

# Anti-Corruption and The Bribery Bill

## Grant Thornton looks ahead to 2010

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### The changing landscape

This update sets out recent developments in the bribery and corruption arena and looks at what's in store for companies in 2010, as well as insights gained from leading figures in the sector at a recent Grant Thornton seminar.

The past decade has witnessed something of a revolution in anti-corruption enforcement in the United States, culminating in the seminal Siemens' case. By contrast, the UK has stuttered over introducing revised corruption legislation, which coupled with the contentious decision to drop the BAE Saudi Arabia case, has resulted in fierce criticism from the OECD and other NGOs, including Transparency International. That said, in the past year, the UK has upped its game in the corruption arena, resulting not only in the first ever conviction for overseas bribery and other related cases lead by the Serious Fraud Office (SFO), but also the Aon Ltd final notice issued by the FSA. The decade closes with the inclusion of the new draft Bribery Bill in the Queen's Speech of November 18, reflecting an ever increasing focus on anti-corruption in the UK. It is expected that the Bill will be enacted before the General Election; however, there will be a relevant delay before it comes into force.

### The Bribery Bill

The proposed bill contains, among others, three principal offences:

- paying (or offering) a bribe
- accepting a bribe
- failing to prevent bribery

The bill has serious consequences for any UK company or third sector organisation found to be involved in bribery, whether it occurs in the UK or overseas. It also contains an important distinction to the equivalent legislation in the United States, the Foreign Corrupt Practices Act 1977 (FCPA), in that it will capture commercial bribery as well as bribery of public officials.

Of particular relevance is the proposed new corporate offence of failing to prevent bribery, where the burden of proof will be upon the entity to demonstrate that it had in place effective anti-bribery policies and controls, referred to as "adequate procedures". This may well prove challenging for some companies to address, particularly as the government, as yet, has not issued any official guidance as to what constitutes "adequate procedures", although the Ministry of Justice (MoJ) does plan to issue some form of guidance in the period before the Act comes into force. The SFO did provide some guidance in this regard in July 2009 in its Guide on self-reporting. Whilst many organisations might consider that they already have appropriate policies and procedures in place, a key test, which the SFO will apply when investigating cases, is to what extent the Board can demonstrate a top-level and visible commitment to establishing an anti-corruption culture that is serious about preventing corruption.

### Breakfast with the SFO

The Forensic team at Grant Thornton recently hosted a seminar featuring guest speakers Richard Alderman (Director) and Vivian Robinson QC (General Counsel) from the SFO, followed by a panel discussion involving Peter Burrell from Herbert Smith, John Garred (UK Regional Compliance Officer) Siemens plc, Homer Moyer from the Washington DC law firm Miller & Chevalier, and Bill Olsen from Grant Thornton US. The session was facilitated by Sterl Greenhalgh, head of the Grant Thornton UK Anti Corruption Group. We outline below some of the key points advanced by the SFO and key matters raised in the panel discussion.

### Scope of the Bribery Bill

The Bill will include extra-territorial jurisdiction to prosecute bribery, enabling the prosecution by a UK court of any individual for bribery offences committed anywhere in the world, so long as the individual is ordinarily resident in the UK. Similarly, an entity that has a permanent establishment, subsidiary or other operation in the UK will also be subject to the global reach of the Bribery Bill. Unlike its US equivalent, which only applies to bribing public officials, the proposed UK legislation will also apply to commercial bribery.

### Penalties extend to criminal convictions

The penalties for committing any of the proposed new Bribery offences is a maximum of 10 years imprisonment for individuals and an unlimited fine for companies.

### The first prosecution for overseas bribery

In a landmark case under the current legislation, the steel bridge manufacturer Mabe & Johnson Ltd became the first organisation to be prosecuted in the UK for corrupt practices in overseas contracts and also for breaching a United Nations embargo on trade with Iraq. The total financial penalty amounted to c.£6.6m. A key feature of this case was that Mabe & Johnson self-reported the matter to the SFO, with the internal inquiry being conducted by its own solicitors. This case is indicative of the severity of these offences and how they are going to be dealt with by the SFO going forward.

### Views from the SFO

On 21 July 2009, the SFO issued a Guide to corporates and other entities on self-reporting (the Guide). In his key-note address, Richard Alderman, referred to the Guide and emphasised his desire for corporates that discover that they may have been involved with bribery, whether domestically or overseas, to engage with the SFO at an early stage.

- **Engagement with the SFO** - It is clear that the approach taken by the SFO to subsequent investigations will be heavily influenced by the degree of co-operation from the entity under investigation.
- **Rulings Process** - Richard Alderman sought the views of the audience on the need for a 'rulings process' in relation to mergers and acquisitions activity and whether, suitably anonymised, these rulings might be published.
- **Flexibility** - Where possible, the SFO would do its best to avoid long, costly investigations. Richard Alderman referenced the SFO's Guide as an example of the new approach, highlighting the guidance contained therein for corporates wishing to demonstrate a strong anti-bribery culture. Notably, he said: "What we have also done in the Guide is to give guidance to corporates on what we would expect to find in a organisation with a very strong anti-corruption culture".
- **Professionalism** - Richard Alderman signalled his intention to build up an investigative team for the 'right' cases and to make use of other agencies' skills. One area he targeted for the future was the proactive use of intelligence and surveillance to identify instances where bribery may be occurring. This should be a sobering thought for Boards considering whether to self-report or keep quiet.

