UK Bribery Act: Aggressive Anti-Corruption Enforcement Enacted

by James Campbell and Raymond L. Sweigart

Considerable publicity has surrounded the recent enactment by Parliament of the Bribery Act 2010 (Bribery Act), with many commentaries about the fundamental change in conduct this legislation will require. In fact, bribery was and is a crime at common law and statutorily in the UK's Prevention of Corruption Acts 1889 – 1916. However, the law in this area was seen as fragmented, certainly very old, and not entirely in compliance with the Organization for Economic Co-Operation and Development (OECD) Anti-Bribery Convention. The new Bribery Act provides a single, modern statute to tackle bribery in the UK and abroad, in both the public and private sectors. It is aimed at issues companies face in the current economic environment, offering greater certainty and consistency regarding the do's and don'ts. It also signals a greater focus by the UK Government on newly aggressive anti-corruption enforcement.

In short, the Bribery Act:

- seeks to combat bribery in the public and private sectors;
- replaces the fragmented and complex offences at common law and in the Prevention of Corruption Acts;
- creates two general offences covering the offering, promising or giving of an advantage, and requesting, agreeing to receive or accepting of an advantage;
- creates a discrete offence for bribery of a foreign public official;

- creates a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf (it will be a defence if the organisation has adequate procedures in place to prevent bribery);

- requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent bribery on their behalf;

- helps tackle the threat that bribery poses to economic progress and development around the world.

The Bribery Act was published in draft on 25 March 2009 for pre-legislative scrutiny by a Joint Committee of both Houses of Parliament. It was passed on 8 April 2010, received Royal Assent that same date, and it is expected to come into force this Autumn.

So, practically speaking, what does that all mean?

The legislation signals a greatly increased focus by the UK Government on prosecuting corruption. The Bribery Act has a broad scope; for example, it creates a corporate offense of "failure to prevent bribery by an associated person." Criminal liability may now be imposed on an entity whenever a person associated with a commercial entity pays a bribe that benefits the entity, as an "associated person" is defined quite broadly to include all those who perform services on behalf of the entity. The Bribery Act includes in this category employees, agents and subsidiaries. Thus, a UK entity may now be held liable for improper payments made by a non-UK subsidiary, agent or consultant that benefit the UK entity. Furthermore, the Bribery Act does not, on its face, require proof of knowledge or intent on the part of the UK entity as a prerequisite to imposing criminal liability for failure to prevent a bribe by an associate overseas and it appears quite likely that the Government will consider this to be a "strict liability" offence.

To offset the somewhat chilling prospects posed by such a strict liability offence, the Bribery Act does provide a defence if an accused entity can demonstrate that it had established "adequate procedures" to prevent bribery by associated persons. The Bribery Act does not define such "adequate procedures," rather it requires the Secretary of State to promulgate guidance on the procedures that commercial entities could put in place to prevent bribery. However, there is already some useful regulatory guidance on what may be considered to be "adequate procedures." In particular, consistent with guidance from the OECD and US Department of Justice, the UK Serious Fraud Office (SFO) has provided a basic framework for a compliance program that corporations could implement to establish "adequate procedures." These include:

- proper "tone at the top" through clear statements of policy and anti-corruption guidance, visibly supported at the highest levels in the company;

- clear and direct reporting by executive management to the Chief Executive;

- a code of ethics and anti-corruption principles that are applicable regardless of whether local laws permit or prohibit bribery and whether improper payments may be culturally accepted;

- specific training on the company's anti-corruption principles, policies and procedures;

- individual accountability, including appropriate disciplinary and incentive programs;

- a specific policy on gifts, hospitality and facilitation payments that addresses corruption risks in these areas;

- a specific policy on outside agents, consultants, advisers and third parties, including appropriate due diligence policies and procedures; and

- ongoing risk assessment, auditing and improvement of the compliance program.

It is important to note as well that the Bribery Act does not provide a defence or exception for payments to officials to expedite a routine government function or so-called "facilitating payments." Such an exception was proposed and rejected by Parliament. The Bribery Act, as a result, is consistent with recent OECD recommendations and is more stringent than the US Foreign Corrupt Practices Act (FCPA). This suggests that companies that have tailored their global anti-corruption policies to the FCPA and permit or do not forbid such facilitating payments should carefully analyze their programs to ensure compliance with UK law where that may be applicable to them.

In that regard, it must be borne in mind that the Bribery Act has broad extraterritorial application. By definition, overseas bribery offenses implicating the Bribery Act will frequently occur outside of the UK. Accordingly, the Bribery Act provides that a UK person or company is subject to liability even where relevant conduct occurs outside the UK.

In addition, the Bribery Act provides that non-UK persons or entities are subject to liability if they carry on a business, or any part of a business, in any part of the UK. This raises a concern about the possibility that if an entity transacts any business in the UK, it may be liable under the Bribery Act for failure to prevent bribery outside the UK irrespective of whether the acts or omissions which form part of the offence take place in the UK or elsewhere. It will be important to follow the development of the interpretation of these provisions by the SFO.

Accordingly, companies that are listed, headquartered, which have operations, or conduct any business in the UK would be well advised to review carefully their existing anti-corruption compliance policies and programs to evaluate whether they are sufficient to take full advantage of the Bribery Act's adequate procedures defence. In addition, existing agreements and forms of agreement will need to be restructured and/or rewritten to ensure that they demonstrate compliance with the legislation and include the appropriate safeguards. Since the City of London Police, the Financial Services Authority (FSA) and the SFO are all active in the investigation and prosecution of offences and cases frequently involve more than one agency, companies should have emergency procedures in place to respond if they are subject to the increased enforcement effort the Bribery Act facilitates. Companies should further be aware that plea bargaining has been introduced in the UK by the FSA, but at least one court has questioned any agreement on penalties that would bind the court's unlimited statutory discretion. This trend is likely to spread to other enforcement agencies, so a carefully considered response to enforcement might be prudent as we await developments in this area. In short, Companies must recognize the new political reality of aggressive inter-governmental anti-corruption enforcement and quickly adopt policies and procedures to protect themselves.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or any of the attorneys below.

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