



Secretary  
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 Scotland's Colleges

# Guidance Note to Scotland's Colleges and College Boards of Management on The Bribery Act 2010

**GUIDANCE NOTE TO SCOTLAND'S COLLEGES AND COLLEGE BOARDS OF MANAGEMENT ON  
THE BRIBERY ACT 2010**

**1 Introduction**

1.1 The Bribery Act 2010 came into force on 1 July 2011. The purpose of this guidance note is to assist further education colleges (FECs) and college board members (Board Members) to prepare for the implementation of the Act.

1.2 The guidance note is divided into 4 sections:

- A summary of the offences created by the Bribery Act (Part One)
- A discussion on how the offences may impact on FECs and Board Members (Part Two)
- Guidance on how to reduce the risks to which the Act gives rise (Part Three).
- Case studies on how the Act may operate as relevant to FECs (Part Four).

## **PART ONE: THE BRIBERY ACT OFFENCES**

### **2 Introduction of the Bribery Act**

- 2.1 The Bribery Act 2010 (the Act) came into force on 1 July 2011. In anticipation of the Act coming into force the Ministry of Justice published guidance in March 2011 (the Guidance) on how the Act will operate. All references to legislation in this note are references to the Act unless otherwise stated.
- 2.2 The Act is the most substantial change to the UK's corruption laws since 1916. Prior to the introduction of the Act, the UK had received criticism for a poor record for prosecuting corruption. This criticism peaked when direct intervention from the British Prime Minister in 2008 led to a decision by the Serious Fraud Office not to proceed with a prosecution of BAE Systems following allegations of corruption in the sale of arms to Saudi Arabia.
- 2.3 The Organisation for Economic Cooperation and Development is responsible for helping governments tackle the economic, social and governance challenges of a globalised economy. The UK is a member of OECD. The Act was introduced by the UK government partly in response to sustained pressure from OECD and other organisations attempting to develop common international standards for global anti-corruption.
- 2.4 The purpose of the Act is to meet these challenges by providing a new consolidated scheme of bribery offences to prosecute bribery both in the UK and abroad.

### **3 Bribing and being bribed: improper performance of function**

- 3.1 The approach of the Act is to penalise the intention to induce improper conduct. To achieve this, the Act makes the "improper performance of a function or activity" the key to the offences of bribing and being bribed.
- 3.2 Improper conduct is where someone offers, gives, requests or receives an advantage. An advantage includes a financial advantage such as a payment but is otherwise undefined in the Act so it will be a matter of common sense as determined by the courts.
- 3.3 A relevant function is a public function or a business activity where it is expected that the person performing it does so impartially or in good faith or in a position of trust. Improper performance will arise where the relevant person does not act impartially, or in good faith or acts in abuse of a position of trust.
- 3.4 The Act regulates functions and activities when these are:-
1. functions of a public nature
  2. activities connected with a business

3. activities performed in the course of a person's employment; and
4. activities performed by or on behalf of a body of persons.

3.5 In carrying out their duties FECs and Board Members may, from time to time, perform functions or activities which would fall under categories 1 -4 above.

3.6 FECs and Board Members will be performing a public function where they are expected to act impartially, in good faith and in a position of trust.

#### **4 Offence 1: bribing another person**

4.1 This offence will be committed by a person who bribes. As described above this is where a person offers, promises or gives a financial or other advantage to a receiver, where that person's aim is to induce the receiver to perform a function or activity improperly (section 1 of the Act).

#### **5 Offence 2: being bribed**

5.1 This offence will be committed by the receiver of the bribe. It can be committed when the receiver requests, agrees to receive, or accepts a financial or other advantage where the aim, result or purpose is that a function or activity is performed improperly (section 2 of the Act).

#### **6 Offence 3: bribing a foreign official**

6.1 The offence of bribing a foreign public official deals with the offering, promising or giving of bribes but not the acceptance of them. The person giving the bribe must intend to influence the foreigner in his official capacity and must be seeking business or a business advantage. However this conduct will only amount to an offence where the *written law* applicable to the foreigner does not permit or require him to be influenced by the offer, promise or gift (section 6 of the Act).

6.2 A foreign public official includes government members, judicial officers and other individuals exercising public functions.

#### **7 Offence 4: the corporate offence**

7.1 The Act creates an offence for failing to prevent bribery which can be committed by a "relevant commercial organisation" (section 7 of the Act).

