



## The Bribery Act

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# Outline

- Bribery Act 2010
- Offences and defences
- Serious Fraud Office
- Prosecutorial discretion and guidance



# Offences, defences and scope

## Bribery Act 2010

- Bribing another person (section 1)
- Being bribed (section 2)
- Bribing a foreign public official (section 6)
- Failing to prevent bribery (section 7(1))
- Adequate procedures defence (section 7(2))
- Extraterritorial jurisdiction (section 12)
- Consent or connivance (section 14)
- Transitional provisions (section 18)

## Public Contracts Regulations 2006, reg 23

# The Serious Fraud Office

Lead enforcement agency for England, Wales and Northern Ireland

SFO decisions to prosecute under the Bribery Act 2010:

- no need for the Attorney General's consent
- matter for the SFO's discretion, in accordance with guidelines

The SFO will

- work with companies that want to get things right
- vigorously pursue those who want to use, or are complicit in, bribery or corruption

# Prosecutorial discretion

- Code for Crown Prosecutors
- Joint Prosecution Guidance
- MoJ Guidance (under section 9)
- SFO's Guidance on Corporate Prosecutions

## Outcomes:

- some cases will result in a prosecution
- some cases may be suitable for civil disposal
- some cases may result in no action
- some cases may involve more than one outcome

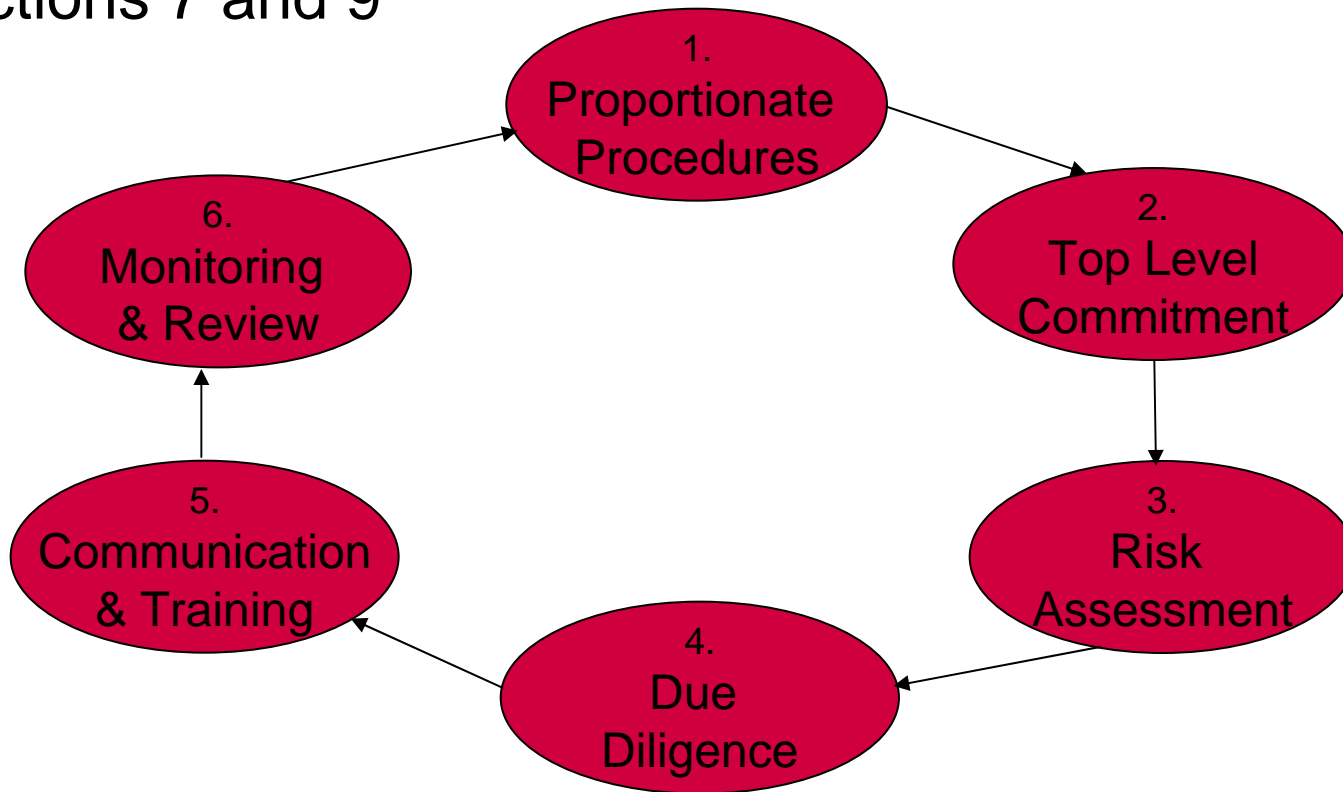
# “The Phoney war”

Period of uncertainty and anticipation since 1 July 2011

- uncertainty about the meaning of certain provisions
- uncertainty about judicial approach to MoJ Guidance
- awaiting judicial interpretation to bring greater clarity
- SFO now considering cases under the Act
- prosecutions in due course ...

# Ministry of Justice Guidance

## Sections 7 and 9



# Corporate hospitality

- MoJ Guidance:
  - no binding legal effect
  - should not be followed slavishly
- Bribery Act not intended to encompass “reasonable and proportionate” expenditure aimed at improving image / better presentation of products or services / establishing cordial relations
- **But** the higher the expenditure
  - the greater the inference that it was intended to influence the recipient to grant business / business advantage
  - the greater the likelihood that it will be construed as bribery
- Prosecutorial discretion provides flexibility



# Corporate hospitality and the SFO's discretion

The SFO considers the following factors to be relevant:

- clear issued policy regarding gifts and hospitality
- scale of the expenditure in question fell within the confines of such policy (and, if not, whether special permission had been sought at a high level)
- expenditure was proportionate with regard to the recipient
- evidence that such expenditure had been recorded by the company
- recipient was entitled to receive the hospitality under the law of the recipient's country

The inference of bribery will be strengthened if:

- there are unjustifiable 'add-ons', e.g. with regard to travel / accommodation
- expenditure related in time to some actual or anticipated business with the recipient (particularly in a competitive context).

# Facilitation payments – the SFO’s discretion

The SFO considers the following factors to be relevant:

- whether the company has a clear issued policy regarding such payments
- whether written guidance is available to relevant employees as to the procedure they should follow when asked to make such payments
- whether such procedures are being followed by employees
- whether there is evidence that all such payments are being recorded by the company
- whether there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded
- whether the company is taking what practical steps it can to curtail the making of such payments

Overarching principle:

*Can the company demonstrate that it is actively working towards “zero tolerance”?*

# Corporate self reporting and the SFO's discretion

Prosecution or civil disposal?

The SFO considers the following factors to be relevant:

- the seriousness of the wrongdoing
- isolated incident / several incidents
- whether or not the wrongdoing is established practice for the corporate
- whether or not current Board members have personally profited
- whether warnings had previously been given as to the inadequacy of processes
- whether there was an unreasonable delay in self reporting
- the extent to which the report is detailed and complete



**Thank you for the opportunity to share our perspective**

Jane de Lozey and Raymond Emson – 14 May 2012 – International Pharmaceutical Congress