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Changing Laws and Strategies

New UK Anti-Bribery Laws: A Compliance Requirement



Responsibility for prevention falls on companies.

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The United Kingdom is to implement comprehensive “anti-bribery” legislation. Known as the Bribery Act 2010 and referred to here as the UK Act, it will take effect in April 2011. The legislation has far-reaching effects on any company with UK subsidiaries, operations or employees. It has wide extraterritorial jurisdiction and, in important respects, is broader than the Foreign Corrupt Practices Act. It applies, for example, to bribery in both the private and public sectors, and to facilitation payments. It contains specific offenses for senior company officials

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who consent to or ignore bribery; criminalizes bribery of foreign public officials; and renders a commercial entity's failure to prevent bribery by a person performing services on its behalf a corporate offense. The latter offense is intended, in part, to ensure that organizations introduce and enforce effective anti-bribery policies, as they will be strictly liable for bribes paid on their behalf unless they can demonstrate that they had "adequate procedures" in place designed to prevent bribery.

The UK Act applies to bribes paid anywhere in the world by British citizens, UK residents, and organizations incorporated in the UK, regardless of whether the bribes have any connection to the UK. The failure to prevent a bribery offense applies to foreign commercial organizations that carry on business in the UK, and an offense may be committed where the bribe, and all the steps relating to it, occurred outside of the UK.

Given its scope and potential consequences, especially in light of the significant resources expected to be deployed toward its enforcement, proper planning for the UK Act should start now.

The Scheme of Offenses

The UK Act contains four main classes of offenses: offering or giving a bribe (bribing another party), requesting or receiving a bribe (being bribed), bribery of a foreign public official and, for commercial organizations, failing to prevent bribery. In addition to the payment of money, a bribe can be a non-monetary advantage, extending to inappropriate hospitality or gifts. The offenses also capture bribes paid through third parties and for the benefit of third parties.

There are different formulations for the offenses of bribing another party or being bribed. These offenses are triggered by the payment or receipt of a bribe in return for the improper performance of a function of a public nature; an activity connected with a business, trade or profession; an activity performed in the course of a party's employment; or any activity provided by or on behalf of a company, partnership or unincorporated association.

It is for the prosecution to prove that the party

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performing one of these functions or activities was expected to perform it in good faith or impartially, or was in a position of trust by virtue of performing it, and had acted improperly by failing to meet that expectation or his position of trust. Improper performance is a failure to meet what a reasonable person, in the UK, would expect in relation to the function or activity concerned. Local customs or practices are irrelevant, unless permitted or required by written law.

Foreign Public Officials. The UK Act contains a specific offense of bribery of a foreign public official. The offense is committed where a party offers or pays a bribe with the intention of influencing a foreign public official, in his or her official capacity, to obtain or retain business, or an advantage in business. "Foreign public official" is broadly defined. It would be a defense to show that the foreign public official was permitted or required by local written law to be influenced by the offer or making of a payment.

Personal Liability of Directors and Management. Directors, managers, company secretaries and those holding similar offices will be held criminally liable if they consent to or ignore the payment of bribes. "Manager" is ill-defined in English law, and could apply to quite junior employees in large organizations.

Failure of Commercial Organizations to Prevent Bribery. The UK Act responds to criticism that the UK has failed to effectively criminalize bribery by commercial entities by introducing a new corporate offense of failing to prevent the payment of bribes. It applies to "commercial organizations," including UK companies and partnerships, and foreign companies and partnerships, that transact business in the UK. The bribe need not otherwise be connected to the UK.

The offense does not require dishonest or corrupt intent. A commercial organization will have committed the offense where a person "associated" with the organization pays a bribe intended to obtain or retain business, or to secure a busi-

ness advantage, and the organization is unable to demonstrate that it had "adequate procedures" to prevent bribery by those associated with it.

A person is "associated" with a commercial organization if he or she performs services for or on the organization's behalf. Beyond current and former employees, persons "associated" with an organization can include agents, subsidiaries, joint venture companies and partners, and even subcontractors. There is a rebuttable presumption that an employee who paid a bribe did so acting on its employer's behalf.

The UK Act, in effect, requires organizations to implement, maintain and enforce effective anti-bribery and anti-corruption policies, systems and controls. Companies that have done so should be free of concerns about criminal liability in the event that their policies, systems or controls are defeated by a fraudulent employee.

The UK Act does not define "adequate procedures." However, it requires the government to publish guidance "intended to support businesses in determining the sorts of bribery prevention measures they can put in place." Draft guidance, issued in September 2010, does not contain a formal set of procedures and policies, but offers guidance formulated around six general principles. Commercial organizations are encouraged to employ these principles in developing and implementing their anti-bribery procedures and policies that are properly tailored to their businesses and markets. The six general principles are as follows:

1. "Risk assessment"—commercial organizations should regularly and comprehensively assess the scope of bribery risks they face. Their assessment should focus on the countries and business sectors in which they regularly transact business, and the organization's business practices.

