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## **FCPA ARTICLE**

### **The Bribery Act: Raising the Enforcement Bar by Michael L. Volkov**

The UK Bribery Act 2010 (“Bribery Act”) has been described as the toughest anti-corruption legislation in the world. It was enacted in April 2010 and will come into force in April 2011.

Businesses with a presence in the United Kingdom must now get to grips with the Bribery Act. The key differences<sup>1</sup> between the FCPA and the Bribery Act include the following:

#### **1. A STRICT LIABILITY CORPORATE OFFENSE**

The Bribery Act introduces a new strict liability corporate offence of failing to prevent bribery by a person “associated” with the organization, where that person intends to obtain or retain business for the organization or to obtain or retain an advantage in the conduct of business for the organization. This is the biggest change to the current position in the United Kingdom and will have the greatest impact on compliance programmes.

An “associated” person is one who performs services for or on behalf of the organization. The Bribery Act indicates that it may include employees, agents or subsidiaries. This is not, however, an exhaustive list – it could also include self-employed persons, consortia and joint ventures which provide services for or on behalf of the organization. It should be borne in mind that there is no test of “control” or “influence” under the Bribery Act. It does not matter if senior management of the corporate did not know that bribery was taking place. The only defense to a charge under this offence is that the organization had put in place “adequate procedures” to prevent bribery. Accordingly, having in place appropriate compliance procedures and ensuring that employees and other providers of services to the business adhere to these will be critical to protect businesses from enforcement action in respect of this new offence.

UK Government guidance on what constitutes “adequate procedures” is expected to be published in early 2011. It is anticipated that the chief prosecutors of offences under the Bribery Act (the Serious Fraud Office<sup>2</sup> (SFO), the Director of Public Prosecutions (DPP) and the Director of Revenue and Customs Prosecutions (DRCP)) will issue their own guidance. In addition, it is expected that professional bodies such as the Solicitors Regulation Authority and the Bar Council will issue guidance for their members.

Draft explanatory notes produced by the Ministry of Justice before the Bribery Act was enacted suggested that the defendant could adduce evidence which showed that, for example, given the size of the organization, the particular sector or country in which it operated and the foreseeable risks, the procedures employed by the defendant to prevent bribery being committed on behalf of the organization were adequate despite the fact of the bribe. It is not expected to be an easy task to prove that procedures were adequate when bribery has nonetheless been proven to have occurred.

There is no similar strict liability offence of failing to prevent bribery under the FCPA, although a person may be liable for violating the FCPA where he or she has knowledge that an improper payment is made on his or her behalf by another person. Under the FCPA, “knowledge” is defined very broadly so as to include conscious disregard or deliberate ignorance, so that “turning a blind eye” to corruption can constitute knowledge.



## **2. SCOPE**

The FCPA applies to the bribery of public officials outside the United States only (corruption of US public officials and corruption in the private sector are governed by separate federal and state statutes, in particular those relating to tax fraud, mail fraud and wire fraud). The Bribery Act is wider in scope. It applies to bribery of both UK and non-UK public officials and also applies to bribery in the private sector. Accordingly, businesses within the territorial application of the Bribery Act (see below) who have FCPA compliance procedures already in place will need to focus on revising existing procedures and implementing additional procedures, in particular in respect of private sector bribery.

Separately, the FCPA contains accounting provisions that generally require companies with securities listed in the United States to keep books and records which accurately reflect transactions and to maintain an adequate system of internal accounting controls. While the Bribery Act does not specifically address accounting concerns, a UK company's failure to keep adequate accounting records may trigger criminal liability for its officers under Section 387 of the Companies Act 2006. Moreover, the Bribery Act's inclusion of an "adequate procedures" defense for corporate parallels the FCPA's concern with adequate accounting controls, although the Bribery Act places the burden of proving adequacy on companies rather than placing the burden on government authorities to prove inadequacy.

## **3. EXTRA TERRITORIAL APPLICATION**

The FCPA applies to US nationals, US firms and foreign firms who have issued securities in the United States or have a place of business there and persons acting within the United States. However, companies operating in the United States that do not have securities listed in the United States or otherwise make public securities filings in the United States generally can be liable under the FCPA only if conduct related to a bribery scheme occurred in the United States (such as meetings, telephone calls, banking activity, etc.)