7.2 The term "relevant commercial organisation" is a new concept brought in by the Act. It can be any body corporate or partnership wherever incorporated or formed which *carries on a business* in any part of the UK. The Board of Management of an FEC is a body corporate. However the key point from the perspective of a Board Member is that the body corporate must also be one which "carries on a business". There is no statutory definition for what "carries on a business" means.

7.3 The Guidance sets out the Government's intention as to the application of the phrase "carries on a business". The Guidance provides at paragraph 35 (emphasis added):

“ As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, **it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.**”

- 7.4 In light of the content of the Guidance we consider an FEC could be considered a “relevant commercial organisation” for the purposes of the Act.
- 7.5 Whether or not an institution will be considered a commercial organisation will depend on the type of activity that that FEC engages in. The educational and research activities of FECs, or at least some of them, could be seen as commercial activities. More widely, it is likely that all FECs will engage in other activity which is commercial, for example through the hiring out parts of their venue for private functions, sales of tickets for events, or through generating income from property sales and rent. The ultimate decision as to whether or not an FEC is a commercial organisation will be answered by the courts following consideration of the individual facts of the case.
- 7.6 Board Members should also be aware of the corporate offence as it may affect commercial partners of their FEC. The offence provides that a commercial organisation will be guilty of an offence where a person “associated” with it bribes another person to obtain business or a business advantage. The test of who is an associated person is drawn very wide: any person who “performs services for or on behalf of” an organisation will be an associated person. This includes but is not limited to employees, agents and subsidiaries. An organisation convicted of this offence faces an unlimited fine.

## 8 Penalties

- 8.1 An individual convicted of Offences 1-3 could be liable to a maximum of 10 years in prison and an unlimited fine. An organisation convicted of these offences can face an unlimited fine on conviction.
- 8.2 The Board of Management of an FEC will be treated as a public body for the purpose of any prosecution. This means that any fine will be payable to the Scottish Government Consolidated Fund. Board Members should be mindful of the effect this will have on their FEC’s budget. There will also be significant risk of reputational damage to the FEC following a conviction.
- 8.3 Part Two of the Guidance Note sets out circumstances in which a Board Member may be prosecuted.

## 9 International reach

- 9.1 In addition to prosecuting conduct which takes place in any part of the UK, the Act also provides for the prosecution of organisations or persons where they have a *close connection with the UK*,

**even when** the conduct did not take place in the UK and the conduct would not be prosecuted in the place it was carried out.

- 9.2 This means that the Board of Management of an FEC or Board Member, as set out below, can be prosecuted in the UK for conduct which breaches the Act, where this conduct is alleged to have occurred outside the UK.
- 9.3 This also means that individuals closely connected with the UK, which includes among others British citizens and persons ordinarily resident in the UK, can be prosecuted in the UK for conduct which breaches the Act where this conduct is alleged to have occurred outside the UK.

## PART TWO: IMPACT ON FECs AND BOARD MEMBERS

### 10 Prosecuting the Board of Management

- 10.1 An FEC acquires a legal persona through its Board of Management. This means that any prosecution of an FEC will be run against the Board of Management. It is however possible to prosecute the Board Members separately as individuals as described in section 11 below.
- 10.2 There are a number of risks which could present to an FEC under the Act. Below this guidance note sets out how the Board of Management can directly commit the offences of bribing, being bribed, and bribing a foreign public official.

#### Bribing

- 10.3 A Board of Management may face prosecution and conviction for bribing (**Offence 1**) if the FEC *offers, promises or gives a financial or other advantage* with the aim that another person will *improperly perform a relevant function or activity*.
- 10.4 A Board of Management may face prosecution and conviction if it bribes directly or if it arranges for the bribe to be made through a third party.

#### Being bribed

- 10.5 A Board of Management may face prosecution and conviction for being bribed (**Offence 2**) if the FEC *requests, agrees to receive or accepts a financial or other advantage* with the aim that a *relevant function or activity will be performed improperly*.
- 10.6 A Board of Management may face prosecution and conviction if it requests, agrees to receive or accepts the bribe *directly or through a third party*. The FEC can be guilty of this offence even if the bribe is not for the FECs benefit.

