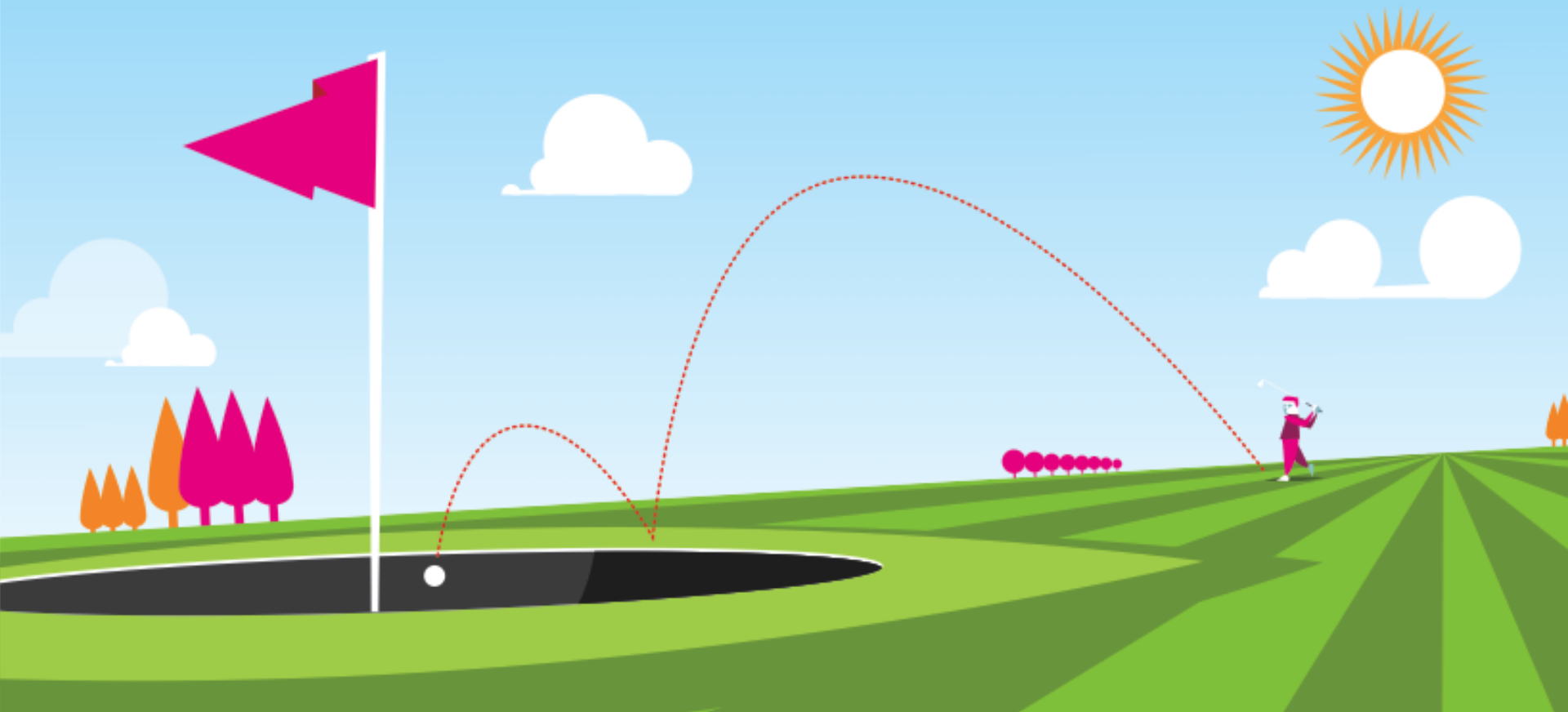


Welcome



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The Bribery Act 2010

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Background

- Bribery already an offence under Prevention of Corruption Act 1889-1916 and common law
- Reform of current laws needed to deal with increasingly sophisticated, cross-border use of bribery
- Bribery Act 2010 received Royal Assent April 2010
- Was to come into force April 2011. Estimated May 2011
- February 2011 – government announces some relaxation to the Act
- MoJ Consultation on bribery prevention procedures closed November 2010. No response published yet. Aim for 3 months between publication and when law comes onto force



