

# Global Regulatory Enforcement

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## The Bribery Act 2010

### The Bribery Act 2010 – What it means for you

The Bribery Act 2010 (the “Act”) which recently was passed by Parliament has far-reaching implications for any business which is either registered in the UK or which has any part of its operation in the UK. The breadth and importance of this legislation means that corporates and their senior officers would be well advised to familiarise themselves with the effects of this new law.

#### Why is this legislation important to you and your business? The Act includes:

- A new corporate offence of failing to prevent bribery: this is a **strict liability offence**: a company’s guilt can be a result of an attempted or actual bribery on the company’s behalf;
- “Senior officers” (including non-board level managers) can **individually be held criminally liable** for a company’s bribery offences;
- Extensive **extra-territorial powers** of prosecution similar to those found in the U.S. Foreign Corrupt Practices Act (“FCPA”);
- Offences apply to both public **and private** sectors (unlike the FCPA);
- No carve-out for facilitating or “grease” payments (unlike the FCPA);
- Conviction could mean **debarment from all public sector contracts** within the European Union.

This legislation comes at a time of increased international co-operation between regulators not only in matters relating to bribery, including enforcement of the FCPA, but in connection with financial fraud, insider dealing and related activities. The extensive powers provided by the Act will be used by UK enforcement agencies such as the Serious Fraud Office (“SFO”) to clamp down on corrupt behaviour. The Bill received Royal Assent on 8 April 2010 and its various provisions are likely to be brought into force over the next six months.

This Client Briefing Note provides a summary of the key provisions and offers suggestions for best practices to comply with the Act.

### Key Provisions of the Act

The Act sets out four offences:

1. **Offering, promising or giving a bribe** to another person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity (the active offence). It does not matter whether the person to whom the bribe is offered or given is the same person who is to perform the function or activity concerned. This applies to both public and private functions.
2. **Requesting, agreeing to receive or accepting a bribe** to perform a function or activity improperly (the passive offence). It does not matter whether the recipient of the bribe requests or receives it directly or through a third party, or whether it is for the recipient’s benefit or not. In some cases, it is not necessary for the recipient to know or believe that the performance of the function or activity is improper. This applies to both public and private functions.
3. **Bribing a foreign public official** - where a person directly, or through a third party, offers, promises or gives any financial or other advantage to a foreign public official (“FPO”) (or to a third party at the request or acquiescence of the FPO) in an attempt to influence them in their capacity as a FPO in order to obtain or retain business, or to obtain an advantage in the conduct of business. To constitute bribery under the Act the FPO must be neither permitted nor required by applicable law to be influenced by the offer, promise or gift.

4. **Failure of a commercial organisation to prevent bribery** (the “Corporate Offence”). This provision of the Act may prove in practice to be the most radical part of the legislation and companies will need to review their procedures and practices in light of it. We discuss this in detail below and provide some guidance on how to avoid liability under this and other provisions of the Act.

#### **To whom does the Act apply?**

All commercial organisations that are either registered in the UK or that have any operation in the UK will be covered by the Act. The Act also has wide-reaching territorial application; there are no territorial limits imposed on the UK prosecuting authorities in relation to the prosecution of UK corporations, partnerships, citizens or residents. Non-UK persons can be prosecuted for offences of bribery where any part of the offence takes place in the UK.

#### **What is the standard for determining bribery?**

The passive and active bribery offences are both linked to the “improper performance” of a function or activity (either performed in the UK or abroad). Performance of (or failure to perform) such a function or activity will be “improper” under the Act if it breaches the expectations of good faith or impartiality or breaches a position of trust. When deciding what is expected of a person for these purposes, the test is **what a reasonable person in the UK would expect** in relation to the performance of the relevant function or activity.

If the functions or activities in question are not subject to UK laws, **any local custom and practice will be disregarded** when deciding what a reasonable person in the UK would expect unless the custom and practice is permitted or required by the written law in the country or territory concerned.

#### **What about bribery of foreign public officials?**

- There is no requirement for a prosecutor to prove that the person who paid the bribe “intended” to bribe.
- There is no specific exemption for a legitimate promotional expenditure or a facilitation/ “grease” payment, such as is contained within the FCPA.
- There is no facility for a company to obtain an official opinion as to the legitimacy of an action similar to the opinions issued by the U.S. Department of Justice in relation to the FCPA, although it is expected that the SFO will continue to provide guidance to those involved in M&A transactions who have concerns that corruption overseas may have been committed by the target business.

#### **What are the implications of ‘Failing to Prevent Bribery’ under the new corporate offence?**

A commercial organisation will be guilty of the corporate offence where it fails to prevent an “**associated**” person from bribing another person with the intention of obtaining business, or an advantage in the conduct of business, for that commercial organisation. “Person” in this context means either a legal or a natural person. This is a strict liability offence and applies to any UK incorporated entity as well as to any company (wherever incorporated) which carries on business or part of a business in the UK.

