

Bribery Act Guidance

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Tackling fraud and managing security

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BRIBERY ACT GUIDANCE

Background

1. The Bribery Act 2010 (“the Act”), which came into effect on 1st July 2011, makes it a criminal offence to give promise or offer a bribe, and to request agree to receive or accept a bribe, either at home or abroad. It also includes bribing a foreign official. It will increase the maximum penalty for bribery to 10 years imprisonment, with an unlimited fine.
2. In addition the Act introduces a corporate offence of failing to prevent bribery by the organisation not having adequate preventative procedures in place (“the section 7 offence”). An organisation may avoid conviction if it can show that it had procedures and protocols in place to prevent bribery. The corporate offence is not a stand-alone offence, but always follows from a bribery and/or corruption offence committed by an individual associated with the company or organisation in question.
3. The Ministry of Justice (MoJ) launched a consultation exercise in September 2010 on the guidance relating to ‘adequate procedures’. This consultation closed in November. The exercise was followed by a series of events to ensure awareness of the changes the Act makes to current law.¹
4. Guidance was published in April 2011 to allow for a commencement date for the Act of 1st July 2011.²

Remit of the Act

5. The Department of Health Legal Service has advised that as long as a body is incorporated under the law in the United Kingdom, then that is sufficient for it to fall under section 7 of the Act. Consequently NHS bodies such as PCTs, NHS trusts, foundation trusts, strategic health authorities and special health authorities are all bodies corporate established by order of the Secretary of State under statute. As such, they will become liable, unless they put in place adequate preventative procedures, for acts of bribery and corruption committed by persons associated with them, in the course of their work.³

The risks of breaching the Bribery Act

6. There are a number of risks entailed in breaching the Bribery Act. These include:
 - Criminal justice sanctions against directors, board members and other senior staff

¹ NHS Protect (then NHS CFSMS) responded to the consultation. The response can be found in annex C.

² The main guidance can be found at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf> and the quick-start guide at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf>

³ The proposed NHS Commissioning Board will also, if established as a statutory corporation, fall under the provisions of the Act; and provided that GP Commissioning Consortia are established as statutory bodies corporate, so will they.

- Damage to the organisation's reputation (something which also may have financial implications in light of the envisaged move by NHS trusts to foundation status)
- Conviction of bribery or corruption may lead to the organisation being precluded from future public procurement contracts
- Potential diversion and/or loss of resources
- Unforeseen and unbudgeted costs of investigations and/or defence of any legal action
- Negative impact on patient/stakeholder perceptions

Suggested next steps

7. It is advised that health organisations start preparing for when the Act comes into force by taking steps toward compliance with the Act and official guidance by following the suggestions outlined in this guidance. It is important to bear in mind, however, that this document is not intended as a guide to the legal details of the Bribery Act, but as a prompt to encourage health bodies to take the necessary preparatory action.

Risk-based Approach and Proportionate Procedures

8. The two guidance documents outline principles helpful to organisations seeking to comply with the Act.
9. **Risk-based approach:** The MoJ guidance states "...organisations should adopt a risk-based approach to managing bribery risks...[and] an initial assessment of risk across the organisation is therefore a necessary first step."⁴ The level of risk will be affected by a number of factors including, importantly, the nature and scale of business and the geographical area of activity. NHS bodies working in the United Kingdom only, arguably runs far less of a bribery risk than a large multinational company operating in sectors and areas of the world where corruption is endemic. It is recommended that the organisation carries out assessments of the risks of bribery and corruption in its business on a periodic basis.
10. **Proportionate procedures:** Once risks have been assessed, organisations should put in place procedures that are *proportionate* to the bribery risks that have been identified. The greater the bribery risks identified by the organisation, the more comprehensive their preventative procedures should be. Conversely, an organisation that has identified fewer and lesser risks will need less comprehensive procedures.⁵

Areas for action

The following suggested areas for action follow the areas outlined in the guidance documents issued by the MOJ but also includes areas suggested by NHS Protect.

Top Level Commitment

⁴ *The Bribery Act 2010 - Guidance*, pp. 7 and 21.

⁵ The quick-start guide for example states on page 5 that "in micro-businesses [that have identified the risks as being low] it may be enough for simple oral reminders to key staff about the organisation's anti-bribery policies".

11. The chief executive officer (or equivalent) should make a statement in support of the anti-bribery and corruption initiative and this statement should be published on the organisation's website.
12. The board of directors (or equivalent management body) should take overall responsibility for the effective design, implementation and operation of the anti-bribery and corruption initiatives. The board should ensure that senior management is aware of and accepts the initiatives, and that it is embedded in the corporate culture.

