bribery illegal – not just the bribing of a foreign government official (or the attempt thereof).
- In addition to banning the actual or attempted bribery of private individuals and public officials, the Bribery Act also prohibits the receipt of bribes. The FCPA contains no such provision.
- Unlike the FCPA, the Bribery Act does not have a facilitation payments defence. Under the Act, certain types of corporate hospitality are prohibited if they are "intended to subvert the duties of good faith or impartiality that the recipient owes his or her employer."
- The FCPA has no strict liability offence either written directly into the statute or interpreted by judicial review. The Bribery Act creates a new strict liability offence for the failure of a company to prevent bribery. Under the Bribery Act, companies will be liable if anyone acting on its behalf commits bribery which includes its employees, agents, subsidiaries, joint venture partners, and consultants. The only defence is where a company has adequate procedures in place to prevent bribery from occurring.
- The FCPA has criminal penalties of five years per offence. The Bribery Act has penalties of up to 10 years per offence and unlimited fines for companies that have failed to implement "adequate procedures."
- The FCPA "books and records" provisions could be used to prosecute the bribery of private individuals as well as public officials. The Bribery Act has no equivalent provision (except insofar as companies are required to maintain accounts in accordance with the U.K.'s Companies Act 2006).

Companies subject to FCPA will need to revise their FCPA compliance programs to take into account the U.K. Bribery Act provisions.

##### How will the Act affect my business?

Businesses and business leaders that act in good faith and are genuinely ethical in their business dealings, with well defined policies and controls in place to prevent bribery occurring should have nothing to worry about under the Act. The UK prosecution authorities have already made it clear that they will be targeting the 'business mavericks' who are involved in blatant acts of bribery. Those who pay lip service to an ethical policy while secretly countenancing bribery will also be targeted.

## **Where are businesses most vulnerable under the Act?**

Third parties acting for businesses as part of the supply chain and improper use of gifts and corporate hospitality are the areas where businesses need to be careful. A recent US based Dow Jones State of Anti-Corruption Compliance survey reported that 56 percent of respondents had ended partnerships with overseas agents, distributors, and consultants or have walked away from joint-venture opportunities because of corruption liability concerns. The survey findings also found that more than 80 percent of respondents regularly conduct due diligence on prospective business partners.

Corporate hospitality, despite the rumours, has not been outlawed. Reasonable and proportionate corporate hospitality that has a clear business purpose is acceptable, provided it is transparent, properly documented, and not intended to induce someone to act improperly.

## **What about facilitation payments?**

Facilitation payment is another term for a bribe and remains illegal. Although it is unlikely that prosecutors will pursue a minor one-off payment to an official in a foreign country where corruption is rife, if the payments are systemic then prosecution is more likely. Such payments can only be made if legitimised by the local written law of that country to allow for such payments to be made to individuals (which in the main, is unlikely).

## **We are a foreign registered company with an office in the UK. Could we be affected?**

Yes, but how the prosecution authorities will apply the law on jurisdiction will ultimately be determined by the UK courts on a case-by-case basis. The UK prosecution authorities have already stated that they will use the extra-territorial provisions of the Act to take action against overseas companies that pay bribes if they have disadvantaged honest UK companies that have been competing for the business.

## **Will the UK prosecution authorities become more proactive in tackling bribery and corruption?**

Almost certainly. The Act replaces old legislation that had made corporate prosecutions difficult. The old legislation had failed to keep up with commercial progress, particularly in proving corporate liability for bribery. Previously, to prove a corporate offence of bribery the authorities needed to prove beyond reasonable doubt, that the directors and senior management of the business, i.e. the directing arm of the business, knew of or had countenanced acts of bribery. The new Act has created a strict liability offence, which means that a commercial organisation is automatically held liable for bribes paid to secure business. Its only defence is if it can demonstrate, to the satisfaction of prosecutors and the courts, that it had 'adequate procedures' in place to prevent bribery.

Furthermore, UK prosecutors have already stated that they will be working more closely with their overseas counterparts to tackle bribery and corruption, relying on information and intelligence from a number of sources including information from whistle-blowing lines and from companies that had lost out in a tender process because they refused to pay bribes.

There are also indications that, in some cases, prosecution authorities may seek the power to accept substantial out-of-court settlements with companies facing bribery charges. As a criminal conviction for bribery means automatic debarment from competing for public tenders, many culpable businesses will probably prefer to settle out of court than risk a criminal conviction.

## **What should I do now?**

The guidance has outlined the steps below that companies should typically undertake to fulfill Adequate Procedures:

- Proportionate Procedures
- Top Level Commitment
- Risk Assessment

- Due Diligence
- Communication (including training)
- Monitoring and Review

These procedures are not prescriptive and the burden is on a business to prove that its procedures were adequate. Procedures and supporting controls should reflect the level of bribery risk a business is likely to incur.

Protiviti would recommend that, provided the top level commitment is genuine and properly articulated throughout the business, companies should start by undertaking a risk assessment of those areas considered most at risk from bribery. The areas could include jurisdictions where bribery is believed or known to be rife (if necessary refer to Transparency International’s website, [www.transparency.org](http://www.transparency.org) which indicates high-risk areas), business sectors that are known to be susceptible to bribery, or agents and other third parties that conduct business on behalf of the company. Policies and controls should be defined once the risk assessment has been conducted. As the Act has extra-territorial jurisdiction, the assessment should include all business activities overseas. Note that being FCPA compliant may be a good starting point, but the FCPA is not as far reaching as the Bribery Act.

### What practical steps can I take?

All organisations face a low risk of bribery and no one can guarantee that bribery cannot occur. It can happen as a result of a breach of trust or of someone over-stepping the mark, so the starting point should be a risk assessment from which the risks can be categorised. In its basic form, a risk model could be classified as “High, Medium or Low”.

Where the risk is low, minimal procedures that might be applied include updating your general policies and providing guidance through a communication and awareness programme, possibly to include training in those areas that may be susceptible.

For those areas or business functions, if any, where the risk of bribery is considered medium risk, the following additional procedures could be applied: providing targeted policies and supporting guidance / training, documenting processes and preparing risk and control matrices, performing due diligence on third party agents, and obtaining an acceptance by third parties of your policies.

For areas deemed as high risk, the business may wish to also consider the following: targeted testing of key controls, independent review of significant contracts / wins, review of unusual payments / expenses, ‘right of audit’ clauses in contracts with third parties, and inclusion of anti-corruption and bribery schedules in third party contracts.

These examples are illustrative of how a framework may work. There is no one size fits all approach and every business will need to put in place procedures that reflect both the level and nature of the risk.

Some organisations may conclude that the risk of bribery is low in all parts of their business and take minimal steps. Other organisations will be subject to much higher levels of risk, due to the nature of the transactions and markets in which they operate. In such cases, a much more extensive set of procedures may be appropriate in areas of highest risk.

## Contacts

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# Illustrative Approach: Adequate Procedures

