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Clean hands

by Tina Nielsen

A crackdown on fraud and corruption is promised under tough new bribery legislation. What can directors do to protect themselves under the law?

Businesses could be faced with new anti-bribery legislation this side of the general election. After the furore over excessive bankers' bonuses and the expenses scandal in Westminster, it seems the government is determined that transparency should be key in 2010.

The Queen's Speech declared last year that Labour wanted to modernise the bribery law within the current legislative programme in parliament. And it needs updating; the most recent bribery statutes in the UK date back to 1916.

"Bribery is illegal in the UK, but this law is intended to make it much clearer," says Michael Littlechild, co-founder of responsible business management firm GoodCorporation. "It will make it easier for prosecutors to prosecute. It also makes it clearer for businesses how they can ensure they don't step out of line and how they can protect themselves."

The outcome of the recent case against BAE Systems may well have been different under a clearer anti-bribery law. While the defence giant agreed a settlement for false accounting it escaped prosecution for alleged bribery. Bribery, defined by the Serious Fraud Office (SFO) as "giving or receiving something of value to influence a transaction", is estimated to add up to 10 per cent to the total cost of doing business globally and up to 25 per cent to the expense of procurement contracts in developing nations. The government believes more than £1trn worth of bribes are paid every year.

"We all share the common desire that those who are using corruption as a way of undercutting good honest businesses should be found out and put out of business," says Richard Alderman, director of the SFO.

To a large extent the bill is driven by the UK's obligations under the OECD Convention on Combating Bribery of Foreign Public

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Officials in International Business Transactions, which has been ratified by 38 countries. "The UK has lagged behind so many of its colleagues in putting in place the OECD convention," says David Lawler, a partner at consulting firm Forensic Risk Alliance. "Bribery has not been taken seriously in the UK until now. The last OECD working group said it was disappointed and seriously concerned that the British had not put this in place."

The government is also taking a lead from the US where the Foreign Corrupt Practices Act (FCPA) has been in place since 1977 following the Watergate scandal and has been heavily enforced for the past 10 to 15 years. "The FCPA is a widely feared piece of legislation in the US and I think the bribery bill will be here, too," says Lawler.

The bribery bill goes further than the FCPA, which has a get-out clause for smaller facilitation, or grease, payments. The UK bill has no such clause and while the US law provides only for bribery of public officials, the regulations here will cover domestic internal payments and business bribes.

The bill proposes making it a criminal offence to give, promise, offer and request a bribe at home and abroad, including bribery of a foreign public official. It will increase the maximum penalty from seven to 10 years in prison and, perhaps most importantly, it introduces a new corporate offence of failing to prevent bribery by people working on behalf of your business. A defence will be available to businesses if they can show that "adequate measures" are in place to prevent bribery taking place.

It does not provide a definition of "adequate procedures", but the government has agreed to provide guidance. "They will not be able to pinpoint it with precision because the extent of the adequate procedures depends on the nature of your business, where you are doing business, who with and the size of your company," explains Jeremy Cole, a partner at law firm Lovells LLP.

Alderman agrees it will differ from business to business. "What I am looking for is a company that has either got an anti-corruption culture or is determined to introduce one, and we will want to know what the board is doing about it, whether the chief officers are showing a real commitment to ethical business," he says.

Cole says the bill will affect a range of sectors, particularly those companies that do a lot of public procurement work in jurisdictions towards the bottom of global anti-corruption organisation Transparency International's Bribe Payers index. "But this is not a case where you can take a view as to whether you are at risk or not. You could argue that bigger corporates are more exposed, but if a big corporate is targeted it may well involve a series of transactions, involving a number of parties, which could result in smaller companies being targeted by the SFO," he says.

Companies that use agents should be especially vigilant and make sure they know how their agents operate. "The company has to do everything it can to ensure the agent knows what may and may not be done," says Littlechild. "Demand details of what money is spent on and don't accept that there are large sums spent mysteriously and no receipts."

The UK is not among the worst offenders when it comes to Transparency International's index, coming fifth from the top in the latest listing from 2008.

"I wouldn't say corruption is very commonplace in the UK, but it does go on and when it is found out it is not only a huge embarrassment but it can cost a lot of money, and it really damages the reputation of the company," says Littlechild. "Those who are found guilty will find themselves excluded from business because we don't accept business like that."

Lawler says all businesses need to take the bribery issue seriously. "You still hear people saying 'if we are doing business in Nigeria we have to pay bribes to get things done', but there are ways of doing business in high-risk countries without resorting to bribes," he argues.

He thinks the SFO will enforce the new law strongly. "The US has seen an increase in prosecutions and huge fines based on the gain from paying bribes, not the actual bribe itself, and the UK will closely follow what has happened there."

Businesses often protest at the prospect of new legislation, but in this case most have welcomed it. "The business knee-jerk reaction is to question why we need more red tape, but on this issue no one has been saying that," says Littlechild. "Companies that have already made sure their business is clean should not be suffering from disadvantages because of those who are still willing to bend the rules."

The bill at a glance

- It replaces complex and fragmented legislation dating back to 1916
- Will create an offence of bribery of a foreign official
- Introduces a new offence of failing to prevent bribery, requiring organisations to have adequate procedures in place
- Likely to be passed as law before the next general election

Heroes and villains

The countries least likely to pay bribes...

1. Belgium
2. Canada
3. Netherlands
4. Switzerland
5. UK
5. Germany
5. Japan

... and those most likely to

22. Russia
21. China
20. Mexico
19. India
17. Brazil
17. Italy

Listings from Transparency International's Bribe Payers index 2008-a ranking of companies in 22 of the leading export countries

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