The first three offences under the Bribery Act (bribing, accepting a bribe and bribing a foreign official<sup>3</sup>), will apply to:

- Persons committing an act in the United Kingdom
- Persons committing an act outside the United Kingdom where the act or omission would have been an offence if carried out in the United Kingdom, provided the defendant has a close connection with the United Kingdom (such as a British citizen or British overseas territories citizen, a UK resident or UK body corporate)

The fourth offence under the Bribery Act (the new corporate offence of failing to prevent bribery) applies to corporate bodies or partnerships either incorporated or formed in the United Kingdom or else carrying on business or part of a business in the United Kingdom. The corporate will be liable where the bribe is made or accepted by any person performing services for or on behalf of the corporate. That person's actions need not occur in the United Kingdom and need have no connection with the United Kingdom. Accordingly, a non-UK corporate which carries on business in the United Kingdom may fall foul of this provision even where all activities relating to the bribe occur outside the United Kingdom, and even if the corporate does not have securities listed in the United Kingdom, unless it has in place adequate procedures to prevent bribery.

## **4. FACILITATION PAYMENTS AND HOSPITALITY**

The new specific offense of bribing a foreign public official is designed to track the requirements of the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and is similar to the FCPA bribery offence, but lacks certain defenses available in the United States relating to facilitation payments and bona fide expenses. Accordingly, payments that are legitimate under the FCPA may be prohibited under the Bribery Act and corporate should review and, if necessary, modify their existing policies on hospitality and facilitation payments accordingly.



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## **Facilitation Payments**

Excluded from the scope of the FCPA anti-bribery provisions are payments made to facilitate or expedite routine governmental action by a foreign official, such as the issuing of licenses or permits, installation of utilities, etc. US enforcement agencies appear, however, to have taken an increasingly narrow construction of this exception. The accounting provisions of the FCPA also require that facilitation payments be reflected accurately in an issuer's books and records (even if not prohibited by the anti-bribery provisions).

## **Hospitality/Bona Fide Expenses**

Under the FCPA, it is an explicit defense that the relevant payment represented reasonable and bona fide expenditure (such as travel and lodging expenses) directly related to the promotion, demonstration or explanation of products or services or the execution or performance of a contract with a foreign government or its agencies. There is no such specific defense under the Bribery Act.

## **Compliance Programs**

Corporations with a UK presence will be wondering what modifications will be needed to their compliance programmes in order to meet the demands of the Bribery Act. Although corporate may be awaiting publication of government guidelines in respect of what constitutes adequate procedures in connection with the strict liability corporate offence of failing to prevent bribery before incurring the expense of altering their procedures, it should be borne in mind that no government guidance is expected in respect of the other three offences under the Bribery Act (bribing, accepting a bribe and bribing a foreign official). Moreover, the guidelines will likely be general and not contain a "one size fits all" compliance solution. "Adequate procedures" will vary from one corporate to another and will need to be tailored to accommodate the corporate size, business sector, geographic scope of operations, and industry regulations and practices, among other concerns. As mentioned above, it is clear at this stage that companies with FCPA compliance programs already in place should be giving particular consideration to addressing private sector corruption, facilitation payments and hospitality.

Additionally, because strict liability for failing to prevent bribery may attach for third party acts, relevant corporate need to ensure compliance throughout the supply chain, with particular attention to distributor agreements, employment agreements, agency agreements, joint venture agreements and such like. There should be a policy and procedure for due diligence to be carried out before entering into a business relationship, and for this procedure to be repeated periodically. In-depth due diligence should be carried out on all agents being appointed in countries prone to corruption and fees should be benchmarked.

Risk assessments should be carried out, with a focus on high risk sectors of the business, high risk countries and high risk activities. Transparency International UK has recommended that risk assessment be a continuous process and focus on: local conditions and customs; business sector including competitors' practices; dependence on critical licenses; business practices of the corporate; employees (e.g., untrained employees or a large number of new hires); operational functions of the business (e.g., marketing and sales); processes (e.g., time pressures, contract variations); the form and nature of the corporate local business relationships with agents, distributors, suppliers, joint venture and consortia partners and the extent of interaction with public officials; the organizational structure of the corporate; and the political structure of the country.

## **Conclusion**

For the past 30 years, the FCPA has set the standard for anti-corruption legislation, with a noted upsurge in enforcement activities over the last few years by US enforcement agencies. The enactment in the United Kingdom of the Bribery Act, which is wider in scope, and has stiffer penalties and fewer defenses is, however, likely to set the new minimum standard of conduct for international businesses in the prevention of corruption. Implementing changes to compliance programs for the Bribery Act and the enforcement activity that will follow is now an imperative for international businesses and may save considerable cost in the long term.