

Business briefing: The Bribery Act

"These are certainly tough rules. But readers should understand too, that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms."

Kenneth Clarke, Secretary of State for Justice, March 2011

"the concept of a person who 'performs services for or on behalf of' the organization is intended to give [a] broad scope..."

The Bribery Act 2010, Guidance from the Ministry of Justice

"There is no exemption in respect of facilitation payments ... A prosecution will usually take place unless ... there are public interest factors tending against prosecution which outweigh those tending in favor."

The Bribery Act 2010, Guidance from the Serious Fraud Office

Fraud Investigation & Dispute Services contacts

For further information, please contact:

David Stulb, Global and EMEA Leader
+44 (0) 20 7951 2456 | david.stulb@ey.com

Brian Loughman, Americas Leader
+1 212 773 5343 | brian.loughman@ey.com

Chris Fordham, Asia Pacific Leader
+852 2846 9008 | chris.fordham@hk.ey.com

Bill Stewart, Japan Leader
+81 3 3503 1096 | stewart-wllm@shinnihon.or.jp

John Smart, UK Leader
+44 (0) 20 7951 3401 | jsmart@uk.ey.com

The new UK Bribery Act

The Bribery Act (Act) has transformed the UK law on combatting bribery, replacing a number of historically fragmented and complex offenses and creating a unified and extended law that carries heavy penalties for wrongdoers.

The Act signals a fundamental change in the UK's approach to prosecuting corruption, and the authorities have already made a significant investment in enforcement capabilities. This change in approach is underlined by a growing number of high-profile actions taken against corporations recently.

The offenses set out in the Act go significantly further than the US Foreign Corrupt Practices Act (FCPA), in particular, covering all bribery, regardless of whether it involves a public official. However, the exact reach of the Act is still subject to interpretation.

With the Bribery Act comes an urgent need for businesses to re-examine their approach to managing bribery risk and to ask whether their current procedures are adequate.

The provisions of the Act

The Act creates four offenses:

- ▶ Two general offenses covering the offering and receiving of a bribe
- ▶ A separate offense of bribing a foreign public official
- ▶ A new corporation offense of failing to prevent bribery

The new offense of failing to prevent bribery is of particular note. It covers the activities of any person or third party acting on behalf of a business (for example, employees, agents or subsidiaries). It affects not just UK incorporated businesses, but potentially the global operations

of foreign businesses with a UK presence. The legislation allows for unlimited fines where a corporation is found guilty under this offense.

The only defense available to corporations is one of having "adequate procedures" in place to prevent bribery. What constitutes adequate procedures requires interpretation. This interpretation must take into account the guidance issued by the Ministry of Justice (see over) and the prosecuting authorities.

The bribery offenses by individuals carry a maximum penalty of 10-years imprisonment, and the offense by corporations may attract unlimited fines.

The Bribery Act and the FCPA

The FCPA is likely to be familiar to businesses with links to the US. This piece of legislation has already led to high-profile cases in which reputations have been severely damaged, fines of billions of dollars have been levied and jail terms have been handed down for senior executives.

The offenses set out in the Act are not the same as those in the FCPA. Therefore, compliance with the FCPA does not necessarily mean compliance with the Bribery Act. For example, the Bribery Act:

- ▶ Draws no distinction between public sector and private sector bribery, bringing into its remit business-to-business bribery
- ▶ Has no exemption for facilitation (grease) payments or for promotional expenditure
- ▶ Introduces an explicit offense of failing to prevent bribery by associated parties



Impact on business

The UK Ministry of Justice has published its finalized guidance on "adequate procedures" to combat bribery and corruption. The guidance is high-level and principles-based, rather than prescriptive of particular procedures.

The Bribery Act will become effective on 1 July 2011. For larger organizations in particular, this leaves little time to assess the current state of their anti-bribery and corruption frameworks and to implement improvements. Small and Medium Enterprises (SMEs) may be less familiar with managing these sorts of risks.

Of particular note should be an exposure as a result of third-party relationships (associated persons) to a corporation. Agents, consultants, distributors, joint ventures and new acquisitions create exposures that can be difficult to assess, but these are the areas where the risk can be greatest. Organizations need to look carefully at the due diligence they carry out on third parties that act on their behalf.

Next steps

As a result of the new legislation and enhanced enforcement regime, businesses urgently need to examine their existing anti-corruption measures, benchmark against industry norms, and assess what improvements should be made as a priority.

The changes in working practices that may be required as a result of this legislation can be difficult and slow to implement, especially in global businesses. Organizations should be taking action urgently to be prepared.

"Adequate procedures" guidance

The six principles covered by the Ministry of Justice guidance may be summarized as follows:

Proportionate procedures

Bribery prevention procedures should be:

- ▶ Proportionate to the risks faced and the size and complexity of the business
- ▶ Clear, practical, accessible, properly implemented and enforced

Top-level commitment

Top-level management should:

- ▶ Take responsibility at the board level for bribery prevention
- ▶ Foster a zero-tolerance culture toward bribery

Risk assessment

The risk assessment should:

- ▶ Consider both internal and external risks
- ▶ Be performed periodically and documented

Due diligence

Due diligence should be:

- ▶ Conducted on parties performing services for or on behalf of a business
- ▶ Proportionate and risk-based

Communication

Communication and training:

- ▶ Should ensure that bribery prevention policies and procedures are embedded and understood throughout the business
- ▶ May include external communication and a secure, confidential and accessible "speak up" procedure

Monitoring and review

Regular monitoring and review should:

- ▶ Evaluate the effectiveness of current bribery prevention procedures
- ▶ Identify and implement necessary improvements

We offer a range of compliance services that can help you interpret these principles into practical measures appropriate for your business.

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