#### Bribing a foreign public official

- 10.7 A Board of Management may face prosecution and conviction for bribing a foreign public official (**Offence 3**) if the FEC bribes the official with the intention of obtaining business or a business advantage. A Board of Management may face prosecution for this offence if it bribes directly or through a third party.
- 10.8 In relation to **Offences 1-3**, the Board of Management can be liable to prosecution even if the conduct takes place outside of the UK because the FEC will have a close connection with the UK.

#### The corporate offence

- 10.9 A Board of Management may face prosecution and conviction for the corporate offence (**Offence 4**) if an FEC is considered a commercial organisation and fails to prevent bribery. The FEC will

have a full defence if it puts in place adequate procedures designed to prevent bribery. The corporate offence cannot be committed by a Board Member.

- 10.10 The Guidance sets out what the Government considers *adequate procedures designed to prevent bribery* means. In Part Three of this Note we provide advice on steps which FECs should consider implementing now to reduce the risk of exposure.
- 10.11 The Act allows for offending “directly or through a third party”. This form of wording is a departure from the usual language of statutory offences which typically refers to “causing or permitting” something to be done.
- 10.12 For the offences of bribing (**Offences 1 and 3**) or being bribed (**Offence 2**), if the FEC does not directly commit the offence, its exposure can be triggered by knowledge of the offending behaviour.

## 11 Prosecuting a Board Member

- 11.1 Board Members are part of the body corporate of the FEC. They are senior officials within the FEC and are responsible for managing and conducting the FEC. This means that as well as the Board of Management of the FEC, a Board Member can be guilty of an offence where he arranges for a bribe (**Offence 1**) or accepts a bribe (**Offence 2**) or bribes a foreign public official (**Offence 3**). Liability would arise where the Board Member is engaged in bribing or being bribed, and the Board Member either **consents or connives** in this conduct. The corporate offence (**Offence 4**) cannot be committed by a Board Member.

### What are the risks which present to Board Members?

- 11.2 The purpose of the “consent or connivance” provision is to provide for personal liability for Board Members to encourage those who direct or control organisations to promote the Act’s aims.
- 11.3 The UK Courts have said that no fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the Board Member’s state of mind was such as to amount to consent or connivance. In some cases, where the Board Member is remote from the workplace or what is done was not under his immediate direction and control, there will require to be detailed evidence. In others cases, where the Board Member is in day to day contact with what is done, very little evidence may be needed to prosecute.
- 11.4 In deciding whether a Board Member has consented or connived in an offence, the Courts are likely to consider whether a Board Member has failed to take a step which he could and should have taken given all the circumstances including his knowledge of the need for action, or the existence of a state of fact requiring action to be taken. Previously the Courts have also taken into account whether a senior person in an organisation such as a Board Member ought to have been aware of facts and circumstances. The language used in the Act casts doubt on whether a Board Member will be held to account in this way.

**12 How can exposure to those risks be reduced or eliminated?**

- 12.1 FECs and Board Members can protect against exposure to the risk of prosecution by taking an active role in implementing the steps outlined in Part Three.

**13 Self reporting**

- 13.1 On 1 July 2011, to coincide with the Act coming into force, the Crown Office and Procurator Fiscal Service in Scotland launched an initiative to allow organisations to self-report bribery offences. The Crown is the sole prosecutor in Scotland and has the ultimate say as to whether an organisation is prosecuted. During the initiative the Crown will accept reports from organisations who wish to report conduct which may amount to an offence under the Act. The Crown will then decide whether or not, as an alternative to prosecution, to refer the case to the Crown's Civil Recovery Unit for civil settlement. Civil settlement by the Civil Recovery Unit means the proceeds of unlawful conduct are recovered and passed to the Scottish Government. The initiative will run for 12 months from 1 July 2011 and will be reviewed at the end of the 12 month period.
- 13.2 FECs should be aware that self reporting does not necessarily mean that prosecution will be avoided and should take legal advice before considering doing so.

## **PART THREE: MANAGING THE RISK**

### **14 Bribery prevention**

- 14.1 The Ethical Standards in Public Life etc (Scotland) Act 2000 provides for a Code of Conduct which regulates those in public service. The Code of Conduct applies to FECs and Board Members. The Code is enforced by the Standards Commission and enshrines high standards of conduct for those in public service.
- 14.2 The Code promotes and supports anti-corruption and if followed will assist Board Members in ensuring that bribery is prevented.
- 14.3 The Code sets out requirements in respect of:
- gifts and hospitality;
  - appointment of partner organisations;
  - registration of interests; and
  - declaration of interests.
- 14.4 FECs and Board Members should review their Code of Conduct and policies and procedures to ensure compliance with the Act. In particular, consideration should be given to any policies which deal with activity outside of the UK which may affect Board Members when abroad.

