

## The Only Defense: Adequate Procedures under the UK Bribery Bill

With wide cross-party support it is anticipated that the Bribery Bill will pass the House of Commons and become law by May, 2010. The Bribery Bill amends and repeals existing anti-bribery offences under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916 and abolishes the UK common law offenses of bribery and embracery (bribery of jurors). This proposed legislation represents a long awaited simplification of the law on corruption and makes the UK compliant with its international obligations under the OECD. It will have a major impact on the way businesses connected to the UK manage their international business.

There is one affirmative defense listed in the Bribery Bill. This is the ‘adequate procedures’ defense. The Explanatory Notes to the Bribery Bill indicate that this narrow defense would allow a corporation to put forward credible evidence that it had adequate procedures in place to prevent persons associated from committing bribery offences. Although not explicit on the face of the Bill, in accordance with established case law, the standard of proof the defendant would need to discharge is the balance of probabilities. The legislation requires Secretary of State to publish guidance on procedures that relevant commercial organizations can put in place to prevent bribery by persons associated with their entity.

Other than this commentary, the Bill provides no further information on what might constitute ‘adequate procedures’ as a defense but the Government has signaled that it will work with the UK business community to provide appropriate guidance to this critical component of the Bribery Bill. The UK law firm KattenMuchin has indicated that they expect the Government will apply a test regarding the ‘adequate procedures’ defense “with regard to the size of the company, its business sector and the degree to which it operates in high risk markets.”

While it might only give general guidance, the United States Department of Justice has published its Sentencing Guidelines which provide a framework to construct an ethics and compliance program which will meet the strictures of the FCPA. Using the Sentencing Guidelines, Richard Cassin has written about an effective compliance program, in his excellent FCPABlog. He notes that the purpose of an “effective compliance program” is to prevent and detect criminal conduct. In his listing his suggestions for what constitutes an "effective compliance program" He suggested the following:

- 1. A Written Program.** A company must have standards and procedures in place to prevent and detect criminal conduct.
- 2. Board Oversight.** A public company’s Board of Directors must be knowledgeable about the content and operation of the compliance program and must exercise reasonable oversight of its implementation and effectiveness.
- 3. Responsible Persons.** One or more individuals among a company's high-level personnel must be assigned overall responsibility for the compliance program.

**4. Operating and Reporting.** One or more individuals must be delegated day-to-day operational responsibility for the compliance program. They must report periodically to high-level personnel on the effectiveness of the compliance program. The individuals must have adequate resources, appropriate authority, and direct access to the Board or Audit Committee.

**5. Management's Record of Compliance.** A company must use reasonable efforts not to hire or retain personnel who have substantial authority and whom a company knows or should know through the exercise of due diligence have engaged in illegal activities or other conduct inconsistent with an effective compliance program.

**6. Communicating and Training.** A company must take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance program, to directors, officers, executives, managers, employees and agents -- by conducting effective training programs and otherwise disseminating information appropriate to the individuals' respective roles and responsibilities.

**7. Monitoring and Evaluating; Anonymous Reporting.** A company must take reasonable steps (a) to ensure that its compliance program is followed, including monitoring and auditing to detect criminal conduct, (b) to evaluate periodically the effectiveness of the compliance program and (c) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby a company's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

**8. Consistent Enforcement -- Incentives and Discipline.** A company's compliance program must be promoted and enforced consistently throughout a company through appropriate (a) incentives to perform in accordance with the compliance program and (b) disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

**9. The Right Response.** After criminal conduct has been detected, a company must take reasonable steps to respond appropriately and to prevent further similar criminal conduct, including making any necessary modifications to a company's compliance program.

**10. Assessing the Risk.** A company must periodically assess the risk of criminal conduct and take appropriate steps to design, implement, or modify its compliance program to reduce the risk of criminal conduct identified through this process.

Once again the British Government has not provided any guidance as to what might constitute "adequate procedures" under the Bribery Bill. However procedures based upon some of all of the elements above would certainly be a good starting point for any UK corporation to put in place.

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