

The Bribery Act 2010: the death knell for corporate hospitality?

Kenneth Clarke MP has announced that the Bribery Act 2010 (the Act) will be implemented on July 1, 2011, following the long-awaited publication of the statutory guidance (the guidance) on April 30, 2011. Paris Smith's Sarah Wheadon writes

At a time when retaining existing clients and winning new work is perhaps more important than ever, the question for many businesses will be: "at what point does corporate hospitality become bribery?"

The starting point is the legislation.

The law

The corporate offence

In summary, under section seven of the Act a "relevant commercial organisation" is guilty of an offence if a person "associated" with it bribes another person (this includes a foreign public official) intending to obtain or retain business or to obtain a business advantage for the organisation. This covers corporate hospitality given or received in the UK or elsewhere.

However, the organisation will have a full defence if it can prove that it had in place "adequate procedures designed to prevent persons associated with [it] from undertaking such conduct."

Relevant commercial organisation

The definition is deliberately wide. It covers:

- A body incorporated or a partnership formed in the UK which carries on a business (whether in the UK or elsewhere); and
- A body corporate or partnership (wherever incorporated or formed) which carries on a business or part of a business in any part of the UK.

Essentially, any business engaged in commercial activity for whatever purpose will be caught by the Act.

Associated person

This is anyone who "performs services" for or on behalf of the relevant commercial organisation. This can include employees, agents, subsidiaries, contractors or suppliers.

Compliance

For businesses, the key to compliance with the Act is having "adequate procedures". Admittedly, this is easier said than done. What amounts to "adequate procedures" is subjective and by its very nature creates uncertainty. The only way a business can avoid uncertainty is to adopt a policy which prohibits any activities that sit in the grey area of uncertainty, such as corporate hospitality. For many businesses, this is just not an option if they are to remain competitive.

With the July 1, 2011, date looming and no case law to help with interpretation, does the guidance provide any assistance?

The guidance

Helpfully, in the foreword to the guidance, Clarke says: "Rest assured - no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix". Thank goodness for that.

Building on this, the guidance says that the Government does not intend that the Act should prevent reasonable and proportionate corporate hospitality or promotional-type activities which seek "to improve the image of a commercial organisation, better to present products and services, or establish cordial relations."

The guidance provides an illustrative example of hospitality that is likely to fall into this category as taking foreign clients to a six nations match at Twickenham "as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisations' field."

However, the point is that corporate hospitality and promotional-type activities can be used as a bribe if the activity is not for building business relationships or raising profile, but is intended to induce certain conduct on the part of another person so as to gain a business advantage. The guidance reminds businesses that ultimately, the final decision of what is or is not bribery will rest with the courts taking into account the particular circumstances of each case.

So what do businesses need to do in the run up to July 1, 2011?

The answer is to have in place policies and procedures covering activities such as corporate hospitality to prevent anyone associated with the business falling foul of the law, and to take advantage of the "adequate procedures" defence if they do.

The starting point is to adopt the six principles set out in the guidance and to follow a logical step-by-step process of implementation as follows:

- Ensure there is commitment from top-level management at the outset;
- Identify "associated" persons;
- Assess the nature and extent of risks of bribery internal to and external of the business;
- Carry out due diligence checks on "associated" persons (if identified as necessary by the risk assessment);



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- Draft an anti-bribery policy and procedures, ensuring that these dovetail into whistleblowing and disciplinary procedures. Think of ways in which the procedures can be made easy for people to use, how they can fit into existing financial or audit procedures and if possible, how they might benefit the business in other ways, for instance by capturing marketing information. For corporate hospitality, set guidelines to create certainty and establish a process of prior approval for "out of the ordinary" events to ensure that they do not fall foul of the law;
- Ensure that all "associated persons" are made aware of the anti-bribery policy and procedures through oral or written communications and training; and
- Monitor activities through, for example, the creation of a central register and review and update policies and procedures where appropriate, for instance if starting work in another country.

Conclusion

The Act is not designed to catch reasonable and proportionate corporate hospitality which is aimed at building business relationships and raising profile. Many businesses will therefore be able continue to do what they do now.

However, the question posed at the start of the article: "At what point does corporate hospitality become bribery?" remains the million dollar question and one to which there is no prescribed answer.

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