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## Highlights

- Bribery offences now apply to both public, private entities and individuals.
- Entities not incorporated in Kenya are caught under the Act if they do business in Kenya.
- All public and private entities will be required to have anti-bribery procedures in place.
- A Kenyan entity or individual that commits an act of bribery abroad is caught under the Act.
- Where the senior officer (e.g. director) in an entity is found to have consented to the bribe being given they commit an offence.
- Facilitation / grease payments are now captured.

### Background

On 13th January 2017 the Bribery Act (the "Act") came into force. The Act closely mirrors on the UK Bribery Act 2010. The following changes are important to note:

#### Private Entities Are Captured Under the Act

A private entity is broadly defined to include any person or organisation (e.g. charity or partnership);

or a body incorporated under the laws of Kenya and carrying on business within or outside Kenya; or any entity which carries on business or part of its business in Kenya.

#### Extra-territorial Application of the Act

If a Kenyan individual, a private entity, or public entity engages in conduct outside of Kenya that would be an offence under the Act then the conduct will still constitute as an offence under the Act.

#### What Constitutes a Bribe?

**Giving** - a person commits the offence of giving a bribe if "the person offers, promises or gives a financial or other advantage to another person, who knows or believes the acceptance of the financial or other advantage would itself constitute the improper performance of a relevant function or activity" (emphasis ours).

**Receiving** - a person commits an offence of receiving a bribe if they request, agree to receive or receive an advantage intending that a relevant function or activity will be performed improperly.

The Act has a wider definition of what constitutes an 'advantage' for the offence of bribery. For example an advantage can either be money, a fee, employment, a contract or interest in property to name a few. In addition it includes "any facilitation payment made to expedite or secure performance by another person." It is also irrelevant if the advantage is given or received directly or through a third party.

**Reporting** Every state officer, public officer or other person in a position of authority in a public or private entity is required to report to the Ethics and Anti Corruption Commission (the "Commission"), within a period of twenty four (24) hours, any knowledge or suspicion of instances of bribery.

#### Anti-Bribery Policies

All public and private entities are required to have procedures for the prevention of bribery and corruption. The Cabinet Secretary, in consultation with the Commission, is required to publish guidelines to assist private entities in preparing these procedures.

#### Private Entities and Applicable Penalties

If a private entity (or a person associated with it) bribes another person to obtain or retain business for the private entity or an advantage in the conduct of business by the private entity the consequences of such action on conviction include:

##### For the entity

The private entity is liable to a fine not exceeding KES 5 million. In addition the entity will be disqualified from transacting with the government for a period of 10 years following the conviction.

##### For the senior officer of the entity

If it can be demonstrated that the bribe was given with the consent or connivance of a senior officer of the entity, the senior officer on conviction is liable to imprisonment for a term not exceeding 10 years or a fine not exceeding KES 5 million or both. They will also be disqualified from holding similar office for a period of 10 years (e.g. a director would be barred from being a director) or public office. This fine also applies if you fail to report any knowledge or suspicion of bribery within the 24 hours to the Commission

##### For any other individual involved

An individual will face a similar penalty as that of a senior officer (described above). The individual may also be liable to an additional mandatory fine if, as a result of the conduct constituting the offence, he received a quantifiable benefit or any other person suffered a quantifiable loss. This mandatory fine shall be equal to five times the amount of benefit or loss.



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