



Compliance Advisory
Bribery

Pannone Corporate
November 2010



Society is entitled to expect of the corporates these days that they have adequate anti-bribery processes and that those processes are carried out throughout the corporation. If there is a significant failure, then it is a board level failure.

Richard Alderman, Director
Serious Fraud Office (SFO).

THE BRIBERY ACT 2010 - KNOW YOUR ABC

Introduction

This guide is intended to provide a short summary of the Bribery Act 2010 (“the Act”) and specific areas on which corporate clients should focus their attention to ensure their anti-bribery and anti-corruption (ABC) systems and controls are updated to take account of the new legislation.

The most significant development in the legislation is a strict liability corporate offence of failing to prevent bribery. This offence will make it easier to prosecute companies since no intent is required. If companies are to avoid the risk of prosecution they must develop compliance procedures that are risk sensitive, taking into account their size, the industry they operate in and the particular corruption risks to which they may be exposed.

Although the government is committed to providing guidance on what may constitute “adequate procedures” for commercial organisations, most commentators agree that this is likely to be high-level and will not provide firms with a “safe harbour” from regulatory enforcement.

Pannone has brought together an ABC Compliance Advisory team to deal with the challenges that the Act will pose for our clients.

The team is led by Partner Zia Ullah who was formerly the Group head of sanctions and policy at Barclays, responsible for the ABC, AML and sanctions policies.

The new law

The Act was passed into law by Parliament on 8 April 2010 and its main provisions are due to come into force in April 2011. It reforms the criminal law as it relates to ABC to provide a modern and comprehensive scheme of bribery offences that seeks to enable the courts and prosecutors to respond more effectively to bribery in the UK and abroad.

Following detailed consultation by the Law Commission, which was tasked with examining the UK’s outdated bribery laws, recommendations were made as to the proposed overhaul of the existing legislation. The consultation followed sharp criticism from non-governmental organisations such as Transparency International of the UK’s seriousness in combating corruption.

The Act contains three potential offences:

- A general offence of offering or receiving bribes;
- A specific offence of bribing a foreign public official; and
- An offence of commercial organisations failing to prevent bribery.

Corporate entities which are not registered in the UK but which do business here can also be charged with the offence of failing to prevent bribery.

General offences

The general bribery offences cover:

- Active bribery (offering or paying); and
- Passive bribery (soliciting or receiving).

They are applicable to individuals and corporates, and include bribery conducted through a third party intermediary. To be an offence the bribe must be associated with an intent to “improperly perform” or an inducement to “improperly perform” certain “functions and activities”.

It does not matter whether the recipient of the bribe is the same as the person who is to perform, or has performed, the relevant function. These offences may be committed irrespective of whether the acts or omissions which form part of the offence take place in the UK or elsewhere.

Bribery of foreign public officials

The Act creates a specific offence of directly or indirectly offering, promising or giving a bribe to a foreign public official. To commit this offence a person must intend the bribe to influence the actions of the foreign public official.

The offence covers only active bribery (offering or paying). However, like the general bribery offences, it is applicable to both individuals and corporate bodies. To be an offence the bribe must be intended to obtain or retain a business advantage by influencing the recipient of the bribe in their function(s) as a public official.

A financial or other advantage will constitute a bribe if it is not legitimately due to the foreign public official. The judgment of what is legitimately due is based on the local written law (which would include statutes, regulations and case law, but exclude local custom or tolerance).

Corporate offence

The Act contains a new offence of a commercial organisation failing to prevent bribery. Under this offence, a commercial organisation (“C”) is guilty of an offence if an “associated person” (“A”) bribes another person intending to obtain or retain business, or an advantage in the conduct of business, for C.

The Act defines A an “associated person” as a “person who performs services for or on behalf of C”. The capacity in which A performs services for or on behalf of C does not matter, and so A may be C’s employee, agent or subsidiary.

Employees are presumed to perform services unless the contrary is shown. Further, whether or not A is a person who performs services for or on behalf of C is to be determined “by reference to all the relevant circumstances” and not merely by the relationship between A and C. “Associated persons” could therefore include others over whom the organisation has no direct control. Corporate clients could therefore be convicted in circumstances where they did not know that a third party agent had bribed others.

Adequate procedures

It will be a defence to the corporate offence if commercial organisations can show that they have “adequate procedures” in place designed to prevent bribery.

