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Company & Commercial Newsletter

Regulatory & Corporate

# Bribery Act update

April 2011 will be an important month for many companies. This is when The Bribery Act 2010 (the 'Act') is expected to come into force, representing a significant change to UK law.

The Act seeks to modernise the existing legislation and to provide greater clarity to an area which has historically been seen as fragmented and complex.

The Act is primarily intended to target UK corporate bodies and individuals who conduct business and public activity in an improper manner.

**The general offences**
The Act will replace the common law offence of bribery with two statutory offences of offering or receiving bribes. The offences may apply where an advantage is "improperly" offered or accepted in connection with the performance of a business activity. The concept of "improper" will be judged against the expectation of a reasonable person.

Although corporate hospitality is of course an accepted part of business practice, it may in certain circumstances trigger one of the offences where it can be proved that the person offering the hospitality intended the recipient to be influenced to act "improperly" in the context of a business activity.

For example, lavish corporate hospitality which is used to secure advantages or ensure that a contract is awarded is now likely to be an offence under the new Act.

However, routine, relatively inexpensive or "proportionate" hospitality of a sort that might be reasonably be expected is unlikely to constitute an offence under the Act.

**Bribery of foreign public officials**
The Act specifies that an offence will be committed if a person offers an advantage with the intention of influencing a foreign public official in the performance of his functions which is not permitted by the written law applicable to that official. To be an offence under the Act, the bribe must also be made with the intention of acquiring a commercial advantage.

This is likely to catch circumstances such as those in the 2009 case involving Mabey & Johnson Limited, in which the bridge building company were fined more than £6.5 million for bribing 12 officials in six different countries. Cases like this indicate the potentially major scale of criminal liability that companies could face.

**Failure of commercial organisations to prevent bribery**
The Act also introduces a new offence for companies and partnerships that fail to prevent bribery by persons who undertake activities on their behalf, which will be construed broadly and could cover agents, employees, subsidiaries, intermediaries, joint venture partners and suppliers, all of whom could render the organisation guilty of this offence. This is a strict liability offence, which means that there is no need to prove negligence or the involvement and guilt of the 'directing mind and will' of the organisation. This will make the offence easier to prove and will probably lead to more corporate prosecutions and convictions. The offence however is subject to an 'adequate procedures' defence which effectively allows companies to demonstrate that they had sensible procedures (policies, training, monitoring, reporting etc) in place to prevent acts of bribery from taking place.

**Penalties**
The Act will raise the imprisonment term for an individual found guilty of a bribery offence from 7 years to 10 years and/or an unlimited fine. A company convicted of failing to prevent bribery could receive an unlimited fine. A director convicted of bribery may also be disqualified from acting as a director for up to 15 years.

An organisation convicted of offences under the Act could also face permanent exclusion from all government and EU contracts.

In light of the raft of new offences which the Act will introduce, and the stiff penalties likely to be meted out to offenders, commercial organisations, particularly those doing business with national or government bodies in the UK or overseas would be well advised to consider an audit of their policies and procedures in order to avoid these pitfalls. This audit should be carried out at an early stage to ensure that organisations have adequate policies and procedures in place before the Act comes into force.

*Andrew Digwood*

## In this issue

Pensions

# The Government's use of CPI in occupational pension schemes

The Government's recent announcement that it intends to use the consumer prices index (CPI) as the measure of inflation rather than the retail prices index (RPI) for determining statutory minimum increases for pensions in payment and for revaluing deferred benefits in occupational pension schemes may have mixed consequences for employers and their pension schemes.

Historically, the CPI has produced a lower rate of inflation (by between 0.5% and 0.75%) than RPI. This may mean (subject to the considerations discussed below) that pension scheme liabilities will decrease in the future, which might ease worries for employers in funding their scheme. Conversely, this may be bad news for employees, who would see their benefits decrease.

This announcement has raised concerns in terms of schemes implementing the change. Where a scheme's rules refer, in its provisions relating to increases to pensions in payment and deferred pensions, to increases to be made in accordance with relevant legislation, then no changes would be needed to those rules to implement the new statutory minimum based on CPI, and increases would then automatically be related to CPI.

