

Failing to Prevent Bribery

Failing to prevent bribery

Failing to prevent bribery under section 7 of the Bribery Act 2010

This offence can only be committed by relevant commercial organisations (RCOs), not individuals. RCOs are:

References: BA 2010, s 7

- o bodies incorporated, or partnerships formed, under the law of any part of the UK that carry on a business anywhere (ie within the UK or elsewhere), or
References: BA 2010, s 7(5)
- o bodies incorporated, or partnerships formed, anywhere that carry on any business in the UK

A business includes a trade or profession.

An RCO will be guilty of failing to prevent bribery if a person associated with it bribes another person with the intention of obtaining or retaining business or business advantage for the RCO.

Business advantage is not defined. However, it might include being placed on a preferred suppliers list or being given eligibility to tender for contracts.

A person associated with the RCO is someone who performs a service for or on behalf of that organisation. In this regard:

References: BA 2010, s 8

- o such a person may be natural or corporate
- o the capacity in which the service is performed is irrelevant
- o the person may be, for example, an employee, agent or subsidiary
- o employees are presumed to be performing services for employer RCOs, and
- o in other cases, whether persons perform services will be determined in all the circumstances and not just the nature of the relationship

The bribery committed by such an associated person, and forming the grounds of the Bribery Act 2010, s 7 (BA 2010), offence by the RCO, is that which would constitute an offence under BA 2010, ss 1 or 6 (ie bribing another person or bribing a foreign public official); or would do so if the act did not fall under those sections (ie occurs outside the UK) but the person is closely connected with the UK. A person is closely connected to the UK if, and only if, they are:

References: BA 2010, ss 7(3), 12(2), 12(4)

- o a British citizen or overseas territory citizen
- o a British National (Overseas) or British Overseas Citizen
- o a person who was a British subject under the British Nationality Act 1981 or a British protected person under that Act
- o an individual ordinarily resident in the UK, or

- o a UK-incorporated body or a Scottish partnership

The adequate procedures defence

It is a defence for the RCO to prove it had in place adequate procedures designed to prevent those who perform services for it from committing bribery. It is assumed that the usual civil standard of proof applies, ie that the RCO must prove its assertion is more probable than not.

The Ministry of Justice published guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (the MoJ Guidance), under BA 2010, s 9. It gives recommendations about procedures RCOs can implement to prevent bribery on their behalf. It is not prescriptive, so departing from the guidance will not give rise to the assumption that an RCO has not taken adequate procedures.

References: MoJ Guidance (PDF)

The MoJ guidance accepts that circumstances will vary from business to business and recommends a risk-based approach. Any specific industry guidance should also be considered. It may be that in certain sectors compliance will be promulgated by the sector itself.

It is not made clear (as it is, for example, in relation to money laundering) that following this guidance will equate to a defence.

The MoJ guidance contains six principles for preventing bribery:

- o *proportionate procedures*--the RCO's procedures to prevent bribery by associated persons should be proportionate to the risks it faces and to the nature, scale and complexities of its activities. They should be clear, practical, accessible and effectively implemented and enforced, ie they should:
 - o apply to all employees, group companies and business partners under the RCO's effective control, and
 - o cover all relevant risks such as political and charitable contributions, gifts and hospitality, promotional expenses, and responding to demands for facilitation demands or when an allegation of bribery comes to light
- o *top-level commitment*--the top-level management of the RCO should establish a culture across the organisation in which any bribery is unacceptable (if the RCO is small or medium-sized, this may not require much sophistication but the need is to make the message clear, unambiguous and communicated regularly to all staff and business partners)
- o *risk assessment*--the RCO needs to know and keep up to date with the bribery risks it believes it faces in its sectors and markets; this assessment should be carried out periodically and appropriately documented
- o *due diligence*--this involves the RCO knowing with whom it does business and why, when and to whom it releases funds and seeks reciprocal anti-bribery agreements; it should be able to feel confident that its business relationships are transparent and ethical

- o *communication (including training)*--going beyond tick-box compliance to embedding anti-bribery in the RCO's internal controls, recruitment and remuneration policies, operations, communications and training on practical business issues
- o *monitoring and review*--including transparent, bribery-sensitive auditing and financial controls, checking how regularly policies and procedures are reviewed and updated, and assessing whether external verification would help

The body of the guidance includes suggested procedures depending on the size and nature of the organisation. The aim should be an outcome of robust and effective anti-bribery systems and controls.

The duty to report

BA 2010 does not impose a specific duty on a RCO to report actual or suspected bribery. However, RCOs will, in that event, wish to consider whether they should do so; the designated organisation is the Serious Fraud Office (SFO). RCOs should also consider whether particular cases require reporting separately under POCA 2002 or the Money Laundering Regulations 2007, SI 2007/2157.

References: SI 2007/2157

POCA 2002 s 330

Self-reporting may mean that an organisation is able to make representations as to the public interest in a non criminal outcome (such as a civil recovery order under Part 5 of POCA 2002), rather than suffer a criminal prosecution. In relation to overseas corruption, this has the additional benefit that, where appropriate, the mandatory debarment provisions under Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, art 45 would not apply.

References: Directive 2004/18/EC

The SFO, on receiving a report, will enquire immediately into an organisation's anti-bribery policies and procedures. In relation to overseas corruption, the SFO has stated that it will want to establish whether:

- o senior management of the business is genuinely committed to resolving the issue and moving to a better corporate culture
- o the business is prepared to work with the SFO on the scope and handling of any additional investigation it considers to be necessary
- o at the end of the investigation (and assuming acknowledgement of a problem), the business will be prepared to discuss resolution of the issue on the basis, for example, of restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and, at least in some cases, external monitoring in a proportionate manner
- o the business understands that any resolution must satisfy the public interest and must be transparent

- o the business will want the SFO, where possible, to work with regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global settlement

The SFO revised its Guidance on Gifts and Hospitality and Facilitation payments and on Self Reporting and removed the previous 2009 guidance, Approach to Dealing with Overseas Corruption, from its website in October 2012. The revised guidance makes it clear that, in cases of self reporting, it will make a decision whether to prosecute by applying the Full Code Test in the Code for Crown Prosecutors, the Joint Prosecution Guidance on Corporate Prosecutions and, where relevant, the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010.

References: SFO Guidance on Self Reporting

The Guidance on Corporate Prosecutions explains that, for a report from a company to be taken into consideration as a public interest factor tending against prosecution, it must form part of a 'genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice'. Self reporting is no guarantee that a prosecution will not follow.

The process that the SFO requires from corporate bodies and/or their advisers when self-reporting in outline is as follows:

- o initial contact, and all subsequent communication, must be made through the SFO's Intelligence Unit (confidential@sfo.gsi.gov.uk). The Intelligence Unit is the only business area within the SFO authorised to handle self-reports
- o hard copy reports setting out the nature and scope of any internal investigation must be provided
- o all supporting evidence including, but not limited to emails, banking evidence and witness accounts, must be provided
- o further supporting evidence may be required during the course of any ongoing internal investigation

Where the SFO uses the civil recovery powers it retains under POCA 2002 it will publish the reasons for pursuing civil recovery instead of prosecution, the details of the illegal conduct, and the details of the disposal. This decision will be made with reference to the Attorney General's Guidance on Asset Recovery under the Proceeds of Crime Act 2002.

References: A G's Guidance on Asset Recovery under POCA 2002

Where the SFO does not prosecute a self-reporting company, the SFO reserves the right:

- o to prosecute it for any unreported violations of the law, and
- o lawfully to provide information on the reported violation to other bodies including foreign police forces and prosecuting authorities.