

## UK Bribery Act: Corporate Exposure Beyond The FCPA

*Law360, New York (June 22, 2010, 10:45 AM ET)* -- On April 8, 2010, the United Kingdom's Bribery Act 2010 received Royal Assent, representing a major overhaul of U.K. anti-corruption law. The act, which takes effect later this year, replaces the piecemeal existing law and provides a more comprehensive and far-reaching legal framework for combating bribery in both the public and private sectors.

The new law is similar in purpose to the United States Foreign Corrupt Practices Act but has a substantially broader jurisdictional reach and applicable scope.

The U.K. Bribery Act establishes four classes of offenses: (i) promising, offering or making a bribe to a private person; (ii) accepting or agreeing to accept a bribe, or requesting a bribe; (iii) bribing a foreign public official; and (iv) failing, as a corporation, to prevent bribery among agents.

The recent surge in FCPA enforcement actions (and the resulting larger penalties) caused many companies to re-examine their anti-corruption policies. Companies seeking to reduce their anti-corruption exposure developed compliance programs specifically addressing the FCPA.

Conventional wisdom suggested that if a company was FCPA-compliant, its anti-corruption exposure was limited since the FCPA's scope was generally considered to represent the outer bounds of legal restraints on corruption.

However, by extending the jurisdictional reach of anti-corruption law and criminalizing more acts than the FCPA, the U.K. Bribery Act has changed the way in which companies must think about anti-corruption compliance.

Fortunately for companies doing business internationally, the act also contains significant safe harbors.

### **The U.K. Bribery Act's Expansive Reach**

Several aspects of the U.K. Bribery Act expand its reach far beyond that of the FCPA. Perhaps most notably, the act allows the U.K. to bring a huge range of enforcement actions, extending far beyond its own borders.

The U.K. Bribery Act applies to any company, public or private, with a business connection to the U.K., regardless of where the company is incorporated or headquartered, or where the offending conduct takes place. An action that violates the law need not take place in the U.K., and the person or entity committing the act need not have any direct connection to the U.K.

This massive expansion of anti-corruption jurisdiction will require increased internal policing for both large, multinational corporations and smaller companies with only occasional international business.

Of equal significance is the fact that the U.K. Bribery Act extends to wholly private transactions. As a result, it reaches a vast array of conduct not addressed at all by the FCPA, which criminalizes only improper payments or gifts to foreign public officials.

Compounding the effects of this difference is a third point of differentiation between the FCPA and the U.K. Bribery Act. While the FCPA permits “facilitation payments” — certain low-level payments meant to facilitate nondiscretionary government acts — the U.K. Bribery Act 2010 does not contain an exception for facilitation payments, nor does it provide an exception for de minimis payments.

In deciding what types of gifts and payments violate the U.K. Bribery Act, “[l]ocal practice and custom must not be taken into account.”

Thus, once the U.K. Bribery Act takes effect, any payment made to a public official or private individual, no matter how small or large, or how necessary or customary in day-to-day business, may come under scrutiny. And, similar to the FCPA, a company risks liability if it fails to effectively police its agents in a manner designed to detect or prevent such payments.

Under the new law, corporate liability for failure to prevent bribery among agents is a strict liability offense, allowing for direct prosecution of a corporate entity without a showing that an officer or director was involved with, or had reason to know of, the corrupt act.

Under the FCPA, enforcement actions are viable only through statutory accounting provisions or respondeat superior theories.

In keeping with its generally draconian tenor, the U.K. Bribery Act carries the potential of up to 10 years' imprisonment for individuals and unlimited fines for corporate entities.

### **Limitations of the U.K. Bribery Act**

Although the U.K. Bribery Act appears on its face to be more aggressive than the FCPA, it contains at least two provisions that may temper its otherwise harsh effects.

Although a corporate entity is subject to strict liability for failure to prevent bribery, it can avoid liability completely by implementing and maintaining “adequate procedures” to prevent agents from committing bribery. Therefore, an appropriate compliance program provides corporate immunity.

By way of comparison, many companies have enacted FCPA compliance policies in an effort to limit liability. But even the most robust compliance programs provide companies with only a limited measure of protection, because the FCPA does not have a provision that explicitly immunizes compliant companies.

Whereas, under the U.K. Bribery Act, an adequate compliance program provides a complete defense against corporate liability. The act obligates the U.K. secretary of state to publish guidance defining “adequate procedures,” expected later this year.

Additionally, the U.K. Bribery Act defines bribery as providing an advantage intending to induce a bribed person to “perform improperly.”

The FCPA defines bribery more broadly, as simply inducing a bribed person to grant a benefit, with no requirement that the bribed person do so “improperly.” Thus, presumably, fewer actions will fall under the criminal purview of the U.K. Bribery Act than the FCPA.

### **Practical Next Steps: Limiting Exposure**

Any company doing business internationally should consider the expansive scope of the U.K. Bribery Act, both in terms of the acts it criminalizes and its jurisdictional range.

Since companies can significantly limit their exposure to the U.K. Bribery Act by implementing anti-corruption compliance policies, the act all but requires corporate entities with any business connection to the U.K. to develop and maintain compliance programs designed to detect or prevent employees or agents operating anywhere in the world from engaging in conduct that may violate the U.K. Bribery Act or local anti-bribery laws.

Companies should re-examine and amend FCPA policies to ensure that their compliance standards comport with the more aggressive reach of the U.K. Bribery Act.

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