However, many schemes have rules which include specific references to RPI. In the absence of a rule amendment, therefore, these schemes would have to continue to provide increases and revaluation by reference to RPI. (For most schemes, increases are capped at the lesser of 5% and RPI (or since April 2005, the lesser of 2.5% and RPI)).

It should also be noted that the index is only used to establish statutory minimum increases; schemes can (and will continue to be able to) provide for increases at a greater rate (e.g. 5%). If a scheme's rules already provide for a greater increase, that increase will continue to apply.

For schemes with specific references to RPI in their rules, this means that, if in the future CPI were to be greater than RPI, then those schemes would then have to use CPI instead of RPI (as CPI would be the statuory minimum).

Two main problems arise for schemes that would need to amend their rules to take advantage of the change to CPI.

Firstly, the increase is applied to benefits already accrued. Pensions legislation (and scheme rules) have long protected members against attempts to reduce accrued benefits, and this cannot be done without member consent.

Secondly, scheme trustees may not wish to (potentially) reduce members' benefits in this way, and so may not agree to an amendment of the scheme rules.

The government has indicated that it will introduce legislation "at the earliest opportunity" in relation to the change to CPI, and has said it is considering legislation that might make it easier for schemes to amend their rules to include CPI. One way that this could be done is to add this change to an existing legislative provision that provides for certain specified amendments to be made without contravening the legislation protecting members' benefits. However, it has said it needs to consider such changes carefully; there may, for instance, be human rights implications of such a course of action.

In the meantime, the Pensions Regulator has published a statement on CPI to assist trustees and employers whilst awaiting further action by the government. This has recommended that the scheme rules and member communications be reviewed to check the existing provisions relating to indexation and revaluation with a view to discussing what changes may be needed, depending on the government action.

Until that time the Regulator has indicated that recovery plans and funding objectives be based on the current position; should the change to CPI result in lower estimated scheme liabilities, the Regulator would expect shorter recovery plans for making up any scheme deficit to be implemented.

Employers and trustees should be reviewing their scheme rules in advance of any legislative changes to be prepared when this is finalised, and Rollits can help by reviewing and checking scheme rules and documentation.

*Craig Engleman*

Commercial

# Collecting personal information online – new rules

The Internet has evolved to assume a significant role in the lives of most of us. There is very little that cannot be done online: you can share your holiday photographs, sign up for car insurance and purchase your groceries all at the click of a button.

A by-product of this revolution is that we are sharing an increasing amount of personal data on the Internet, and as a result of this the Information Commissioner's Office (ICO) has decided to publish a new code of practice explaining how organisations providing online services can ensure that they comply with the Data Protection Act (DPA) when gathering and using personal data provided over the Internet.

Activities covered by the code include collecting details through online forms, using cookies or IP addresses to target content at particular individuals and using personal data for marketing or delivering services.

The code is not concerned with information that does not identify individuals, such as anonymised or purely statistical information, because such information falls outside the remit of the DPA. Neither is it concerned with activities that display the same content to all users, such as untargeted advertising, at least up until the point that information is collected.

All organisations which have a website should be aware of the code and make themselves familiar with its content to assist in their compliance with the DPA. Practical tips include only collecting information when it is absolutely necessary, adding clear explanations on websites explaining what information will be collected and for what reason, and ensuring that internal procedures such as IT security and employee awareness are up to speed.

*James Peel*

Commercial

# Internet adverts to be subject to new scrutiny

Online advertisements are to be made subject to greater regulation following the announcement that the Advertising Standards Authority (ASA) is to be given the power to oversee Internet advertising.

Previously, online advertisements have been outside the remit of the ASA, although the rise of the Internet and abundance of online marketing strategies meant that the ASA felt that the situation had to change; in 2009 the ASA received over 1700 complaints regarding adverts that it did not have authority to deal with.

