

## Preparing for the U.K. Bribery Act

### How Written Policies May Limit Liability

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Much has been written about the U.K. Bribery Act, which will take effect on July 1, 2011. And indeed, the scope and breadth of the Act justify careful review of the Act and the Guidance produced by the Ministry of Justice.

This article will focus on one aspect of the Act's provisions in particular, though: the Act incentivizes to companies that develop policies to prevent bribery. Because companies that develop appropriate policies can assert the complete defense to certain charges, the development of those policies is an important step that all companies that do business in the U.K. should consider taking.

#### Background to the Act

The Act is concerned with bribery—described as giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward them for already having done so. It provides three general bribery offenses: 1) offering, promising, or giving a bribe; 2) requesting, accepting, or agreeing to receive a bribe; and 3) bribing a foreign public official. Importantly, the Ministry of Justice has made clear that there is no exception for facilitation payments—just as under prior law—unlike the limited exception available under the U.S. Foreign Corrupt Practices Act. Thus, a U.S. company with ties to the U.K. that does not meet the exception under U.S. law may be prosecuted under both. In addition, the bribery can be completely in the commercial sector, not involving governmental officials.

The Bribery Act is broad enough to include virtually all companies that do business in the U.K. For example, while the Act applies directly to individuals with a close connection to the U.K.—citizens, residents, or organizations incorporated in the U.K.—it also applies to individuals and organizations outside the U.K. if any part of the bribe takes place in the U.K.

Moreover, the Act's provisions attribute the criminal conduct of individuals to companies in certain circumstances. The conduct of senior level employees is attributed to the organization. And when a business fails to prevent an "associated person" from committing an act of bribery, it can be charged. It is here that the Act's breadth should be most concerning for companies: a company that conducts part of its business in the U.K. can be liable if any person who performs services for that company makes a bribe anywhere in the world for the company's benefit, even if the bribe is unconnected to the business conducted in the U.K.

## **The Complete Defense to Failing to Prevent Bribery**

Though the Act does attribute criminal conduct to companies, it also provides a hefty incentive to companies that act to prevent bribery. The Act offers a complete defense to the charge that a company failed to prevent bribery if the company can show that it had “adequate procedures” in place to prevent bribery. What is “adequate” will vary from company to company, and the Act has provided six principles that should be considered to determine what, if anything, companies should do differently.

The first principle is proportionality. What procedures are taken should be proportional to the risks that the company faces and the size of the business. A small company that operates in markets where bribery is rare may need to do less to prevent bribery than a larger company or one that operates in markets where bribery is commonplace. The second principle, top level commitment, encourages those at the top of affected companies to take active roles in ensuring that their associates do not engage in bribery.

The third principle, risk assessment, is closely-related to the first. Through this principle, the Ministry of Justice is encouraging companies doing business in the U.K. to conduct some research of the markets in which they are involved and the parties with which they are dealing. That may be as simple as conducting an Internet search in certain circumstances, or it may involve contact with diplomatic posts in the U.K. or other markets to learn about counterparties.

The fourth principle is due diligence—particularly of parties that actually perform services for the company or on its behalf. Once the company has conducted a risk assessment, it can determine how much due diligence is necessary. But the key in all situations is that the company is satisfied that the person chosen to represent the company can be trusted not to engage in bribery.

The fifth and sixth principles—communication and monitoring and review—are closely related. The fifth asks companies to consider what methods of communicating these policies to associates are sufficient: again, it may be sufficient for smaller companies to provide a written policy, whereas larger companies may consider additional training. The sixth principle considers monitoring and review of policies—a principle that applies particularly when new markets are entered, or new associates are retained.

The Act provides no set of policies that is sufficient for one particular business or another; instead, it provides this advice to companies doing business in the U.K. and expects those companies to consider their own risks and address them appropriately. The Ministry of Justice even makes clear that it may be the case that a company’s current policies may be sufficient, but it encourages all affected companies to review their policies for their effectiveness.

### **Conclusion**

Companies that do business in the U.K. need to consider their current policies and decide whether to adopt additional policies, given this incentive in the Bribery Act. The potential savings from avoiding liability for an associate’s acts far outweigh the time and resources it would take to consider and perhaps adopt new policies. For more information, the Ministry of Justice’s published Guidance on the Bribery Act can be found [HERE](#).