THE LONG REACH OF THE UK BRIBERY ACT

There is little doubt that directors and officers of companies are feeling the heat of an increased spotlight on their activities. The news is full of shareholder activism over executive pay, corporate wrong doing and the on-going effects of economic turmoil. The common theme is that the attention of regulators, shareholders and the public is firmly fixed on the boardroom. Miller's D&O specialist Richard Watts outlines the key issues.

Directors and officers, particularly of multi-national businesses, are facing heightened exposures as shareholders and regulators increasingly look to hold individuals liable. Despite being spoilt for choice when it comes to the legislative and regulatory issues that could keep corporate officers awake at night, the most frequently asked questions that we get as brokers are centred around the Bribery Act.

The Bribery Act, which has been in force since July 2011, has made companies liable for any failure to prevent bribery within their organisation. A company will be held liable unless it can demonstrate that it has taken all possible measures to prevent bribery, and directors can also be found guilty if they consent to, or ignore, bribery on the company's behalf by an employee or agent. Under the Act, the maximum penalty for individuals found guilty will rise from seven to 10 years' imprisonment and an unlimited fine.

Nearly a year on, and with no major prosecution so far, directors and officers are still very concerned that they are operating in a changed environment, where the burden is being placed on boards to prove that no wrongdoing has occurred. In addition, they are worried that the Act has a very long reach, with extensive territorial scope as it applies not only to UK-incorporated entities who operate overseas, but also to any multi-national conducting business in the UK.

> **"10 years is the maximum prison sentence for individuals found guilty under the Bribery Act"**

CHANGED ENVIRONMENT

So, what are the key concerns? From the perspective of the businesses that need to comply with the Act, the key issue is a lack of clarity around the definition of a bribe – despite the guidance notes which have been issued. While some are clear cut, many others fall into a grey area that can broadly be described as "doing day-to-day business" – the most significant category of which is undoubtedly corporate hospitality.

So far only one minor case has been prosecuted – a former magistrates' court administrative officer received a three year prison term for bribery offences. However, organisations should not be complacent that the absence of a major prosecution to date indicates any unwillingness by the authorities to enforce the Act. In April this year, the new Director of the Serious Fraud Office (SFO), David Green, made some uncompromising statements that the SFO is there to target "top end bribery and corruption". In addition, the FSA has issued a considerable amount of guidance about required anti-bribery/crime systems and controls.

DEFENDING A CHARGE OF BRIBERY

Should an allegation be made, the cost of defending it remains unknown territory – with no cases to use for reference. The closest comparison is probably fraud cases, which may not be very comforting as the costs there can run to millions of pounds.

With a sizeable risk of significant personal liability, corporate officers are keen to ensure that their D&O policy offers the right protection for the Bribery Act, and that indeed insurers are including this risk. However, the underwriters are keen to understand what policies and systems companies are putting into place to test that the insureds have "adequate procedures" in place to prevent bribery.

EXTRA TERRITORIAL REACH

Broadly speaking, businesses that do all they can to stay on the right side of the law should have less to fear from this legislation. Where there may be more concern, given the extra-territorial reach of the Act, is around subsidiaries and individuals that are outside the UK, and possibly in countries where the cultural norms and business practices are different.

At present, the evidence suggests that businesses are taking the subject very seriously – and investing considerable time and resource in getting the right processes in place. However, only time will tell, and it will take concrete examples of enforcement action by the various regulatory bodies for both insureds and insurers to genuinely understand the full ramifications of this legislation.

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BEST PRACTICE FOR COMPANIES TO PREVENT BRIBERY

It will be the responsibility of the board of directors to design, implement and regularly review the policies in place. Below are some guidelines.

- Appoint a senior officer who is accountable for the oversight of the programme
- Assess risks specific to the company and its business – with consideration given to the nature and location of its activities
- Conduct education and training for new and existing staff in the anti-bribery procedures
- Implement internal financial controls and record-keeping to minimise the risk of bribery, for example a register of entertainment offered or received
- Establish whistle blowing procedures so that employees can report corruption safely and confidentially