Conyers Dill & Pearman

Bermuda Introduces Bribery Act Legislation
百慕大推行反贿赂法例

The *Bribery Act, 2016* has come into force on 1 September 2017 (the "Bribery Act"). It provides a complete overhaul of Bermuda's anti-bribery laws.

《2016年反贿赂法》（下称“反贿赂法”或“法案”）已于2017年9月1日生效，此乃百慕大反贿赂法例的一次全面修订。

Why should you be concerned?

- The Bribery Act creates a new corporate criminal offence – failing to prevent bribery by an associated person – which applies even to non-Bermuda companies and partnerships that carry on business (or part of a business) in Bermuda.
- There is only one defence to the new corporate offence: the commercial enterprise must prove that it had "adequate procedures" in place, designed to prevent persons associated with it from undertaking acts of bribery.
- The Bribery Act criminalises private-sector bribery and creates a new offence of bribing a foreign public official.
- The Bribery Act goes beyond the US's *Foreign Corrupt Practices Act* ("FCPA") in a number of ways, so even companies with robust FCPA compliance programmes need to check that those programmes would be viewed as adequate for the purposes of the Bribery Act.

您为何应该关注？

- 反贿赂法增设了一项新的法人刑事罪行 –关联人士未能防止贿赂行为罪 – 该罪行甚至适用于在百慕大从事业务（或部分业务）的非百慕大公司及合伙。
- 该新的法人罪行仅有一种抗辩理由：商业企业须证明其已制订“足够程序”来防止其关联人士从事行贿行为。
- 反贿赂法将私营领域的贿赂行为刑事化，并增设贿赂外国公职人员罪。
- 反贿赂法在多个方面超出美国《海外反腐败法》（下称“FCPA”）的范围，因此即使拥有全面的FCPA合规方案的公司亦需核查该等方案就反贿赂法而言是否视为足够。

The Bribery Act in a Nutshell

The Bribery Act is based on the UK's *Bribery Act, 2010*. It abolishes Bermuda's existing anti-corruption laws and replaces them with:

- an offence of bribing (offering, promising or giving a financial or other advantage);
- an offence of being bribed (requesting, agreeing to receive or accepting a financial or other advantage);

反贿赂法概述

反贿赂法乃基于英国《2010年贿赂法》制订。该法废除了百慕大现有的反贪污法例，并代之以：

- 行贿罪（提议、许诺或给予财务或其他利益）；
- 受贿罪（索要、同意收取或接受财务或其他利益）；

- an offence of bribery of foreign public officials and
- a corporate offence of failing to prevent bribery.

The first three offences apply to both individuals and corporations. Regarding the offence of bribing and the offence of bribery of foreign public officials, it does not matter whether the advantage is offered, promised or given directly or through a third party. The Bribery Act applies to private sector bribery, as well as public sector bribery and contains no exemption for facilitation payments or for corporate promotional expenditure.

The fourth offence (failure by a corporate to prevent bribery) is a strict liability offence with only one possible defence.

The Corporate Offence

Under the new Act, a commercial organisation will be guilty of a criminal offence, if it fails to prevent a person associated with the organisation from bribing another person, with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation (the "Corporate Offence").

The Ministry of Legal Affairs in June 2017 published guidance on anti-bribery compliance procedures. The new guidance, 'Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (Section 11 of the *Bribery Act, 2016*)' (the "Guidance"), is intended to inform companies about their duties under the Act.

The Corporate Offence will apply to corporate bodies and partnerships incorporated and formed in Bermuda. As expressed in the Guidance, the Government's view is that charitable, educational and public sector entities will all come within the scope of the offence, if they engage in commercial activities.

