

2010 Bribery Act: Commercial Applicability

July 1, 2011

The Bribery Act 2010 (Act), heralded as the toughest anti-corruption legislation in the world, comes into force today in the United Kingdom. The Act is designed to address global bribery and to modernise the UK's outdated, piecemeal anti-bribery legislation. The Act will be enforced against firms and individuals irrespective of where breaches are committed globally. One of the key features of the Act is the introduction of a corporate offence of failure to prevent bribery. All organisations need to enhance their anti-bribery culture, and implement effective anti-bribery systems internationally, in order to prevent liability.

Under the Act, organisations, and consenting "senior officers" (including directors, managers and company secretaries) can be liable for offering or receiving bribes. In addition, the Act makes organisations directly liable for "bribery committed" on its behalf by any "associated" person anywhere in the world. Anyone that provides services on behalf of the organisation (*inter alia* employees, agents, distributors and subsidiaries) constitute "associated persons". Penalties are severe; unlimited fines and potential disbarment from public contracts, along with the connected reputational damage. The only available defence is proving that "adequate procedures" were in place to prevent bribery occurring.

Adequate procedures

Adoption of adequate anti-bribery procedures is a defence of prevention, not protection. The Act does not impose fixed standards upon organisations, but the UK Ministry of Justice's guidance outlines six key principles to bear in mind when designing and implementing anti-bribery safeguards:

1. **Proportionate procedures**

An organisation's procedures to prevent bribery by "associated" persons need to be proportionate to the bribery risks faced and the nature, scale and complexity of the organisation's activities. The procedures also need to be clear, practical, and accessible, as well as being effectively implemented and enforced.

2. **Top-level commitment**

Senior management is expected to foster a culture within an organisation in which bribery is never acceptable. This commitment should include the communication of an organisation's anti-bribery stance, as well as an appropriate degree of involvement in developing bribery prevention procedures. Without board-level involvement, including overseas parent company boards, it will be difficult to demonstrate adherence to this principle.

3. Risk assessment

Reviews of all the risks the organisation is exposed to should be periodic, informed and documented. They should enable an organisation to accurately identify and prioritise the risks it faces, whatever the organisation's size, activities, customers or markets.

4. Due diligence

Every organisation should apply due diligence procedures, that take a proportionate and risk-based approach, in respect of the person who will perform services for, or on behalf of the organisation, to mitigate identified bribery risks. There is no duty to engage consultants to conduct risk assessments or due diligence, but it may be useful, and proportionate, for larger organisations to do so.

5. Communication

Awareness and understanding of anti-bribery policies must be communicated internally and externally, perhaps by way of publication on the intranet and the company website respectively. In addition, training of employees, contractors and other third parties is an important part of this process.

6. Monitoring and review

Each organisation's board should receive regular reports, provide oversight, and modify practices where necessary, to maintain the effectiveness of implemented procedures. Monitoring will be key in ensuring procedures continue to provide organisations with a defence, as case law develops in relation to the Act.

Sector Specific Risk

Oil, Gas and Mining

Organisations in the energy sector are especially vulnerable due to the propensity for corruption in certain resource-rich jurisdictions, and the necessity for interaction with public officials. An effective risk assessment, identifying areas that resources need to be focused on, will allow existing policies to be refined. Personnel working in 'high-risk' jurisdictions (countries with a Transparency International corruption perception index score of less than 3) should receive increased levels of training to effectively combat the increased risk of bribery. Joint ventures also pose an elevated risk; all contracts should stipulate partners must comply with the Act, and allow termination for breach of this term.

Life Sciences

The increasing value of emerging markets and increasing externalisation of operations, when coupled with the concept of an “associated person”, may expose organisations in this sector to serious bribery risks. Thorough due diligence and training should be conducted on all suppliers, agents and distributors engaged, especially those in ‘high-risk’ jurisdictions. Industry regulations may govern hospitality, but this does not guarantee a defence under the Act. Consideration, and effective plugging, of any gaps between the regulations and the Act will provide protection with minimal effort.

Manufacturing

The supply and distribution relationships, essential in the manufacturing industry, make training and due diligence of all third parties engaged essential. Facilitation payments (small payments demanded by officials to provide or expedite services they are obligated to perform) are prohibited under the Act. Employees should be trained to recognise and resist such payments. Duress is available as a defence; and other factors, such as the vulnerability of the payer, size of the payment and having corporate safeguards in place, also will be considered by the UK Serious Fraud Office when exercising its discretion to prosecute.

Banking

Due to the relatively regulated nature of the banking sector, organisations should already have robust policies in place. Excessive hospitality and facilitation payments pose the greatest risks for financial services organisations. The British Bankers Association is yet to release its final guidance in relation to the Act, but already has given some insight into issues that require consideration, such as risk management and monitoring for all activities of the business, transparency of transactions and the availability of whistle-blowing hotlines.

Conclusion

Whilst some commercial sectors clearly are more at risk from bribery than others, every organisation needs to consider how its operations measure up to the Act’s provisions. The vast majority of organisations already will have procedures in place addressing bribery. The level of sophistication of these policies, and the level of dissemination among staff, and associated people, will determine the extent to which anti-bribery procedures need updating.

The single biggest risk area, across all sectors, is hospitality and gifts associated with winning new business. When updating contracts or human resources policies, issues relating to ‘high-risk’ jurisdictions, joint ventures,

agency arrangements, parent company liability and facilitation payments also merit careful consideration. If you have any concerns, we have a specialist team ready to discuss your ongoing compliance regime.

The material in this publication may not be reproduced, in whole or part without acknowledgement of its source and copyright. On the Subject is intended to provide information of general interest in a summary manner and should not be construed as individual legal advice. Readers should consult with their McDermott Will & Emery lawyer or other professional counsel before acting on the information contained in this publication.

© 2010 McDermott Will & Emery. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery/Stamford LLP, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, MWE Steuerberatungsgesellschaft mbH, McDermott Will & Emery Studio Legale Associato and McDermott Will & Emery UK LLP. McDermott Will & Emery has a strategic alliance with MWE China Law Offices, a separate law firm. These entities coordinate their activities through service agreements. This communication may be considered attorney advertising. Previous results are not a guarantee of future outcome.