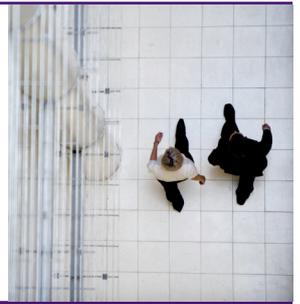


Review

Commercial & Dispute Resolution



The Bribery Act 2010

On 8 April 2010, the UK Bribery Act became law. The Act is expected to come into force in October and will radically transform the existing UK anti-corruption legislative framework. It is intended to help tackle the threat bribery poses to economic progress and development around the world by consolidating and clarifying the law on bribery, introducing a new strict liability for corporates and a “no-fault” discrete offence of bribing a foreign official. It will also have a significant impact on foreign companies who do business in the UK and far reaching compliance consequences for many public and private organisations.

This Act goes beyond the requirements of the US Foreign Corrupt Practices Act and therefore even companies which have controls to meet these requirements, must review these in light of this new legislation.

The Offences

The Act contains

- Two new primary offences of:
 - (a) offering, promising or giving a bribe; and
 - (b) requesting, agreeing to receive or accepting a bribe;
- A new specific offence covering bribery of a foreign public official for which the burden of proof is lower than the general offence;
- A new strict liability corporate offence of failing to prevent a bribe being made on their behalf by an “associated person”.

What is a bribe?

A bribe is defined as a “financial or other advantage”. A broad interpretation of this definition would suggest that this may include paying a premium to secure business, promising return business or even providing corporate hospitality in some circumstances. If such a broad interpretation is given to what constitutes a bribe, this could change the way deals are done by restricting the usual ‘give and take’ bargaining that happens routinely in commercial negotiations.

Who will be affected?

- The main provisions in the Act apply to England, Scotland, Wales and Northern Ireland.
- UK corporate bodies, non-UK corporate bodies which carry on business or part of a business in the UK, UK nationals and UK residents will be caught by the new provisions.
- The Act provides for extra-territorial jurisdiction to prosecute bribery offences committed abroad by UK residents, UK nationals and UK corporate bodies.
- The Act also covers situations where only part of an offence is committed in England, Scotland, Wales or Northern Ireland.
- The offences are directed at improper conduct in business and public activity. This applies even if the activity has no connection with the UK.

“The new provisions on corporate liability create one of the strictest regimes in the world for commercial organisations.”

The new corporate offence of failing to prevent bribery

The new provisions on corporate liability create one of the strictest regimes in the world for commercial organisations. Companies can become vicariously liable for public and private sector bribery by its employees, agents or other more loosely connected parties. The offence can be triggered by acts of bribery anywhere in the world.

The offence will be committed when:

- A person who performs services for or on behalf of a relevant commercial organisation commits bribery; and
- Where the bribe was intended to obtain or retain business or an advantage in the conduct of business for the commercial organisation.

A relevant commercial organisation includes:

- Any body or partnership incorporated under the law of any part of the United Kingdom and which carried on a business (whether there or elsewhere); or
- Any other body corporate or partnership (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom.

The “failure of commercial organisations to prevent bribery” offence is broad and will apply to most businesses. These businesses will be criminally liable if anyone “associated” with it, including employees, agents, subsidiaries and intermediaries, makes or receives a bribe in order to win work, regardless of whether that bribe is made in the UK or another country. The maximum penalties for bribery offences are unlimited fines for companies and 10 years imprisonment or an unlimited fine for individuals. Directors and senior managers may also face prosecution if they are aware of any bribes but fail to take any action to prevent them. Directors face the prospect of being disqualified from acting as a director.

The Sole Defence

The only defence available to companies charged with the corporate offence is to demonstrate that they have “adequate procedures” in place to prevent bribery. If prosecuted for this offence, once the prosecution has proved that a bribe for the benefit of the organisation was made, the burden will shift to the organisation to prove that it had such adequate procedures.

The legislation requires the Secretary of State to issue guidance on what constitutes “adequate procedures” and what procedures relevant commercial organisations can put in place to prevent bribery.

In light of this sole defence, companies will need to ensure that they have appropriate procedures in place to monitor and control the activities of all potentially associated parties whose actions could give rise to liability for the company under the Act. Commercial organisations need to put in place a robust internal anti-corruption regime. Exactly what this will entail will differ from organisation to organisation and the Ministry of Justice is currently working on guidance which is likely to be released in the Autumn. However, companies need to be ready for when the Act comes into force and therefore should be taking steps now which may include setting up a working party to assess the implications of the Act on the business and putting in place actions they believe need to be taken. These actions may include some or all of the following;

- Establish a clear anti-corruption policy and code of ethics including:
 - Publishing a clear code of conduct for staff including the disciplinary action which will be taken should the code be breached. This code should be publicised to staff and on the organisation’s website;
 - Procedures to monitor and control activities by agents, intermediaries, joint ventures or syndicates including effective due diligence of third party agents and others employed to work on behalf of the organisation and certification on a regular basis to confirm they have read, understood and complied with the organisation’s policies and procedures;
 - Ensure recruitment policies are aligned with the anti-corruption policy such as including the vetting of prospective employees;

“The failure of commercial organisations to prevent bribery” offence is broad and will apply to most businesses.”

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- Ensuring whistle blowers are encouraged and protected;
 - Notification of any breach to a relevant person who:
 - Has appropriate access to the Board; and
 - Can take legal advice on whether to report the issue to the Serious Fraud Office.
 - A response plan to deal with incidents of potential corruption quickly and effectively;
 - Express anti-corruption contractual obligations; and
 - Risk assessment and management including a review of whether the organisation:
 - Operates in countries or sectors which a high propensity for corruption;
 - Conducts through sales agents, joint ventures or other third parties;
 - Conducts business with government customers;
 - Has gifts and hospitality forming a significant element of the sales process; and
 - Is aware of previous incidents of bribery within the organisation.
 - Training all employees, agents and business partners on anti-corruption procedures and also providing refresher training where necessary;
 - A robust internal audit procedure to continually monitor, review, investigate and enforce the anti-corruption policy and its effective implementation;
 - Board level commitment – one way this may be shown is members taking part in the internal audit procedure. A senior officer will need to be accountable for the anti-corruption policies and procedures with appropriate access to the Board in any event;
 - Effective financial controls including:
 - Procedures for facilitation payments ensuring such payments are proportionate or small one-off payments. However, a zero tolerance approach is better;
 - Procedures for sign-off of any gifts or corporate hospitality ensuring that they are proportionate i.e. it should be “routine and inexpensive” rather than “lavish or extraordinary”. Therefore consideration of previous hospitality or gifts offered and the market place should be considered; and
 - Procedures lobbying activities, charitable donations and sponsorships.
 - Considering existing company insurance and directors’ and officers’ liability insurance cover including whether this provides the protection needed and whether the policies and procedures in place work to protect such insurance cover.

All policies and procedures should be visibly and consistently supported by senior management ensuring an appropriate tone flows from the top of the organisation down.

How can Hammonds help?

Hammonds regularly advises clients on anti-corruption issues. We also offer in-house training seminars on anti-corruption awareness. The seminars are bespoke taking into your account existing policies and procedure and can be adapted to cover non-UK jurisdictions.

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FURTHER INFORMATION

For further information on how the Bribery Act will affect your business or for details of our anti-corruption training programme, please contact:

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