



EVERYTHING MATTERS

New Legislation on Bribery and Corruption

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2009 MLRO Toolkit Event

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Why is everyone talking about Bribery and Corruption?



- increasing international pressure for regulators to act
- breach of law - long arm of the US
- first prosecutions in UK
- ethics - double standards at home and abroad
- hinders developing nations - adverse effect on economy and national wealth
- undermines company values and reputations
- bad for business: undermines competition, hidden tax
- cost of being caught – ten largest US prosecutions have cost companies over \$175 in penalties
- many companies and countries are still turning a blind eye

- CBRN Team Ltd
 - First conviction for foreign bribery in UK history
 - Employee of UK security consulting firm and an official of Uganda sentenced for bribery
- Balfour Beatty
 - Inaccurate accounting at an Egyptian joint venture
 - £2.25m settlement in October 2008
 - Civil Recovery Order
- AON Ltd
 - FSA fines AON £5.25m for systems and controls failures which meant “suspicious payments” went undetected

- Mabey & Johnson
 - Pleas to conspiracy to corrupt and Sanctions offence
 - Fines and confiscation £4 million

- Siemens (December 2008)
 - allegations that it paid officials a total of €1.3 billion to win contracts
 - made record €1 billion (£890m) payment to US and German authorities
 - investigations against former board members/employees continuing
- Halliburton/KBR (February 2009)
 - KBR paid over \$180m in bribes to top-level Nigerian government and national oil company officials
 - fined \$579m for FCPA violations
 - SFO investigating UK subsidiary



- Public Bodies Corrupt Practices Act 1889
- Prevention of Corruption Act 1906
- Prevention of Corruption Act 1916
- Anti-Terrorism Crime and Security Act 2001 (from 14 February 2002 extends law to overseas bribery of public officials and foreign agents in the public or private sector)
- Common law offence of bribery
- Bribery Bill published 25 March 2009

Criminal liabilities for companies as well as individuals

Other offences can be committed



- S16 Theft Act 1968
- Fraud Act 2006
- Conspiracy to defraud
- Companies Act offences

"Where a person is in the position of a trustee to perform a public duty and takes a bribe to act corruptly in discharging that duty it is an offence. For the purpose of any Common Law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward had no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom"

Public Bodies Corrupt Practices Act 1889



"Anyone who offers or receives any advantage as an inducement or reward to any member, officer or servant of any public body to do or forebear to do anything in respect of any matter or transaction in which the public body is concerned commits an offence."

Public Bodies Corrupt Practices Act 1889 (contd)



Public body includes a Council or other Local Government body and includes any body which exists in a country or territory outside the United Kingdom and is equivalent to a UK public body but it does not include a Government official

Prevention of Corruption Act 1906



"If any agent corruptly accepts or obtains or agrees or accept or attempts to obtain from any person for himself or for any other person any gift or consideration as an inducement or reward for doing or forbearing to do or for having after the passing of this Act done or forborne to do any act in relation to his principals affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principals, affairs or business....."

Prevention of Corruption Act 1906 (contd)



A person serving under the Crown or under any Corporation or any Borough, County or Council is an agent and for the purposes of the Act it is immaterial if the principals, affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom or that the agents functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.

- Bribery Bill published 25 March 2009
- Covers bribery both in UK and overseas
- 2 general offences:
 - offer, promise and giving of an advantage (P)
 - request, agreeing to receive or acceptance of an advantage (R)
- Discrete offence of bribery of a foreign public official
- New offence of negligent failure of commercial organisations to prevent bribery
- Maximum penalty of 10 years imprisonment for all new offences, save the corporate offence which carries an unlimited fine.

- P commits the offence by offering/giving an advantage to someone, intending to induce or reward improper conduct by R.

OR

- P offers or gives an advantage knowing or believing that its acceptance by R would in itself be improper

The person advantaged and the person behaving improperly may be different.

- R commits the offence whether the bribe comes as an inducement, or as a reward
- R also commits it if it would be improper even to ask for or accept an advantage
- R behaves "improperly" by improperly performing a public or private function
- "Improper" means in breach of an expectation of good faith, impartiality, or of a position of trust: these are specific forms of acting "corruptly".

- Bribery of a foreign public official (FPO)
- Intention to influence FPO in that capacity
- Intention to obtain/retain business
- Bribe may be through/to a third party
- Defence if local law permits payment. Also:
- Reasonable belief that payment lawful

- Corporate ('C') failure to prevent bribery
- 'A' is performing services for C
- A bribes C in connection with C's business
- Someone responsible for stopping A bribing another negligently failed to do so
- Defence to show adequate anti-bribery systems in place
 - must be a genuine operating system
- Defence unavailable if C's senior officers were guilty of the negligent failure.
 - unfair on small businesses?

Joint Committee - Pre-legislature Scrutiny



- Welcomes the Bill
 - Welcomes the corporate offence and recommends no need to prove negligence
 - No exception for facilitation payments
 - More work required on detail and one what adequate procedures would look like

Adequate procedures will include



- Aim for zero tolerance
- Promote integrity, honesty and fairness
- Engage senior management
- Conduct risk assessment
- Publish a code of conduct/ethics
- Train
- Monitor
- Enforce

How is corruption often discovered?



- Whistleblower
- Change of management
- Audit [and disclosure]
- Change of regime overseas
- As a result of overseas investigation
- As a result of another investigation e.g. money laundering
- Specific intelligence gathering

- SFO inviting companies to self report
 - Civil recovery rather than a prosecution
 - No guarantee



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The Fraud Act 2006

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The Act aims to:

- make the law more comprehensible to juries
- make the offences simpler and easier to prove
- encompass fraud in its many modern forms (e.g. use of email)

New offence of fraud can be committed in 3 ways:

- fraud by false representation (s2)
- fraud by failing to disclose information (s3)
- fraud by abuse of position (s4)

Company officers liable for offences committed by the company (s12)

For each type of fraud:

- conduct must be dishonest;
- intention to make a gain or cause a loss or the risk of a loss to another; but
- no actual loss or gain needs to have been made

False Representation:

- may be express or implied – in words or by conduct – written, spoken, by email, on a website etc
- could be by omission – e.g. failing to declare a conviction or disqualification
- made with the knowledge that it is, or might be, “untrue or misleading”

Failure to disclose:

- failure to disclose information to another when under a legal duty to disclose that information

- may be committed by conduct or omission

- no definition of legal duty – could be:
 - contractual
 - statutory
 - custom from trade or market; or
 - fiduciary duty

Abuse of position:

- failure to safeguard and not act against the financial interest of another

- abuse may be by conduct or omission

- examples of “position”:
 - trustee and beneficiary
 - director and company
 - professional and client
 - between partners

Company officers liable for offences committed by the company:

- directors or officers who "consent or connive" will be caught
- acquiescence may expose director to prosecution