



For The Defense

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Bribery Act Reflects UK's No-Tolerance Policy for Corruption

By Shawn M. Wright and Kelly Loughery

The U.K. Parliament's April 8, 2010 enactment of the Bribery Act ("the Act") garnered significant international attention for its sweeping reforms of what has been criticized as an antiquated hodgepodge of anti-bribery common law and statutes. Aggressive on its face, the Act has a relatively broad scope, and provides a comprehensive framework of offenses to address bribery conduct, generally and specifically. Unlike the U.S. Foreign Corrupt Practices Act ("FCPA"), the Act does not distinguish between the public and private sectors, and addresses not only the payor of the alleged bribe, but also the recipient. The offenses outlined under the Act include: 1) general bribery offenses, specifically offenses of bribing another person and offenses relating to being bribed; 2) bribery of foreign officials; and 3) a corporate offense that is levied on companies that fail to prevent bribery within their organizations. In addition to the prohibition against financial bribery, the general bribery offenses and the bribery of a foreign official also prohibit the offering, promising or giving of an advantage as well as requesting, agreeing to receive or accepting an advantage. For these offenses, the person offering the bribe must intend for the recipient to exploit a position in which he is otherwise expected to act "impartially," "in good faith," or "in

accordance with a position of trust." The standard for determining this expectation is an objective one: would a reasonable person in the UK have the expectation that the recipient is in a position requiring impartiality, good faith and trust.

The jurisdiction of the Act is based on citizenship, ordinary residence, or incorporation in the UK, which puts multinational companies with operations in the UK squarely within its ambit. UK citizens and corporations are also subject to the Act, regardless of where the conduct occurs.

Perhaps the most contentious reform presented by the Act is the broad-sweeping corporate strict liability offense whereby any company that "carries on a business, or part of a business," in the UK commits an offense if it fails to prevent an act of bribery by any "associated person." Associated person is broadly defined to include employees, agents, foreign subsidiaries, consultants, etc. There is no requirement that anyone at the corporation have actual knowledge of wrongdoing or that the corporate culture rewarded, encouraged or intended to commit any corrupt act. However, if the advantage sought by the improper activity directly flows to the business, that is, the objective of the conduct benefits the business rather than the individual perpetrating it, then the corporation is at risk.

The strict liability nature of the offense has escalated anti-bribery compliance policies and procedures to board-level agenda items for many multi-national companies. The only affirmative defense to this charge is a demonstration that the company maintains adequate internal controls to prevent bribery. Unfortunately, the Act does not define what constitutes “adequate procedures,” but the Act does require the Secretary of State to publish guidance on procedures businesses can put in place. Similar to the requirements outlined in the U.S. Federal Sentencing Guidelines, such measures would include formal written compliance policies, anti-bribery training, monitoring and auditing of all employees, agents and subsidiaries, etc., and perhaps, most importantly, an ethical corporate culture that communicates clearly to all levels that corruption is not tolerated within the organization.

Although the new legislation aligns UK domestic law much more closely with the FCPA, the Act differs and is in some ways more aggressive than the U.S. statute. First, as discussed above, the Act features a distinct strict liability corporate offense. Although entities with a corrupt corporate culture can, and frequently are, subject to enforcement

under the FCPA, the FCPA does not contain a similar strict liability offense for corporations. Likewise, the Act does not distinguish between the public and private sectors, so even transactions between two commercial entities can be subject to the legislation. This is significantly broader than the FCPA, which applies solely to corrupting foreign officials. Another distinction, in contrast to the narrowly tailored FCPA exception for facilitation payments, is that under the Act *any* payment made for improper advantage is covered. Lastly, the Act imposes criminal liability on directors who “consent or connive” to the corrupt act, which may prove more encompassing than liability for aiding and abetting under the FCPA, which U.S. courts have generally imposed on individuals who facilitate and/or assist a covered person in committing a proscribed act.

The Act is a substantial step by the UK towards addressing bribery conduct. Only time will tell if the UK allocates enforcement resources comparable to those being utilized by the U.S. Department of Justice and Securities and Exchange Commission for FCPA enforcement. ■

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