



Bribery Act Guidance – issued June 2011

Overview

New anti-bribery legislation – the Bribery Act 2010 ('the 2010 Act') – comes into effect in the UK from 1 July 2011. This is part of a world-wide drive by the World Trade Organisation ('WTO') and Organisation for Economic Co-operation and Development ('OECD') to eliminate bribery because of its negative impact on fair competition, economic and social development.

The new law is intended only to cover acts of bribery – which are illegal. (It does not cover matters such as fraud, theft, money laundering, offences under the Companies Act, or competition law.) The Optical Confederation supports the anti-bribery measures set out in the 2010 Act and the promotion of good corporate governance. As the Ministry of Justice has stated these measures are directed at making life difficult for the mavericks responsible for corruption; and not designed to be burdensome on the vast majority of decent, law-abiding firms.

However there is little scope for bribery in the optical sector and, indeed, little or no evidence of any ever having taken place. Members will also be aware that there are already a number of safeguards already in place to detect and discourage improper conduct of this nature. Nevertheless there is a clear expectation in the material produced by the Ministry of Justice that commercial organisations will have assessed the risk for bribery and have developed, following that risk assessment, a proportionate set of policies to address and mitigate the risk, if any.

It is against this background that this guidance has been produced to clarify matters for Optical Confederation members, and to set out what the Optical Confederation believes to be good corporate governance in retail practice, referrals, domiciliary services, manufacturing and import/export in the optical sector, under the 2010 Act.

What is Bribery?

This is defined as seeking or intending to seek to induce any person

- who is in a position of trust
- who is expected to act impartially
- and in good faith

to act in a way that they would have not otherwise have done in that position without an inducement - and vice versa (i.e. it is also an offence for such a person to seek such an inducement).

Employers also have a duty under the 2010 Act to ensure that in so far as is reasonable that their employees do not commit acts of bribery.

Where a bribe is paid for the benefit of a commercial organisation i.e. an organisation carrying on business such as a partnership or incorporated body - whether by an employee, agent or representative, the organisation itself might be guilty of a criminal offence unless 'adequate procedures' have been put into place to prevent bribery (please refer to 'minimising the risks of bribery' below).

Optical businesses and professionals should be aware of the broad requirements under the 2010 Act and what would be considered an offence under the Act. An outline of the 2010 Act is produced in Annex A.

What Bribery is not

As the Ministry of Justice has stated the 2010 Act is not intended to prohibit normal, honest business practices such as

- seeking and receiving discounts and deals
- marketing and other support for specific product lines
- small marketing "memo" items such as mouse mats, key rings, pens, memory sticks, note pads, desk furniture, umbrellas
- small conference "give-aways" such as goodie bags, refreshments at events, drinks receptions
- sponsorship of conferences, events and training sessions (provided they are not held in unnecessarily exotic locations with disproportionate free time and entertainment)
- taking clients to events like Wimbledon or the Grand Prix
- normal business hospitality e.g. Christmas gift of bottle of whisky, occasional lunch, dinner or lecture

when these are appropriate, reasonable and proportionate for the particular circumstances.

Sanctions under the Act

Individuals, including company directors, found guilty of offences under the Act are liable to a sentence of up to 10 years imprisonment or a unlimited fine or both.

Corporate Hospitality

The Ministry of Justice has stated that ‘bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour’.¹ The Ministry of Justice is not therefore seeking to prohibit reasonable and proportionate hospitality, or promotional or other similar business expenditure intended for these purposes.

Hospitality and promotional or other similar business expenditure that goes beyond what is reasonable may be captured. Case law has not yet been established in this area as the law is new and prosecuting authorities will have to use their discretion on a case by case basis. They will consider for example the scale of the offence, the role and seniority of the recipient and the context within which the hospitality is provided.

However the more the lavish hospitality, the more this could be seen as having potential to influence or obtain business advantage, although this would also depend on norms for a particular industry. Lavish hospitality might be considered to be a disproportionately large gift (e.g. a car, a yacht, a five-star holiday, expensive jewellery, a shopping trip) for someone from whom a deal or business benefit is obtained or expected would be deemed to be bribery.

(It would be different of course if this were a gift, say on retirement, to a trusted trading partner after many years of business and when no further business benefit could be obtained – as long as it were not promised or offered in advance in return for business favours or could be construed as such.)

¹ Ministry of Justice (2011) The Bribery Act Section 9 Guidance <http://www.justice.gov.uk/guidance/bribery.htm>

Dealing with public officials

Particular care should be exercised in dealing with public officials. There is also a specific offence in the 2010 Act relating to bribery of foreign officials. In the United States for example any gifts or hospitality to public officials is banned. In the UK public officials are governed by more flexible codes of conduct but again reasonableness and proportionality are key.

