

FCPA/Antibribery Alert

UK Bribery Act Raises the Bar on FCPA Standards for Antibribery Compliance

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On July 20, 2010, the U.K. government announced that the new U.K. Bribery Act (the “Act”) will come into force in April 2011. In important respects, the new U.K. law will establish a stricter anticorruption regime than its older and better-known transatlantic cousin, the U.S. Foreign Corrupt Practices Act (FCPA). Like the FCPA, the Act provides a very broad basis for international enforcement by U.K. authorities. The U.K. law will apply on a strict liability basis to all businesses that are either incorporated or “carrying on business” in the U.K., regardless of the country in which corrupt conduct occurs. Consequently, companies with international interests that touch on the United Kingdom can no longer assume that the internal controls they have previously developed in reference to the FCPA are sufficient to conform with global antibribery compliance standards. Indeed, key differences between the FCPA and the new U.K. law, including the absence in the latter of the kinds of express limited exceptions and affirmative defenses specified under the U.S. law, present potential challenges that affected companies should carefully consider. As this suggests, the U.K. Bribery Act provides a basis for significant change in the landscape of international antibribery enforcement as it comes into effect and is enforced next year. In the interim, companies that engage in business in the U.K. have the opportunity to review their anticorruption policies and procedures and ensure that these measures conform with the evolving landscape of international enforcement that the new U.K. law will help to shape in years to come.

This alert provides an overview of the Act, highlights key differences relative to the FCPA and identifies key issues of potential concern to consider for companies with affected interests.

Overview of the Act

The Bribery Act replaces and consolidates the previous mix of U.K. antibribery statutes and common law, some of which dated back to the 19th century. The Act’s provisions generally follow the mandates of international conventions to which the U.K. is party, including the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The new law, which was enacted April 8, 2010, is now slated to become effective in April of 2011 and will be enforced by the U.K.’s Serious Fraud Office (SFO).

U.K. Justice Secretary Ken Clarke has been made the U.K.’s new international anticorruption champion, an appointment that “sends out a clear message that the UK coalition Government will not tolerate bribery or corruption and that we will work together to stamp out these practices across the board.”

UK Jurisdiction Under the New Law

The Act applies to (1) persons “ordinarily resident” in the U.K. and (2) “Relevant Commercial Organizations,” namely—

- U.K. partnerships
- U.K.-incorporated companies



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- entities that “carry on business or part of a business” in the U.K. regardless of where they are registered or incorporated. It is still unclear how aggressively this provision may be interpreted and applied by SFO officials and by the courts.

In addition, non-U.K. entities can be liable under the Act if an act or omission forming part of the relevant offense takes place in the U.K.

Offenses Under the Act

General Bribery Offenses – Giving and Receiving Bribes

The Act restates two existing general U.K. offenses, offenses of bribing another person and offenses relating to being bribed, which cover, respectively, the offering, promising or giving of a financial or other advantage and the requesting, agreeing to receive or accepting of a financial or other advantage. In simple terms, the Act prohibits giving and receiving a bribe, as well as offering or promising a bribe, or requesting or agreeing to receive a bribe.

Bribery of Foreign Public Officials

Section 6 of the Act contains a discrete offense of bribery or attempted bribery of a foreign public official in his or her official capacity in order to obtain or retain business or an advantage in the conduct of business. In substance, this restates the offense under the previous regime.

Importantly, where a corporate entity commits an offense under either the general bribery provisions or those specific to foreign public officials, any “senior officers” with a close connection to the U.K. are culpable for commission of the same offense if they consented to, or “connived” in, the conduct.

Corporate Offense for Failure of Commercial Organizations to Prevent Bribery

Section 7 of the Act creates a new bribery offense under U.K. law for failure to prevent bribery. The Act provides that a commercial organization will be guilty of an offense if an “associated person” bribes another person intending to (a) obtain or retain business for the organization or (b) obtain or retain an advantage in the conduct of business for the organization. An “associated person” means someone who performs services for, or on behalf of, the organization and includes employees, agents and subsidiaries. Consequently, if a U.S. or other non-U.K. company carries on business in the U.K. and separately has an agent in another country who pays a bribe, the company can be strictly liable for an offense under the U.K. Act.

The Bribery Act includes a potent mandate for companies to establish and maintain effective internal controls to prevent acts of bribery. The offense of failure to prevent bribery applies on a strict liability basis, and a company will be liable unless it can demonstrate that it had in place “adequate procedures” designed to prevent bribery. In order to prove that a company has adequate procedures, it has to show not only that it has adopted appropriate policies, but also that it has taken appropriate steps to apply and enforce them. The Act does not define what “adequate procedures” mean. However, the U.K. government has announced that, early in 2011, it will publish guidance about procedures that commercial organizations can put in place to prevent bribery on their behalf. U.K. officials have indicated that, starting in September 2010, they will provide for a brief period of public comment and consultation in relation to the development of this guidance. We understand that the guidance is expected to provide broad principles and illustrative best practices, rather than a checklist of requirements for companies to implement.

Importantly, these provisions leave significant room for interpretation of the range of parties that could qualify as “associated persons”. For example, in certain circumstances, could a parent company, affiliate or joint venture partner be caught? Ultimately, it falls to the U.K. courts to interpret the Act, but the approach taken by the SFO in enforcement will have considerable practical importance.