The Corporate Offence also applies to corporate bodies and partnerships incorporated or formed outside Bermuda if they carry on business, or part of a business, in Bermuda, even where the underlying conduct takes place outside Bermuda. It is unclear whether a non-Bermuda company that has its equity or debt securities listed on a Bermuda exchange is thereby at risk of being prosecuted under the Bribery Act. The Guidance states that having a Bermuda subsidiary will not, in itself, mean that a parent company is carrying on a business in Bermuda, since a subsidiary may act independently of its parent or other group companies. Whether or not a company is carrying on business in Bermuda will ultimately depend

- 贿赂外国公职人员罪；以及
- 未能防止贿赂行为的法人罪行。

前三项罪行适用于个人及法团。对于行贿罪和贿赂外国公职人员罪，是否直接或透过第三方提议、许诺或给予利益并没有关系。反贿赂法适用于私营领域以及公共领域的贿赂行为，通融费或公司推广支出不会获得豁免。

第四项罪行（法人未能防止贿赂行为）为严格法律责任罪行，仅有一种可能的抗辩理由。

法人罪行

根据新法案，若某商业机构的关联人士为了获取或保留该机构的业务或为了获取或保留该机构在商业活动中的优势而向他人行贿，而该机构未能防止此行贿行为，则该机构触犯刑事罪行（下称“法人罪行”）。

法律事务部于2017年6月发布了有关反贿赂合规程序的指引。新指引作为“相关商业机构可施行用以防止其关联人士行贿的程序指引（《2016年反贿赂法》第11条）”（下称“指引”），旨在使公司了解其在法案下的责任。

法人罪行适用于在百慕大注册成立及组成的法人团体及合伙。如指引所述，政府认为慈善、教育及公营实体如从事商业活动，则属于该罪行的适用范围之内。

若在百慕大境外注册成立或组成的法人团体及合伙在百慕大境内从事业务或部分业务，法人罪行亦适用，即使相关行为在百慕大境外发生的情况也适用。目前尚不清楚股本或债务证券于百慕大证券交易所上市的非百慕大公司会否因此面临根据反贿赂法被起诉的风险。指引规定，由于附属公司能独立于其母公司或其他集团公司行事，因此拥有一间百慕大附属公司本身并不代表母公司在百慕大从事业务。公司是否在百慕大从事业务将最终视乎确切的实际情况而定。

upon the precise factual circumstances.

For the purposes of the Corporate Offence, a person is associated with a commercial organisation if they perform services for, or on behalf of, the organisation. Obvious examples of an associated person are employees, agents and subsidiaries that perform services for their parent company. The Guidance confirms that contractors, sub-contractors, suppliers, joint venture partners or a joint venture entity could all potentially be associated persons, but clarifies that where a joint venture entity pays a bribe, the members of the joint venture will not be liable, "simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture".

就法人罪行而言，为了或代表某商业机构而履行服务的人士是该机构的关联人士。关联人士的明显例子是雇员、代理人和为其母公司履行服务的附属公司。指引确认承包商、分包商、供应商、合资企业合伙人或合资企业实体均可能是关联人士，但又阐明若合资企业实体行贿，合资企业的股东不会“仅因其透过投资或拥有合资企业而间接从贿赂中受益”而须承担责任。

However, the definition has been deliberately drafted widely, and could include parties with whom there was no formal relationship, for example the lead partner in a consortium.

然而，其定义被特意赋予较宽的范围，可涵盖不存在正式关系的当事方，例如银团的牵头合伙人。

The Corporate Offence does not require the associated person to be connected to Bermuda, nor does it require an act to have taken place in Bermuda.

法人罪行无需关联人士与百慕大有联系，亦不要求贿赂行为在百慕大发生。

A bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage of a parent company or other subsidiaries – even if the parent company or subsidiaries may benefit indirectly from the bribe: "liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent".

若无法证明一间附属公司的雇员或代理人意图获取或保留母公司或其他附属公司的业务或业务优势，则雇员或代理人代表该附属公司行贿不会自动波及其母公司或母公司的任何其他附属公司 – 即使母公司或附属公司间接从贿赂中受益：“不会因单纯拥有公司股份或投资或因附属公司向其母公司支付股息或提供贷款而产生责任”。

The need to Implement "adequate procedures" to Prevent Bribery

需实施“足够程序”防止贿赂

The Corporate Offence is essentially a strict liability offence. There is only one defence: the organisation will have to prove that it had "adequate procedures" in place designed to prevent persons who are associated with it from bribing.