Due Diligence

13. **Due diligence:** This is a key element of corporate good governance and involves making an assessment of new business partners prior to engaging them in business. Due diligence procedures are in themselves a form of bribery risk assessment and also a means of mitigating that risk. It is recommended that at the outset of any business dealings, all new business partners should be made aware in writing of the organisation's anti-corruption and bribery policies and code of conduct.

Code of Conduct, Hospitality and Employee Procedures

14. **Code of conduct:** The organisation should have a proportionate anti-bribery and corruption policy which may form part of a general code of conduct or which may be a stand-alone policy.
15. **Hospitality:** The organisation should develop and implement a gifts and hospitality policy whereby it either prohibits the giving or acceptance of all gifts, hospitality, and donations, or puts in place a policy setting out acceptable limits for hospitality and gifts and appropriate controls and monitoring mechanisms such as a declaration of interests/gifts/hospitality register. In the interest of transparency, NHS Protect recommends that the trust register of hospitality be submitted to the main board or trust audit committee (or equivalent) for scrutiny and publication along with the minutes of the meeting. It is recommended that this is done annually. For a sample section of how a declaration of interest and gifts and hospitality policy might look like, please see the **annex A**. A template hospitality register has been included as **annex B**. NHS Protect recommends that active checks of gifts, hospitality and business interests provided by staff are carried out annually.
16. **Employee checks and procedures:** Employees should go through propriety checks before they are employed to ascertain as far as is reasonable that they are likely to comply with the organisation's anti-bribery and corruption policies. The propriety check might include a Criminal Records Bureau (CRB) check and a combination of other checks, including driving and vehicle records, employment history, credit/bankruptcy records, civil court records, property ownership, professional licensing, military records and character references.

Further employee procedures may include:

- Employment contracts should include contractual obligations and penalties in relation to bribery and corruption

- New employees should be informed of the organisation's code of conduct (and its anti-bribery and corruption elements) and asked to sign a statement confirming they understand the code and the importance of complying with it
- Employees should be required to declare any conflict of interest. A register or database of conflicts of interest should be maintained. This should be monitored by an appropriate senior manager
- Disciplinary procedures should be in place, which enable the organisation to take appropriate disciplinary action against an employee who commits a corrupt act. These procedures should be specified in the employment contract

Communication and Training

17. **NHS reporting tools:** The organisation should publicise the NHS Fraud and Corruption Reporting Line and also publicise the online reporting tool.
18. **Reporting procedures:** The organisation should have an internal procedure for reporting suspect activities in a safe and confidential manner such as a whistleblowing function. Staff should report any suspicions or allegations of bribery to one of the following:
 - their Local Counter Fraud Specialist
 - their organisation's whistleblowing function
 - the relevant regional NHS Protect Area Anti-Fraud Specialist
 - the **NHS Fraud and Corruption Reporting Line 0800 028 40 60** or
 - the **online fraud reporting form** at **www.reportnhsfraud.nhs.uk**.
19. **Stakeholders:** The organisation should work with its stakeholders in the public and private sectors to help reduce bribery and corruption in the health industry. Preventing bribery and corruption requires open collaboration between all parties who are able to influence the agenda.
20. **Training:** The organisation should provide appropriate anti-bribery and corruption training and awareness sessions on a regular basis to all relevant employees to make them aware of the different types of corruption and bribery, the risks of engaging in corrupt activity, the organisation's anti-bribery and corruption code and policies, and how they may report such incidents.

Monitoring and Review

21. **Overall responsibility:** It should be the responsibility of a senior manager to ensure that the organisation has a proportionate and adequate programme of anti-corruption and bribery initiatives. The manager should be provided with sufficient resources and proper authority to implement and monitor relevant activities, and should have direct and prompt access to the chief executive and board of directors (or equivalent management body).

22. **Financial/Commercial controls:** The organisation should ensure that its financial and commercial controls minimise the risk of the organisation committing a corrupt act against a business partner, individual or organisation, or of any corrupt act being committed against the organisation by a business partner, individual or organisation or of any corrupt act being committed against the organisation by a business partner, individual or organisation. These controls may include appropriate procurement and supply chain management, and the appropriate monitoring and management of contracts.
23. **Detection procedures:** The organisation should implement internal audit or other processes which check projects, contracts and systems on an appropriate sample basis for signs of suspicious behaviour or transactions.
24. **Keeping records:** The organisation should keep reasonably detailed records of its anti-fraud and corruption initiatives and any compliance issues which arise. These records would include matters such as the steps taken to implement the initiatives, training provided, gifts and hospitality given and received, reports, investigations and other relevant information.
25. **Internal review:** The organisation should carry out periodic internal reviews of the anti-bribery and corruption procedures and should revise them as appropriate in the light of the review and risks identified.
26. **Independent assessment and certification:** Proportionate to risks identified, it is recommended that the organisation commission an independent periodic assessment and certification of its anti-bribery and corruption programme.

