

BRIBERY ACT 2010

Focusing on the Bribery Act 2010, this article considers the likely key role accountants will play in reviewing organisational risks relating to bribery, and implementing adequate procedures and controls

The Bribery Act 2010 was passed in April 2010 and will be examinable from June 2012. The Act repeals old UK bribery laws and is aimed at dealing with the risk of bribery and corruption, which undermines corporate governance, the rule of law and damages economic development.

BRIBERY OFFENCES

There are four offences of bribery under the Act:

s.1 Offences of bribing another person

It is an offence to offer a financial or other advantage to another person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity.

s.2 Offences relating to being bribed

It is an offence where a person receives or accepts a financial or other advantage to perform a relevant function or activity improperly.

'Relevant function or activity' includes any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment, and any activity performed by – or on behalf of – a body of persons. The activity may be performed in a country outside the UK.

s.6 Bribery of foreign public officials

It is an offence directly, or through a third party, to offer a financial or other advantage to a foreign public official (FPO) to influence them in their capacity as a FPO, and to obtain relevant business, or an advantage in the conduct of business.

'FPO' means an individual who holds a legislative, administrative or judicial position of any kind outside the UK, or who exercises a public function outside the UK, or is an official or agent of a public international organisation.

s.7 Failure of commercial organisations to prevent bribery

It is an offence for a commercial organisation (a UK company or partnership) if a person associated with it bribes another person intending to obtain or retain business, or to obtain or retain an advantage in the conduct of the business for the organisation. This could take place outside the UK. S.8 defines associated persons as someone who performs services for – or on behalf of – the commercial organisation, and,

therefore, could be an employee, agent or subsidiary.

An organisation does, however, have a defence under s.7 if it can prove it had in place adequate procedures designed to prevent bribery. S.9 requires the Secretary of State to publish guidance about adequate procedures. The guidance, which was published in March 2011, states that what counts as adequate will depend on the bribery risks faced by an organisation, and the nature, size and complexity of the business. Further, if there is no risk of bribery, then an organisation will not require any procedures to prevent bribery. The guidance is not prescriptive and is based around six guiding principles.

THE SIX PRINCIPLES

1. Proportionate procedures

The procedures taken by an organisation should be proportionate to the risks it faces and the nature, scale and complexity of its activities. A small organisation would require different procedures to a large multinational organisation.

2. Top-level commitment

The top-level management should be committed to prevent bribery and foster a culture within the organisation in which bribery is unacceptable.

3. Risk assessment

Organisations should assess the nature and extent of its exposure to risks of bribery, including potential external and internal risks of bribery.

For example, some industries are considered higher risk than others, such as the extractive industries; some overseas markets may be higher risk where there is an absence of anti-bribery legislation.

4. Due diligence

The organisation should apply due diligence procedures in respect of persons who perform services for – or on behalf of – the organisation in order to mitigate bribery risks.

5. Communication

The organisation should ensure its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, proportionate to the risks it faces. Communication and training enhances awareness and helps to deter bribery.

6. Monitoring and review

The organisation should monitor and review procedures designed to prevent bribery and make improvements where necessary. The risks an organisation faces may change and, therefore, an organisation should evaluate the effectiveness of its

anti-bribery procedures and adapt where necessary.

The question of whether an organisation had adequate procedures in place to prevent bribery is a matter that will be determined by the courts by taking into account the circumstances of the case. The onus will, however, be on the organisation to prove it had adequate procedures in place.

It should be noted that genuine hospitality that is reasonable and proportionate is not prohibited by the Act.

PENALTIES

An individual found guilty is liable to imprisonment for a maximum of 10 years. (This has been increased from seven years.)

An organisation found guilty is liable to an unlimited fine. The obvious further damage to the organisation is reputational damage and the consequences of this, as well as potential civil claims against directors for the failure to maintain adequate procedures.

CONCLUSION

The Bribery Act 2010 aims to combat bribery and encourage free and fair competition. It replaces outdated and criticised laws on bribery. All of the offences have extra-territorial application. Of most significance is the introduction of a new offence against commercial organisations that fail to prevent a bribe being paid on their behalf, subject to the statutory defence.

Organisations will be responsible for putting adequate procedures in place to prevent bribery; the core principle behind these being proportionality. It is likely accountants will be key to the organisation reviewing risks relating to bribery and implementing adequate procedures and controls.

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