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Bribery Act 2010: implications for accountants

The countdown to the implementation of the Bribery Act 2010 has now begun. The publication on the 30th March 2010 of guidance on adequate procedures served as a firm reminder to the commercial sector that firms now have just under three months to get to grips with the legislation and implement these procedures, or face investigation and even prosecution at the hands of the Serious Fraud Office ('SFO').

The Act creates four new offences:

- 1) bribing another person;
- 2) accepting or receiving a bribe from another person;
- 3) bribing a foreign official; and
- 4) failure by a commercial organisation to prevent bribery.

Offences one to three can be committed by an individual or a business, if the acts constituting the offence can be attributed to a senior member or employee in the organisation. This will be of particular concern in identified cases of bribery where senior employees or directors are found to have had knowledge of the alleged incident, whether or not they explicitly authorised or approved it. A lateral as well as top down approach will be taken, so if it can be established that, for example, a company's Financial Director or Accounts Manager had knowledge of acts within the organisation which constituted an offence under the act, not only could they find themselves personally liable, but if they are sufficiently senior within the organisation the Courts could also impose liability on the company as a whole.

The fourth offence is a corporate only offence, and it is this which is causing concern for firms and businesses all over the world, because the drafting of the Act means that any company carrying on business or part of a business in the UK can be prosecuted.

This has caused understandable consternation world wide. In an attempt to assuage doubts, Kenneth Clarke in his guidance makes assurances that a common sense approach will be taken, and that only organisations with a demonstrable business presence in the UK will be affected. However, ultimately he concedes, it is a matter for the Courts to decide whether or not an organisation 'carries on a business in the UK'. It therefore remains to be seen how widely the Courts are willing to construe this jurisdiction. The issue should further be considered in light of comments made by the Director of the SFO, Richard Alderman, who has confirmed that he aims to adopt a broad interpretation of jurisdiction under the Act. He has also confirmed that he is not afraid to pursue prosecutions against organisations even when there is little more than a UK stock market flotation tying the company to the UK. Consequently, UK firms with international roots and ties will need to ensure that they have a firm grip on operations overseas, as it would seem that remoteness will not keep the SFO at bay. Until further guidance has been handed down by the Courts, firms would be well advised to adopt a very broad interpretation of these provisions.

Another key area of concern for firms and businesses is the extent to which corporate hospitality and promotional expenditure might constitute an offence under the Act. The MOJ guidance draws a distinction between reasonable and proportionate corporate hospitality, and hospitality or promotional spending deliberately employed as a bribe. There is therefore a grey area between reasonable hospitality expenditure and lavish, disproportionate expenditure which could constitute an offence. Firms will have to ask themselves when considering corporate hospitality whether proposed spending is commensurate with the reasonable norms for their industry. If the answer is 'no', there should be cause for concern. Furthermore, simply asserting that the expenditure incurred was within the norms for your particular industry will not necessarily exculpate you if there is evidence of a specific intention to bribe. Firms will need to ensure that they continually monitor accepted practice and regularly review what is commercially proportionate when considering hospitality and promotional expenditure.

Firms which can prove that they have taken such precautionary measures should be afforded the protection of section 7 (2) of the Act if they find themselves facing prosecution for failure to prevent bribery. The Act provides a defence if organisations can prove that they had in place at the time the bribery was committed, adequate

procedures to prevent such acts. The MOJ guidance sets out six principles to guide firms when devising such procedures, with a particular focus on risk assessment and proportionality. Companies should adopt a risk based approach when considering what would constitute adequate procedures for preventing bribery within their sector. It is clear that the MOJ does not envisage smaller firms incurring crippling expenses drafting reams of internal policies and implementing complex procedures for preventing bribery, but an ability to demonstrate an awareness of the risks and steps taken to avoid them will be necessary. Needless to say, any company with links to the UK should by now be taking steps to ensure that they are properly protected, before this legislation bites.

The Act comes into force on the 1st July 2011.

If you would like to talk to us about the issues raised by this note, please contact:

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