The Bribery Act 2010
An Overview

“Advisers need to talk to their clients about the forthcoming Bribery Act and the procedures they need to have in place to comply. A really strong anticorruption culture is important and training for all staff is a critical part of this.”

Richard Alderman
Director of the Serious Fraud Office

The Bribery Act received Royal Assent on 8 April 2010 and will come into force in April 2011 but will not have retrospective effect. The Act makes sweeping changes to UK bribery and anti-corruption legislation and will have a huge impact on UK companies in all sectors and companies operating a branch or subsidiary in the UK.

The existing legal framework relating to corruption is complex, antiquated and fragmented, which is why new legislation in the form of the Bribery Act has been introduced. It will make the UK anti-bribery regime one of the strictest in the world and is far wider than the US Foreign Corrupt Practices Act 1977. By way of example only, facilitation payments are prohibited under the Bribery Act whereas under US legislation they are permitted in certain circumstances.

Key areas

The key areas for UK companies to be aware of are:

- The offences of bribing another person (section 1) or being bribed (section 2);
- The corporate offence of “failing to prevent” bribery (section 7) and the defence of “adequate procedures”;
- Bribery of a Foreign Public Official (“FPO”) (section 6);
- The illegality of facilitation payments;
- The extra territorial scope of the Bribery Act;
- The potential criminal liability of senior officers and managers; and
- The potential for debarment from public procurement contracts if convicted of an offence under the Bribery Act.

A summary of the key offences

The Bribery Act will introduce four new criminal offences, including a strict liability corporate offence of “failing to prevent bribery”.

Active bribery

This is the giving, promising or offering of a bribe, which can include hospitality or gifts, with intent to induce improper conduct by the recipient of the bribe.

This definition is intentionally broad and applies not only to cash inducements, but also to gifts, hospitality and other “advantages”. and other “advantages”.

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Passive bribery

This is the requesting, accepting or agreeing to receive a payment or other advantage in return for the improper performance of a function or activity. The offence is committed even if the person requesting the bribe does not benefit personally.

Failure to prevent bribery

This corporate offence is one of strict liability, meaning that if a company fails to prevent an “Associated Person” (such as an employee, agent or intermediary) from paying a bribe for its benefit, the offence is committed. It is irrelevant that the company was unaware of the bribe being paid. Controversially however this offence does not include any notion of improper conduct. It simply requires a payment or other advantage for the winning or retention of business. Thus, paying for overseas officials to attend premises in the UK for a site visit or facility inspection would, on a strict interpretation, amount to an offence. This places a very high burden on companies to comply with the Bribery Act and ensure that they have adequate procedures (for which see below) in place to prevent and discover acts of bribery and corruption.

The Bribery Act allows for a defence in circumstances where the company can show it had “adequate procedures” in place to minimise the risk of bribery. The onus will be on the company to prove, on the balance of probabilities, that it had “adequate procedures”. The Ministry of Justice is due to publish guidelines in early 2011, in relation to adequate procedures in order to assist companies in combating bribery.

Bribery of a Foreign Public Official

This offence covers “active” bribery of an FPO. The definition of FPO is very wide and includes anyone in a legislative, administrative or judicial position, whether elected or appointed, anyone who performs a public function and any official of a public international organisation.

As it only relates to active bribery, the person giving the bribe must intend to obtain or retain business or an advantage in the conduct of business. In addition, the intention must be to influence the FPO in his official capacity.

Facilitation or “grease” payments

These are usually small payments made to officials to ensure they perform or expedite their routine duties. By way of example, a $100 payment is made to an overseas official to have goods released from the docks. Facilitation payments are illegal under the Bribery Act. In certain jurisdictions such facilitation payments are commonly requested and some legislation (including in the US) include a specific exemption or defence for small facilitation payments in certain circumstances. The Bribery Act does not include any such an exemption.

During the consultation process surrounding the Bribery Act the SFO said it will exercise “prosecutional discretion” in relation to such facilitation payments.

