

The Bribery Act 2010: Covering your back will pay off

The issue

Key offences under the Bribery Act 2010 ("the Act") in force from 1 July are:

- offering or receiving a bribe
- bribery of foreign public officials
- failure of a commercial organisation to prevent bribery conducted on its behalf

Penalties are up to ten years' imprisonment and/or unlimited fines for individuals, and unlimited fines and exclusion from tendering for public contracts for commercial organisations.

"Commercial organisation" includes any body incorporated in any part of the UK, any other body corporate, and partnerships which carry on business in the UK. There is no definition of "carrying on business" but the Government's guidance ("the Guidance") states even if an organisation pursues primarily charitable or educational aims or purely public functions, it will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made. Therefore, an incorporated charity which carries on a "business" generating profits would be a "commercial organisation" and in scope.

The consequences

The new offence of failure of a commercial organisation to prevent persons associated with it from committing bribery on its behalf presents management challenges. A person is "associated" if they perform services for or on behalf of that organisation, and this includes agents, contractors and suppliers. It is a full defence for an organisation to prove it had "adequate procedures" to prevent persons associated with it from engaging in bribery.

The Guidance specifies six principles for the prevention of bribery:

- proportionate procedures
- top-level commitment
- risk assessment
- due diligence
- communication (including training)
- monitoring and review
- Corporate hospitality

Despite the breadth of language in the Act, the Guidance states that "reasonable and proportionate" hospitality is not prohibited if it is:

- intended as a public relations exercise
- designed to present products and services
- intended to cement effective business relations.

However, corporate hospitality could be intended as a bribe under the Act if given with the aim of inducing a person to "perform a relevant function improperly".

The solution

Organisations should:

- undertake a bribery risk assessment to consider the nature and extent of the bribery risks to which the organisation is exposed, including reviewing the sector and territories in which the organisation operates and its dealings with business partners
- ensure that all policies, including Whistleblowing, Expenses and Corporate Hospitality, are updated and compliant, and consider updating or implementing an Anti-Corruption and Bribery policy
- consider updating disciplinary policies to specify that breach of the organisation's Anti-Corruption and Bribery policy may amount to gross misconduct
- ensure that there is a clear policy statement on the giving or receiving of gifts, and on the provision of corporate hospitality
- communicate policies and procedures, and the required compliance, to "associated persons" including employees, independent contractors, agents, business partners and suppliers
- consider providing bribery risk awareness training to staff and "associated persons"