法人罪行本质上是一项严格法律责任罪行，仅存在一种抗辩理由：机构须证明其已实施“足够程序”以防止与其相关联的人士行贿。

Thus, unless it has "adequate procedures" in place, a non-Bermuda company, which does business in Bermuda could be prosecuted in Bermuda in relation to bribery carried out wholly outside Bermuda by a person unconnected to Bermuda.

因此，除非已实施“足够程序”，一间在百慕大从事业务的非百慕大公司可能因为与百慕大无关的人士在百慕大境外行贿而被起诉。

The Guidance intends to inform companies' efforts in this regard. The Guidance will be essential reading for anyone tasked with implementing anti-bribery procedures. Although "departure from the suggested procedures ... will not of itself give rise to a

指引旨在为公司在此方面的努力提供依据，且将是任何负责实施反贿赂程序的人士的必读资料。尽管“背离建议的程序…本身不会推导出机构不具备足够程序的结论”，公诉人及法院不可避免地会将公司程序与指引中概述的原则进行比较。

presumption that an organisation does not have adequate procedures", prosecutors and courts will inevitably look at how corporate procedures stack up in relation to the principles outlined in the Guidance.

The Guidance sets out six principles, summarized as follows:

Principle 1: Proportionate Procedures

The Guidance advises that the organisation's anti-bribery policies and procedures should be clear, practical, accessible and enforceable. We suggest that accessibility should be readily achievable through the organisation's internal and external websites.

They should "take account of the roles of the whole work force from the owners or board of directors to all employees, and all people and entities over which the commercial organisation has control". The Guidance proposes that financial and auditing controls, disciplinary procedures, performance appraisals and selection criteria can act "as an effective bribery deterrent", and recommends procedures to deal with incidents of bribery "in a prompt, consistent and appropriate manner".

Principle 2: Top Level Commitment

Reflecting the mantra that "it is tone at the top that counts", the Guidance proposes that the management of an organisation should issue a statement of commitment to counter bribery in all parts of the organisation's operation. An organisation should also consider reflecting the commitment against bribery in the organisation's management structure, for example, through the appointment of an anti-bribery officer.

Principle 3: Risk Assessment

An assessment of an organisation's exposure to bribery risk is the starting point for introducing anti-bribery policies and procedures that are tailored to be proportionate to the risks the organisation faces. The Guidance implicitly accepts that adequate procedures will be risk-based. However, a risk-based approach requires a careful choice of risk assessment procedures in order to identify internal risks and external risk factors such as country, transaction and business partnership risks.

Principle 4: Due Diligence

Although the Bribery Act defence of adequate procedures only requires organisations to have procedures to prevent active bribery by the organisation and those who perform services for, or on its behalf, the Guidance goes further in suggesting that due diligence policies and procedures should cover all

指引列出六项原则，概述如下：

原则一：适度的程序

指引提出机构的反贿赂政策及程序应清晰、实用、可及和可执行。我们建议可及性可透过机构的内部及外部网站容易达到。

彼等应“考虑从所有者或董事会到所有雇员的整体人员以及商业机构控制的所有人士及实体的角色”。指引建议，财务及审计管控、纪律处分程序、绩效评估和甄选标准可对“贿赂起到有效遏制的作用”，并提出“以迅速、一致和适当的方式”处理贿赂事件的程序建议。

原则二：最高层承诺

因应“最高层基调起着决定性作用”的观点，指引提出，一个机构的管理层应发表承诺声明，承诺在机构营运的各个方面抵制贿赂。机构亦应考虑在机构的管理架构中（例如透过委任反贿赂负责人）实现反贿赂的承诺。

原则三：风险评估

评估一个机构所面临的贿赂风险是实施根据所面临风险按比例定制的反贿赂政策和程序的第一步。指引含蓄地接受足够的程序是基于风险的。然而，基于风险的方法需要审慎地选择风险评估程序，从而识别内部风险和外部风险因素，例如国家、交易及商业合伙风险。