For instance

- it is perfectly reasonable to offer a public official a meal or refreshment during a visit but there may be a world of difference between, say, a good local restaurant and a Michelin starred restaurant some distance away
- equally in some circumstances it might be helpful for an official or officials to visit, say, a manufacturing plant, distribution centre or retail outlet. In this case this should be at the nearest location ideally within the UK unless there are overriding reasons for, say, an overseas trip. In the world of modern communications it should rarely be necessary to fly officials around the globe.

Retail Practice

The 2010 Act is not intended to prevent

- the usual business practices of negotiating discounts and other business-to-business incentives
- a business opting to provide a limited range of products (provided they meet the majority of patients' needs and , in exceptional cases, practitioners can supply outside this range to meet a patient's needs).

Moreover, in the case of optical retail practice, the General Optical Council's Codes of Conduct for Corporate and Individual Registrants, the College of Optometrists' Code of Ethics and Guidelines for Professional Conduct² and the ABDO's Advice and Guidelines³ as well as NHS rules include duties that

- optometrists and dispensing opticians must make the care of their patient their first and continuing concern
- optical practices ensure that optometrists and dispensing opticians are free to exercise their professional judgement in the best interests of their patients.

² College of Optometrists (2011) http://www.college-optometrists.org/en/professional-standards/Ethics_Guidelines/index.cfm

³ABDO Advice and Guidelines (2008) <http://www.abdo.org.uk/adviceandguidelines.php>

The Optical Confederation believes that in the majority of circumstances by abiding by these Codes, principles and rules, optical retailers, community optical practices and registered practitioners will simultaneously be complying with the principles of the 2010 Act.

Incentives to practitioners by manufacturers or suppliers to influence the performance of a service or prescription of a particular appliance or product however would not comply with these guidelines and might also fall foul of the 2010 Act.

It is particularly important therefore that practitioners pay particular attention to ensuring that they can meet all patients' reasonable and appropriate needs and do not allow financial considerations to distort any clinical decisions they make with patients in individual cases. More specifically, practitioners should not accept an inducement to recommend a particular product or service, or to prescribe a specific appliance.

Referrals

Inducements for clinical referrals are already prohibited under the Code of Practice for the promotion of NHS-funded services⁴ and would cast doubt on whether a practitioner or business were acting exclusively in the patient's best interest. The same applies in the case of private referrals. The Optical Confederation would recommend that in all cases of referring a patient, a record should be kept of the individual grounds as to why the particular referral was made to the specific service provider, and why the patient would benefit from that referral.

Domiciliary Services

Inducements to care home staff are already prohibited under GOS regulations⁵ and under the Code of Practice for Domiciliary Eyecare⁶. The Optical Confederation believes that, in the majority of circumstances, by abiding the code, regulations and guidelines for Retail Practice above, a domiciliary provider would also generally be complying with the principles of the 2010 Act.

⁴ *Code of Practice for the promotion of NHS-funded services*, Department of Health, 2008

⁵ Under Schedule 2 of General Ophthalmic Services Contracts Regulations 2008

⁶ *Code of Practice for Domiciliary Eyecare*, ABDO, AOP, College of Optometrists, FODO, 2006

Manufacturing and Supply

Similar requirements will apply in respect of optical manufacturers and distributors, and these members should note the points above which relate to Retail Practice.

Multinational Companies

It should be noted that all commercial organisations that operate in the UK, even if headquartered overseas, come within UK jurisdiction (for this purpose) and can be prosecuted in the UK under the 2010 Act in respect of any of their activities whether within the UK or overseas.

A number of multinational companies may have long-standing procedures in place which were designed to meet the requirements of the US Foreign and Corrupt Practices Act (FCPA) which is focussed on bribery of government officials. We would strongly encourage companies to revisit these programs as the provisions of the 2010 Act are much broader and also cover commercial bribery.

Import and Export

Commercial organisations already carry out due diligence checks on overseas providers and sub-contractors. The 2010 Act adds another dimension to this by requiring the same level of care and due diligence in dealing with commercial partners and transfers of value as they would with government bodies and public officials.

The same arguments apply in respect of product importers and exporters. Indeed other countries have also moved to tighten anti-bribery and corruption legislation, although we expect that compliance with the 2010 Act should be sufficient for Optical Confederation members that operate overseas.

As a matter of policy, manufacturers and product importers should only do business with properly registered businesses operating within the laws of their own countries. We would advise members to consider this a core element of due diligence when choosing overseas partners and to take reasonable steps to ensure trading partners are compliant.

