



# The Changing Face of Regulation

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# THE BRIBERY ACT 2010, CORPORATE OFFENCES AND THE “ADEQUATE PROCEDURES” DEFENCE

*This article, contributed by David Blackmore, Director of Financial Crime, Risk Reward Ltd, is a “call to action” to all UK firms which are covered by this legislation. The Act will be in force from April 2011, and whilst Ministry of Justice and Serious Fraud Office Guidance notes are expected later this year/early next, firms would be ill-advised to wait that long before reviewing and updating their systems and controls.*

## Background to the Act

Bribery and corruption have been with us for centuries, but there is now recognition that these practices present serious risks to all involved. Political corruption is not a victimless crime; it has real effects on real people. It causes untold material hardship to the poorest and most disadvantaged. Corruption means that many countries do not have an independent or competent police or judicial system. The sheer size of some corrupt payments has the potential to destabilise emerging economies and saddle donor countries with losses of billions. Basic values of fairness, honesty and integrity are at stake from the impact of both these pernicious forms of financial crime.

The UK is a signatory to the UN Convention against Bribery and Corruption. However, it has been under sustained international pressure for years to update its legal framework, much of it over 80 years old. The Bribery Act, 2010 is the resulting response and arguably is the most formidable legislative attack on bribery and corruption anywhere in the world. Every part of corporate UK is affected along with the Act’s extra-territorial impact on all non-UK entities operating in the UK.

This article tries to highlight what the international and UK response are seeking to achieve and how individual firms can protect themselves against an increasingly coordinated and potent international legal and regulatory framework against bribery and corruption. Non-compliant firms risk exclusion from domestic and EU procurement contracts, regulatory penalties and fines, whilst individuals risk fines, imprisonment and regulatory sanctions. The article points firms to ways of developing systems and controls which constitute the “adequate procedures” defence to the corporate offence of failure to prevent bribery under the new Bribery Act.

## What is the Bribery Act?

The Act creates four bribery offences:

- Active bribery, i.e. bribing someone else;
- Passive bribery, i.e. receiving a bribe;
- Bribery of a foreign public official; and
- Corporate failure to prevent bribery.

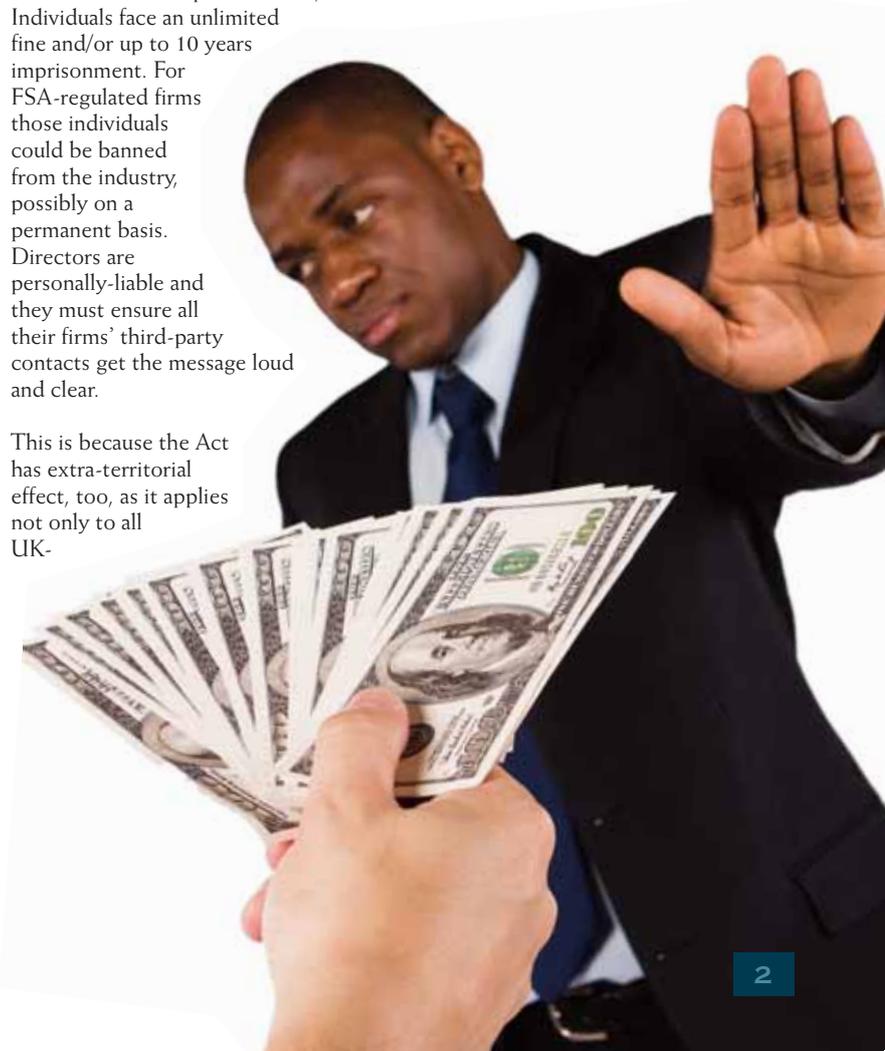
There are three possible defences, namely:

- “adequate procedures” by a corporate entity;
- Bribery specifically authorised by written law, and
- Conduct necessary for the proper exercise of any function of an intelligence service or the armed services when engaged on active service.

If firms fall foul of the corporate offence they face an unlimited fine, plus the prospect of regulatory action and exclusion from EU procurement, as described above.

Individuals face an unlimited fine and/or up to 10 years imprisonment. For FSA-regulated firms those individuals could be banned from the industry, possibly on a permanent basis. Directors are personally liable and they must ensure all their firms’ third-party contacts get the message loud and clear.

This is because the Act has extra-territorial effect, too, as it applies not only to all UK-



## THE BRIBERY ACT 2010, CORPORATE OFFENCES AND THE “ADEQUATE PROCEDURES” DEFENCE CONTINUED

incorporated entities, their branches and subsidiaries wherever located but also to foreign registered entities doing business in the UK. UK nationals are covered wherever in the world they are located. These aspects significantly widen the scope of the Act and local custom or culture does not provide a defence.

**What can firms do?**

The Act makes provision for guidance to be drawn up before it comes fully into force, now confirmed for April 2011. This guidance will be drawn up by the Ministry of Justice but is likely to be quite high-level, focussing on:

- Visible “Top-down” commitment;
- A risk assessment of the whole business on a global basis;
- Clear, practical policies and procedures with actual performance to match;
- Effective implementation of the firm’s regime;
- Appropriate due diligence;
- Monitoring, assurance and review.

The lead enforcement agency, the SFO, is also providing guidance on its enforcement policy. However, it would be unwise to await both offerings and do nothing! Clear pointers have been available for some time, ranging from the very public “settlement” between UK and US authorities and BAE Systems Plc and the regulatory action taken by the FSA. This has ranged from the £5.25 million fine imposed on Aon Plc in January, 2009 for serious failings in this area, to the final report (May 2010) on “Anti-bribery and corruption in commercial insurance broking”. Some of the findings are damning and should be read-across by all FSA-authorized

firms. The findings replicate many of those in its “Small firms Financial Crime Review”, also published in May, 2010.

With this evidence it seems clear that, as in sanctions compliance, the FSA (and its successor?) will again focus on breaches of the Principles and SYSC (systems and control) Sourcebook as an additional enforcement area to any action by the SFO on the predicate bribery offences.

**Specifics**

Action is needed now along the following lines:

- Board / Senior Management to lead a risk assessment, establish an action plan with clear roles and responsibilities and nominate an officer for overseeing the whole process;
- Risk assessment needs to be within and without, i.e. cover supply-chains, procurement as well as outsourcers, intermediaries, joint-ventures, associates and business-introducers;
- Procedures need to cover operational risk management, including financial controls and an escalation procedure for higher-risk situations;
- Internal reporting lines, similar to AML / CTF, need to be clearly laid down and cover where reports may need to be copied across to SOCA as well as the SFO. In extreme cases the FSA might need to know, as per Principle 11 covering communication with FSA “in an open and cooperative manner”;
- An enhanced staff training and awareness programme may need to be put together, so that training is relevant to staff roles and responsibilities; testing to demonstrate understanding is crucial;
- Clearly whilst the above affects all UK firms, financial sector firms and especially banks will need to pay ever-closer attention to Customer Due Diligence (CDD), particularly for high-risk jurisdictions and vulnerable industry sectors such as construction, mineral exploration, transport infra-structure, energy, pharma and defence. There are clear overlaps here with counter-proliferation financing and PEPs and sanctions screening, especially in jurisdictions where the state has a major role in both the economy and enterprises;
- Coupled with enhanced CDD financial firms may well need to establish enhanced monitoring in areas such as payments processing, accounting and correspondent banking.

As if this were not enough, it is understood that the inter-governmental body, the Financial Action Task Force (FATF) is closely examining the prospect of incorporating the UN Anti-bribery Convention into its 40 Recommendations, thus globalising still further the reach of coordinated action in the financial crime space. **We have all been warned!**

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