However, from March 2011 online marketing will be subject to similar rules as those applying to print media. The rules will apply to any statement on a website that is intended to sell products or services, as well as online marketing and advertisements. This also means that the ASA will be able to veto marketing statements falling foul of the rules on social networking websites such as Twitter and Facebook, which many organisations now use. The ASA will also have jurisdiction over direct requests for donations from fund-raisers.


Those found to have flouted the new rules are subject to a range of new sanctions, which include the ASA being able to post its own adverts explaining an advertiser's non-compliance, and also the removal of paid-for search advertising.

*James Peel*

Corporate

# Companies Act 2006 – corporate directors

One of the new requirements introduced by the Companies Act 2006 was that a company must have at least one director who is a natural person (i.e. an individual); previously all directors could be companies. This new requirement came into force on 1 October 2008, although a transitional arrangement was introduced where companies which had no natural persons on their board on 8 November 2006 (the date when the Act received Royal Assent) were given a two-year period of grace to comply with this requirement. So, companies which are still taking advantage of this transitional arrangement need to ensure that from 1 October 2010, they have at least one director who is a natural person.

*Tom Farrington*

Tax & Corporate

# Shares, CGT and The Budget

**Most individuals holding shares were pleasantly surprised by the changes to the rules on CGT and shares announced in the June 2010 Budget.**

The rate of CGT for individuals paying at least 40% income tax increased from 18% to 28% for disposals after midnight on 22 June 2010. Many feared a bigger hike.

Entrepreneur's relief (ER) is preserved. ER-qualifying gains are taxed at 10%. The conditions to qualify for ER remain the same, including that:

- the shares must have been held at least 12 months before they are sold; and
- the individual must have held shares which comprise at least 5% of the ordinary share capital and 5% of the voting rights in the company.

There was an out-of-the-blue extension of ER from the first £2m to £5m of lifetime gains. That could mean an extra saving of up to £540,000 for a higher rate tax payer making a chargeable gain of at least £5m.

Holders of approved options (CSOPs or EMIs) were disappointed that they will still not qualify for ER unless they have exercised their option 12 months before the sale of their shares. CSOP and EMI schemes remain attractive thanks to the significant differential between the rates of tax on income and gains and the possibility of avoiding NICs.

Employer's and employee's NICs are to each increase by 1% with effect from 6 April 2011, making equity-based reward arrangements even more attractive.

Those struggling to qualify for ER need not despair. Valuable companies can reorganise their share capital in order to freeze value which would allow executives to take 5% of the ordinary share capital. Alternatively, nil paid share arrangements can get shares into the hands of key executives at least 12 months before a sale of the company. Rollits has recent experience of each of those tactics.

*Nasim Sharf*

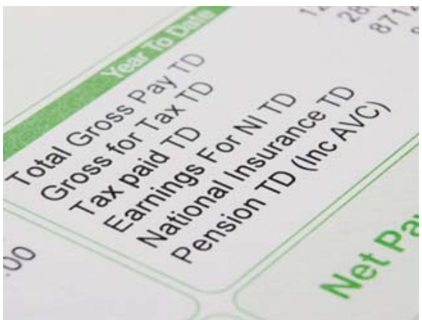

Employment

# New National Minimum Wage rates

**National Minimum Wage rates will rise from 1 October 2010. Under the new rates, the adult minimum wage rate will now apply to 21 year olds (the previous qualifying age was 22).**

The rates will increase as follows:

- £5.93 an hour for workers aged 21 and over
- £4.92 an hour for workers aged 18 to 20
- £3.64 an hour for those older than school-leaving age and younger than 18 (someone is under school-leaving age until the end of the summer term of the school year in which they turn 16).




For the first time, a minimum wage for apprentices has been fixed at £2.50 an hour. This new rate will apply to all apprentices under 19 or those aged 19 and over but in the first year of their apprenticeship.

*Lottie Pigg*

## Information

If you have any queries on any articles in this newsletter or other corporate or commercial matters please contact: Keith Benton or Tom Farrington on (01482) 323239

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form. Action should not be taken without obtaining specific advice. We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull HU1 1YJ.

The law is stated as at 13 September 2010.

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