White Collar Defense and Investigations Practice Advisory

U.K. Enacts Bribery Act 2010 As A Major Foreign Bribery Legislative Reform
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Executive Summary

• In April 2010, the British Parliament passed a comprehensive modern Bribery Act.
• The Act criminalizes commercial bribery and bribery of domestic and foreign government officials; receipt of a bribe; and failure by a corporate entity to prevent bribery. Unlike the Foreign Corrupt Practices Act, it does not contain a "books and records" provision.
• The corporate offense of failure to prevent bribery applies not only to U.K. companies, but to any company that conducts part of its business in the U.K., even if no part of the conduct constituting the bribery took place in the U.K.
• The Act does, however, provide for a defense to liability for failure to prevent bribery if the corporate entity can show that it has "adequate procedures" in place to detect and deter such conduct.
• The Act was expected to become effective later this year, though the recent change in government in the U.K. may cause a delay in implementation.
• For a summary comparison of the Bribery Act and the Foreign Corrupt Practices Act (FCPA), consult our U.K. Bribery Act vs. FCPA At A Glance chart located at the end of this advisory.

Background

The U.K.'s enactment of legislation reforming its anti-bribery laws is one of the most important developments in recent years in international anti-corruption enforcement, which historically has lagged far behind U.S. enforcement of the Foreign Corrupt Practices Act (FCPA). See page 50 of the March 2010 FCPA Business Guide. The U.K. has not had a strong record of prosecuting bribery of foreign officials, despite being a signatory to the OECD (Organisation for Economic Cooperation and Development) Anti-Bribery Convention. The U.K.'s antiquated and piecemeal bribery laws may have contributed to tepid enforcement by the U.K.'s Serious Fraud Office (SFO), which for years elicited international criticism. In the past two years, however, the U.K. brought its first foreign bribery prosecutions. Then, last year, the SFO published guidance encouraging companies to make voluntary disclosures of violations of the foreign bribery laws, as the U.S. Department of Justice does. Finally, on April 8, 2010, British lawmakers passed a comprehensive, modern Bribery Act 2010 (Act). The Act was expected to come into full force later this year, though the recent change in government in the U.K. may cause a delay in implementation.

Bribery Act Basics

The Act criminalizes both commercial bribery, receipt of a bribe, and bribery of government officials, including foreign officials. The Act also criminalizes the failure by a corporate entity to prevent bribery committed on its behalf. By comparison, the FCPA applies only to bribe payors, and it regulates only bribery of foreign, not domestic, officials, although the U.S. has long used other laws (such as the Travel Act and anti-money laundering laws) to prosecute...
both commercial bribery and bribe solicitation and receipts. See page 50 of the March 2010 FCPA Business Guide.

The Bribery Act contains no “books and records” component like the FCPA, although British authorities possess some alternative grounds to pursue such claims.

**Bribery of a Foreign Public Official**

The Act’s criminalization of bribery of a foreign public official, set forth in Section 6, closely resembles the FCPA. The briber must intend to influence the foreign public official to obtain or retain a business advantage. The briber must directly or through a third party, offer, promise, or give a bribe to the foreign official, or to another person at the foreign official’s request, assent or acquiescence. It is not necessary that the foreign official actually commit an improper act. The offense is committed if the briber tries through its improper payment or offer to influence the official to obtain a business advantage. Senior officers of a corporate entity may be held liable if the entity committed the offense with the “consent or connivance” of that senior officer. Finally, these prohibitions apply to U.K. companies, citizens and residents wherever the bribery occurs, and to non-U.K. nationals or companies if an act or omission forming part of the offense takes place in the U.K.

**The New Offense for Corporate Entities that Fail to Prevent Bribery Committed on Their Behalf**

The U.K. Act provision criminalizing failure of a “commercial organization” to prevent bribery deserves special scrutiny. It has what appears to be extremely far-reaching application. At the same time, the Act does provide for a defense to liability that does not exist under the FCPA.

Section 7 of the Act provides that “a relevant commercial organisation” is guilty of [violating the Act] if a person “associated with” the organization “bribes another person intending to” obtain or retain business or a business advantage for the organization. A person “associated with” a commercial organization is “a person who performs services for or on behalf of the commercial organization.” Section 7. Relevant commercial organizations include U.K. companies as well as any company that conducts all or even just part of its business in the U.K. *Id.* The Act provides that the determination of whether a person is “associated with” an organization will depend on the circumstances, but that certainly may include an “employee, agent or subsidiary.” Section 8(3).

