

Bribery Act 2010: What does it mean for pension trustees?

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Pension Briefing

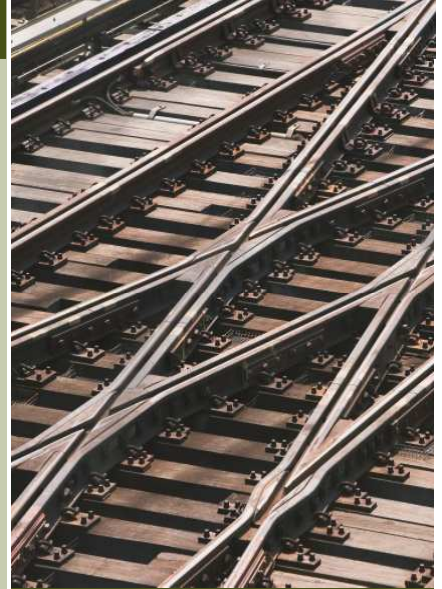
HIGHLIGHTS

The law on bribery in the UK has been updated with the coming in to force of the Bribery Act 2010 on 1 July last year. The Act created four new criminal offences:

- individual offences of bribing, being bribed or bribing a foreign official; and
- a corporate offence (section 7) for commercial organisations, committed where an organisation fails to prevent anyone performing services on its behalf (employee, worker or consultant) anywhere (UK or overseas), from committing bribery. There is a statutory defence for organisations who can show they have "*adequate procedures*" in place to prevent bribery offences.

In April 2011 the Ministry of Justice published its long-awaited guidance on the Act. The guidance emphasises that compliance is "largely about common sense, not burdensome procedures" and offers comfort in some areas which had been the subject of debate and speculation.

This note explains the implications for both corporate and individual trustees and some suggested actions.



BACKGROUND

The law on bribery - the offer or acceptance of a reward to persuade someone to act dishonestly and/or in breach of the law - has developed piecemeal in the UK via legislation and case law. Some of that law is over 100 years old and does not deal adequately with bribery in today's complex and sophisticated world.

After a long period of consultation, the Bribery Act 2010 finally came into force on 1 July 2011. It created new criminal offences carrying a maximum penalty of 10 years' imprisonment or an unlimited fine, for which individuals, commercial organisations and directors can be liable.

The Act potentially impacts on both individual and corporate trustees, as well as their sponsoring employers.

INDIVIDUAL OFFENCES OF BRIBERY

Both corporate and individual trustees are exposed to the basic offence of bribery: offering, promising or giving a bribe; or requesting, agreeing or receiving a bribe. In each case, the offence is complete where there is an intention to induce or reward improper conduct in the performance of a public function or any business activity, provided that there is an expectation that the function will be carried out in good faith or impartially, or the person performing the function is in a position of trust.

The broad definition of a bribe: "*financial or other advantage*" is capable, for example, of catching excessive corporate hospitality.

CORPORATE OFFENCE

As well as the individual offences, the Act introduced a new strict liability criminal offence whereby "*commercial organisations*" (likely to include corporate pension trustees) can be automatically liable for bribes paid by their "*associated persons*" - those who "*perform services*" for the corporate or on its behalf.

This raises two separate issues for corporate pension trustees:

- the corporate pension trustee could be liable for the acts of its "associated persons" – the most obvious being its trustee directors; and
- the corporate pension trustee is likely to be an "associated person" of the sponsoring employer.

The corporate pension trustee and sponsoring employer can only avoid conviction if it can show that it had "*adequate procedures*" in place to prevent bribery (see below). In other words, the organisation is given the opportunity to demonstrate that any improper conduct was an isolated incident rather than an institutional failure.

The guidance recognises that the definition of "associated person" is intended to be broad. Nevertheless, the corporate will only be liable where the associated person acted with an intention to obtain or retain business (or a business advantage) for the corporate, even if the corporate may benefit indirectly from the bribe. The guidance emphasises that this is an important limiting factor.

ADEQUATE PROCEDURES DEFENCE TO THE CORPORATE OFFENCE

The guidance on "*adequate procedures*" takes the form of six principles that are intended to guide corporates in deciding what bribery prevention measures to put in place:

- **Proportionate procedures.** Although policy documents will be important, "procedures" extend further to the steps that an organisation takes to implement its policies and to embed an anti-bribery culture.
- **Top level commitment.**
- **Risk assessment.** Corporates should review the bribery risks associated with their market, the countries in which they operate and the third

parties with whom they interact, on a periodic basis.

- **Due diligence.** Businesses should take steps to understand who they are doing business with.
- **Effective implementation.**
- **Monitoring and review.**

CORPORATE HOSPITALITY

The most obvious concern for trustees is the issue of hospitality. Here the guidance offers considerable reassurance about the impact of the Act. It makes clear that the Act is not intended to prohibit businesses from taking clients or customers to Wimbledon, the Grand Prix or Twickenham; three specific examples given to illustrate that the Act does not prohibit "*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.*"

ACTION

Trustees already have a duty under general trust law to act and take decisions in the interests of their beneficiaries. Nevertheless, corporate pension trustees who have not already done so will want to liaise with their sponsoring employer to understand any requirements of the sponsoring employer's adequate procedures test. They will also want to consider introducing their own rules and procedures (in particular, gifts and hospitality rules) that meet the adequate procedures test.

All trustee bodies (corporate or otherwise) should:

- adopt a simple bribery policy that focuses primarily on corporate hospitality matters.
- ensure that trustee training covers the new bribery law and explains the policy.
- maintain a register of hospitality and gifts.

This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

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