

The Bribery Act is here and the radical new corporate offence will go live in April 2011.

How prepared are you?

The Act

The Bribery Act has at last arrived having survived the final "wash up" stage of Parliamentary business ahead of the General Election. Here are some of the highlights:

The Offences

The new Bribery Act offences include:

- 1 Offering, promising or giving of a bribe;
- 2 Requesting, agreeing to receive, or accepting a bribe, either in the UK or abroad, in both the public and private sectors;
- 3 Bribery of a foreign public official in order to obtain or retain business; and
- 4 Corporate liability in relation to "commercial organisations" which fail to prevent a bribe being paid by those who perform services for or on behalf of the organisation (capturing 3rd parties).

A "Senior Officer" may also face personal criminal liability if found to have consented to, or connived with, any of the first three offences.

Businesses are now exposed to potential criminal liability where bribes are paid by

overseas agents and subsidiaries, even if the relevant conduct has no connection with the UK and might be part of business as usual in that country.

The Penalties

If found guilty the penalties for companies, Senior Officers, employees, or associated parties, are severe: with up to 10 years imprisonment for individuals and unlimited fines for companies.

Implementation

The first three of these offences come into force in the summer and it will likely be Autumn before the new corporate offence of failing to prevent bribery applies.

Adequate Procedures

The delay is to allow the Government time to formulate its guidance on the so-called "adequate procedures", which will constitute a defence to this charge (under Section 7 of the new Act).

In delaying the introduction of the corporate offence, the Government is providing a window of opportunity for organisations to respond to the new Bribery Act.

We view the potential impact of the new Act on organisations to be significant and it is clear from the Serious Fraud Office's (SFO) standpoint that the expectation is that it will be a regular Board agenda item.

The Right Response

We recommend that organisations do not await the Government's view of what constitutes "Adequate Procedures". The guidance is likely to be principles based not prescriptive or formulaic and the challenge will be for each organisation to determine and develop its own procedures for preventing bribery, more crucially, based on an assessment of its own corruption risk.

Organisations should begin the review and revision of their existing policies and procedures for preventing fraud and anti-

competition risk and adapt and align these to address corruption risk. It is likely that existing training programmes for management and staff will need to be enhanced to provide the opportunity for staff to ask questions.

How can Grant Thornton help you?

Guidance on Adequate Procedures

There is no confirmed date for the publication of the Government's view of "Adequate Procedures". It is unlikely though to differ greatly from existing approaches relied upon to protect the organisation, in such related aspects as preventing fraud, money laundering or similar risks through the creation of a robust control and compliance environment, underpinned by effective training so as to embed an ethical culture across the organisation. The SFO has already issued guidance on Adequate Procedures and other Non Government organisations such as the Organisation for Economic Co-operation and Development (OECD) are doing the same.

The hot spots

As demonstrated by the House of Lords Committee Stage debate on the Bribery Bill there remain divergent views on certain issues and organisations will need to consider these carefully. These include:

- Hospitality/gifts to foreign public officials, and facilitation payments - both are prohibited under the new Act;
- The anomalous relationship to the US Foreign Corrupt Practices Act 1977 (FCPA) - as well as the facilitation payment issue (legal under the FCPA) the reach of the Bribery Act, notably covering B2B corruption, goes far beyond existing US legislation (considered to be the current bastion of anti-corruption enforcement) - existing FCPA programmes will need updating;
- An additional hot spot is M&A activity - there are risks associated with the take on of "successor liability" for any corrupt activity which may have previously occurred in the acquired entity - due diligence is therefore critical.

These are just some of the complex issues associated with the new Act and how it sits alongside existing overseas legislation, which cannot be overlooked.

Organisations inevitably will be faced with difficult choices. For example, while it is easy to prohibit facilitation payments, the reality on the ground presents a totally different challenge. How will you react? A realistic test to determine if you are prepared for the new Bribery Act will be if you can answer the following points:

Are you really prepared?

- Have you performed an enterprise wide Corruption Risk Assessment (CRA)?
- You have a bribery strategy but are policies and procedures bespoke or aligned to the CRA?
- Do your policies and procedures fully address facilitation payments, gifts, entertainment, corporate hospitality, or political donations on a global basis?
- Do you have an over-reliance on agents or other intermediaries, particularly overseas, to assist in winning business?
- Do you rely on tiered due diligence for the appointment of agents, and/or during M&A activities to address "successor liability"?
- Do you have an escalating review process for payments to agents?
- Is there an anti-corruption training programme for the Board, all managers and staff?
- How do you assess how effective your training programme is?
- Is staff training conducted face-to-face to allow them to ask questions?
- Do you have a mechanism such as an independent whistle-blowing or helpline for staff to report their concerns or seek advice?
- Are reports of corruption investigated and appropriate sanctions employed?
- Do you have an effective compliance monitoring programme which provides the requisite assurance?

Poor systems and controls in a business allow bribery to occur and red flags to go unnoticed. If you cannot answer these points with confidence, we can work with you to undertake a Corruption Risk Assessment which will drive out the actions you need to take.

What is our experience?

At Grant Thornton we have a wealth of experience of helping companies mitigate corruption and fraud risk through effective internal control regimes, (especially financial controls), performing proactive reviews and advising companies on anti-corruption programmes.

This is combined with in depth experience of undertaking corruption investigations on an international basis including FCPA cases.

In addition, we are at the forefront of the debate on this topic and our working relationships with prosecution and regulatory agencies are extensive.

As part of our broader thought leadership on this subject, we are also working alongside the World Bank Institute to help companies find a different way to do business and mitigate corruption risk*.

We at Grant Thornton are confident that we can work with you to identify the risks to your organisation posed by corruption and recommend appropriate action to mitigate those risks.

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