In effect, the new Act provides for a standard of vicarious liability of corporate entities for acts committed by others on their behalf that is akin to U.S. common-law principles of corporate vicarious liability. This new statutory standard for the failure-to-prevent-bribery offense appears to be more expansive than the background U.K. legal standard for corporate criminal liability. Specifically, under more generally applicable and pre-existing U.K. standards, criminal liability of a corporate entity typically has required that someone within the entity with a fairly high level of authority -- known as a “directing mind” -- had engaged in the conduct. See The Crown Prosecution Service, Corporate Prosecutions, available at www.cps.gov.uk/legal/a-to_c/corporate_prosecutions/index.html#a04.

The new failure-to-prevent-bribery offense purports to have an extraordinarily broad extraterritorial reach – broader even than extraterritorial jurisdiction under the FCPA. First, the new U.K. offense applies not only to U.K. companies but also to any company that conducts part of its business in the U.K. Second, the offense applies “irrespective” of whether conduct forming part of the offense took place in the U.K. See Section 12(6). This seems to mean that a non-U.K. company could be held liable for bribery where no part of the conduct constituting the bribery took place in the U.K., so long as the company does at least part of its business in the U.K. This would be broader than the reach of the FCPA. We will watch with close interest and attention to see if the SFO applies the law in this manner and the U.K.’s courts uphold such a reading. In terms of enforcement risk, however, any company doing business in the U.K. is well-advised to keep this extremely broad jurisdictional provision in mind.

**The Adequate Compliance Procedures Defense to Liability for Failure to Prevent Bribery**

The U.K. Act does provide corporate entities charged with failure to prevent bribery with a possible defense: the “adequate procedures” defense. An entity will not be held liable if it can show that it had “adequate procedures” in place to prevent such conduct. See Section 7(2).
The FCPA provides for no such defense. That fact, combined with the common law principles of vicarious liability under U.S. law, means that a corporate entity can be held criminally liable for acts committed by an employee as long as that act is committed within the scope of employment and with some intent to benefit the employer, even if the corporate entity had a well-functioning compliance program but a low-level, rogue employee decided to engage in bad acts. The existence of a strong compliance program is to be taken into account in calculating penalties under the federal Sentencing Guidelines, but that is all.

Thus, the fact that the Bribery Act so clearly includes a defense to corporate liability when “adequate procedures” are in place appears to soften the “strict liability” label this provision has received. If reasonably implemented, the U.K. Bribery Act may do more in terms of recognizing companies who have demonstrated appropriate efforts to implement strong compliance programs than does the FCPA.

What comprises “adequate procedures” to prevent bribery, however, is not certain. U.K. authorities have said that they will publish guidance on that question prior to the Act’s implementation. It is likely that U.K. authorities will look to the recently promulgated OECD Practice Guidelines as well as the principles set forth in the US Sentencing Guidelines on the topic of corporate compliance programs. It is hoped that U.K. authorities will promulgate reasonable principles that both allow appropriate flexibility for companies and that are sufficiently concrete to enable companies to rely on the guidelines to show a defense to liability. We outlined the OECD Practice Guidelines on page 52 in our FCPA Business Guide and provide them in summary form below.

- Adopt a clear and visible anti-bribery policy that is strongly supported by senior management;
- Instill a sense of responsibility for compliance with the policy at all levels of the company, as well as independent compliance structures;
- Keep up regular communication and training on foreign bribery for all employees, as well as with business partners;
- Encourage observance of anti-bribery compliance measures, and disciplinary procedures to address their violations;
- Provide protection for whistleblowers, specifically allowing confidential reporting of ethical violations and protection of the employees or business partners willing to report breaches of the law occurring within the company.

To see the OECD Good Practice Guidelines in their entirety, please go to http://www.oecd.org.

Other Points of Comparison With the FCPA

Unlike the FCPA, which allows for reasonable and bona fide business expenditures directly related to certain promotional activities, British lawmakers did not include a carve out for such expenses. The House of Lords considered “suggestions to add ‘corrupt’ or a similar adverb to the offense specifically to exclude legitimate corporate hospitality” would be addressed by prosecutor discretion.

Also in contrast to the FCPA, the U.K. Act does not except facilitation or “grease” payments. British lawmakers may have been reacting to the OECD’s new Recommendation for Further Combating Bribery of Foreign Public Officials which, among other things, recommends that OECD member countries prohibit or discourage the use of small facilitation payments. According to the OECD, such grease payments can have a “corrosive effect” particularly on small businesses and furthermore, can be illegal in the countries where they are made.

