



LAW

THE BRIBERY ACT – CORPORATE CRIME RISKS

When the Bribery Act comes into force on 1 July, businesses of all sizes will be at risk of employees and agents laying them open to criminal convictions, fines and other costs. Based on recently issued statutory guidance, **Felicity Banks** explains the urgent action required to minimise that risk.



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The Bribery Act was passed in the final stages of the last parliament, with common agreement between the two main political parties, but with some amendments. These amendments included a requirement for statutory guidance from the Ministry of Justice on what procedures would be appropriate for commercial organisations to prevent bribery.

Subsequent discussions with business and other organisations, about the practicality and helpfulness of this guidance led to some delay in the implementation of the legislation.

However the final version of the guidance, issued on 30th March, is helpful not just in designing anti-

bribery procedures and controls, but also in clarifying the interpretation of the act in a practical and pragmatic way. For example it establishes the following:

- that where a business provides corporate entertainment in a measured and proportionate way, in accordance with past UK norms, this will not be considered to be bribery; and
- that 'bribes' paid under duress (the threat of physical violence) will not be considered criminal.

Not acceptable

What will not be considered acceptable, though, are large or small bribes paid in the UK or any

other jurisdiction by UK companies or citizens. No allowance is given for 'facilitation payments' (just as there are no exemptions for small expropriations under the Theft Act). Nor is any allowance made for foreign custom and practice – UK standards for expected behaviour will prevail, unless there is specific 'written law' to the contrary, in the jurisdiction concerned.

The core offences

The act's core offences are of paying or receiving a bribe, and can be committed by any UK national or company, at home or abroad, to induce improper performance of almost any

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function (whether remunerated or not) undertaken as a matter of good faith.

However there is also an additional offence of bribery of a foreign public official, which can be committed by paying an inducement to obtain or retain a business, or a business advantage, with no requirement at all to show improper performance. This will considerably simplify the prosecution of bribery carried out in third party jurisdictions, where proper performance requirements may be difficult to assess.

In the past, the UK has sometimes found it difficult to hold businesses to account for misconduct carried out by its employees or other agents, but this is changing – this legislation includes a specific offence which can be committed by a commercial organisation which fails to prevent bribes being paid on its behalf. Any ‘associated person’ which carries out services for the business, and which pays bribes in the course of those services, can thus lay the business open to a criminal conviction. If bribes have been paid in these circumstances, the only defence for the business is to have

in place ‘adequate anti-bribery procedures’. The final statutory guidance lays down six principles on which such ‘adequacy’ will be judged – for a list of these see box (below).

The proportionality and risk assessment elements make it clear that a great deal less will be expected of smaller entities, with close control by owner managers, and those which carry out all their business in low-risk jurisdictions such as the UK. A lot more will be expected of complex entities and those with significant operations in high risk jurisdictions.

This new UK legislation is part of strong international pressure towards the control of bribery and corruption on a world-wide basis. Though much economic crime has been poorly enforced in the past, this is unlikely to be the case going forward. Sizeable fines have already been levied on UK companies, under the old inflexible legislation. This is unlikely to decrease, given both continuing international pressure combined with pressure on public funds. A few well merited penalties on bribe-paying corporations could be very welcome to the Treasury.

FURTHER RESOURCES

For further information on the Act, and other bribery source material see www.icaew.com/bribery

For an ICAEW analysis of all criminal activity carried out by or on behalf of businesses, see its Thought Leadership publication *Business and Economic Crime in an International Context*, obtainable from www.icaew.com/marketfoundations or www.icaew.com/lawandregulation

Box 1 STATUTORY GUIDANCE ON BRIBERY

1. Proportionate procedures – all businesses will be expected to have considered their policies and procedures for avoiding bribery and to have implemented them.
2. Top-level commitment – the board or other ultimate governing body cannot afford to delegate this element of ‘corporate compliance’ and then take no further notice.
3. Risk assessment – little may need to be done for low risk business but changes to risk profiles, as well as existing high risk business, need to be kept under review.
4. Due diligence – care needs to be taken in engaging employees and agents; businesses cannot afford to assume that the agents they take on will always be clean and honest.
5. Communication (including training) – the legislation may lead to significant changes in the way that people operate in certain jurisdictions, and some of them may find it hard to change long established practices. It is vital to ensure that everyone recognises what is expected of them under the new regime.
6. Monitoring and review – it is not sufficient to have put in place policies and procedures and then forget about them; action must be taken to ensure that they are complied with on an on-going basis.