

## What you need to know about Bermuda's Bribery Act

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The *Bribery Act, 2016* will come into force on 1 September 2017 (the "Bribery Act"). It provides a complete overhaul of Bermuda's anti-bribery laws.

### Why should you be concerned?

- The Bribery Act creates a new corporate criminal offence – failing to prevent bribery by an associated person – which applies even to non-Bermuda companies and partnerships that carry on business (or part of a business) in Bermuda.
- There is only one defence to the new corporate offence: the commercial enterprise must prove that it had "adequate procedures" in place, designed to prevent persons associated with it from undertaking acts of bribery.
- The Bribery Act criminalises private-sector bribery and creates a new offence of bribing a foreign public official.
- The Bribery Act goes beyond the US's *Foreign Corrupt Practices Act* ("FCPA") in a number of ways, so even companies with robust FCPA compliance programmes need to check that those programmes would be viewed as adequate for the purposes of the Bribery Act.

### The Bribery Act in a Nutshell

The Bribery Act is based on the UK's *Bribery Act, 2010*. It abolishes Bermuda's existing anti-corruption laws and replaces them with:

- an offence of bribing (offering, promising or giving a financial or other advantage);
- an offence of being bribed (requesting, agreeing to receive or accepting a financial or other advantage);
- an offence of bribery of foreign public officials and
- a corporate offence of failing to prevent bribery.

The first three offences apply to both individuals and corporations. Regarding the offence of bribing and the offence of bribery of foreign public officials, it does not matter whether the advantage is offered, promised or given directly or through a third party. The Bribery Act applies to private sector bribery, as well as public sector bribery and contains no exemption for facilitation payments or for corporate promotional expenditure.

The fourth offence (failure by a corporate to prevent bribery) is a strict liability offence with only one possible defence.

### The Corporate Offence

Under the new Act, a commercial organisation will be guilty of a criminal offence, if it fails to prevent a person associated with the organisation from bribing another person, with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation (the "Corporate Offence").

The Ministry of Legal Affairs in June 2017 published guidance on anti-bribery compliance procedures. The new guidance, 'Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (Section 11 of the *Bribery Act, 2016*)' (the "Guidance"), is intended to inform companies about their duties under the Act.

The Corporate Offence will apply to corporate bodies and partnerships incorporated and formed in Bermuda. As expressed in the Guidance, the Government's view is that charitable, educational and public sector entities will all come within the scope of the offence, if they engage in commercial activities.

The Corporate Offence also applies to corporate bodies and partnerships incorporated or formed outside Bermuda if they carry on business, or part of a business, in Bermuda, even where the underlying conduct takes place outside Bermuda. It is unclear whether a non-Bermuda company that has its equity or debt securities listed on a Bermuda exchange is thereby at risk of being prosecuted under the Bribery Act. The Guidance states that having a Bermuda subsidiary will not, in itself, mean that a parent company is carrying on a business in Bermuda, since a subsidiary may act independently of its parent or other group companies. Whether or not a company is carrying on business in Bermuda will ultimately depend upon the precise factual circumstances.

For the purposes of the Corporate Offence, a person is associated with a commercial organisation if they perform services for, or on behalf of, the organisation. Obvious examples of an associated person are employees, agents and subsidiaries that perform services for their parent company. The Guidance confirms that contractors, sub-contractors, suppliers, joint venture partners or a joint venture entity could all potentially be associated persons, but clarifies that where a joint venture entity pays a bribe, the members of the joint venture will not be liable, "simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture".

However, the definition has been deliberately drafted widely, and could include parties with whom there was no formal relationship, for example the lead partner in a consortium.

The Corporate Offence does not require the associated person to be connected to Bermuda, nor does it require an act to have taken place in Bermuda.

A bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage of a parent company or other subsidiaries – even if the parent company or subsidiaries may benefit indirectly from the bribe: "liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent".

## The need to Implement "adequate procedures" to Prevent Bribery

The Corporate Offence is essentially a strict liability offence. There is only one defence: the organisation will have to prove that it had "adequate procedures" in place designed to prevent persons who are associated with it from bribing.

Thus, unless it has "adequate procedures" in place, a non-Bermuda company, which does business in Bermuda could be prosecuted in Bermuda in relation to bribery carried out wholly outside Bermuda by a person unconnected to Bermuda.

The Guidance intends to inform companies' efforts in this regard. The Guidance will be essential reading for anyone tasked with implementing anti-bribery procedures. Although "departure from the suggested procedures ... will not of itself give rise to a presumption that an organisation does not have adequate procedures", prosecutors and courts will inevitably look at how corporate procedures stack up in relation to the principles outlined in the Guidance.

The Guidance sets out six principles, summarized as follows:

### Principle 1: Proportionate Procedures

The Guidance advises that the organisation's anti-bribery policies and procedures should be clear, practical, accessible and enforceable. We suggest that accessibility should be readily achievable through the organisation's internal and external websites.

They should "take account of the roles of the whole work force from the owners or board of directors to all employees, and all people and entities over which the commercial organisation has control". The Guidance proposes that financial and auditing controls, disciplinary procedures, performance appraisals and selection criteria can act "as an effective bribery deterrent", and recommends procedures to deal with incidents of bribery "in a prompt, consistent and appropriate manner".

### Principle 2: Top Level Commitment

Reflecting the mantra that "it is tone at the top that counts", the Guidance proposes that the management of an organisation should issue a statement of commitment to counter bribery in all parts of the organisation's operation. An organisation should also consider reflecting the commitment against bribery in the organisation's management structure, for example, through the appointment of an anti-bribery officer.

