



**Burges Salmon**

**The Bribery Act 2010**

**Health Check: Adequate Procedures**



**BURGES  
SALMON**

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### Part 1 - Health Check

This section will help you identify the core areas to consider, and the steps you may need to take, in order to ensure your business is compliant with the Bribery Act 2010 (the “Act”) which came into force on **1 July 2011**. Certain issues may be more relevant than others, depending upon the nature of your business, its scale and the jurisdictions in which it operates.

	Question	Answer	
		Y/N/NA	Action taken/work required
1	<p><b>Consideration of Ministry of Justice Guidance and Quick Start Guide</b></p> <ul style="list-style-type: none"> <li>■ Have you read the Ministry of Justice Guidance and the Quick Start Guide?</li> <li>■ If not, these can be found at: <a href="http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm">http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm</a></li> <li>■ Having read the Guidance and Quick Start Guide, and having considered in particular Principle 1 on “Proportionality”, what steps, if any, will your business need to take in light of its activities?</li> <li>■ Will a risk identification programme, a statement by management and an anti-bribery policy be sufficient? If so, consider Questions 2 to 4 in particular.</li> <li>■ Will further steps be required? If so, consider Questions 5 to 10 also.</li> </ul>		
2	<p><b>Risk identification programme</b></p> <ul style="list-style-type: none"> <li>■ Has a risk identification exercise been carried out internally in order to highlight key areas of vulnerability and high risk practices? For example, does the business do any of the following: <ul style="list-style-type: none"> <li>- provide “facilitation” or “grease” payments in the UK or overseas, even where such payments are accepted practice in the industry or jurisdiction?</li> <li>- provide higher value corporate hospitality to customers/targets?</li> <li>- negotiate or otherwise deal with public officials?</li> </ul> </li> </ul>		

	<ul style="list-style-type: none"> <li>- operate, or have agents that operate on its behalf, abroad, specifically in higher risk jurisdictions (e.g. in Middle East, Eastern Europe)?</li> <li>- operate in higher risk sectors such as public procurement, charitable or political contributions, high value or other projects with many contractors, intermediaries or agents?</li> <li>- have subsidiaries, business divisions, or agents whose business practices are not fully known e.g. because they have been recently acquired?</li> </ul> <ul style="list-style-type: none"> <li>■ Has a report been produced setting out these risks/practices?</li> <li>■ What are the proposed actions in respect of these risks/practices?</li> <li>■ Have any specific instances of corruption been identified? If so, have these been reported to the board of directors?</li> </ul>		
3	<p><b>Culture and management</b></p> <ul style="list-style-type: none"> <li>■ What steps are the board of directors and other relevant management taking to ensure that an anti-corruption culture is being disseminated throughout the business?</li> <li>■ Are the management ensuring that anti-corruption culture and processes are being embedded and implemented at the relevant levels of the business so as to avoid mere “paper compliance”.</li> <li>■ Has a director or senior level manager been appointed to oversee, monitor, and be the primary point of contact on corruption issues?</li> <li>■ Has an all staff email/memorandum been sent setting out the business’ zero tolerance on corruption, its requirements and expectations of its staff in relation to promoting an anti-corruption culture and practices?</li> </ul>		
4	<p><b>Policies and procedures</b></p> <p>Has a clear, overarching anti-bribery policy document been drafted and published within the business? Does the policy refer to the business’ existing policies/codes where relevant?</p> <p>Have the following internal policies/codes of practice (UK and overseas operations) been updated to take account of the changes made by the Act?</p> <ul style="list-style-type: none"> <li>■ Corporate and employee codes of practice.</li> <li>■ Ethics/anti-corruption codes of practice.</li> <li>■ Gifts, hospitality, political and charitable donations, expenses, and facilitation payments codes of practice.</li> </ul>		

	<ul style="list-style-type: none"> <li>■ Supply chain management/ sub-contracting code of practice.</li> <li>■ The codes of practice maintained by agents of the business.</li> </ul> <p>If not, when will a “gap review” be undertaken and revisions made to those policies?</p> <p>Will a review be undertaken of the above policies/codes to ensure that they take account of the Guidance and the Quick Start Guide?</p>		
5	<p><b>Contractual arrangements</b></p> <ul style="list-style-type: none"> <li>■ Do director and employee contracts expressly prohibit any form of bribery, including any form made illegal by the Act?</li> <li>■ Do agency/sub-contractor contracts expressly prohibit any form of bribery, including any form made illegal by the Act?</li> </ul> <p>If not, has legal advice been sought on revising these contracts?</p>		
6	<p><b>Training and awareness</b></p> <ul style="list-style-type: none"> <li>■ Do you understand the new offences?</li> <li>■ Does your board of directors understand the new offences?</li> <li>■ Do the relevant UK staff understand the new offences?</li> <li>■ Do any staff based or operating overseas understand the new offences?</li> </ul> <p>If the answer to any of the above is “no”, when and how will a training programme be delivered to relevant staff? Are regular updates for staff planned?</p>		
7	<p><b>Vetting and due diligence</b></p> <p>Are the following properly vetted for the purposes of mitigating corruption risk?</p> <ul style="list-style-type: none"> <li>■ New employees.</li> <li>■ New agents, sub-contractors, and other business partners.</li> <li>■ New acquisitions.</li> <li>■ Overseas jurisdictions in which business is to be transacted.</li> </ul>		