#### **Will you be liable for the actions of your business partners and associates?**

A person will be “associated” with a commercial organisation if that person performs services for or on behalf of that organisation. The Act is deliberately broad here; it expressly states that this may include employees, agents or subsidiaries, though it may also apply to joint ventures. Courts are to have regard to “all the relevant circumstances” and the Act states that the determination will not be decided simply by reference to the nature of the legal relationship between the commercial organisation and the person. Importantly, the associated person does not need to have any connection to the UK.

#### **When may senior officers be held criminally liable?**

This is a new measure. A “senior officer” of a body corporate shall be liable under the Act if it can be shown that one of the offences 1 to 3 above was committed by a company with that officer’s “consent or connivance”. The term “senior officer” is defined broadly to include directors, managers, secretaries and other similar officers. The senior officer must be a British national or an individual ordinary resident in the UK.

**What are the penalties?**

Fines: The fines that may be imposed are unlimited in amount.

Prison: There is a maximum penalty of 10 years' imprisonment for individuals for offences 1-3 above.

Debarment from contracts: Under Article 45 of the EU Public Sector Directive those convicted of a deliberate act of corruption (in the public or private sector) are excluded from participation in public sector contracts for five years. A conviction under offences 1 to 3 above would therefore be applicable here. A conviction under the Act could therefore have a devastating effect on some businesses which rely heavily upon public contracts. It is questionable whether conviction of a commercial organisation for offence 4 above (failing to prevent bribery) will result in debarment from public sector contracts; the new offence does not require any proof of "deliberate" involvement in bribery/corruption whereas the debarment provision requires that the organisation be convicted of an offence of active/deliberate involvement in corruption.

**Does your business have adequate procedures?**

It will be a defence for a commercial organisation to show that it has in place "adequate procedures" designed to prevent bribery. The practical effect of this new corporate offence is that all businesses will need to have and operate a clear and comprehensive anti-bribery policy. The Act requires the Government to publish guidance about procedures that companies can put in place to prevent bribery by persons associated with them. This guidance has not yet been published and as it will need to cover all types of commercial endeavour it is likely to be very general. It is expected that this guidance will specifically cover facilitation payments and corporate hospitality.

**Best practices to develop adequate procedures**

The statutory guidance cannot cover every possible situation, but these are the kinds of measures which we believe are important for a commercial organisation to undertake in order to take advantage of the "adequate procedures" defence:

- A clear and unambiguous anti-bribery and corruption compliance policy that is adequately published internally and overseen by a designated person at Board level;
- Documented due diligence of third parties who are "associated" with the commercial organisation together with detailed and regular audits of those third parties. Due diligence should also be conducted on any country in which business is to be conducted in order to identify country specific risks;
- Regular, tailored and comprehensive bribery and corruption training programmes at all employee levels (with reminders and updates on a regular basis);
- Comprehensive monitoring and internal financial controls/record-keeping to minimise the risk of bribery;
- Clear policies on corporate gifts and hospitality;
- Robust screening processes for third party payments;
- Anti-bribery clauses in commercial contracts;
- Whistleblower facility providing clear channels for staff to raise concerns in a safe and confidential manner;
- An effective procedure for investigating and resolving any problem.

The SFO and the Financial Services Authority ("FSA") in the UK and the Department of Justice and the Securities and Exchange Commission in the U.S. have stepped up civil and criminal investigations and prosecutions of both corporate entities and individuals under existing bribery laws, and cooperation between and among these agencies and other international regulatory agencies continues to expand. The Act gives UK enforcement agencies considerably more firepower and will have far-reaching effects on the way that many businesses are regulated. This is an evolving area of law and it is important for companies to undertake compliance reviews and risk assessments in light of the new standards imposed by the Act. Companies will ignore it at their peril.

## Reed Smith's Global Regulatory Enforcement Group can help

Our Global Regulatory Enforcement ("GRE") group has wide experience in a broad range of government agency investigations and internal investigations in key industry sectors in Europe, the United States, the Middle East and Asia. As a global team, we employ a multi-disciplinary and multi-jurisdictional approach to assist clients in conducting internal investigations and representing companies and individuals under investigation in civil and criminal enforcement matters. Our London GRE lawyers have substantial expertise in assisting global financial institutions, international corporates and regulated individuals involved in significant and high profile enforcement investigations conducted by the SFO and the FSA. Our London team frequently works with our Government Investigations & White Collar Defense and Securities Litigation & Enforcement groups around the globe. This seamless collaboration provides our clients with the benefit of our extensive experience in connection with enforcement and other regulatory matters before the Department of Justice, the Securities and Exchange Commission and other regulatory agencies in the U.S. as well as the SFO, FSA and other international regulatory agencies.

We will publish a client briefing on the guidance as soon as it becomes available and will also provide a teleseminar and other resources to our clients to assist in making sure that you are fully prepared.

If you have any questions about the Bribery Act or related subjects, or want assistance in reviewing your compliance procedures in the light of these changes, Reed Smith can assist. Please do not hesitate to contact the authors or any of the Global Regulatory enforcement lawyers identified or your usual Reed Smith contact.

### About Reed Smith

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