

## Bribery Act 2010

The Bribery Act received Royal Assent on 8 April 2010, having completed its parliamentary process. It will come into force after the General Election on a commencement date yet to be determined by the new Minister of Justice Kenneth Clarke.

### Existing Anti-Corruption Legislation

Although bribery is a criminal offence (pursuant to the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and 1916, the Anti-Terrorism Crime and Security Act 2001; and at common law), it was generally accepted that this current legislation was piecemeal and in need of reform.

The enactment of the new Bribery Act will give the UK a strong platform upon which to build new anti-corruption enforcement efforts. The purpose of the new Act is to modernise the existing law, by creating a single piece of legislation criminalising bribery, (and other associated corrupt activities), and by repealing what is generally accepted to be outdated legislation.

### Key Provisions

The Bribery Act creates four offences: two general offences of bribery, one specific offence of bribing a foreign public official, and a new corporate offence for failing to prevent bribery. The most striking feature is the Act's fourth offence, which creates a new strict liability offence allowing for stiff fines against commercial organisations failing to prevent a bribe being paid for on its behalf. Under this offence, a commercial organisation commits a crime if a person acting on its behalf bribes someone in connection with the organisation's business in an effort to "obtain or retain business" for the organisation or to "obtain or retain an advantage in the conduct of business" of the organisation.

This offence applies to UK corporations or partnerships, and to foreign corporations or partnerships doing any part of their business in the UK. However, there is a defence for the commercial organisation if it can prove that adequate systems were in place to prevent bribery. The Act states that the purpose of the strict liability offence is to encourage adoption of robust compliance programmes by commercial organisations.

With regard to minimum penalties, the Act provides for a penalty of up to 10 years' imprisonment or a fine (or both) for individuals, and an unlimited fine for a corporate entity. The Act replaces the requirement for the Attorney General's consent to prosecute a bribery offence. Prosecution may be instigated by the Director of Public Prosecutions, the Director of the Serious Fraud Office (SFO), or the Director of Revenue and Customs Prosecutions.

### General Offences

The general bribery offences concern the offence of offering a bribe (Section 1) and the offence of receiving one (Section 2).

In essence, an offence is committed when "the provider" gives a financial or other type of advantage to another person, "the receiver," with a view to inducing the receiver to act "improperly." The receiver's behaviour will be considered improper where the offender was expected to act in good faith, impartially or in accordance with a position of trust. An offence is committed whether the bribe was offered directly or through an agent or third party.

The following “expectation test” is then applied to determine what is expected from the person who is being bribed, and exercises a relevant function: “What a reasonable person in the United Kingdom would expect in relation to the function or activity concerned.” In deciding what would be expected from a reasonable person in the performance of these activities or functions, “Local practice and custom must not be taken into account, unless such practice is permitted by written law.”

The purpose of this proviso is to prevent individuals and/or corporate entities from relying upon accepted practices in foreign countries to justify carrying out corrupt practices. In any event, the fact that a bribe could be authorised by the “written law” of the foreign country is not strictly a defence, but rather only a factor to assess whether the relevant “expectation” has been breached. Consequently, the Act creates an international offence of bribery, in the context of business activities, which covers acts committed inside and outside the UK.

### **Bribery of Foreign Public Officials**

The Act creates a separate offence of bribery of a foreign public official (Section 6) which closely follows the requirements of the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It only concerns the offering of the bribe and not the acceptance of a bribe by a public official. A foreign public official is defined as a person “who holds a legislative or administrative or judicial position of any kind whether appointed or elected” or a person “who is an official or agent of a public international organisation.”

The Act provides that an offence is committed when a financial or other advantage is offered to a foreign public official which is not “legitimately due” with a view to obtaining or retaining business. As with general bribery offences, an offence is committed whether the bribe was offered directly or through an agent or third party. The test applied to determine whether the advantage is legitimate or not is whether, under the laws which apply to that official, the payment is legal. Unlike the general bribery offences outlined above, the Act provides for the defence that the bribe is authorised by the “written laws” of the foreign country.

### **Failure of Commercial Organisations to Prevent Bribery**

The Act creates a strict liability offence for commercial organisations which fail to prevent bribery (Section 7). This new offence enables the direct prosecution of commercial organisations (including companies and partnerships), as there is no requirement for the prosecuting authority to show that the organisation’s directors or partners were directly involved in the commission of a crime.