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Objectives & reasons for the Act

- Existing legal framework old and fragmented
- Greater clarity and consistency required
- New law will be easier to enforce
- Reinforces importance of ethical conduct
- Bribery poses a significant threat to economic progress
- Costs associated with bribery
- Enhance ability of UK companies to compete
- Reputational issues associated with bribery
- Disruption associated with bribery
- Specific need to address cross-border bribery by UK businesses
- International strategy

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So what?

- Many business owners & directors are unaware of the Act
- One of toughest pieces of anti-corruption legislation in the world (although some relaxation announced)
- Affects every business in the UK
- Places a greater onus on companies
- Companies and senior individuals in companies may face prosecution for failing to prevent bribery
- Penalties include imprisonment for up to 10 years and/or unlimited fines
- Lack of clarity in some areas of the Act (some further clarity expected in updated guidance)
- Additional bureaucracy and associated costs of compliance

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Bribery Act Framework

Three offences:

- General bribery offences
 - Bribing another person
 - Being bribed
- Bribery of foreign public officials
- Failure of commercial organisations to prevent bribery



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Scope

| | General offence | Foreign public official | Failure to prevent |
|---|--------------------|----------------------------|-----------------------|
| Individuals | ✓ | ✓ | |
| Companies/Partnerships incorporated in UK | ✓ | ✓ | ✓ |
| Companies carrying on business in UK | | | ✓ |

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General bribery offences

- Bribing another person:
 - Give, or promise to give, financial or other advantage to another person which:
 - a) induces that other person to perform a relevant function improperly or
 - b) rewards that other person for improper performance
- Being bribed:
 - Request, agree to receive or accept financial or other advantage with the intention to perform relevant function improperly
 - Request, agree to receive or accept financial or other advantage which, in itself, constitutes improper performance
 - Request, agree to receive or accept financial or other advantage as a reward for improper performance of a relevant function
 - In anticipation of receiving financial or other advantage, a relevant activity is improperly performed

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General bribery offences (continued)

- Directly or through a third party
- Person receiving advantage can be different from person who performs function
- Improper performance = failure to perform one's duties in line with relevant expectation (based on reasonable person test)
- Relevant expectation = good faith, impartiality, trust

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Bribing a foreign public official

- Intention to influence official in their capacity as a foreign public official
- Intention to obtain or retain business or an advantage in the conduct of business
- Offer, promise or give financial or other advantage to the official or to another party at request/assent of official
- Official not permitted or required to be influenced
- Applicable to individuals and companies
- OECD definition of foreign public official

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Failure of commercial organisation to prevent bribery

- Person associated with a commercial organisation bribes another person with the intention of obtaining or retaining business, or an advantage in the conduct of business
- Defence is to show adequate procedures in place to prevent bribery
- Commercial organisation:
 - Entity incorporated in UK
 - Body corporate (wherever incorporated) which carries on business in UK
 - Partnership formed under UK law
 - Any other partnership wherever formed which carries on business in UK
- Associated person = anyone who performs services for or on behalf of the entity, regardless of capacity (eg employee, agent, subsidiary)

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Penalties

Companies

- Unlimited fines
- Disbarred from tendering for Government contracts
- Senior officers could also be penalised

Individuals

- Maximum 10 year prison sentence and/or unlimited fine



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Implications and concerns (1)

- Failure to prevent bribery - only defence is 'adequate procedures'
- Adequate procedures not clearly defined
- Geographical/territorial implications – any entity which carries on business in UK, conduct could take place anywhere in world
- Bribery by 'associated person'. Associated person = anyone who performs services on behalf of the entity eg employee, subsidiary, joint venture, agent, distributor, contractor, sub-contractor
- Impartiality consideration - hospitality, gifts and inducements are relevant (although further guidance is expected)
- May be difficult to prevent influencing someone to behave partially (vs impartially)

