

Update on the Bribery and Corruption Act

Further to the recent Article prepared by Beale and Co which was published in the May/June ACE Impact Magazine, it has been announced that the offences created by the Bribery Act 2010, including the new corporate offence will come into force in April 2011.

The Offences

By way of reminder, amongst a number of provisions the Bribery Act 2010 creates (or clarifies with respect to existing legislation) four offences:

- 1 – Making a bribe
- 2 - Receiving a bribe (new offence)
- 3 - Bribing a foreign official
- 4 - The liability of companies (and their Directors) for the acts (or inactions) of their employees, agents and third parties (new offence)

The Penalties

The penalties associated with the offences are as follows:

Individuals – Unlimited fine and up to 10 years imprisonment

Companies – Unlimited fine and up to 10 years imprisonment for Directors and automatic debarment from public works contracts.

The Update

The Ministry of Justice has confirmed that in September 2010 a “short consultation” exercise will commence allowing interested parties to comment on the Governments proposals concerning guidance on “adequate procedures” which form a potential defence under the Act. The statutory guidance will then be published in early 2011 to allow businesses a familiarisation period before the Act commences.

ACE will be looking to engage in the consultation exercise and will seek to represent Members views or concerns prior to the Statutory Guidance coming into force. If you have any particular issues that you would like ACE to consider as part of this process then please contact us.

This new announcement does not of itself provide any further clarity as to the content of the guidance and it still remains to be seen whether the Government’s proposals will go beyond broad principles.

Companies are still best advised, in any event, to start introducing and/or reviewing their systems/policies, procedures and training programmes to seek to

maintain compliance with sound ethical business practices. There will ultimately be no fail-safe checklist, however total transparency in a system of clear recording may assist in mitigating the likelihood of the SFO pursuing an organisation for a breach the Act, subject of course to the particular circumstances of the offence.

Suggested Bribery Act Compliance Health check

Identify Risks:

A good starting point for creating effective internal controls and compliance programmes with regard to this and other issues is to undertake a specific risk assessment as to the likelihood of corruption arising , taking on board the individual circumstances of the company and the measures necessary for preventing and detecting foreign bribery. This is likely to include risks linked to the nature or location of the organisations activities.

The standards expected of a small private company will differ from those of a large multi-national, but each organisation needs to apply the most stringent applicable standards.

Establishing codes of compliance and adequate training:

In order to mitigate the risks identified by the risk assessment the next step is to establish a code of compliance for the organisation which ultimately prohibits bribery and corruption.

The Code must be clear, visible (e.g.; via a company website, if there is one) and communicated to all staff both at induction and updated on a regular basis. It needs to be a physical working policy.

Ownership:

A senior officer within the organisation should be designated to oversee compliance matters, however, compliance with the prohibition and the related internal controls, ethics and compliance programmes or measures is the duty of individuals at all levels of the company and this must be understood.

Larger organisations should ensure that the item is considered regularly at established risk committees for constant scrutiny and review and picked up by legal compliance reporting for active interrogation, as per the other risks, regularly reviewed by organisations in accordance with good corporate governance.

Smaller entities will need to establish suitable review mechanisms to ensure that this issue is kept constantly on the agenda.

Documented Items:

Depending on the size of the organisation potential Ethics and Compliance documentation should cover and/or include:

- A documented Bribery Act Compliance Policy
- Board level statements supporting the policy
- A code of business ethics
- A Gifts and Hospitality Guidance and/or Register

Items for review:

The types of issues that should be reviewed as part of the ethics and compliance programmes or measures to prevent and detect foreign bribery (applicable to all Directors and Officers of the company and all entities over which the company has effective control – including subsidiaries) are as follows:

- i) gifts
- ii) hospitality, entertainment and expenses (Note: although this is often an accepted part of modern business the question is whether the gift or hospitality is lavish and as such can be used to secure advantages making it unacceptable)
- iii) travel
- iv) political contributions and lobbying
- v) charitable donations and sponsorships
- vi) facilitation payments
- vii) solicitation and extortion

This list is not exhaustive and would need to be tailored to cover the elements required by an individual organisation.

The Companies policies can be further embedded by the inclusion of express contractual obligations in relation to corruption in employment contracts, ensuring that appropriate disciplinary procedures are in place and acted upon as appropriate.

External controls:

As well as ensuring that internal controls are clearly established within the organisation then there is a need to review and consider the companies contracting/supply chain arrangements as follows:

- Ensure that there are standard clauses in commercial contracts prohibiting bribery and corruption and in arrangements with business partners
- Undertake due diligence over business relationships and projects
- Consider how best to cover joint ventures
- Consider how best to approach the use of agents and intermediaries which may be a particular concern with regard to compliance with the Act.

Response procedures:

Having established the framework for compliance it is vital that systems are put in place to deal with potential/actual allegations. These could include:

- A helpline/or alternative system of reporting concerns (whistle blowing)
- Proper investigation of all allegations
- Appropriate and consistent disciplinary procedures
- Review fraud and corruption response plans

The above suggested compliance health check is not exhaustive and may require additional steps once the formal guidelines have been published , however they may serve as a prompt to starting a process to ensure that responsible steps have been taken to prevent corrupt activities by an organisation. The key would seem to be the demonstration of physical and working compliance measures that seek in the first instance to prevent corrupt practices but that will also, if necessary, serve as live evidence that a company has taken adequate procedures in the prevention of bribery and corruption.