

## Bribery Act 2006 Update Guidance FAQs

As you are aware, the long awaited Guidance on the Act has been published and the Act will be implemented on 1 July 2011.

In brief, the Guidance is intended to reassure businesses that the Act will be enforced with common sense and pragmatism. It focuses on six high-level principles and advocates a risk-based, proportionate and common sense approach to the implementation of policies and procedures. It states that "the objective of the Act is not to bring the full force of the criminal law to bear upon well-run commercial organisations that experience an isolated incident of bribery on their behalf".

For SMEs, the following FAQs are likely to be relevant.

### 1. Is my business at risk for non-compliance of the Act?

As stated above, the law will take a common sense approach as to whether an isolated incident of bribery has been committed by your business. That aside, you are still required to adopt a risk-based approach to managing corruption risk and to implement procedures that are proportionate to the corruption risk faced by your business. The factors you will need to take into consideration when making your risk assessment include the following:

- size and structure of your business
- nature of your business activities
- scale and location of your business activities

Having completed the risk assessment, you then need to ensure that certain policies and procedures will be implemented to reduce your risk profile.

### 2. What are the commonly encountered risks?

The Guidance provides five broad groups of commonly encountered risks:

- **Country risk:** some countries have perceived high levels of corruption and an absence of effectively implemented or enforced anti-bribery legislation. Lists of such countries are available widely.
- **Sectoral risk:** some industry sectors have higher risk than others. The Guidance lists the high risk factors which include the extractive industries and large-scale infrastructure sectors.
- **Transaction risk:** certain types of transactions give rise to potentially higher risk. Examples are charitable or political contributions, licences and permits, and transactions relating to public procurement.
- **Business opportunity risk:** these might arise from high-value projects involving many contractors or intermediaries. They may even be projects which are not apparently undertaken at market prices or have a clear legitimate objectives.
- **Business partnership risk:** certain relationships may involve high risk. The use of intermediaries in transactions of foreign public officials, consortium or joint-venture partners, relationships with politically exposed persons or associations with prominent public officials can all increase the level of risk.

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### **3. We engage agents, distributors, third-party representatives to find new business or new clients in overseas countries. Are we at risk?**

Yes. A commercial organisation is liable under the Act if a person 'associated' with it bribes another person intending to obtain or retain business or a business advantage for the organisation. Agents and distributors are commonly used by businesses in order to grow the client base or increase sales. It is important that such third-parties are aware of the implications of the Act for your business. To reduce your risk, it is important to undertake 'due diligence' before engaging with such third parties. More emphasis is placed under this if the third parties are engaged in countries with a high country risk profile.

The broad scope of this Act means that contractors in the supply chain may also be considered to be 'associated' persons.

To reduce your risks, you are well advised to include relevant provisions into your contract with such third parties including the right to terminate the relationship and for payment of indemnities if there was a breach of the Act.

### **4. In some countries that we operate in, we have to pay 'extra fees' if we wish to expedite the process, for example, the formation of company or a search in a government department. Are we at risk?**

Small bribes paid to facilitate routine government action - otherwise called 'facilitation payments' - could trigger an offence under the Act where there is an intention to induce improper contact. Unlike the US foreign bribery law, the Act does not provide any exemptions for such payments.

Under the Guidance, the Government does however recognise the problems that some businesses will face in certain parts of the world and in certain sectors. Issues relating to the prosecution of facilitation payments in England and Wales are referred to the Serious Fraud Office and the Director of Public Prosecutions.

It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. An example is where immigration officials in an overseas country will detain you indefinitely unless you make a small facilitation payment for your exit visa. In this case the law of duress is likely to be available as a defence.

It must be noted that it is necessary to be aware of local anti-bribery laws that your business must also comply with.

### **5. We supply medical equipment to local NHS authorities and private hospitals. Is our business at risk?**

The higher risk is with the local NHS authorities as these will be considered to be government authorities. It is imperative that proper procedures are adopted when tendering for such NHS contracts. Although private hospitals are not government entities, it is still important to follow the tender protocols very carefully to avoid any appearance of impropriety or improper conduct.

### **6. Each year our business provides various forms of corporate hospitality, whether it is taking a client to Wimbledon or to Glyndebourne. These may be existing or past clients or potential clients. Can we do this under the Act?**



Yes, provided the business expenditure is intended to achieve one of the following objectives:

- Improve the image of your business
- Market your products and services in a different way
- Establish or strengthen client relationships

The expenditure will need to be reasonable and proportionate as the more lavish the offering, the greater the inference that it is intended to influence the granting of business or a business advantage in return.

**7. Our business manufactures machine parts. As part of our marketing, we invite potential overseas clients to visit our manufacturing facility. The intention is to show them our skills and technological advances. As part of their visit, we will pay for their travel and living expenses. Are such expenses permissible under the Act?**

Similar to corporate hospitality in FAQ 6 above, this is permitted provided it achieves one of the objectives set out above. It is important that there must be a business rationale for such a trip and the travel and living expenses must be reasonable and proportionate. Your business should have a clear travel and living expenditure policy in order for such trips to be approved.

**8. What does my business need to do to comply with the Act?**

All companies, whether SMEs or multinationals, need to set up adequate procedures. These procedures will need to be proportionate to the risks that your business are exposed to. At a minimum your procedures should include the following key elements:

- Effective policies, controls and procedures that include travel and living expenses, gifts and entertainment, making of facilitation payments, third-party procedures (if applicable)
- Establishing a clear compliance procedure which details how to raise concerns, how to find help or to report concerns to, and what happens when a concern is raised
- Adopting these policies and procedures by your board of directors
- All employees and third parties engaged by your business should be made aware of the new policies and procedures, and they should all accept and acknowledge them
- Repeated education/training and assessment for all board members, senior management, employees and third parties should be held on an annual basis

**Conclusion**

In conclusion, the adequate procedures required for your business need not be extensive or expensive. What is important is that your business has to have a commitment to high standards of business ethics and a genuine effort to build and promote a culture of ethical conduct. Like many processes, the compliance process will take a little time to establish. However, once it is, it will create an environment of high integrity and high standards of business ethics leaving your business less susceptible to risk of prosecution under the Act or any local anti-bribery and corruption laws.

**For further information**

If you have any further queries, please contact Francesca Lee on 01865 3399360 or 020 3356 4938 or email [fsclee@crescolegal.com](mailto:fsclee@crescolegal.com).

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