### **15 Government guidance**

- 15.1 The Guidance sets out what adequate procedures designed to prevent bribery may be. This relates to the corporate offence and sets out useful steps an FEC can take to prevent bribery. The guidance identifies the following six principles:-
- Proportionate procedures
  - Top level commitment
  - Risk assessment
  - Due diligence
  - Communication (including training)
  - Monitoring and review

**16 Proportionate procedures**

- 16.1 An FEC should have in place adequate bribery prevention procedures which are proportionate to the risk that the FEC faces. The level of risk an FEC faces will vary from FEC to FEC depending on its size, activities and complexity.

**17 Top level commitment**

- 17.1 Board Members can prepare a statement or commitment against bribery. This should build upon the principles set out in the Code of Conduct and be circulated throughout the FEC.

**18 Risk assessment**

- 18.1 FECs can arrange for a bribery and corruption risk assessment to be carried out by a suitably skilled person. The appropriate person should be provided with sufficient information to carry out the risk assessment. An appropriate risk assessment will identify key bribery risks arising for FECs out of, among other things, the countries where they operate, the nature of their operation and their business partners.

**19 Due diligence**

- 19.1 FECs can prepare due diligence procedures designed to assess their relationships with business partners. These procedures should request sight of business partners' own anti-corruption policies and procedures.

**20 Communication (including training)**

- 20.1 FECs will have policies and procedures in place but they should be reviewed to ensure they are clear, practical and accessible for employees of an FEC. FECs should also ensure they communicate their policies and procedures effectively both internally and externally. A straightforward way of communicating internally is through provision of training to Board Members and other key individuals. An FEC can convey its message externally through its Code of Conduct.

**21 Monitoring and review**

- 21.1 FECs and Board Members should take steps to ensure they monitor and review policies and procedures they have in place to ensure they are being complied with.

## PART FOUR: CASE STUDIES

### 22 Case Studies

- 22.1 In this section we provide three case studies demonstrating how liability may arise.
- 22.2 Case Study 1 – Bribing
- 22.3 *Abernorth College is keen to secure a “knowledge exchange” with BIG Games a computer games manufacturer based locally. The Scottish Funding Council (SFC) is assisting BIG in picking a suitable college for the programme. A lunch meeting is arranged between representatives of Abernorth College, BIG and SFC. At the lunch BIG reveal they are considering meeting all of the colleges in the North East to find the most suitable match. The bill arrives for lunch and Abernorth College pay for their share and BIG’s share. SFC has a strict hospitality policy so their representative pays for their own share. However, later on in the week a Board Member from Abernorth sends the Scottish Funding Council representative a voucher for £150 for Donald Trump’s new golf course as a thank you for arranging the meeting. Abernorth College is later awarded the knowledge exchange programme.*
- 22.4 Abernorth College Board of Management faces prosecution for bribery and the Board Member faces prosecution as an individual.
- 22.5 Case Study 2 – Being bribed
- 22.6 *Western College is looking to procure some additional IT support. Representatives from an IT consultancy Restart Machine visit Western College to discuss the tender exercise with an interview panel. The interview panel is composed of members of the college including a Board Member. At interview, Restart present the panel with tender packs containing information on their bid and iPhones. The interview panel recommend that Restart Machine is awarded the contract and they duly are.*
- 22.7 Western College Board of Management faces prosecution for being bribed and the Board Member faces prosecution for consenting and conniving in the receipt of the bribe.

22.8 Case Study 3 – Bribery of a foreign public official

22.9 *Eastside College are keen to increase the number of students from Country X who attend the college. In order to promote the college Anne O'Fficial arranges a visit to Country X with the aim of recruiting students. She meets a government education minister to discuss student recruitment. At this meeting the education minister explains that if Eastside make a series of regular facilitation payments to the city government, officials at the visa offices will ensure the speedy processing of all visa applications to Eastside College. The minister also offers to arrange for Eastside's promotional materials to be available at all visa application offices. Eastside agree and begin to make the payments.*

22.10 Eastside College Board of Management faces prosecution for bribing a foreign official.