

# Act Accordingly

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Matthew Secomb explains how oil and gas companies can deal with the UK's move against bribery and corruption, and the implications of the Bribery Act 2010.

Oil and gas companies do business in countries where bribery and corruption run rampant. Some of the most oil and gas-rich countries also find themselves at the bottom of Transparency International's corruption perception index. Prominent examples span the globe, including Nigeria (134th out of 178 countries), Russia (153rd), Venezuela (164th) and Iraq (175th). Thus, dealing with bribery and corruption, and the legal frameworks governing them are an integral part of the oil and gas business. The Bribery Act 2010 (UK), which comes into effect in July 2011 sets a new high-water mark for anti-corruption legislation, changing the framework dealing with corruption for many operators in the oil and gas industry, large and small. Addressing this change will require proactive steps given the Act's broad scope of application and strict provisions.

## The Bribery Act's long tentacles

The Act has a broad scope of application, which may extend in ways that are not immediately apparent. It applies both to UK-incorporated entities as well as entities that carry on business or part of their business in the UK. Once the Act applies, it extends to an entity's activities worldwide. Thus, a non-UK company that carries on part of its business in the UK could be guilty of the new corporate offence of failing to prevent bribery if one of its employees, agents or subsidiaries pays a bribe anywhere in the world.

For non-UK entities, the key question is when does a company carry on business or part of a business in the UK for the purposes of the Act? The Ministry of Justice has issued certain 'guidance' on the Act's application, including this 'carrying on

business' test. It suggests, somewhat unhelpfully, that a 'common-sense' approach should be taken. It has clarified, however, that a company's listing on the London Stock Exchange will not in itself constitute 'carrying on business' in the UK, nor will merely having a UK subsidiary mean that a parent company is carrying on business in the UK: a company must have a "demonstrable business presence" in the UK shown by, for instance, regular and consistent business or trade transactions.

## What does the Bribery Act mean to your organisation?

The Act contains both the predictable and the surprising. As well as covering the bribing of foreign officials, the Act also criminalises active and passive bribery in the private sector.

The Act's 'corporate offence' of failing to prevent bribery by an associated person is novel. A company commits this offence if a person associated with it bribes another person intending to obtain business or an advantage in the conduct of business for that company. This offence could have broad application to oil and gas companies because the definition of 'associated person' includes people who perform services for a company. Thus, employees, agents, subsidiaries and, potentially, joint venture partners would be covered. The offence is 'strict liability', in that the mere bribe by an associated person triggers a company's liability. It is not necessary to show that the company's management knew of, or was complicit in the bribe. Companies found guilty face an unlimited fine, confiscation of all proceeds generated by the bribe and potential debarment from public procurement contracts.



**Matthew Secomb**  
Partner

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### **A good policy is the best defence**

The Act is not all about punishing instances of bribery. It also encourages good corporate behaviour by providing a defence to the corporate offence if a company proves that it had adequate procedures in place designed to prevent persons associated with it from paying or accepting bribes.

In March 2011 the Ministry of Justice issued guidance as to the procedures that companies might put into place to prevent persons associated with them from bribing. The guidelines set out six principles (in summary): procedures proportionate with the bribery risks faced and the nature, scale and complexity of the company's activities; top-level management commitment to preventing bribery; periodic, informed and documented assessment of the risks of bribery by associated persons; due diligence of associated persons to mitigate identified bribery risks; ensuring that bribery prevention policies are embedded in and understood throughout the organisation; and, monitoring and review of procedures to ensure that they prevent bribery.

In a number of respects, the Bribery Act departs from the US Foreign Corrupt Practices Act (known as the FCPA). Thus, policies and practices compliant with the FCPA will not necessarily comply with the Bribery Act. Aside from a good anti-bribery policy, the following tips will help reduce the risk of exposure to liability.

### **Chose your bedfellows carefully – and then take the proper precautions**

The corporate offence described above should make oil and gas companies think a little more carefully about their contractual partners. Oil and gas companies frequently form joint ventures for various activities. Given the broad definition of 'associated person' under the Act, a company participating in a joint venture may well be liable if an employee of its contractual partner pays a bribe intending to obtain a business advantage for the joint venture as a whole. The same can apply to agents or other contractual partners.

Two things can be done to potentially limit risk exposure. First, companies should undertake appropriate due diligence before entering into joint ventures or other contractual relationships. Here, a risk-based approach is recommended by the UK Ministry of Justice. It suggests that the extent of the due diligence undertaken should be proportional to the risk of bribery by the potential contractual counterparty. Thus, the prevalence of corruption in the potential counterparty's country might be taken

into account. Second, companies can include in their joint venture and other contracts 'anti-bribery provisions', and request that their contractual counterparties use similar clauses in contracts further down the 'contractual chain'. For identified high risk associated persons, mere inclusion of provisions will be insufficient: companies must ensure counterparties have really understood what the provisions mean in practice and have properly implemented them.

### **Take a zero-tolerance approach to grease payments**

In many parts of the world, small 'grease' or 'facilitation' payments to government officials to ensure that they perform their duties are relatively common (often due to pitifully low government salaries). Such payments are so common that the US FCPA actually contains an exception for such payments.

However, the UK government decided to follow a zero-tolerance approach, and the Act contains no exception for facilitation payments, however small. The Ministry of Justice's guidance to the Act is rather circumspect on such payments – acknowledging their prevalence, stating that their eradication is a 'long term objective' and suggesting that small payments might not be prosecuted.

However, two lessons remain: first, companies should be aware that even the smallest payment could breach the Act and, second, any policies containing exceptions for small facilitation payments should be modified.

### **Be hospitable, but not too hospitable**

Corporate hospitality and promotional expenditure on current and potential clients is an integral part of business (oil and gas and otherwise). However, such hospitality is often in the grey zone between legitimate promotional activities and bribery. Again, the Ministry of Justice provides some practical guidance. It states that the Act is not intended to criminalise 'reasonable and proportionate hospitality', while recognising that hospitality and promotional expenditure 'can be employed as bribes'. It underlines that 'the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure', the more likely it is to constitute a bribe. This suggests that companies should be increasingly vigilant to the possibilities that hospitality may step over the line.

## Get ready now

The Act's impact on oil and gas companies and the way they deal with corruption is yet to be seen. However, indicators point to its effects being significant. A few weeks remain before the Act comes into force in July 2011. Oil and gas companies should use the time that remains to consider the Act's likely impact on them, and what they can do to minimise the likelihood that they fall foul of it.

*Matthew Secomb is a partner at White & Case LLP, concentrating on international commercial arbitration with a focus on construction and energy related disputes. He has been involved in international commercial arbitrations under most of the major institutional rules as well as in ad hoc arbitrations. In addition to his counsel work, Matthew also serves as arbitrator. He is admitted to practice in both common and civil law jurisdictions.*