8	<p><b>Whistleblowing and investigation</b></p> <ul style="list-style-type: none"> <li>■ Is there a clear mechanism by which employees may report their concerns regarding bribery to appropriate senior personnel?</li> <li>■ Is there a clearly established investigatory procedure that will be carried out by a suitably qualified and impartial person?</li> </ul>		
9	<p><b>Monitoring and review</b></p> <ul style="list-style-type: none"> <li>■ Are there mechanisms in place to ensure that your risk analyses and policies are regularly reviewed at a senior level and updated?</li> <li>■ What checks or audits are carried out to monitor compliance with policies?</li> </ul>		
10	<p><b>External advice</b></p> <p>Would it be prudent to appoint an external legal adviser to review and advise on the business' approach to anti-corruption?</p>		

Summary of Action Points	
Actions	Deadline

## Part 2 - Summary of the Bribery Act 2010 offences

This section summarises the key offences that are established under the Act. It also seeks to explain some of the new terminology used in the Act. Of particular interest is the new “corporate offence” contained in Section 7 of the Act, whereby commercial organisations may be held strictly liable for bribery committed by their subsidiaries, employees, and sub-contractors etc.

### 1. Offering or providing bribes (Section 1 of the Act)

The general bribery offences under Section 1 of the Act are drawn very widely:

- It is an offence for a person to offer or provide a financial or other advantage to another person, where the advantage is intended to induce a person to “perform improperly” a “relevant function or activity”, or reward them for that improper performance.
- An offence will also be committed where it is known or believed that the acceptance of the advantage would itself constitute improper performance.
- The offering or provision of the advantage can be made directly or via a third party (e.g. an agent).
- There is no exception for “facilitation” or “grease” payments.
- “Functions” and “activities” include any public function, and any business or employment activity, whether within or outside the UK.
- “Improper performance” means performance of a function or activity in breach of a “relevant expectation” i.e. that the function or activity be performed in good faith, impartially, or by a person in a position of trust.
- The “expectation” is deemed to be that of a reasonable person in the UK. If the function or activity is performed outside the UK, the local customs and practices of bribery in the foreign country are to be disregarded, unless they are permitted by the written law of that country.

### 2. Receiving bribes (Section 2 of the Act)

It is an offence under the Act to be bribed as well as to bribe:

- The Act makes it an offence to request or accept a financial or other advantage, with the intention that, as a consequence, a relevant function or activity (as defined above) should be performed improperly.
- Again, an offence will be committed where the request or acceptance itself constitutes the improper performance, and also where a person requests or accepts the advantage as a reward for improper performance. Note that, in these instances, there is no requirement that the recipient knows or believes that the performance of the function or activity is improper.
- Again, the request or acceptance of the advantage can be made directly or via a third party.

### 3. Bribery of foreign public officials (Section 6 of the Act)

The Act sets out specific offences relating to bribery of public officials:

- It is an offence to offer or provide a financial or other advantage to a foreign public official with the intention of influencing the official in order to obtain or retain business or an advantage in the conduct of business.
- Again, the offering or provision of the advantage can be made directly or via a third party (e.g. an agent).
- The local customs and practices of bribery of officials in the foreign country are to be disregarded, unless they are permitted by the written law applicable to that official.

#### 4. Failure of a commercial organisation to prevent bribery (Section 7 of the Act)

The Act creates an entirely new “corporate” offence which can be committed by any commercial organisation (partnerships and companies) in the private, as well as the public, sector:

- A commercial organisation will commit an offence where a person “associated” with it commits one of the above bribery offences with the intention of obtaining or retaining business for the organisation, or obtaining or retaining an advantage in the conduct of business for the organisation.
- The offence can be committed by a UK body corporate or partnership carrying on business in the UK or abroad, and also a foreign body corporate or partnership carrying on business in the UK.
- An associated person is anyone who performs services for or on behalf of the organisation. This can extend beyond employees and subsidiaries to sub-contractors, distributors, suppliers, business partners, and other agents. The key test is whether the person is performing services for or on behalf of the organisation.
- The offence is one of “strict” or automatic liability i.e. it can be committed by the commercial organisation without intention or knowledge.
- However, it will be a defence for the organisation to prove that it had in place “adequate procedures” designed to prevent associated persons from committing bribery offences. Adequate procedures will need to be proportionate to the size of the organisation and the risks faced by it, for example whether business is carried on in higher risk overseas jurisdictions where bribery in the public and private is more common and even accepted.
- The Ministry of Justice has produced Guidance and a Quick Start Guide designed to assist businesses in determining what “adequate procedures” will mean in the context of their activities.
- The Guidance and Quick Start Guide can be found here: <http://www.justice.gov.uk/guidance/making-and-reviewing-the-law/bribery.htm>
- The Guidance sets out six key principles to be considered when establishing “adequate procedures”. These are:
  - Proportionality;
  - Top Level Commitment;
  - Risk Assessment;
  - Due Diligence;
  - Communication (including training); and
  - Monitoring and Review.

#### 5. International application

- The offences set out above have international application. Therefore, a person may commit the offences in Sections 1, 2, and 6 of the Bribery Act either in the UK, or abroad, so long as the person has a “close connection” with the UK e.g. is a British citizen or UK company.
- A commercial organisation, as defined, may commit the offence under Section 7 in the UK or abroad in any event. There is no additional requirement that it has a close connection with the UK.

#### 6. Penalties

- Maximum prison sentence of 10 years.
- Unlimited fine.

## Contacts

If you wish to consult Burges Salmon on the new Bribery Act or your business' compliance with it, please contact:



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