“Adequate procedures” are not defined in the Act but reference is made to the government publishing guidance on what constitutes adequate procedures. These guidelines will be indicative rather than prescriptive. The government wishes to consult on the guidelines prior to the Act coming into force, which has led to the delay in implementation of the Act.

It aims to have the guidance ready by January 2011 to enable UK businesses to prepare for implementation.

The government has stated that the guidance will stress the need for companies to:

- Take responsibility for anti-corruption programmes at board level and appoint a senior officer accountable for their oversight;
- Assess the risks that are specific to the company and its business, including risks linked to the nature or location of its activities;
- Establish clear policies and procedures, and train new and existing staff in anti-bribery procedures;
- Implement internal financial controls and record keeping to minimize the risk of bribery; and
- Establish whistle-blowing procedures so that employees can report corruption safely and confidentially.

Overseas reach

The Act has broad scope and extraterritorial reach, which means that:

- Any individual ordinarily resident in the UK (whether or not a British national) can be prosecuted for bribery offences committed anywhere in the world; and
- Any partnership or corporate (whether or not incorporated in the UK) can be prosecuted if it does business in the UK (e.g. through a subsidiary or other business operation), even if the offence was committed outside the UK.

Penalties

Corporate bodies found to have committed any bribery offence could face unlimited fines. In addition, they may be debarred from tendering for government contracts, under Article 45 of the EU Public Sector Procurement Directive 2004.

Individuals could face a maximum 10 year prison sentence and/or an unlimited fine. This includes senior officers (which includes a director, manager, secretary or similar officer) of companies held liable through their consent to or connivance with a bribery offence committed by their company. Company directors also face the prospect of director disqualification proceedings.

It should also be noted that the commission of bribery offences may also lead to companies and their shareholders incurring separate money laundering liability, with the consequent statutory obligations that arise under the Proceeds of Crime Act 2002 (POCA). Examples of such conduct includes handling the proceeds of bribery, increasing company profits, paying/receiving dividends or increasing the value of shares as a result of bribery.

Under POCA, individuals are protected from committing money laundering offences if they report the conduct in question to the authorities. This may, however, lead to other action being taken as a result of the underlying criminal conduct. Careful consideration of issues such as confidentiality and privilege are required when faced with these matters and legal advice should always be sought to ensure businesses and their employees are fully protected.

KEY ABC RISK STRATEGIES

To counter the risks of committing offences under the Act businesses need to adopt comprehensive policies and procedures to prevent and detect bribery in their organisations. These policies and procedures need to be part of the company's overall compliance framework.

Any measures should be developed as part of a detailed risk assessment taking into account the particular circumstances of the company in question including factors such as geographical risk, industry areas and third party engagement. These themes will form part of the UK government's adequate procedures guidance, as discussed above.

What is essential, however, is that senior management take responsibility for the ABC agenda within their firms and ensure that there are mechanisms in place to allow for reporting to appropriate supervisory oversight committees within organisations, such as internal audit committees, to escalate any bribery related issues. These mechanisms form part of any rigorous assurance processes and should compliment other review mechanisms such as annual risk assessment or ongoing monitoring. SME's may not need such extensive oversight but should still ensure that some form of assurance controls exist in order to address any later inquiry into the extent of any anti-bribery programme.

As a minimum, policies and procedures should, in addition to dealing with specific acts of bribery, deal with the company's policies with respect to:

- Third party intermediaries and other business partners
 - companies should ensure that adequate due diligence checks are carried out on third parties that the organisation plans to employ. Any contracts with these third parties should require them to comply with anti-bribery legislation. They should also ensure that all books and records are maintained and are available for inspection.
- Gifts, hospitality and entertaining
 - ensuring that gifts and entertainment are proportionate and reasonable and that there exists a route of escalation and minimum standards.
- Facilitation payments
 - recognising that facilitation payments are bribes and unlawful under the Act. Understanding the extent to which employees may be exposed to such payments.
- Political and lobbying activities
 - provide clear guidance for employees that making political contributions as a means of winning business is strictly prohibited and ensuring that all political contributions are publicly disclosed.
- Sponsorships and charitable donations
 - disclose all charitable contributions and maintain a clear policy on sponsorships.
- Conflicts of interest
 - clearly set out the company's position with respect to potential conflicts of interest and provide guidance for employees.

