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THE U.K. BRIBERY ACT: BOLSTERING THE ARSENAL OF ANTI-CORRUPTION LEGISLATION

by
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On August 31, 2011, Munir Patel, a clerk in a British court who had been filmed allegedly accepting a £500 bribe, had the dubious honor of becoming the first person charged under the 2010 U.K. Bribery Act ("Bribery Act"). After a delay of almost a year, the Bribery Act went into effect on July 1, 2011, marking the advent of a new era in anti-corruption enforcement. The Bribery Act is seventeen pages in length and contains only four substantive offenses: (1) Bribing; (2) Receiving a bribe; (3) Bribing a foreign public official; and (4) Failing to prevent bribery. Despite this brevity, this legislation will play a significant role in deterring corrupt practices by companies and their principals. Under the Bribery Act, the failure of a company to prevent its employees, agents, or subsidiaries from engaging in bribery can lead to an unlimited fine and, in some circumstances, personal criminal liability for directors and employees who on conviction may be imprisoned for a period of up to ten years.

Guidance on the Bribery Act

In the forward to the formal "Guidance" published by the Ministry of Justice, Kenneth Clarke, the Secretary of State for Justice, seeks to provide reassurance that although the Bribery Act promulgates "tough rules," the rules, "are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms."[1]

The Guidance is based on six high level guiding principles, each followed by commentary and examples.[2] It makes clear that the Guidance is not "prescriptive" or a "one-size-fits-all document," rather it encourages commercial organizations to "adopt a risk-based approach" and

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[1] The document is entitled, "The Bribery Act 2010, Guidance about procedures which relevant commercial organizations can put in place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)."
[2] *Id*. at 6.

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adopt procedures that are "proportionate to the risks faced by an organization . . . and focus the effort where it is needed and will have [the] most impact."[3] The Guidance acknowledges that "the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions."[4]

The six principles are as follows:

1. **Proportionate Procedures**: A company's procedures to prevent bribery by persons associated with it should be proportionate to the bribery risks it faces and to the nature, scale, and complexity of the company's activities. The company should also make sure that such procedures are clear, practical, accessible, and effectively implemented and enforced.

2. **Top-Level Commitment**: The top-level management of a company (be it the board of directors, the owners, or any other equivalent body or person) should be committed to preventing bribery by persons associated with it. Such persons should foster a culture within a company in which bribery is never acceptable.

3. **Risk Assessment**: A company should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The company's assessment should be periodic, informed, and documented.

4. **Due Diligence**: A company should apply due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform service for or on behalf of the organization, in order to mitigate identified bribery risks.

5. **Communication**: A company should seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training that is proportionate to the risks it faces.

6. **Monitoring and Review**: A company should monitor and review procedures it designs to prevent bribery by persons associated with it and make improvements to such procedures as necessary.

In addition to the foregoing Guidance, the Ministry of Justice has also published a "Quick Start Guide," and organizations such as Transparency International have published resources to help companies navigate the provisions of the Bribery Act.

Jurisdiction

As a threshold matter, companies should be mindful of the reach of the Bribery Act. If a company has a demonstrable business presence in the U.K., *i.e.*, carries on business or part of its business in the U.K., it will most likely be subject to the new law. This includes, but is not limited to, those companies with subsidiaries, branches, sales representatives, agents, distributors, or even bank accounts and customers in the U.K.[5] Consequently, companies are advised to exercise caution and closely examine the legal and operational set up of their operations to help ensure that potential liability under the Bribery Act is minimized should the U.K courts interpret the scope of its

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[3] *Id*. at 7.
[4] *Id*.
[5] *See* briberyact.com website.

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application broadly.

The Bribery Act and the Foreign Corrupt Practices Act ("FCPA")

Comparisons between the Bribery Act and the FCPA reveal several key differences. One of the more fundamental differences is that while the FCPA deals only with bribery of foreign governmental officials, the Bribery Act also encompasses corruption *between* commercial entities. Another fundamental distinction is in relation to jurisdictional reach. It appears that jurisdiction under the Bribery Act is broader than under the FCPA. Individuals can be guilty of an offense even if no act or omission occurred in the U.K. as long as (1) the acts or omissions would have been illegal if done in the U.K. and (2) the individual was a "close connection" to the U.K.[6] Moreover, companies can be guilty of an offense if they do business in the U.K., regardless of where the act or omission which form part of the offense take place.[7] Other notable differences between the Bribery Act and the FCPA are as follows:

- **Definition of "Foreign Official**": The FCPA's definition of "foreign official" explicitly includes "employee of a foreign government or any department, agency or instrumentality thereof." The Bribery Act's definition is ambiguous as to whether low-level bureaucrats are included. Specifically, the Bribery Act's definition of "foreign public official" requires that the individual "holds a legislative, administrative or judicial position of any kind, whether appointed or elected."

- **Knowledge Requirements**: Although under both the FCPA and the Bribery Act payments made to foreign officials through third-parties can form the basis of an offense, the FCPA requires knowledge of the illegal payment to such third party, interpreted as actual knowledge or conscious avoidance. By contrast, the Bribery Act does not use the term "knowledge" and therefore potentially has a broader scope. Section 6 of the Bribery Act provides that a person can bribe a foreign official directly or through a third-party at the foreign official's "request," "assent," or "acquiescence."

- **Nexus Requirement**: The Bribery Act requires the intention that a bribe be paid to "obtain or retain business or *an advantage in the conduct of business*."[8] (emphasis added) The FCPA, however, uses a narrower "obtain or retain business" formulation.[9]

- **Promotional Activities**: The FCPA provides an affirmative defense for reasonable and *bona fide* business expenditures directly related to promotional activities.[10] There is no such defense in the Bribery Act.

- **Facilitation or "Grease Payments"**: The Bribery Act makes no distinction between bribery and facilitation, or so-called "grease payments."[11] The FCPA, by contrast, carves

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[6] UK Bribery Act Section 12(2).
[7] *Id.* at Section 7(5).
[8] *See, e.g.*, Section 6(2) of the Bribery Act.
[9] § 78dd-1.
[10] § 78dd-1(c).
[11] Individuals and companies subject to the Bribery Act should therefore be careful in their interactions with local regulators, *e.g.,* customs clearance, license or visa renewal, annual inspections, *etc*.

out a safe harbor for facilitation or expediting payments made to secure performance of routine government action.[12]

- **Scope of Liability**: As opposed to the FCPA, under the Bribery Act, companies are strictly liable for the acts or omissions of persons "associated" with them.[13]

- **"Adequate Procedures" Defense**: Although companies can commit an offense if they fail to prevent bribery of persons associated with them, under the Bribery Act it is a complete defense for a company if it can demonstrate that it had "adequate procedures" in place that are "designed to prevent persons associated with [them] from undertaking such conduct."[14] There is no "adequate procedures" defense under the FCPA.

All Eyes Are on the Prosecutors and the Courts

Similar to the FCPA, the Bribery Act has attracted criticism for the uncertainty and breadth of its provisions. With pressing, unanswered questions about how prosecutors and the courts will interpret and apply its provisions, there is justified anxiety for all companies potentially subject to the Bribery Act. Until such questions are resolved, commercial organizations or companies are encouraged to take an aggressive and proactive approach towards implementing adequate compliance controls and mechanisms to limit the significant potential liability created by the Bribery Act.

[12] § 78dd-1(b).
[13] Section 7 of the Bribery Act.
[14] Section 7 of the Bribery Act.

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