Annex A

Two areas of particular importance in a code of business conduct are declarations of interest and gifts/hospitality. The organisation should publish clear policy statements on both areas.

Please see a sample policy below (based on the Department of Health code), which is followed by a template declaration of interest/hospitality form. This is followed by **annex B**, which is a template hospitality register. This is followed by **annex C**, the NHS Protect response to the MoJ public consultation on the Bribery Act in 2010.

Declaration of Interests

1. Where a possible conflict of interest arises in relation to the award of a contract, special care must be taken. Personal interests, and potential conflicts of interest may come about through:
 - financial interests – for example, where someone involved has significant shareholdings or voting rights in a company or partnership
 - decisions affecting individuals who share the interests of organisation staff – for example, family members or members of societies, clubs or other organisations
 - acceptance of hospitality from current or prospective business contacts, and
 - acceptance of gifts
2. Where any potential for conflict of interest arises, you should inform a (senior) member of staff and/or your line manager, following relevant reporting protocol.
3. All members of staff (including contractors and temporary staff) are required to declare any potential conflicts of interest.

Negotiations

4. You should not become involved in any form of negotiation on behalf of the organisation if you have personal interests in the other parties. Should such a circumstance occur, this must be reported on the declarations of interest and hospitality register or database.

Interests in Companies

5. If you do find yourself working alongside and/or doing business with a company in which you have an interest or are employed by, you must declare this to your line manager and in the register/database if applicable.
6. Staff gaining information which is unpublished and price sensitive in relation to any company's shares or other securities of companies are prohibited, by law, from trading in those or encouraging others to do so – this is what is known as 'insider dealing'.
7. Specifically this means you may not:

- use any information acquired in the course of your work to advance your financial interests or those of others, and
 - have financial interests in companies which have extensive interests in areas associated with your official business
8. Putting declarations of interests on record in this way ensures that you are protected against any subsequent accusation of compromise, provided you have made a full disclosure and followed the advice given. Bear in mind that following business processes, such as authorisation procedures or separation of duties, may count in your favour in case of any challenge. This information should be noted on the declaration of interest and hospitality register/database.
 9. Where there is no potential conflict of interests, you may freely invest in shareholdings and other securities.

Gifts and Hospitality

10. All staff must take great care over offering or accepting offers of gifts, hospitality and entertainment that are in any way linked (currently or prospectively) to the organisation's business. This is to avoid anyone being put in a position where there is potential or actual conflict of interest, or which might be construed in that light.
11. The guiding principle is that you must not accept gifts, hospitality or other benefits of any kind from a third party, which might be seen to compromise your personal and professional integrity. Corruptly soliciting or receiving any gift or favour is a criminal offence.
12. In practice, the range of potential situations to which this guidance applies is so wide that judgement can be difficult. The sections below should help to provide guidance where issues are not clear-cut.

Gifts

13. A 'gift' is defined as any item of cash or goods, or any service, which is provided for personal benefit at less than its commercial value.
14. Any acceptance of a gift needs to be justified. Think about the context in which the offer has been made, and the effect on your position. For example, is the gift likely, or could it be seen as likely, to influence you? The onus is on you to make sure that the acceptance of a gift will not be misconstrued.
15. Gifts should, in general, be refused, to avoid the appearance of improper acceptance. However, you may accept gifts and benefits of a trivial or inexpensive nature. This would include items such as:
 - low value 'promotional' gifts (such as calendars, diaries or other small gifts) inscribed with the provider's name

- conventional personal gifts – such as flowers, fruit or confectionery of reasonable value – for someone who has been off work for a long time (for example, through sickness or the birth of a child)
- team gifts of low value, such as confectionery, intended to be shared by the team

16. You should not accept:

- gifts on a larger scale than those described above
- goods or services provided by a business contact for personal benefit at nil or reduced cost (for example, building or maintenance work)
- payment by business contacts to subsidise social events (such as Christmas parties)

17. You should:

- report immediately all offers of unreasonably generous gifts, following the relevant reporting protocol
- return promptly any unacceptable gifts, with a letter politely explaining the terms of this policy and stating that you are not allowed to accept them, and
- dispose of any gift that cannot be returned (such as perishables) at the discretion of a suitably senior member of staff; for example, it might be shared between junior staff or given to charity. In these cases the supplier should also be informed, in writing, of the organisation's action

18. Where a business relationship has developed into personal friendship, which exists outside the business environment, personal gifts may be exchanged (on occasions such as birthdays, Christmas, retirements). This is acceptable provided that the person giving the gift, and not their employer, pays for any gift made to you. You may wish to discuss the position with your line manager.