原则四：尽职调查

尽管反贿赂法规定的足够程序仅要求机构实施程序防止该机构和为了或代表该机构履行服务的人士主动行贿，指引进一步建议尽职调查政策和程序应涵盖商业关系的所有当事方，包括机构的供应链、代理人和中介机构，所有形式的合资企业和类似关系以及该机构从事业务的

parties to a business relationship, including the organisation's supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the organisation does business. The Guidance lists examples of enquiries that might form part of this due diligence, including enquiries:

- About the risk of bribery in the country of operation and the types of bribery most commonly encountered;
- About the risks that a particular business opportunity raises (e.g. whether the project is to be undertaken at market prices, or has a defined legitimate objective and specification) and
- Into the reputation, past behaviour and anti-corruption policies of prospective business partners, and the risks where a public office holder is linked to such partners.

所有市场。指引列出可能组成此尽职调查一部分的查询举例，包括：

- 关于营运地国家的贿赂风险和最常见的贿赂类型的查询；
- 关于具体商业机会产生的风险（例如：项目会否按市价进行，或是否具有确定的合法目标及规范）的查询；以及
- 调查潜在商业伙伴的声誉、过往行为和反腐败政策，以及公职人员与该等合伙人有关联的情况下的风险。

Principle 5: Communication (including training)

Embedding anti-bribery policies and procedures throughout the organisation ensures, the Guidance says, that the development of policies and procedures "reflects the practical business issues that an organisation's management and workforce face when seeking to conduct business without bribery". An implementation strategy should cover:

- Who is to be responsible for implementation;
- How the policies and procedures will be communicated internally and externally;
- Training;
- Reporting to top management;
- External assurance processes, if any;
- Monitoring compliance;
- Timescale;
- A clear statement of the penalties for breaches of the policies and procedures and
- The date of the next review.

The Guidance suggests that larger organisations may need to tailor training for different functions within the organisation, and should consider offering or requiring the participation of business partners in anti-bribery training courses. It recommends organisations communicate their anti-bribery policies externally.

原则五：沟通（包括培训）

指引表示，将反贿赂政策及程序根植于机构的各个部分，可确保政策及程序的发展“反映机构的管理层和职工在寻求零贿赂情况下开展业务时所面临的实际商业问题”。实施策略应涵盖以下方面：

- 谁负责实施；
- 如何在内部及外部沟通政策及程序；
- 培训；
- 向最高管理层报告；
- 外部保证程序（如有）；
- 监管合规情况；
- 时限；
- 违反政策及程序之处罚的明确说明；以及
- 下次复查的日期。

指引提出较大型机构可能需要为机构内的不同职能定制专门的培训，且应考虑提出或要求商业伙伴参与反贿赂培训课程。指引建议机构向外部沟通其反贿赂政策。

Principle 6: Monitoring and Review

The Guidance suggests larger organisations ensure

原则六：监控及审阅

指引建议较大型机构应确保彼等设有财务监控、贿赂报

they have financial monitoring, bribery reporting and incident management procedures, and that they may wish to disclose findings and recommendations for improvement in the organisation's Annual Report to shareholders. Organisations should ensure that their risk assessments and anti-bribery policies and procedures are updated to take into account events such as "government changes, corruption convictions, or negative press reports", as well as "external methods of issue identification and reporting, as a result of the statutory requirements applying to their supporting institutions, e.g. money laundering regulations reporting by accountants and solicitors". Higher risk and larger organisations may "wish to consider whether to commission external verification or assurance of the effectiveness of anti-bribery policies".