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Implications and concerns (2)

- Definition of performing services is vague
- Unclear what level of supervision is required
- Directors vulnerable to prosecution due to consent, involvement or passive acquiescence or to civil claims resulting from inadequate procedures
- No exemption for small facilitation or 'grease' payments in the Act (although some relaxation in this area is expected)
- Investors may use to sue directors
- Loss of competitive advantage – strictest regime in the world
- May restrict expansion

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Recent changes

- Delays over finalisation on MoJ guidance mean Act implementation postponed
- Government under pressure to relax areas of the Act
- MoJ under pressure to provide more prescriptive guidance
- Expectations:
 - Some relaxation over facilitation/grease payments
 - More prescriptive guidance on corporate hospitality (including examples)
 - Some possible defence strategies for joint venture entities caught up in illegal acts carried out by partners
- However, many problems expected to remain eg
 - Associated persons

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Adequate procedures

- MoJ Draft Guidance published September 2010
- Consultation period to 8 November 2010
- Final guidance expected March 2011
- 6 principles:
 - Risk assessment
 - Top level commitment
 - Due diligence
 - Clear, practical & accessible policies and procedures
 - Effective implementation
 - Monitoring & review
- Not designed to be prescriptive
- Applicable for businesses of all sizes and sectors
- Adequate procedures in the context of an offence can only be determined by the courts

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Principle 1 - Risk assessment

- Understand bribery risks
- Performed by appropriate person
- Use of information eg internal audit/compliance reports, client examples on public record
- Key risks include:
 - Location/country risk
 - Transaction risk
 - Partnership risks
- Risk mitigation – policies and procedures
- Ongoing review



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Principle 2 – Top level commitment

- Culture
- Statement of commitment
- Code of conduct
- Zero tolerance
- Consequences made clear
- Training
- Regular communication
- Involve top-level managers
- Anti-bribery role



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Principle 3 – Due diligence

- Business relationships – who, why, when, where
- Risk assess intermediaries, partners, contractors, suppliers
- Business contracts
- Reciprocal anti-bribery agreements



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Principle 4 - Policies and procedures

- Strategy for anti-bribery
- Code of conduct
- Guidance to staff and associates
- Advice on laws and regulations
- Policies and procedures that cover all relevant risks, eg:
 - Bribery & anti-corruption
 - Reporting & whistle-blowing
 - Gifts, hospitality & entertaining
 - Sponsorship & promotions
 - Political & charitable donations
 - Tendering & contracting
 - Recruitment and remuneration
- Use of existing procedures where applicable
- Review vulnerable areas eg sales incentives/rewards, procurement, supply chain management



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Principle 5 – Effective implementation

- Fully embedded
- Roles and responsibilities
- Communication
- Training
- Performance management
- Reporting
- Internal controls



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Principle 6 – Monitoring & review

- Audit and compliance reviews
- Internal controls eg
 - Employment contracts
 - Commercial contracts
 - Background checks & references
 - Record keeping
- Regular review of policies and procedures
- Reporting mechanisms and use of technology
- External verification



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Consultation

- Consultation now closed
- To review the consultation:

<http://www.justice.gov.uk/consultations/briberyactconsultation.htm>

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What should you do next?

Doing nothing is no longer an option

- Review the Act and the Guidance
- Take steps to ensure adequate procedures are in place
- Perform risk assessment
- Code of conduct and statement of values
- Training

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Useful information

For a copy of the Act www.justice.gov.uk

For guidance on proper procedures:

- MoJ guidance at above website
- 'Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions.' OECD Working Group on Bribery
- OECD Guidelines for Multinational Enterprises (Section VI – Combating Bribery)
- OECD Business Approaches to Combating Corrupt Practices
- US Federal Sentencing Guidelines
- 'Approach of the Serious Fraud Office to Dealing with Overseas Corruption.' Serious Fraud Office
- FSA documents and pronouncements

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How can we help?