### Self-Reporting

Whether, or perhaps when, to self-report suspicions of bribery and corruption is a difficult question; however, it was seen to bring a number of clear advantages for the organisation including:

- Enables maximum input from the organisation and its Board in managing the process and the organisation's image because the SFO will work with the Board and its PR advisers on how this is done and what should be said.
- Allows potential input into whether the SFO will look for a civil settlement or to prosecute. The role of professional advisers who are used to the SFO's approach was emphasised as critical here.
- Avoids the risk of the SFO being contacted by a whistleblower and thereby starting an investigation. The failure to self-report in these circumstances would be regarded as a negative factor as stated in the Guide.
- If the organisation does not self-report the first time, then it becomes very difficult for the organisation when another instance of corruption is identified. Both the SFO and the DOJ in these circumstances will undoubtedly ask whether this is the first instance discovered. If informed that there were earlier instances of which the SFO were not informed, then a criminal outcome is more likely. The SFO might even look at whether the individuals involved in the decision not to self report have thereby incurred personal criminal liability.
- Members of the panel discussed self-reporting and how this can influence the way an investigation is actually carried out. This influence may make it possible through negotiation to agree changes on indictment and have a

say in penalties.

### The Board and its responsibilities

**"..If an organisation does not already have in place some form of existing anti-bribery programme, they should get one pretty quickly.." (Vivian Robinson QC)**

Vivian Robinson QC stressed the importance and weight of responsibility on a organisation's Board by stating "the subject of anti-corruption procedures should be a standing item on any board's agenda these days..".

A podcast of his and Richard Alderman's speeches can be viewed [here](#):

### Other important points raised by speakers and the audience in the subsequent panel session are:

- **The impact of a corruption enquiry is severe** - both from a financial and reputational perspective.
- **Monitors are becoming accepted practice in the UK** - the use of monitors is widespread in the US and is becoming accepted practice in the UK. The choice of monitor and their remit is critical to the success or otherwise of any remediation programme. The US is typically seeing the appointment of monitors for a period of 3 years; the influence over the organisation and its operations can be enormous and costs can often run into seven figures (USD).
- **Culture is key to success** - an entity's culture should be set from the top and embedding an anti-corruption culture has to be led from the top also; the Board's role is critical in this regard.
- **The US has far reaching powers that need to be understood** - UK companies need to understand that the DOJ and SEC have far reaching powers and occasionally find tenuous links to the US in order to prosecute non-US corporates. For example, Statoil (A Norwegian company listed and traded on New York Stock Exchange), was successfully prosecuted for making illegal payments to access the South Pars natural gas field in Iran. Fines were issued in both Norway and by the DOJ and SEC, resulting in total fines to date in excess of \$20 million.
- **Legal privilege** - The issue of legal privilege was raised and organisations were advised to begin preparing two reports when investigating potential bribery. One would be a purely factual report that can be readily shared with the SFO and the other would contain the legal advice on the case.
- **Internal controls** - Being able to sufficiently identify the nature of all payments to third parties and what goods or services they relate to will help to protect an organisation against a probe. If companies can't do this, the experience from the US suggests there will be an increased risk of a broader probe by the SEC or DOJ.

## Summary

In our view, the key issues for companies and other organisations to be aware of and act upon in 2010 are:

- Anti-corruption is clearly high on the UK political agenda.
- Following the Queen's speech, the Bribery Bill looks set to become enacted by spring 2010, although is not expected to come into force immediately.
- Companies should be preparing **now** for the Bill's enactment and not wait until the Government issues guidance on what constitutes "adequate procedures".
- The SFO is not the only law enforcement agency looking at corruption matters in the UK and companies should ensure they understand how the FCPA can impact them.
- The issue of bribery and corruption, as Vivien Robertson QC notes, has to appear on the Board agenda as the penalties for corporates getting it wrong are high.
- The culture of an organisation is not just about the Board; it requires leadership at every level within it.
- Boards should also ensure that the business units within their organisation understand the importance of the anti-bribery procedures and take steps to embed an ethical business culture.
- Anti-Bribery procedures must be appropriately implemented and actively monitored by managers to ensure they are operating effectively.
- Companies should in particular be closely monitoring activity in higher risk areas, such as M&A transactions and payments to third parties.
- An important issue to be aware of is facilitation payments. Whilst legal under the FCPA, they remain illegal under UK law.
- To help mitigate the risk of corruption, organisations should consider doing business in a different way, such as through Collective Action: further details can be found at <http://www.fightingcorruption.org>.
- Doing business in an ethical way is not only about bribery and corruption, but includes embedding consistent behaviours in the risk areas of fraud, competition and health and safety, and should form part of a business ethics culture for every organisation.

## What can we do to help?

Anti-corruption is a critical corporate governance issue for organisations in the UK. The latest developments cannot be ignored and the risk of not thinking carefully at the highest level of an organisation is paramount to ignoring the risk of huge financial penalties and criminal convictions. If these were not enough, a monitor may be imposed and perhaps, the harshest sanction of all, an entity may be debarred from tendering for lucrative projects under the EU's procurement exclusion regime.

At Grant Thornton, we apply our experience of working on large corruption investigations to advise companies on how to mitigate the global risks of bribery and corruption through policy and procedure reviews, anti-corruption awareness training and anti-corruption audits, as part of an overall risk management approach.

It is clear that organisations have a lot to think about as they enter the new decade but perhaps the biggest danger is they do not do so because they wrongly believe the issue of bribery and corruption does not involve them. To discuss this topic further, please contact our Anti-Corruption Group:

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