



UNVEILING BERMUDA'S NEW BRIBERY ACT

With Bermuda's Bribery Act now in force, **Ben Adamson**, a director at **Conyers Dill & Pearman** in Bermuda, navigates the details and analyses the impact on both domestic and foreign companies

Bermuda's Bribery Act 2016 (Bribery Act) came into force on 1 September 2017, completely overhauling Bermuda's anti-bribery legislation by criminalising bribery and creating new offences of bribing a foreign public official or failing to prevent bribery by an associated person.

Further, the new Act goes beyond the United States' Foreign Corrupt Practices Act (FCPA) in a number of ways, so that even companies with robust FCPA compliance programmes must decide whether those programmes would be viewed as adequate for the purposes of the Bribery Act.

Based on the United Kingdom's Bribery Act 2010, Bermuda's new legislation abolishes existing anti-corruption laws and replaces them with four offences: bribing (offering, promising or giving a financial or other advantage); being bribed (requesting, agreeing to receive or

- accepting a financial or other advantage); bribery of foreign public officials; and a corporate offence of failing to prevent bribery.

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

The corporate offence

A commercial organisation will be guilty of a criminal offence under the Bribery Act if a person associated with the organisation bribes another person intending to benefit the organisation (corporate offence).

Bermuda's Ministry of Legal Affairs published guidance for companies in June 2017 on anti-bribery compliance procedures (guidance).

The corporate offence applies to corporate bodies and partnerships incorporated and formed in Bermuda. Charitable, educational and public sector entities that engage in commercial activities all fall within the scope of the offence.

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.

Whether a company is carrying on business in Bermuda may ultimately depend upon the precise factual circumstances. A key issue will however be the interplay between the Bribery Act and section 133 of Bermuda's Companies Act 1981, which provides that (i) overseas companies which carry on business in Bermuda require permits and (ii) sets out when such companies are deemed to be carrying on business in Bermuda.

For the purposes of the corporate offence, a person is associated with a commercial

BERMUDA'S MINISTRY OF LEGAL AFFAIRS GUIDANCE ON ANTI-BRIBERY COMPLIANCE PROCEDURES

The guidance will be essential reading for anyone tasked with implementing anti-bribery procedures. It sets out six principles, summarised as follows:

PRINCIPLE 1: PROPORTIONATE PROCEDURES The organisation's anti-bribery policies and procedures should be clear, practical, accessible and enforceable. We suggest that access be available through the organisation's internal and external websites.

Financial and auditing controls, disciplinary procedures, performance appraisals and selection criteria can act "as an effective bribery deterrent", and the guidance recommends procedures to deal with incidents of bribery "in a prompt, consistent and appropriate manner".

PRINCIPLE 2: TOP LEVEL COMMITMENT The management of an organisation should issue a statement of commitment to counter bribery throughout the organisation's operation. An organisation should also consider reflecting the commitment against bribery in its 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 proportionate to the risks the organisation faces. The guidance implicitly accepts that adequate procedures will be risk-based.

organisation if he or she performs services for, or on behalf of, the organisation, and includes employees, agents and subsidiaries that perform services for their parent company. Contractors, sub-contractors, suppliers, joint venture partners or a joint venture entity could all potentially be associated persons.

Where a joint venture entity pays a bribe, the members of the joint venture will not be liable, according to the guidance, “simply by virtue of them benefitting indirectly from the bribe through their investment in or ownership of the joint venture”. The definition has been deliberately drafted widely, however, 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.

Without “adequate procedures” in place, a

non-Bermuda company that carries on a business in Bermuda could therefore be prosecuted in Bermuda in relation to bribery carried out wholly outside Bermuda by a person unconnected to Bermuda.

The foreign public official offence

The Bribery Act makes it easier to prosecute bribing a foreign public official. Commercial organisations are 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.

Companies subject to the Bribery Act should be extremely cautious in their dealings with government officials and with those who assist in obtaining government business and approvals.

Even where the advantage requested by a government official in negotiations does not →

PRINCIPLE 4: DUE DILIGENCE The 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.

PRINCIPLE 5: COMMUNICATION (INCLUDING TRAINING) An implementation strategy for communicating anti-bribery policies and procedures throughout the organisation and externally should address responsibility for implementation; communicating policies and procedures 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.

PRINCIPLE 6: MONITORING AND REVIEW Larger organisations are advised to have in place 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 regularly updated.

- ➔ 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. 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) constitute 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”. 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... if facilitation payments are requested and these have not been correctly followed”.

Conclusion

The Bribery Act modernises Bermuda’s anti-corruption laws, brings them in line with the UK model, and 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 carrying on 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 (such as insurance and asset management) and low-risk jurisdictions (e.g. the US or 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.

Companies that 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. 

WITHOUT “ADEQUATE PROCEDURES” IN PLACE, A NON-BERMUDA COMPANY THAT CARRIES ON A BUSINESS IN BERMUDA COULD THEREFORE BE PROSECUTED IN BERMUDA IN RELATION TO BRIBERY CARRIED OUT WHOLLY OUTSIDE BERMUDA BY A PERSON UNCONNECTED TO BERMUDA



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