

BRIBERY LAW IN BERMUDA – EQUIVALENCE AND COMPLIANCE

Bermuda's new Bribery Act sets an even higher standard than its UK counterpart, so companies and directors must wise up fast to avoid the enhanced risks

The UK's Bribery Act 2010 ('the UK Act') remains the gold standard of anti-corruption codes. UK lawyers will be familiar with its innovations: the targeting of commercial or private sector bribery; the absence of carve-outs for facilitation payments; the strict liability offence for corporates if anyone associated with them pays a bribe; the offence of connivance by directors; and its extraterritorial reach. Practitioners may recall the claims, when it was introduced, that UK businesses would be at a disadvantage in securing contracts overseas and Wimbledon would close down as the corporate hospitality industry shut up shop.

Many of the fears were overblown, but few common law jurisdictions have rushed to emulate the rigour of the UK Act. (An exception is Kenya which adopted a similar code in 2016.)

On 1 September 2017 Bermuda will, however, pay the UK Act the ultimate compliment when Bermuda's Bribery Act 2016 ('the Bermuda Act') comes into operation, complete with statutory guidance.

Beyond the gold standard

The only material difference between the two statutes is the inclusion, in the Bermuda Act, of additional bribery offences. In Bermuda, but not the UK, it will be a criminal offence if public officials fail to report attempts to bribe them or suspicions about colleagues. These provisions, which are not found in the UK Act, mirror South African anti-corruption legislation. So Bermuda has not only copied the gold standard; it has arguably surpassed it.

The UK Act, to a limited degree, already applies to Bermuda. In theory the UK authorities could prosecute Bermudians under the UK Act for bribery offences committed in Bermuda or elsewhere in the UK criminal courts. The Bermuda Act brings Bermuda fully into line with the UK in terms of corruption laws, and allows it to meet OECD standards – an important point for an offshore jurisdiction.

The community benefit clause

The Bermuda Act, like the UK Act, contains traps for the unwary. If a company signs a contract with a community benefit clause (at the direction of foreign officials and to secure the contract) – a common practice – they could be committing an offence. Community benefit clauses, if directed by foreign

officials, are technically bribes unless local written law permits them.

But since the Bermuda Act mirrors the UK Act compliance should prove relatively straightforward. Many Bermuda companies have UK affiliates and can access institutional knowledge and know-how. Advice and guidance on the UK Act will be equally applicable to the Bermuda Act. Further, Bermuda is a low-risk jurisdiction in relation to corruption, its main industries, financial services and tourism, being low-risk sectors.

Problem areas

The problem areas will be Bermuda companies operating in – or with subsidiaries in – high-risk jurisdictions. Under the Bermuda Act, Bermuda companies will commit an offence if a bribe is paid to benefit them by anyone associated with the company, irrespective of where the bribe is paid. Further, the offence of director connivance brings the risk of prosecution into the boardroom. Directors who fail to prevent acts of bribery by their companies may themselves be guilty of offences.

Directors of Bermuda companies, particularly those with operations in high-risk jurisdictions, may want to pay more attention to the contracts they are approving.

Minimising the risks

To minimise the risks posed by the Bermuda Act, group companies will want to look closely at their risk profiles and, in particular, their group structures. Companies will want to put in place adequate procedures so they can claim the statutory defence. Directors will want to scrutinise their board papers before signing approval. UK specialists in this area may expect urgent calls from Bermuda companies.

Bermuda prides itself on being another world, and indeed it remains another world. But it is becoming an ever-more familiar one.



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