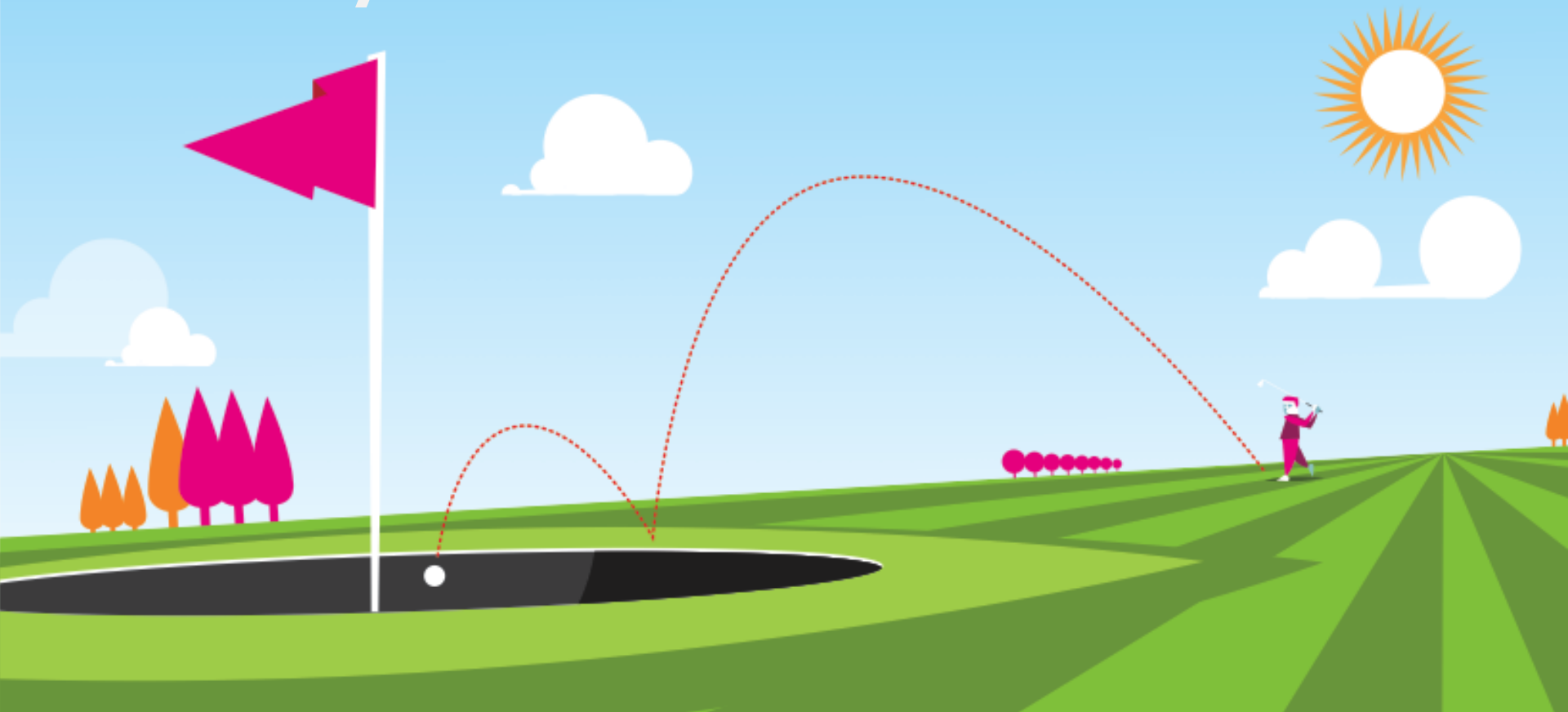
- Risk assessment
- Assess, advise on or document procedures and policies
- Assess, advise on or develop internal controls
- Training
- Internal audit/compliance reviews
- External verification



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Thank you



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HURST
ACCOUNTANTS
THE EDGE