In cases of doubt, Optical Confederation members should seek legal advice when drawing up contracts with overseas suppliers.

Associated Persons

As noted above, a commercial organisation can be liable under section 7 of the 2010 Act if a person (or agent) associated with it bribes another person to obtain advantage for the organisation. However, the Ministry of Justice has stated that the commercial organisation will have a full defence if it can demonstrate that, “despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.”

Specific paragraphs dealing with the potential exposure of parent companies and joint ventures for the activities of agents, subsidiaries or a person acting for another member of a joint venture are contained in the guidance produced by the Ministry of Justice.

The Ministry of Justice has outlined that in such cases, without proof of the specific intention required for a bribery offence, liability will not automatically accrue to the commercial organisation owing to simple corporate ownership or normal corporate financial dealings, investments and relationships.¹

Each case will depend on the relevant facts including matters such as the level of control of the commercial organisation over the associated person and the degree of risk requiring mitigation. Commercial organisations should seek to minimise and address this risk, as above, through risk-based due diligence and the use of anti-bribery terms and conditions.

What employers should do to minimise the risks of bribery

Annex B sets out the six principles for bribery prevention contained in the guidance published by the Ministry of Justice. Members should be informed by these principles when assessing the risk for bribery within their own organisations and taking steps to address the risk through policies and procedures to prevent bribery being committed on their behalf.

In brief, the six principles can be summarised as follows.

- **For optical practices and practitioners**

Ensuring that professional staff and management are aware of their professional duties and any risk of bribery

As above ensuring that optometrists and dispensing opticians are free to exercise their professional judgement in the best interests of their patients

- **For optical supplier companies**

Review corporate practices and commercial activities

Where appropriate, review contracts with overseas suppliers

The Ministry of Justice has particularly advised that commercial organisations should review their policies on hospitality and promotional expenditure to ensure they are seen to be acting both competitively and fairly.¹

Members are advised to retain a documented account of any steps taken to review, and where necessary minimise, their organisation's risk of bribery.

For further information, please refer to Ministry of Justice 'Best Practice Guidance for Commercial Organisations' in Annex B.

Members should note that this guidance cannot cover every eventuality, and a case would be considered in the light of the relevant facts and circumstances.

What to do if you suspect bribery in your company or organisation?

If you or a member of staff suspects a problem within your company or organisation you should alert your (internal) senior management, who will be in a position to investigate the matter.

Care is required before making any disclosures to the authorities. We would strongly recommend that management take legal advice on these matters as it is also possible to fall foul of the laws on defamation, breach of confidentiality, data protection or tipping off.

It is also important to note that if you come across activity in your firm that might be considered to be suspicious, management should seek to stop the activity immediately and to investigate the matter thoroughly.

We would recommend keeping a record the investigation, conclusion and any actions taken in every case.

Further Information

The detail of the legislation is set out at Annex A and the summary of the Ministry of Justice's 'Best Practice Guidance for Commercial Organisations' is at Annex B.

Status of this Guidance

This guidance is intended as guidance only and does not claim to be a comprehensive statement of the law. We will keep this guidance updated as case law develops.

If in any doubt, an optical business, contractor or practitioner should contact their representative body and take further independent legal advice.

This guidance was published in June 2011 and will be reviewed from time to time as case law develops.

Optical Confederation

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Annex A Detail of the Legislation

Background

The Bribery Act 2010⁷ (2010 Act) is the UK's adoption of the Organisation for Economic Cooperation and Development (OECD) Anti-Bribery Convention⁸ which was signed in 2009. The OECD Anti-Bribery Convention was signed by all OECD member countries and four non-members. A list of all participating countries is available on the OECD website.

The Bribery Act 2010 received royal assent on the 8th of April 2010 and will be in force from 1 July 2011. The Act reforms the criminal law of bribery and provides a clear outline of bribery offences both in the United Kingdom and overseas.

General Principles

The 2010 Act establishes two categories of offences: offering a bribe; and receiving a bribe (to which there is a subset of anticipating a bribe). Both offences relate to there being an intention to induce improper conduct of a relevant function or activity (outlined below).

The 2010 Act does not define 'improper conduct', and because the legislation is not yet in force, there is not yet any judicial commentary on what this means in any particular context. This is likely to be applied subjectively depending on the individual facts of any case. Commercial organisations should refer to Annex B for further information.

What gives rise to an offence?

The key test of whether a bribery offence has occurred under the 2010 Act is whether the behaviour provoked is 'improper'.

