The Act has serious financial and reputational implications for UK businesses, and overseas businesses operating in the UK, even on a small scale.

This briefing summarises the new law, and identifies some practical steps that all businesses should take in response.

The offences

The Act abolishes existing common law and statutory offences. In their place, it introduces various new bribery offences, of, broadly:

- bribing, or offering to bribe, another person
- requesting, agreeing to receive or accepting a bribe
- bribing, or offering to bribe, a foreign public official
- a commercial organisation failing to prevent bribery.

A bribe is defined widely, as a "financial or other advantage" intended to bring about or reward the improper performance of a relevant function. There is no minimum value below which a financial advantage can safely be ignored.

Importantly, a relevant function includes both functions of a public nature, and all activities connected with a business, trade or profession, and covers functions carried out in the UK or overseas (and perhaps with no connection with the UK).

Corporate liability

Of particular concern to businesses will be the corporate offence of “Failure of commercial organisations to prevent bribery” contained in section 7 of the Act.

A UK commercial organisation will commit an offence if a person associated with it bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation, whether in the UK or elsewhere.

The definition of an associated person is wide: it is any person who performs services for or on behalf of the organisation. This would clearly cover the organisation's employees, agents and subsidiaries, but could also include third parties, such as joint venture partners, intermediaries and outsourcers.

The penalties for getting it wrong

Individual offences are punishable by up to 10 years' imprisonment, and both individual and corporate offenders can be subject to unlimited fines under the Act. Senior officers convicted of consenting to or conniving in the commission of an offence would face the same potential punishments.

However, the consequences of committing an offence under the Act could go beyond penalties under the Act itself.
The potential for reputational damage is self-evident. Any regulated business or person who has to show they are "fit and proper" to hold an authorisation or licence, in the UK or elsewhere, could also face wider consequences from their regulator if convicted under the Act.

A bribery conviction could also preclude a business from being selected by a government or local authority in the awarding of public contracts anywhere in the EEA, under the Public Sector Procurement Directive (2004/18/EC, implemented in England and Wales by the Public Contracts Regulations 2006).

**Liability of senior officers**

If a body corporate commits one of the three substantive bribery offences and a “senior officer” of the company is found to have consented to or connived in the wrongdoing, that person will be treated as if they had committed the offence too. “Senior officer” means a director, manager, secretary or other similar officer.

A senior officer cannot be held liable under the Act if the organisation merely fails to prevent bribery, in breach of section 7. However, in such cases an FSA-authorised business and its senior management could (as now) face sanctions from the FSA.

**Extra-territorial effect**

The Act applies to acts and omissions whether they occur in the UK or overseas. There is no requirement that the offending behaviour was approved or facilitated in the UK – a rogue individual acting on his or her own initiative on the other side of the world on behalf of a UK organisation could still be caught by the Act.

In the case of overseas organisations, they could be caught by the Act simply by having a UK presence – the offending behaviour need have no connection with the UK.

**Facilitation payments**

In some jurisdictions, the payment of small sums to officials to speed up or ease a legal or official process is reportedly commonplace. The Act prohibits such facilitation payments entirely, on the basis that they perpetuate a culture that accepts bribery as a way of life, which in turn makes it harder for others to resist demands for such payments.

However, some other jurisdictions, notably the United States, specifically exempt such payments in their equivalent legislation, raising concerns that UK organisations will be disadvantaged.

**The “adequate procedures” defence**

The main way in which commercial organisations can protect themselves against a charge of failure to prevent bribery is to try to take advantage of the “adequate procedures” defence set out in section 7(2) of the Act.

A commercial organisation will have a defence if it can prove it had adequate procedures in place to prevent its associated persons committing offences under the Act.

The government has published draft guidance on what might constitute “adequate procedures” for these purposes. The final form guidance is expected to be issued early in 2011, to allow businesses time to take it into account in preparing their procedures.

However, the guidance will not offer a safe harbour, so following it will not guarantee immunity.

A link to the draft guidance, as well as other sources of information is at the end of this briefing.
**Practical steps to protect yourself**

Given the potentially drastic financial and reputational consequences of failing to comply with the Act's provisions, commercial organisations should review their systems, procedures and controls now. In many cases, it will be a case of building on existing procedures, rather than starting from scratch.

There is no off-the-shelf solution – the approach each organisation takes should reflect the risks which that particular business faces. International groups may also want to ensure consistency of approach at a group level. However, in all cases, it is important not just to take appropriate steps, but to review procedures periodically, and to document the measures taken. The attitude of an organisation towards bribery may also be a relevant consideration for a prosecuting authority such as the UK Serious Fraud Office in deciding whether to bring charges in a particular case.

We have put together a five-stage review strategy, set out below, as a helpful starting point. We can assist clients with any of these steps as required.

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<th>Stage</th>
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| **1: Risk assessment** | — Identify the parts of your business which are most exposed to bribery  
— Identify types of transaction which are most vulnerable  
— Review how customers and potential customers are entertained and rewarded  
— Identify joint ventures, intermediaries and outsourcees who might put you at risk |
| **2: Internal systems and controls** | — Review and amend guidance on hospitality, corporate gifts, charitable and political donations and other payments to third parties  
— Check existing payment authorisation processes and mechanisms for flagging unusual payments  
— Make sure that bribery checks are within the remit of internal audit  
— Check that appropriate whistle-blowing procedures are in place |
| **3: Control over third parties** | — Consider use of standard anti-bribery clauses in contracts with third parties  
— Review what rights you have under existing contracts to ensure compliance with the Act by contractors  
— Carry out due diligence where appropriate |
| **4: Training** | — Implement training on bribery for all relevant directors and employees  
— Consider extending training to joint venture partners, distributors etc  
— Keep an attendance record and do a follow-up assessment to ensure understanding  
— Make sure that internal compliance documentation is up-to-date, and is incorporated into contracts of employment |
| **5: Governance** | — Ensure responsibility for prevention of bribery is held at a senior (preferably board) level  
— Make sure that reporting lines are well understood at all levels of the organisation  
— Check that bribery risks are appropriately identified and monitored, through regular reports to the board or risk committee |
Useful resources

The UK government has stated that its guidance on adequate procedures will draw on a number of existing published documents. It added that it intends its guidance to be "flexible and indicative by setting out relevant principles backed up by illustrative good practice examples".

We have listed below some links to key resources which will help you put together appropriate anti-bribery procedures.

- Guidance about commercial organisations preventing bribery, Ministry of Justice
- Ministry of Justice December 2009 letter – indicates likely approach to guidance on adequate procedures, and attaches draft GC100 guidance
- Global Infrastructure Anti-Corruption Centre guidance
- OECD: Good Practice Guidance on Internal Controls, Ethics, and Compliance
- Transparency International: business principles for countering bribery

Markel policyholders who have added Employment Law Protection to their policy can gain further information on any of the points covered in this briefing, or any other employment related issue, by calling the FREE Markel Assist Employer Helpline 0845 2300110 (available Monday - Friday 09.00 to 17.00). You will need your certificate number and policy details to verify the call. A solicitor will then be able to deal with your query immediately.

This helpline is only available to those who have purchased Employment Law Protection Insurance. If you haven’t already purchased this and you wish to do so please speak to your Insurance Broker.

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