告及事件管理程序，以及彼等可以在机构的年报中向股东披露结果和改进建议。机构应确保其风险评估和反贿赂政策及程序已根据“政府换届、贪污案定罪或负面的媒体报道”等事件以及“因适用于其辅助机构的法定要求而产生的问题发现及报告的外部方式，如会计师及律师进行反洗钱规例申报”而进行更新。较高的风险和较大型的机构可能“希望考虑是否委托外部机构对反贿赂政策的有效性进行验证或保证”。

The Foreign Public Official Offence

Under the Bribery Act, it will also be easier to bring prosecutions for bribing a foreign public official. Likewise, commercial organisations will be at particular risk of the offence of failing to prevent bribery involving foreign public officials. The new foreign public official offence will be triggered even in circumstances where the conduct would not currently be characterised as improper or criminal. It will only be necessary to show: (i) that the company or a person offered or gave a financial or other advantage at the request or with the consent of a foreign public official intending to influence him in his capacity as such, (ii) that the company or person intended to obtain or retain business or an advantage in the conduct of business and (iii) that the official is neither permitted nor required by written law to be so influenced. Companies that are subject to the Bribery Act will be extremely cautious in their dealings not only with government officials, but also with those who assist in obtaining government business and approvals. Even where the advantage requested by a government official in negotiations does not appear to benefit any official or their families, it is expected that local law opinions will be commonly sought in order to establish that there are written laws permitting the official to be influenced. In this regard, the fact that such advantages are customary in business dealings in the country concerned, will not protect against the risk of a charge of bribing a foreign public official.

外国公职人员罪

根据反贿赂法，贿赂外国公职人员更容易被起诉。同样地，商业机构特别容易因未能防止涉及外国公职人员的贿赂行为而被定罪。相关行为即使目前尚未定性为不适宜或犯罪，仍可能触及此项新的外国公职人员罪行。仅需证明：(i)公司或人士应外国公职人员的要求或经外国公职人员同意下提出或给予财务或其他好处，意图影响该等人士作为外国公职人员所行使的职权，(ii)公司或人士有意获取或保留业务或业务优势，以及(iii) 成文法并不准许或要求该公职人员被如此影响。须遵守反贿赂法的公司不仅应极其小心与政府官员间的交易，亦应谨慎处理与协助取得政府业务及批准的人士间的交易。即使在政府官员在谈判时要求的利益表面并不有益于任何官员或其家族的情况下，预计通常会寻求当地法律意见来证明有成文法准许该官员被影响。就此而言，即使该等利益在相关国家的商业交易中是惯用手法，也不会使其免于被控贿赂外国公职人员的风险。

Facilitation Payments

Payments made to foreign public officials with the aim of expediting or securing the performance of a routine governmental action (often known as facilitation payments) will clearly be criminal offences under the Bribery Act.

通融费

向外国公职人员支付款项意图加快或促成一项例行政府行为的执行（通常称为通融费）在反贿赂法下无疑是刑事罪行。

The Guidance describes facilitation payments as "small bribes" and says that "exemptions in this context create artificial distinctions that are difficult to enforce ...". Nevertheless, the Guidance recognises "the problems that commercial organisations face in some parts of the world and in certain sectors". Prosecution is more likely where there are large or repeated payments, where facilitation payments are "planned for or accepted as part of a standard way of conducting business" and where "a commercial organisation has a clear and appropriate policy setting out procedures an individual should, if facilitation payments are requested and these have not been correctly followed".

指引将通融费描述为“小额贿赂”，并表示“在这种情况下的豁免造成了难以执行的人为区别对待…”。然而，指引承认“商业机构在世界某些地区和某些行业面临的问题”。在下列情况下，被诉的可能性较高：通融费数额较高或较频繁，通融费“被计划或接受为开展业务的标准方式的一部分”以及“商业机构有明确且适当的政策规定个人在被要求支付通融费的情况下应遵循的程序，但其并没有正确遵循”。

A Case Study (not officially part of the Guidance) sets out a number of steps a business should consider in dealing with hidden or overt facilitation payments. These include: building in extra time in project planning to cover potential delays as a result of non-payment; questioning the legitimacy of the payments; raising the matter with superior officials and/or seeking assistance through diplomatic channels.

