



Bermuda's Bribery Act 2016 – What Your Organisation Should Be Doing to Comply

The Bermuda Government's new Bribery Act 2016 came into force on 1 September, 2017 (**Bribery Act**), drastically modernising Bermuda's anti-bribery legislation. The Bribery Act is largely modelled on the UK's Bribery Act 2010, but it is important that persons and organisations in Bermuda understand the provisions of the Bermuda Bribery Act which has wide implications and introduces a number of new offences into Bermuda law.

Multi-national enterprises based in or connected to Bermuda should analyse their risk and ensure that they implement procedures that sufficiently take into account Bermuda anti-bribery provisions. To assist, the Bermuda Government has issued Guidance on how commercial organisations can ensure that they comply with the Bribery Act entitled '*The Bribery Act 2016 Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 11 of the Bribery Act 2016)*' (**Guidance**).

The Failure of Commercial Organisations to Prevent Bribery

The bribery offences include, inter alia, bribing another person, being bribed, bribery of foreign public officials, and failure of commercial organisations to prevent bribery.

Under the Bribery Act, a commercial organisation will be guilty of a criminal offence if a person associated with the organisation bribes another person with the intention of obtaining or retaining business for the organisation or with the intention of obtaining or retaining an advantage in the conduct of business for that organisation (**Corporate Offence**). This is a strict liability offence with one defence available. In order to have a defence, the organisation must prove that it had in place '*adequate procedures*' designed to prevent persons associated with it from undertaking such conduct.

The Corporate Offence applies to '*relevant commercial organisations*' which are:

1. a body or a partnership incorporated or formed under Bermuda law and which carries on a business (whether in Bermuda or elsewhere); or
2. any other body corporate (wherever incorporated) or any other partnership (wherever formed) which carries on a business, or part of a business, in Bermuda.

Generally, the Corporate Offence applies to corporate bodies and partnerships incorporated and formed in Bermuda; however, it is important to note that the Corporate Offence also has extra-territorial effect and may apply to corporate bodies and partnerships incorporated or formed outside Bermuda if they carry on business, or part of a business, in Bermuda, even if the bribery conduct takes place outside Bermuda. The key concept to note is whether an organisation 'carries on a business' and

the courts will be the final arbiter as to whether an organisation 'carries on a business' in Bermuda taking into account the particular facts on an individual case-by-case basis.

Meaning of Associated Person

A commercial organisation is liable under the Corporate Offence if a person '*associated*' with it bribes another person intending to obtain or retain business or a business advantage for the organisation.

The Bribery Act provides that a person is '*associated*' with a commercial organisation if (disregarding any bribe under consideration) the person performs services for or on behalf of the organisation. The capacity in which the person performs services for the organisation does not matter and so accordingly the person may, for example, be the organisation's employee, agent or subsidiary. Whether or not a person performs services for or on behalf of an organisation must be determined with reference to the relevant circumstances and not merely on the nature of the relationship between the person and the organisation. The Bribery Act states that if a person is an employee, it is presumed they perform services for or on behalf of the organisation unless the contrary is shown.

The concept of a person who '*performs services for or on behalf of*' the organisation is intended to give the Corporate Offence broad scope in order to embrace a wide range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf. Organisations should include anti-bribery provisions in contracts with third party service providers and ensure they are informed about the organisation's anti-bribery policy.

The Guidance clarifies that an offence will be committed only if the third party service provider, agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Therefore, without proof of the required intention, liability would not accrue through mere corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. For example, a bribe on behalf of a subsidiary by one of its employees or agents would 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 for the parent company or other subsidiaries. However, the Guidance also warns that liability for a parent company could arise where a subsidiary is the '*person*' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa.

Senior Officer Consent or Connivance

The Bribery Act provides that if an offence is committed by a body corporate (other than the Corporate Offence) with the consent or connivance of a senior officer (i.e. a director, manager, or other similar officer) or person purporting to act in that capacity, then the senior officer or person, as well as the body corporate, is guilty of the offence and liable to be proceeded against.

Adequate Procedures to Prevent Bribery

An organisation will have a defence in relation to the Corporate Offence if they can prove that they had put in place adequate procedures designed to prevent persons associated with the organisation from bribing others to retain business or business advantage.

The Guidance provides six key principles which commercial organisations should abide by in order to ensure that they have '*adequate procedures*' for preventing bribery by persons associated with them:

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

It is important that procedures implemented by an organisation are proportionate to the risks faced by the organisation. A risk-based approach should take in to consideration the bribery threat across jurisdictions, business sectors, business partners and transactions.

What Organisations Should Be Doing Now

Subject to what is risk-proportionate, commercial organisations are encouraged to take the following baseline actions to ensure compliance with the Bribery Act:

1. Introduce a zero-tolerance policy for bribery:

Organisations should put in place a headline policy that notes the corrosive effect that bribery can have on an organisation's goals and mission, the importance of strong internal anti-bribery systems and makes it clear that the organisation does not tolerate bribery in any form.

Organisations should assess how their internal anti-bribery systems and policies will affect various departments, branches, related group companies, and 'associated persons', and take appropriate steps to implement a holistic anti-bribery culture at the organisation.

2. Communicate the policy to key stakeholders:

Details of the organisation's policy in respect of combating bribery should be communicated to employees, agents and partners. Organisations should ensure that any third party service providers, introducers or brokers who may be 'associated persons' are informed of the organisation's zero-tolerance policy.

3. Conduct a documented risk assessment exercise:

Organisations should assess where their organisation may be exposed to a high risk of bribery, as well as how effective its anti-corruption policy and management systems are. This risk assessment requires robust information gathering as to an organisation's vulnerabilities in relation to its employees, agents or partners.

4. Ensure adequate training and support for employees:

Organisations should ensure that their personnel are aware of the requirements of the Bribery Act, the Guidance as well as the organisation's anti-bribery compliance procedures. The Guidance suggests that adherence to these standards form part of the performance review process for relevant and key employees.

5. Settle procedures for overseas third parties:

It is important for organisations to put in place a written procedure governing the appointment of third parties who are to perform services for or on behalf of the commercial organisation in, or in relation to, overseas countries. Procedures should distinguish between different countries depending on the perceived bribery risk of the country in question.

6. Put in place procedures for the investigation of incidents of bribery:

Clear, accessible, written procedures should be in place for the escalation of concerns to appropriate levels within an organisation and prescribing how (and by whom) potential incidents are to be investigated. These procedures should be subject to the whistle blowing protections provided to employees under Section 29A of the Employment Act 2000.

7. Perform a periodic review of anti-bribery procedures:

Organisations should perform periodic reviews to assess whether the procedures of the organisation continue to be 'adequate' in relation to the Corporate Offence. The Guidance states that larger organisations should review their procedures on an annual basis and that the results of any such review should be communicated to the organisation's directors and senior management.

Hospitality and Promotional Expenditure

The Guidance provides that "bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the [Bribery] Act to criminalise such behaviour." It is understood from the Guidance that reasonable and proportionate hospitality and promotional or other similar business expenditure is not intended to be prohibited by the Bribery Act. However, commercial organisations should review their existing policies on hospitality and promotional expenditure as part of the implementation of anti-bribery procedures in order to establish and disseminate appropriate standards for hospitality and promotional expenditure.

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