The U.K. Act provides that an offense is not committed if the foreign official is permitted or required under written local law to be influenced in his capacity as a foreign public official by the offer, promise, or gift. Although worded differently, this provision is similar to the FCPA’s affirmative defense – which, however, has never been successfully asserted – that a payment was legal under the foreign country’s written laws.
# U.K. Bribery Act vs. FCPA At A Glance

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<thead>
<tr>
<th>Category</th>
<th>Bribery Act</th>
<th>FCPA</th>
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<tbody>
<tr>
<td><strong>Antibribery provisions</strong></td>
<td>Criminalizes commercial bribery; bribery of domestic officials; bribery of foreign officials; receipt of a bribe; failure to prevent bribery</td>
<td>Criminalizes bribery of foreign officials only; other U.S. laws reach commercial bribery and receipt of bribes.</td>
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<tr>
<td><strong>Books and records provisions</strong></td>
<td>None, but other legal mechanisms exist for U.K. law enforcement in this arena.</td>
<td>Civil liability for failure to accurately and fairly record transactions in books and records of an “issuer”; criminal liability for willful violation of this requirement.</td>
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<tr>
<td><strong>Extraterritorial reach</strong></td>
<td>U.K. companies and citizens anywhere in the world; any conduct that takes place in part in the U.K.; and, for the corporate offense of failing to prevent bribery, any company doing business in the U.K., regardless of where the conduct occurs</td>
<td>U.S. companies and citizens anywhere in the world; any conduct that takes place in part in the U.S.</td>
</tr>
<tr>
<td><strong>Treatment of expenses in connection with promotional activities</strong></td>
<td>No exception or affirmative defense for expenses in connection with promotional activities</td>
<td>Affirmative defense available for reasonable and bona fide business expenses related to certain promotional activities</td>
</tr>
<tr>
<td><strong>Treatment of facilitation payments</strong></td>
<td>No exception or affirmative defense for facilitation or “grease” payments</td>
<td>Exception for facilitation or “grease” payments to secure or expedite a routine governmental action</td>
</tr>
<tr>
<td><strong>Treatment of conduct legal under local law</strong></td>
<td>Offense is not committed if foreign official is permitted or required under written local law to be influenced in his capacity as a foreign public official by the offer, promise, or gift</td>
<td>Affirmative defense available if payment to foreign official is lawful under written laws and regulations of foreign country</td>
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<tr>
<td><strong>Treatment of corporate compliance programs</strong></td>
<td>Entity not liable for failure to prevent bribery if it can show it had adequate procedures in place to promote compliance</td>
<td>Compliance programs not a defense to liability</td>
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<tr>
<td><strong>Penalties</strong></td>
<td>Depending on the circumstances of the conviction, there is no statutory maximum fine amount Individuals may be imprisoned for up to 10 years</td>
<td>Anti-bribery provision: for corporations, a fine per violation of up to $2M or up to twice the bribe paid or benefit sought or received, whichever is greater; for individuals, a fine of up to $250,000 or up to twice the bribe paid or benefit sought or received, whichever is greater, and up to 5 years in prison per violation for individuals. Books and records provisions: for civil violations, up to $150,000 for individuals and up to $725,000 for corporations, depending on the circumstances, and subject to regulatory inflation factors; for criminal violations, up to $25 million for corporations, and up to $5 million and up to 20 years in prison for individuals.</td>
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Conclusions
The U.K.’s Bribery Act is far reaching in its extra-territorial scope, and its provisions are broader in some respects and yet distinct from those found in the US FCPA, with which companies have grown more familiar. It is thus imperative that any corporation or partnership that conducts business, or part of a business, in the U.K. should study the Act’s provisions and take measures to protect against liability. Most important, a corporation should review its internal corporate ethics training program to ensure that every employee obtains the information and training they need, as having “adequate procedures” in place will provide a defense to the corporate charge of failing to prevent bribery.


Endnotes
[1] The SFO stated that it will seek a civil settlement, rather than criminal prosecution, “wherever possible” when there has been such a disclosure. Guidance issued by the Serious Fraud Office on Self Reporting Corruption, available at: http://www.sfo.gov.uk/media/10247/approach%20of%20the%20serious%20fraud%20office%20v3.pdf. Whether the benefits of making a disclosure to U.K. authorities outweigh disadvantages will necessarily depend on the circumstances of each case, and the SFO’s record at present is necessarily very limited.