Under this offence, a commercial organisation has committed a crime if a person acting on its behalf bribes someone in connection with the organisation’s business in an effort to “obtain or retain business” for the organisation or to “obtain or retain an advantage in the conduct of business” for the organisation.

The prosecution will have the burden of proving that the purpose of the bribe was to obtain or retain business for and on behalf of the commercial organisation. There is a defence for the commercial organisation to prove that the company had put in place adequate measures to prevent bribery being committed. According to the government’s commentary on the Bill, although “it is not explicit (...), the standard of proof the defendant would need to discharge would be the balance of probabilities.” Commercial organisations may also be held criminally liable for any of the bribery offences committed “with the consent or connivance of” a senior officer, director or person purporting the act in such a capacity.

This applies to extraterritorial offences only if the consenting official has a “close connection” to the UK. Further, officers and directors who consent to or assist in a bribery offence may be held liable for that offence. Organisations may face liability under the strict liability offence for the bribery of individuals acting on the organisation’s behalf, including not just employees, but also agents and other third-party representatives. The meaning of “commercial

organisation" under the Act is far reaching and encompasses either corporate or incorporate bodies, and could also apply to a charity.

This new legislation will force commercial organisations (established inside or outside the UK which carry out part of their business within the UK) to ensure that their staff are familiar with this new legislation and that management has set up appropriate anti-bribery policies and controls within these organisations.

## **Guidance**

The Ministry of Justice will be required (Section 9) to provide guidance as to what constitutes adequate anticorruption procedure, which will be issued before the Act comes into force, to give commercial organisations sufficient time to prepare. This statutory requirement to issue guidance is one of the main changes from the initial draft Bill. The exact contents of the guidance will only be known after a new government has been formed. However, whilst the then Bill was going through both Houses of Parliament, the Labour Government had indicated the intended guidance would be structured. The government stressed the importance of board directors of commercial organisations to take responsibility for anti-corruption programmes.

It also indicated that the guidance would highlight the need for commercial organisations to: appoint a senior officer accountable for oversight of anti-corruption programmes; assess specific risks to the organisation; establish enforcement procedures; train new and existing staff in anti-bribery procedures; put in place financial controls and recordkeeping practices to minimise the risk of bribery; and to establish whistle blowing procedures.

## **Impact**

Although it is impossible to tell at this early stage how vigorously UK law enforcement will seek to investigate and prosecute possible offences, the end of 2009 and beginning of 2010 saw a noteworthy increase in enforcement activities indicating that the SFO is ready to expand its activities in this area and invigorate enforcement efforts. This has included individual prosecutions, and notable parallel investigations and settlements involving the coordination of UK and U.S. law enforcement.

A conviction under the Bribery Act could lead to collateral consequences: a company director could be disqualified, and a convicted company could be debarred from tendering for public contracts under Part 4 of the Public Contracts Regulations 2006, and also pursuant to the agreement entered into by the World Bank and multilateral development banks which provides they would debar companies and individuals if found guilty of bribery from participating in activities which they finance.

The passage of the Bribery Act in the current environment of corporate scrutiny will add to the growing chorus cautioning companies to take great care in how they handle their international business transactions. Companies incorporated in the UK or partnerships formed in the UK, or commercial organisations formed outside the UK, but doing business within the UK, must ensure they have adequate anti-corruption procedures in place before the Act comes into force.

Bearing in mind that it may take several months to implement such procedures, if they have to be put in place for the first time, action is required now to avoid criminal liability being triggered when the Act comes into force.

## **McGuireWoods LLP**

McGuireWoods LLP has extensive experience defending anti-corruption investigations; conducting anti-corruption risk assessments, audits and internal investigations; and designing and helping to implement overall and anti-corruption-specific corporate compliance programmes and training. As recognised by the Bribery Act and SFO

guidelines, the most valuable weapons a corporation and its officers and directors have against potential anti-corruption issues are preparedness, responsiveness, and the deployment of a robust compliance programme designed to identify, address and prevent issues before they become government investigations.

For more information about McGuireWoods' capabilities in this, or any other area, please contact

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