



Fraud and White Collar Crime - Bribery Act

October 2013

The Bribery Act bites: Steps businesses should take

The Bribery Act 2010 has lain in a slumber since its birth, three years ago. However, it appears finally to have stirred with the first prosecution being brought by the Serious Fraud Office. This note summarises the offences under the Act, what steps businesses should take and the currently available details on the SFO's first prosecution.

Summary of offences

1. **Giving a bribe:** It is an offence for a person to offer, promise or give a financial or other advantage to another person, where that advantage is intended to induce that other person to perform his functions or activities improperly, or reward that person for improper performance.
2. **Receiving a bribe:** It is an offence for a person to request or accept a financial or other advantage if it is intended that, as a result of receiving that advantage, he will perform his functions or activities improperly.
3. **Bribing a foreign public official:** It is an offence to offer or provide a financial or other advantage to a foreign public official with the intention of obtaining or retaining business or an advantage in the conduct of business.
4. **The "Corporate Offence":** An offence will be committed by a commercial organisation if any of the bribery offences described above are committed by a person "associated" with (i.e. anyone performing services on behalf of) the organisation, with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation. However, it is a defence for the organisation to show that it had in place "adequate procedures" designed to prevent persons associated with it from committing acts of bribery.

Bribes can include any advantage, including, for example, "facilitation payments", gifts, hospitality or sponsored travel. However, it is important to remember that the provision of proportionate and reasonable gifts and hospitality provided by

or to a business will not constitute a bribe: in order for there to be a bribe, the advantage must be intended to induce or reward impropriety on the part of the recipient.

The offences of bribing, receiving bribes, and bribing a foreign public official can be committed by individuals or companies. They can be committed directly or through third party intermediaries. They can be committed in the UK or even overseas if they are committed by a person with a "close connection" to the UK (e.g. a UK resident, a British citizen, a UK company etc.). The Corporate Offence can also be committed by an overseas entity or partnership so long as it carries on business in the UK.

First SFO prosecution

Whilst three cases have already been prosecuted by the CPS under the Act, there has been increasing press attention to the absence of any prosecution by the SFO.

However, the SFO has recently brought charges under the Act. In a recent press release, the SFO confirmed that:

"[Three men] connected to Sustainable AgroEnergy plc have.... been charged with offences of making and accepting a financial advantage contrary to section 1 (1) and 2 (1) of the Bribery Act 2010.

The SFO commenced proceedings today [14 August 2013] against the [three] and they will appear before Westminster Magistrates Court on 23 September 2013."

The charges relate to an SFO investigation into the promotion and sale of bio-fuel investment products, involving Jatropa tree plantations in South East Asia, by Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd and associated companies to UK investors. The value of the alleged fraud is approximately £23 million and the offences are alleged to have taken place between April 2011 and February 2012. The Sustainable Growth Group companies were placed into administration in March 2012.

This case highlights the relevance of the Act to organisations and re-emphasises the need for businesses to continue to monitor and improve practises and procedures to give themselves the best prospect avoiding prosecution.

Best practice

The Guidance on “adequate procedures”, issued by the Ministry of Justice, highlights six key principles that should shape the procedures that businesses put into place in order to seek to protect against the commission of the corporate offence (as well as the general offences):

- 1 Proportionate Procedures;
- 2 Top-level Commitment;
- 3 Risk Assessment;
- 4 Due Diligence;
- 5 Communication (including training); and
- 6 Monitoring and review.

Steps Businesses Should Take

To reduce the risks of falling foul of the Act, businesses should consider taking the following steps, if they have not done so already:

1. **Coordination:** Appoint a person (e.g. compliance officer) to be responsible for leading efforts to ensure that you have proportionate and adequate procedures in place. This person should report directly to senior management and may also be given the task of being the primary point of contact for corruption issues.
2. **Engagement from the top:** Draft and issue an all-staff memorandum from senior management setting out a zero tolerance approach to corruption by or on your behalf.
3. **Risk assessment:** Carry out a documented risk assessment programme in order to identify key areas of vulnerability and high risk practices (e.g. business dealings in higher risk jurisdictions). Draft a report setting out these risks, what risk mitigation measures you currently have in place, and what further action needs to be taken.
4. **Policies and procedures:** Draft and disseminate a clear, overarching bribery policy document. Such a policy may refer to existing procedures and policies (e.g. policies on gifts and hospitality). Update existing policies where necessary (e.g. employee code of practice).

5. **Contract review:** Review existing and proposed contractual arrangements and amend where necessary in order to specifically prohibit corruption and include as a ground for termination (e.g. sub-contractor contracts).
6. **Due diligence:** Conduct additional due diligence of associated persons, especially if they may be considered to pose a higher risk of corruption (e.g. agents located in higher risk jurisdictions).
7. **Training and awareness:** Develop a training and awareness programme to be delivered to relevant staff.
8. **Whistleblowing and investigation:** Develop whistleblowing and investigation mechanisms to ensure that corrupt activities can be safely reported to a nominated individual who will be able to instigate an independent and comprehensive investigation.

It is important to note, however, that **businesses must be proactive in their approach to reducing exposure to bribery** - it is the continual monitoring and updating of internal policies, rather than simply putting a policy in place, which will enable businesses to reduce the risks presented by the Act.

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