### Principle 3: Risk Assessment

An assessment of an organisation's exposure to bribery risk is the starting point for introducing anti-bribery policies and procedures that are tailored to be proportionate to the risks the organisation faces. The Guidance implicitly accepts that adequate procedures will be risk-based. However, a risk-based approach requires a careful choice of risk assessment procedures in order to identify internal risks and external risk factors such as country, transaction and business partnership risks.

### Principle 4: Due Diligence

Although the Bribery Act defence of adequate procedures only requires organisations to have procedures to prevent active bribery by the organisation and those who perform services for, or on its behalf, the Guidance goes further in suggesting that due diligence policies and procedures should cover all parties to a business relationship, including the organisation's supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the organisation does business. The Guidance lists examples of enquiries that might form part of this due diligence, including enquiries:

- About the risk of bribery in the country of operation and the types of bribery most commonly encountered;
- About the risks that a particular business opportunity raises (e.g. whether the project is to be undertaken at market prices, or has a defined legitimate objective and specification) and
- Into the reputation, past behaviour and anti-corruption policies of prospective business partners, and the risks where a public office holder is linked to such partners.

### Principle 5: Communication (including training)

Embedding anti-bribery policies and procedures throughout the organisation ensures, the Guidance says, that the development of policies and procedures "reflects the practical business issues that an organisation's management and workforce face when seeking to conduct business without bribery". An implementation strategy should cover:

- Who is to be responsible for implementation;
- How the policies and procedures will be communicated internally and externally;
- Training;
- Reporting to top management;
- External assurance processes, if any;
- Monitoring compliance;
- Timescale;
- A clear statement of the penalties for breaches of the policies and procedures and
- The date of the next review.

The Guidance suggests that larger organisations may need to tailor training for different functions within the organisation, and should consider offering or requiring the participation of business partners in anti-bribery training courses. It recommends organisations communicate their anti-bribery policies externally.

### Principle 6: Monitoring and Review

The Guidance suggests larger organisations ensure they have financial monitoring, bribery reporting and incident management procedures, and that they may wish to disclose findings and recommendations for improvement in the organisation's Annual Report to shareholders. Organisations should ensure that their risk assessments and anti-bribery policies and procedures are updated to take into account events such as "government changes, corruption convictions, or negative press reports", as well as "external methods of issue identification and reporting, as a result of the statutory requirements applying to their supporting institutions, e.g. money laundering regulations reporting by accountants and solicitors". Higher risk and larger organisations may "wish to consider whether to commission external verification or assurance of the effectiveness of anti-bribery policies".

## The Foreign Public Official Offence

Under the Bribery Act, it will also be easier to bring prosecutions for bribing a foreign public official. Likewise, commercial organisations will be at particular risk of the offence of failing to prevent bribery involving foreign public officials. The new foreign public official offence will be triggered even in circumstances where the conduct would not currently be characterised as improper or criminal. It will only be necessary to show: (i) that the company or a person offered or gave a financial or other advantage at the request or with the consent of a foreign public official intending to influence him in his capacity as such, (ii) that the company or person intended to obtain or retain business or an advantage in the conduct of business and (iii) that the

official is neither permitted nor required by written law to be so influenced. Companies that are subject to the Bribery Act will be extremely cautious in their dealings not only with government officials, but also with those who assist in obtaining government business and approvals. Even where the advantage requested by a government official in negotiations does not appear to benefit any official or their families, it is expected that local law opinions will be commonly sought in order to establish that there are written laws permitting the official to be influenced. In this regard, the fact that such advantages are customary in business dealings in the country concerned, will not protect against the risk of a charge of bribing a foreign public official.

## Facilitation Payments

Payments made to foreign public officials with the aim of expediting or securing the performance of a routine governmental action (often known as facilitation payments) will clearly be criminal offences under the Bribery Act.

The Guidance describes facilitation payments as "small bribes" and says that "exemptions in this context create artificial distinctions that are difficult to enforce ...". Nevertheless, the Guidance recognises "the problems that commercial organisations face in some parts of the world and in certain sectors". Prosecution is more likely where there are large or repeated payments, where facilitation payments are "planned for or accepted as part of a standard way of conducting business" and where "a commercial organisation has a clear and appropriate policy setting out procedures an individual should, if facilitation payments are requested and these have not been correctly followed".

A Case Study (not officially part of the Guidance) sets out a number of steps a business should consider in dealing with hidden or overt facilitation payments. These include: building in extra time in project planning to cover potential delays as a result of non-payment; questioning the legitimacy of the payments; raising the matter with superior officials and/or seeking assistance through diplomatic channels.

## Conclusion

The Bribery Act modernises Bermuda's anti-corruption laws and brings them in line with the UK's model.

The Bribery Act creates a range of new offences, which apply not only to Bermuda companies and Bermuda residents, but to non-Bermuda companies carrying on business, or part of a business, in Bermuda.

The Corporate Offence creates a compelling reason for all companies doing business in Bermuda to take precautions to guard against acts of bribery being committed on their behalf, and to ensure that their anti-corruption compliance programmes meet the highest standards and reflect the Guidance. Many Bermuda companies operate in low risk industries (insurance/reinsurance and asset management) and low risk jurisdictions (for example USA, Western Europe). Risk assessments for these companies may conclude that few changes are necessary. However many exempt companies, such as holding companies with operations or subsidiaries in high risk industries (mining for example) and high risk jurisdictions, may find compliance more challenging. Group structures may need to be reviewed with an eye to reducing the risk that foreign subsidiaries (in high risk locations) could be viewed as agents of the parent.

Companies which have designed and put in place FCPA compliance programmes will still need to consider whether those programmes are sufficient for the purposes of the Bribery Act, in particular, whether they adequately address the risk of private sector corruption, prohibit the making of facilitation payments and impose adequate controls on corporate promotional expenditure.

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