Extra territorial scope

In relation to the corporate offence of failure to prevent bribery this applies to all UK companies and all overseas companies which carry on a business, or part of a business, in any part of the UK. In relation to the other offences, it applies to bribes paid in the UK. It also applies to bribery and corruption outside the UK where the individual concerned has a close connection with the UK.

Senior officer liability

The Bribery Act includes a provision that allows for the prosecution of senior officers (which includes directors, managers, company secretaries or a person purporting to act in that capacity) if the corporate is being prosecuted. If a senior officer is deemed to have consented or connived in active or passive bribery or in bribery of a FPO, they are also guilty of a criminal offence. Senior officers therefore need to be aware that by ignoring or by turning a blind eye to suspected corruption, it might be alleged that they consented or connived in the activity. Senior officers who are prosecuted are subject to a prison sentence of up to 10 years and/or an unlimited fine. In addition, where a director is convicted of bribery, they may also be disqualified from holding a director position for up to 15 years.

It is of note that senior officers cannot be prosecuted for the corporate offence of failing to prevent bribery. They will not be held personally liable for a company’s failure to maintain adequate procedures to prevent bribery and corruption.
Consequences

A violation of anti-corruption laws may result in:

- Criminal penalties and possible unlimited fines for the company;
- Directors and employees of the company facing huge fines themselves and/or jail sentences of up to 10 years;
- Directors may be disqualified from holding a director position for up to 15 years;
- Disgorgement of the company’s profits;
- Loss of reputation, public trust and business for the company;
- Debarment from public procurement contracts (Article 45 of the EU Public Sector Procurement Directive 2004);
- Investigation costs; and
- Diversion of valuable management time.

What do you need to do?

The Serious Fraud Office is determined to enforce the new legislation aggressively, with additional resource now allocated to investigating and prosecuting corruption by UK businesses.

In order to meet the requisite standard of “adequate procedures”, which is not defined in the Bribery Act, UK companies need to have a fully integrated and effective anti-corruption compliance regime.

UK companies will need to consider the following:

- Appoint a senior person, who reports into the Board, and who will have responsibility for the company’s anti-corruption programme;
- A “risk based” audit of corruption risks faced by the company;
- Review its current relationships with agents, intermediaries and joint venture partners;
- Ensure adequate due diligence is undertaken on all new business relationships (including agents, intermediaries and joint venture partners) and that those relationships are properly monitored on an on-going basis;
- Develop an anti-corruption programme which will include an anti-corruption policy, procedures around gifts and entertainments, whistle-blowers, sponsorship and charitable donations. These policies and procedures need to be integrated and visible throughout the organisation;
- “Risk based” training of staff throughout the organisation on corruption risk and on the new policies and procedures; and
- Consult with employees/agents in worldwide sites and obtain advice on local laws and customs.

Corruption clampdown:

An Eversheds report on the Bribery Act 2010

- Businesses are unprepared for tough new bribery laws.
- One in five companies have no policy to address corrupt practices.
- One in four board directors are unaware that they could face a 10 year prison sentence.

According to research conducted by Eversheds earlier this year, many businesses are in the dark over the new Bribery Act, with 60% of businesses unaware that failing to prevent bribery will be a criminal offence.

To see Neill Blundell discussing the report, and to request a copy, please visit www.eversheds.com/briberybill
How Eversheds can help

Eversheds’ Fraud Group can work with you to ensure that you are ready for the Bribery Act. We have assisted many of our clients in responding to fraud and corruption issues in recent years, so we know from experience where the problems can lie.

With a large team of experienced criminal and regulatory lawyers, we are ideally placed to support you in your review of your processes and systems. We have already provided many clients with Bribery Act related advice, usually for an agreed fixed fee. In particular we can:

• develop or review your policies relating to anti-corruption, gifts and hospitality, whistleblowing, and procurement
• work with you to undertake a thorough risk assessment of your anti-bribery and corruption risks
• advise on corruption-related due diligence issues for M&A activity and/or joint ventures
• develop and deliver structured training programmes for your board/senior management/staff (including bespoke online training solutions): and
• support your team on fraud and corruption related internal investigations.

We would be delighted to meet you in person to discuss the implications for your business.

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