

Review

Regulatory



The Bribery Act 2010

On 8 April 2010, the UK Bribery Act became law. The Act transforms the existing UK anti-corruption legislative framework by consolidating many historic statutory provisions but also introducing new offences. It is intended to help tackle the threat bribery poses to economic progress and development around the world by clarifying the law on bribery, introducing a new strict liability offence 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.

The Act will come into force three months after the final version of the Ministry of Justice guidance has been published. The Ministry of Justice has released draft guidance on the "adequate" procedures which commercial organisations will need to put in place. See below for further information on this guidance.

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 of 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.

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- 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 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 UK 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 UK.

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. Draft guidance has been issued which is considered below.

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.

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Ministry of Justice Guidance

Section 9 of the Bribery Act requires the Government to produce guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from committing acts of bribery. The draft guidance from the Ministry of Justice is based on six broad principles namely:

- Risk Assessment
- Top level commitment
- Due diligence
- Practical and accessible policies and procedures
- Effective implementation
- Monitoring and review

The Government considers these principles to be flexible and will allow each commercial organisation to tailor its policies and procedures so that they are proportionate to the nature, scale and complexity of its business. It invites organisations of all sizes to comment on the consultation and poses a number of questions for consultees to answer.

How can Squire Sanders Hammonds help?

Squire Sanders 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.

Further Information

If you require any further information about this consultation, the Bribery Act 2010 in general, or would like us to help you with your response then please contact:

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