Penalties Under the Act Are Much More Severe than Under the Previous Regime

The Bribery Act provides for much more severe penalties than have previously been applied to bribery offenses in the U.K. under English law. These include—

- unlimited fines

- up to 10 years in prison per offense for responsible persons
- debarment from public contracts in the European Union.

Enforcement

Although many jurisdictions around the globe already have antibribery laws in force, what sets countries apart is, principally, their appetite for enforcement. Until recently, the United States has been widely perceived to be the only country that sought vigorously to enforce its laws in this area. However, that is changing.

The context of the enactment of the U.K. Bribery Act is a renewed political and regulatory determination in the U.K. to bear down on corruption. Prior to passage of the Act, there was already a greater degree of SFO enforcement activity and an increased willingness not only to investigate, but also to prosecute bribery and corruption offenses.

The SFO recently introduced self-reporting procedures and, in a number of cases, has sought to plea bargain. However, in the recent *Innospec* case, the English criminal court criticized that approach on the grounds that sentencing should be a matter for the court alone. This retreat from plea bargaining in the U.K. means that the mechanism by which companies can seek to mitigate their exposure in dealing with bribery allegations through cooperation will be different in the United States and in the U.K. That in itself may add to the complexity of resolving international bribery cases with a transatlantic dimension.

Key Differences from the FCPA

In a number of respects, the Bribery Act is broader than the FCPA. Consequently, it creates some new compliance challenges even for companies that have well-established internal controls and safeguards for FCPA compliance. Key differences between the U.K. and U.S. statutes include—

- **Strict liability for failure to prevent bribery** – The Bribery Act provides that a company is guilty of an offense if any person “associated” with it commits bribery for purposes of obtaining business or a business advantage for that company. This offense applies on a strict liability basis, with the only defense being proof that the company has in place “adequate procedures” to prevent bribery.
- **No public/private sector distinction** – The Bribery Act does not distinguish between public and private sector bribery as a basis for prosecution; commercial or business-to-business bribery is covered.
- **No “corrupt” element required for liability** – Unlike the FCPA, the Bribery Act does not require that payments to a foreign public official be made “corruptly” to establish liability. An intention to influence the official for the purpose of obtaining or retaining business or business advantage is sufficient to trigger liability.
- **Bribe recipient is liable** – The Bribery Act holds the bribe-taker, as well as the party making a bribe, liable for violations of the law, whereas the FCPA does not target actual or would-be recipients of a bribe.
- **No exception for “facilitation payments”** – The Act does not contain any express exception for facilitation payments, which are explicitly excluded from the antibribery provisions of the FCPA.
- **No express affirmative defense for reasonable and bona fide business expenses or lawful payments** – Under the Bribery Act, any financial or other advantage given or promised to another could amount to a bribe if a reasonable person in the U.K. would regard that action as improper or if it is an inducement or reward for something that a reasonable person in the U.K. would regard as improper. Modest corporate entertainment or gifts may fall on the right side of the line, and lavish ones may not, but it will not necessarily be straightforward to decide where the line should be drawn. This contrasts with the affirmative defenses that are permitted under the FCPA.

Practical Implications

In consideration of the new U.K. law, companies that have business interests in the U.K. should be mindful of their potential exposure to Bribery Act violations and take steps to review their established internal controls to ensure that they have adequate antibribery compliance policies and procedures in place, well-understood by company personnel and effectively implemented.

Companies that are subject to the FCPA and already have anticorruption compliance programs need to review and possibly revise established FCPA-based programs to take into account the broader application of the Bribery Act. Companies that do not already have such compliance programs face exposure to strict liability under the Act if they do not develop and implement such measures as the new law comes into force. The new corporate offense of failing to prevent bribery presents a heightened risk for companies with business interests in the United Kingdom because it is a strict liability offense, under which a company will be liable unless it can demonstrate that it had adequate procedures in place to prevent improper conduct if such conduct occurs and is subject to investigation and enforcement.

Companies with U.K. interests that are subject to enforcement action under the FCPA in the United States, or elsewhere under the anticorruption laws of other countries, face an increased prospect of dual prosecution in the U.K. Findings of antibribery law violations in other jurisdictions can provide a separate basis for independent prosecution and penalties under the Bribery Act. This risk has significant potential implications for the way in which companies facing potential violations for such offenses should consider and approach conduct of internal investigations, consideration of voluntary disclosures and defense strategy on a multi-jurisdictional basis.

The stakes associated with antibribery compliance have never been higher, and the legal risks associated with such concerns will now be much greater under the new U.K. law. Now is the time for companies with business interests in the U.K. to consider their potential exposure and compliance profile and ensure that they adapt or develop effective compliance safeguards to address the full range of potential legal risks and challenges that the new U.K. legal standard presents. Key differences between the FCPA and the U.K. law that may be reflected in a company's established compliance policies, such as policies concerning gifts and entertainment or business facilitation, could present prima facie risks of exposure for violations of the new U.K. law if not considered and addressed on a preemptive basis. Whether a company has established anticorruption internal controls or is developing such formal measures for the first time, training and education of personnel, combined with careful ongoing assessment of a company's particular business sector and activities, specific areas of potential risk and global footprint, will remain critical considerations for the development and implementation of an effective compliance program.

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