

The Bribery Act 2010: significant implications for your business

The Bribery Act ("the Act") received Royal Assent on 8 April 2010; it is expected to come into force later this year although the election has made the precise timing uncertain.

The Act considerably increases the coverage of the anti-bribery legislation and brings the UK position into line with the OECD Bribery Convention of 1999.

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New offences

The current law is limited to setting out an offence of bribing a public official. The Act introduces new offences to cover both bribing and being bribed. These offences are not limited to the sphere of public officials. The Act introduces a series of criminal sanctions in respect of both giving and accepting a bribe. The offences can be committed by individuals and/or by corporate entities and the penalties include imprisonment. It is the individual who commits the offence but both the individual and the company face imprisonment or a fine.

Under the Act, it is an offence to offer or promise a financial advantage to an individual in order to bring about or reward the improper performance of a relevant function. A "relevant function or activity" encompasses all functions of a public nature as well as activities connected to a business and does not have to be connected to the UK. "Improper performance" can be summarised as meaning that there is an expectation that a function will be performed in good faith, impartially or by a person in a position of trust and that expectation has not been fulfilled.

Foreign officials

The Act also introduces a separate offence of bribing a foreign official. As well as those working in government organisations, those who work for international organisations fall within the definition of 'foreign official'. The offence is committed by an employee who gives, offers, or promises a bribe or who uses a third party to undertake those acts. Moreover, the foreign official is not required to have been actually influenced by the bribe.

Impact on commercial organisations

The Act also introduces a new offence for commercial organisations of failing to prevent bribery being committed by persons who represent their business. A commercial organisation is defined widely as a body which is incorporated in any part of the UK (but carrying on a business anywhere), and as any body corporate, wherever it be incorporated, that carries on business in any part of the UK.

The commercial organisations offence carries a criminal penalty (a fine or imprisonment). It would of course attract unwelcome publicity. Arguably of more practical significance, any organisation that is convicted is automatically and permanently prohibited from tendering for any public sector contracts.

The commercial organisation may have a defence if it can show that it had "adequate procedures" in place designed to prevent bribery. The Secretary of State is obliged to produce guidance on what amounts to adequate procedures before the Act comes into force. As yet there is no indication of when this will be available. In the meantime, we make some suggestions of preparatory steps that can be taken below.

Preparation for the Act

In preparation for the Act coming into force later in the year, we recommend that companies undertake a risk assessment of their business practices and business partners especially where companies are working in particularly vulnerable markets or locations. An anti-bribery policy should be developed (or updated) that prohibits bribery in any form (direct or implied) and whether by or for the organisation. An existing policy that complies with the terms of current US legislation may need revising. The new UK Act has a much broader extra-territorial effect than the existing US legislation. The new UK Act also criminalises commercial bribery where the old law focused on bribery in the public sector. The new, revised policy should be circulated among staff so that there is no doubt as to what set of activities the company will not tolerate. This has two benefits. First, it will help to educate and inform your staff about the new regime and so hopefully avoid problems arising. Second, having a solid policy and programme of education in place will help the organisation to demonstrate that it has adequate procedures in place should it need to defend an allegation of bribery.

The anti-bribery policy should include: a statement of values, a code of conduct, detailed policies on the acceptance of gifts, hospitality, facilitation payments, provisions for vetting external agents and advisers and clear whistle blowing policies. All companies should also review their commercial contracts and consider including clauses that replicate the clauses prohibiting bribery and corruption that are commonly used by public sector bodies.

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