The Act identifies six cases that can give rise to an offence, summarised below:

- Offering bribes – offering, promising or giving financial incentive or other advantage to another person, either:

⁷ Bribery Act 2010 <http://www.legislation.gov.uk/ukpga/2010/23/contents>

⁸ OECD Anti-Bribery Convention, http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html

- To induce a person to perform a relevant function or activity improperly, or to reward a person for improper performance, or
 - Knowing or believing that the acceptance of the advantage would constitute improper performance
- Receiving bribes – requesting, agreeing to receive or accepting a financial or other advantage:
 - Intending that, in consequence, a relevant function or activity should be performed improperly, or
 - Where the request, agreement or acceptance itself constitutes the improper performance of a relevant function or activity, or
 - As a reward for the improper performance of a relevant function or activity.
- Anticipation of Receiving an Advantage – in anticipation of or in consequence of requesting, agreeing to receive or accepting a financial or other advantage, a relevant function is performed improperly.

What is a relevant function?

Relevant functions are defined in Section 3 of the 2010 Act, in two parts.

The first part identifies that the Act applies to:

- (a) any function of a public nature
- (b) any activity connected with a business
- (c) any activity performed in the course of a person's employment
- (d) any activity performed by or on behalf of a group (corporate or unincorporate)

The second part is that even if one of the functions (a) to (d) above is applicable, the provisions of the 2010 Act are only triggered if one of the conditions listed below is satisfied:

- (a) Condition A – a person performing the function or activity is expected to perform it in good faith
- (b) Condition B – a person performing the function or activity is expected to perform it impartially
- (c) Condition C – a person performing the function or activity is in a position of trust by virtue of performing it.

In addition, under section 7, it is an offence for commercial organisations to fail to prevent bribery in circumstances where a person associated with the company, i.e. performing services for or on behalf of a company, bribes another person with the intention of retaining business for the company.

If the commercial organisation has put adequate procedures in place designed to prevent a person associated with the incorporation or partnership from undertaking such conduct, then the organisation could use those procedures as a legal defence if a particular case of bribery is uncovered.

Under Section 9 of the 2010 Act, the Secretary of State is required to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing.

Punishment under the Act

An individual guilty of offering or receiving a bribe is liable to maximum sentence of imprisonment for a term up to ten years, or to a fine, or both.

Relevance to Members of the Optical Confederation

Services provided to patients by optometrists and dispensing opticians are likely to be subject to the provisions of the Act in accordance with Section 3, the relevant functions/activities and triggering conditions. Optometrists and dispensing opticians have a duty to make the care of the patient their first and continuing concern⁹, and optical practices have a duty to take steps to ensure optometrists and dispensing opticians that they employ are free to exercise their professional judgement in the best interests of their patients¹⁰. Therefore optometrists and dispensing opticians can reasonably be expected to perform their services in good faith, impartially, and to remember that they are in a position of trust when recommending health services and/or dispensing products to a patient.

Companies that supply services and products to optical practices and practitioners should also be aware of their duty to prevent bribery taking place by individuals acting on behalf of the company.

⁹ GOC Code of Conduct for Individual Registrants

¹⁰ GOC Code of Conduct for Business Registrants

Annex B Ministry of Justice's 'Best Practice Guidance for Commercial Organisations'

This Guidance for Commercial Organisations (under Section 7 of the Bribery Act 2010) is available online at <http://www.justice.gov.uk/guidance/bribery.htm>

The guidance sets out that reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products or services, or establish cordial relations, is recognised and established and an important part of doing business.

The guidance set out by the Secretary of State is not intended to be prescriptive and therefore does not cover every circumstance, but it does provide some useful examples to refer to for additional information. As above, matters would often need to be resolved by the courts taking into account the particular facts and circumstances of the case. The best defence for an organisation would be to prove that it had adequate procedures in place to prevent bribery. By considering the general principles outlined below, and by establishing and maintaining policies that are in line with these principles a commercial organisations will do much to limit the risk of bribery taking place on their behalf. These are intended to be used as a flexible guide to deciding what procedures are right for an organisation.

Six Principles for Bribery Prevention¹

The Ministry of Justice considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by the principles set out below.

Proportionate Procedures – A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Top level commitment – Top level management of a commercial organisation (be it a board or directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation within which bribery is never acceptable.

Risk Assessment – The commercial organisation assesses the nature and extent of its exposure to potential external or internal risks of bribery on its behalf by persons associated with it. This assessment is periodic, informed and documented.

Due diligence – The commercial organisation applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Communicating – The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training that is proportionate to the risks it faces.

Monitoring and review – The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Further information regarding all of these principles, with case study examples relating to each, is available in the Ministry of Justice Guidance.