- Bank accounts, cash and petty cash
 - establish and maintain effective systems of internal controls over accounting and record keeping practices and ensure that off-book transactions are not maintained. Subject those controls to internal and external review.
- Staff training on ABC
 - all employees including senior management should be provided with ABC training and consideration should be given to include third party contractors and suppliers where appropriate.
- Whistle blowing
 - employees should be able to raise concerns with respect to ABC violations and the company should provide secure and accessible channels through which those concerns may be raised confidentially.

Self reporting

Businesses have been encouraged to become more open with the prosecuting authorities and to report any activity that highlights the commission of bribery or corruption offences. The SFO has, as the lead authority for the prosecution of bribery offences, been vocal in attempting to persuade companies to approach them with a view to settling matters on a voluntary basis.

This approach, on the face of it, has many advantages, including the potential for civil rather than criminal penalties being imposed, thereby avoiding the procurement issues referred to above. However, the courts have expressed their discontent with the SFO approach, particularly with respect to negotiated settlements and the degree to which they are able to provide certainty to businesses going forward remains to be seen.

“There can be no doubt that corruption of foreign government officials or foreign government ministers is at the top end of serious corporate offending...”

Lord Justice Thomas, R v Innospec Limited

OUR VIEW

Companies should already be in the process of assessing the bribery and corruption risks to their businesses given the imminent implementation of the Act. ABC should be a standing item on the board agenda and senior management should be tasked with ensuring that the ABC message is delivered across the organisation.

Both the SFO and FSA have publicly stated that ABC is a strategic priority in their enforcement programme and several high profile cases (AON, Innospec, BAE, Mabey and Johnson) have shown that the consequences for directors and shareholders can be dire and the wider damage to brand and reputation immeasurable; the day after the SFO announced that it was seeking to prosecute BAE for corruption offences its share price fell by over £530million and one of the former directors of Mabey and Johnson is currently before the courts as a consequence of the corruption case brought against the company.

Those firms that are yet to begin their risk assessments and who do not yet have adequate ABC policies and procedures will be at a significant disadvantage and face potential regulatory censure should any weaknesses come to light.

Ultimately, the development of a strong ABC culture will take time to embed within an organisation and senior management need to exhibit their commitment to the ABC message by ensuring that their employees are aware of the firm's zero-tolerance approach to bribery and shown that "ethical business" can become a competitive advantage and not simply a means to ensure compliance with the law.

"...a company's anti-bribery programme is more likely to be regarded as constituting 'adequate procedures' if it is based on good practice rather than an approach that solely uses compliance with laws to determine the structure of the programme."

Transparency International

HOW CAN PANNONE HELP?

Our team's expertise and experience in dealing with these matters allow us to provide advice and assistance on any ABC related issue including:

- Reviewing ABC policies and procedures or drafting new policies to ensure evolving ABC risks are identified and providing a uniform approach across organisations.
- Providing advice and support throughout any investigation brought about as a result of alleged non-compliance with ABC legal obligations.
- Considering factors such as industry, customer type, product and jurisdictions to identify the areas of highest ABC risk within your business and detailing mitigation strategies.
- Reviewing implementation of ABC policies and procedures and conducting benchmarking exercises on control effectiveness.
- Considering the operational effectiveness of end-to-end ABC compliance processes and providing advice on industry best practice and regulatory expectation.
- Designing and delivering tailored ABC training to ensure risk sensitive awareness of issues/ best practice across your business.
- Providing advice on contentious ABC proceedings, legislation, advising on reporting obligations, drafting self-disclosure reports, liaising or negotiating with regulatory authorities.

Pannone's Regulatory team is headed by Anthony Barnfather who is nationally recognised in both the Chambers UK Guide and the Legal 500 as a leader in the field of corporate defence proceedings and white collar crime. His extensive experience includes cases investigated / prosecuted by the Financial Services Authority, the SFO, H.M Revenue and Customs, the Department for Business, Innovation and Skills, and the Office of Fair Trading.



We also believe that many firms are not currently in a position to demonstrate adequate procedures to prevent bribery - a defence to the Bribery Act 2010's new criminal offence of 'failing to prevent bribery'.

Financial Services Authority

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KEY CONTACTS



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