
REFORM OF BRIBERY OFFENCES IN THE UK AND REQUIREMENT FOR COMMERCIAL ORGANISATIONS TO HAVE “ADEQUATE PROCEDURES”

INTRODUCTION

On 8 April 2010, the UK Bribery Act (the “Act”) became law, although its operative provisions have not yet come into force, modernising UK anti-bribery law and significantly expanding the offences, jurisdictional reach, and penalties for bribery. This law will have a major impact on UK businesses and individuals, especially those operating outside of the UK, as it will significantly increase their exposure to anti-corruption offences.

SPECIFIC PROVISIONS

The Act will now make it a criminal offence to receive, request, offer or promise a bribe or other “advantage,” and it imposes strict liability upon companies for failing to prevent a bribe being paid on a company’s behalf (although it allows a defence if “adequate procedures” to prevent bribery are in place).

Specifically, a person is guilty of an offence under the Act if he (1) offers, promises or gives a financial or other “advantage,” and (2) requests, agrees to receive or accepts a financial or other “advantage,” if that “advantage” induces a person to perform a relevant function improperly or rewards such “improper performance.” “Improper performance” is performance which breaches the expectations of good faith or impartiality or breaches a position of trust.

JURISDICTIONAL REACH

The Act considerably expands the jurisdictional reach of the UK’s bribery laws. The new law criminalises specified activity whether it occurs in the UK or abroad, if it is committed by persons resident in the UK (regardless of nationality), UK nationals (anywhere in the world), any bodies incorporated in the UK (no matter where the companies are operating) or the agents of such corporations. Moreover, senior corporate officers who consent to or conspire in a corporate offence may be criminally liable as individuals.

Importantly, any corporate body wherever incorporated which carries on a business, or part of a business, in the UK is subject to the Act.

These are significant changes to prior law, as the Act now imposes criminal liability upon individuals and corporations for their actions outside of the UK, as well as for the acts of their agents. UK businesses will have to ensure that sufficient compliance programs are in place to make certain they are adhering to these new requirements.

PENALTIES

The Act introduces substantial penalties and fines. For the most serious offences, a sentence as high as ten years of imprisonment is available and the court may also impose unlimited fines.

DIFFERENCES WITH THE US FOREIGN CORRUPT PRACTICES ACT (THE "FCPA")

In several respects, the Act is significantly stricter than the FCPA. For example, the Act prohibits bribery not only of public officials but also of private citizens. Further, the Act permits a sentence of up to ten years in jail (on conviction of an individual for offences of bribing another person, being bribed or bribing a foreign public official), whereas under the bribery provisions of the FCPA a sentence of only five years is available (the FCPA does, however, provide for a sentence of up to twenty years for an individual found to have violated the FCPA's accounting provisions and these provisions are typically invoked in conjunction with the FCPA's bribery provisions). In addition, unlike the FCPA, the Act imposes strict liability upon a company for failing to prevent a bribe being paid on its behalf.

KEY PROVISIONS AND UNCERTAINTY SURROUNDING THE ACT

Some key provisions of the Act are broadly drafted, making it difficult to be precise on the ambit of the Act. For instance:

- It is an offence for a person to offer, promise or give a financial advantage to another person to induce the person to perform a "relevant function" improperly, or to reward such improper performance. But "financial advantage" is undefined, so individuals and businesses will have to exercise careful discretion on such matters as hospitality, gifts, and similar expenses.
- In the offence relating to the failure by a commercial organisation to prevent bribery, "commercial organisation" covers not only UK incorporated businesses but also overseas businesses which carry on business or "part of a business" in the UK. The courts will have to determine the meaning of "part of a business." Also, the Act extends to persons "associated" with the commercial organisation, but the Act provides no definition of the term "associated."
- There is strict liability for organisations for failing to prevent bribery, but this is subject to a defence of having "adequate procedures" to prevent bribery. "Adequate procedures" are not defined.

AWAITED GUIDANCE

The UK Government is required to issue guidance on the new Act but that the guidance is not likely to be available until after the General Election on 6 May 2010. The Act will not come into force until sometime after the required guidance has been issued. Moreover, it is anticipated that after the guidance has been issued, there will be an additional delay before the Act comes into force, to provide companies sufficient time to ensure their current anti-bribery policies meet the terms of the yet-to-be published statutory guidance on adequate bribery prevention procedures. The Serious Fraud Office has, however, already indicated the type of procedures it will be expecting organizations to implement. These include clear support at the highest levels of management, a code of ethics and training.

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