一项案例分析（并不正式构成指引的一部分）列出企业在处理隐秘或明显的通融费情况时应考虑的多个步骤，包括：在项目规划时增加额外时间以缓冲因不支付通融费而可能造成的延误；质询通融费的合法性；向上级官员提出此事宜及/或透过外交途径寻求协助。

Conclusion

结论

The Bribery Act modernises Bermuda’s anti-corruption laws and brings them in line with the UK’s model.

反贿赂法更新了百慕大的反贪污法例，使其与英国的法制体系一致。

The Bribery Act creates a range of new offences, which apply not only to Bermuda companies and Bermuda residents, but to non-Bermuda companies carrying on business, or part of a business, in Bermuda.

反贿赂法订立了一系列新的罪行，该等罪行不仅适用于百慕大公司及百慕大居民，亦适用于在百慕大从事业务或部分业务的非百慕大公司。

The Corporate Offence creates a compelling reason for all companies doing business in Bermuda to take precautions to guard against acts of bribery being committed on their behalf, and to ensure that their anti-corruption compliance programmes meet the highest standards and reflect the Guidance. Many Bermuda companies operate in low risk industries (insurance/reinsurance and asset management) and low risk jurisdictions (for example USA, Western Europe). Risk assessments for these companies may conclude that few changes are necessary. However many exempt companies, such as holding companies with operations or subsidiaries in high risk industries (mining for example) and high risk jurisdictions, may find compliance more challenging. Group structures may need to be reviewed with an eye to reducing the risk that foreign subsidiaries (in high risk locations) could be viewed as agents of the parent.

法人罪行让所有在百慕大从事业务的公司有令人信服的理由采取措施预防其他人士代表他们从事贿赂行为，以及确保其反贪污合规程序符合最高标准并反映指引。很多百慕大公司在低风险的行业（保险/再保险和资产管理）和低风险司法管辖区（如美国、西欧）经营业务。该等公司的风险评估可能得出只需作出少许改变的结论。然而，众多豁免公司（如在高风险行业（如矿业）和高风险司法管辖区内经营业务或设有附属公司的控股公司）可能在合规方面面临更多挑战。集团架构可能需要进行检视，着眼于降低（位于高风险地区的）外国附属公司被视为母公司的代理人的风险。

Companies which have designed and put in place FCPA compliance programmes will still need to consider whether those programmes are sufficient for

已设计并实施FCPA合规程序的公司仍需考虑该等程序就反贿赂法而言是否足够，尤其是彼等是否充分应对私营领域贪污的风险、阻止支付通融费和对公司的推广支

the purposes of the Bribery Act, in particular, whether they adequately address the risk of private sector corruption, prohibit the making of facilitation payments and impose adequate controls on corporate promotional expenditure.

出实施充分管控。

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅!

FOR FURTHER INFORMATION, PLEASE CONTACT:

Conyers Dill & Pearman
29th Floor
One Exchange Square
8 Connaught Place
Central
Hong Kong
Tel: +852 2524 7106
Fax: +852 2845 9268
Email: hongkong@conyersdill.com
Web: www.conyersdill.com

欲了解更多资讯，请联络：

康德明律师事务所
香港中环康乐广场 8 号
交易广场 1 期 29 楼
电话: +852 2524 7106
传真: +852 2845 9268
电邮: hongkong@conyersdill.com
网址: www.conyersdill.com

ABOUT CONYERS DILL & PEARMAN

Conyers Dill & Pearman is a leading international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. Conyers has over 130 lawyers in eight offices worldwide and is affiliated with the Conyers Client Services group of companies which provide corporate administration, secretarial, trust and management services.

关于康德明律师事务所

康德明律师事务所是一间具有领导地位的国际律师事务所，就百慕大、英属维尔京群岛、开曼群岛和毛里求斯之法律提供意见。康德明拥有分布于世界各地八间办事处内的逾130位律师，并与康德明客户服务公司集团有联属关系，而康德明客户服务公司集团提供公司管理、秘书、信托和管理服务。