2. Senior management should be committed to preventing bribery and should establish a culture within the organization that bribery will never

be accepted. Management, the work force and all others acting on the organization's behalf should be aware of the anti-bribery policy, and management should implement and enforce it.

3. Due diligence—commercial organizations should know with whom they are dealing and when and to whom they make payments, and should ensure that business relationships are transparent and ethical.

4. Clear, practical and accessible anti-bribery policies and procedures should be implemented. This is likely to include specific policies for political and charitable contributions, gifts and hospitality, and dealing with demands for facilitation payments, allegations of bribery, and the use of third parties to obtain or retain business.

5. Effective implementation of anti-bribery policies and procedures to deter and detect bribery. This will include appropriate training of staff.

6. Anti-bribery policies and procedures should be regularly monitored and reviewed, and consideration should be given as to whether their effectiveness should also be verified by a third party.

Facilitation Payments

Facilitation payments are payments, typically small, made to persuade a person to perform an act that the person is already obliged to perform, where the payment exceeds that which is properly due. Payments made to obtain preferential treatment are not facilitation payments.

The criminalization of facilitation payments has been a controversial issue, as payers of facilitation payments are often victims of extortion. Facilitation payments have been criminalized in many jurisdictions, although notably not under the Foreign Corrupt Practices Act. While the UK Act criminalizes facilitation payments, the UK government has expressed that it would rarely be appropriate to prosecute a party for making a facilitation payment.

Gifts and Hospitality

While the UK Act does not specifically address them, unduly lavish hospitality or gifts may be

considered bribes. The problem for any organization is identifying the line between permissible and impermissible hospitality. There will undoubtedly be difficult grey areas, especially when policies are applied across jurisdictions with differing wealth and cultures.

The UK government has stated that it does not wish to prevent or punish genuine hospitality. One useful test to determine whether the hospitality at issue is genuine or lavish may be whether the gift or hospitality is something that a recipient would be able or willing to buy. Timing will also be important; for example, hospitality or gifts during a tender process may prove difficult to justify. A gifts and hospitality policy is essential.

Money Laundering and Debarment

The UK has stringent money laundering legislation, deriving from European legislation. The receipt or use of funds that are the product of a bribe may constitute money laundering. That can include funds obtained through historic bribes under prior management. Disclosing the payment of a bribe to a statutory law enforcement body would be a defense to a money laundering charge, although it could lead to criminal investigation and prosecution of the underlying bribery offense.

Professionals within the regulated sector, such as bankers, auditors, accountants and attorneys, have an obligation under UK money laundering legislation to report suspicions of money laundering, unless, in the case of an attorney, the information was obtained through a privileged communication.

European Union procurement law disqualifies organizations from public sector contracts if the organization, or its directors or certain other representatives, have been found guilty of corruption, bribery, fraud or money laundering. This is a draconian provision in that it applies regardless of the seriousness of the offense and that there may be relevant mitigating circumstances in place.

It is unclear whether a conviction for the corporate offense of failure to prevent bribery would also lead to disqualification from public contracts. On the one hand, it is an offense of

strict liability that does not require dishonesty or improper intent by the defendant organization. This would suggest that there should be no disqualification upon a conviction. However, in pre-legislative debate, the UK government has expressed that consideration was being given to whether conviction under these circumstances should nevertheless require disqualification.

Self-Reporting

Following a U.S. model, the UK authorities are actively encouraging organizations to notify the authorities if they discover bribery or corruption. Self-reporting is a difficult decision for any company to make. In July 2008, the UK Serious Fraud Office published particular guidance in relation to the reporting of overseas corruption. Its preferred approach, similar to the Department of Justice, is to deal with self-referrals through civil penalties, at least for the company involved, as opposed to criminal prosecution. This may not apply where directors are personally involved in the wrongdoing, or personally benefited. Civil penalties would not trigger mandatory exclusion from public procurement contracts.

Conclusion

The UK Act requires effective compliance policies, systems and controls. Vigorous enforcement of the Foreign Corrupt Practices Act already makes this essential for any organization trading internationally, and such organizations therefore should already be compliant with significant elements of the UK Act. However, policies, systems and controls will have to be updated to reflect the important differences between the U.S. and UK legislation, in particular the extension of the UK Act to private sector bribery and the criminalization of facilitation payments. Companies without existing compliance programs will need to introduce policies as quickly as possible. UK enforcement of bribery can be expected to increase following the implementation of the UK Act.