19. Similarly, the organisation's resources may not normally be used to make personal gifts to business contacts. However, if in exceptional circumstances it is proposed to make a gift, your line manager should approve any proposal in advance. It should be made clear that there is no element of inducement involved, and that the gift should not be reciprocated.

Code of Conduct Declaration Form

(Please print in BLOCK CAPITALS)

Name:

Department:

Unit/Team:

Signature:

Date:

As an employee of you are required to declare, on an annual basis, any interests under the following sections, in accordance with the Code of Conduct:

- Business interests of yourself, your partner or spouse, which are, or may be relevant to, the work of [insert name of organisation] or *your* work within the organisation.
- Details of any other employment you have or may undertake.
- Any gifts or hospitality offered to you, whether accepted or not.

If at anytime your declaration changes and you are affected by one or more of the above you must complete this form at that time, and in any instance that you feel appropriate.

Business Interests Relevant to the Work of the Organisation

Please give details of any relevant business interests held by you or your associates:

Name of Organisation:

Relationship:

When did business interest begin?

How is this relevant to the work of the organisation?

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.....

.....

.....

Additional Employment

There should be no conflict of interest between your duties and any other job. If you have another job but there is no conflict of interest, you must still declare it below.

Employer:

Your post:

Date employment began:

Hours and time worked:

Gifts and Hospitality

All gifts or hospitality must be declared, whether accepted or not. Your Line Manager will decide whether acceptance is appropriate.

Details of gifts or hospitality:

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Value (where known):

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Date offered:

By whom (please give as much detail as possible):

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Declaration

I have read and understood the Code of Business Conduct as it relates to Conflicts of Interest, Personal Activities and Hospitality. I understand that failure to abide by the Code will render me liable for disciplinary action, including termination of employment.

I declare that the information I have provided on this form is correct and complete.

Signature:

Print Name: **Date:**

Line Manager to complete:

Declaration is **Acceptable/Unacceptable** (please delete as appropriate)

Comments:

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.....
.....
.....

Would you like an HR Advisor to contact you regarding any aspect of this declaration? If yes, please give details of your query:

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.....

Signature:

Print Name:

Date:

Thank you for completing this form, please ensure that it is returned, fully completed and signed, to your Line Manager, for onward submission to Human Resources.

Annex B – Template hospitality register

Name member of staff	Person or Organisation Making the Offer	Circumstances in which the offer was made	Gift/Hospitality (given/received), Contractual Interest, Sponsorship etc involved	Date given / received	Action taken	
					By Staff member – Declined/Accepted	Approved by manager (name/position)

Annex C – NHS Protect response to public consultation

The NHS Protect response to the Bribery Act consultation

Dear Sir or Madam

Response to the consultation: Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)

The NHS Counter Fraud Service (CFS) is the body responsible for leading on all aspects of anti-fraud and security management work in the NHS. As the Bribery Act, and the guidance under section 9, deals with bribery and corruption and how to prevent it from an organisational/company point of view, this is relevant to our remit. We are therefore grateful for the opportunity to respond to this consultation.

We support the Ministry of Justice's work to minimise bribery and corruption, and the guidance to companies and organisations on what processes and procedures to put in place to prevent someone associated with them committing bribery, as outlined in the consultation document.

We support the six general principles as established by the current draft guidance and in the consultation document. In addition, the NHS Protect is working to produce guidance which will guide and encourage NHS organisations to adopt the measures outlined.

We recognise that the guidance, although applicable to companies and organisations that are active both in the UK and internationally, may be most helpful to those who operate and do business overseas. As stated in the consultation however, the six general principles included in Annex A, which we feel have captured the essential principles that ought to guide commercial organisations in combating bribery and corruption, are clearly of general applicability across all sectors, type and size of business whether active internationally or in the UK only.

We welcome the non-prescriptive nature of the draft guidance and the flexibility of the six principles. This will enable NHS organisations to develop procedures appropriate to their circumstances and the particular risks to which they might be exposed.

I hope that these remarks are helpful, and am happy to provide further comment if required.

Yours faithfully

Martin Wiles

Head of Policy and Research

NHS Counter Fraud and Security Management Service