



# The UK Bribery Act of 2010 Whither the FCPA?

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## Statement of intent

This paper provides a brief explanation of the new UK Bribery Act and highlights how the Act will set new standards in the fight against bribery and corruption, using a comparison with the US Foreign Corrupt Practices Act (FCPA).

This White Paper will be of particular interest to ethics and compliance officers. The new Act is expected to have a significant impact on the way that companies and their officers conduct business in the international arena.

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## Background

On March 25, 2009, Jack Straw, Her Majesty's Lord Chancellor and Secretary of State for Justice, presented draft legislation to Parliament to reform the bribery law of the United Kingdom (UK). Queen Elizabeth II commented that the purpose of the Bribery Bill was to "Provide a modern and comprehensive scheme of bribery offenses to equip prosecutors and courts to deal effectively with bribery at home and abroad."<sup>1</sup> While the United Kingdom ranks high on the Transparency International Index of Perceived Corruption and has traditionally attacked the issue of bribery, the case for reform was strong. As Jack Straw said in his forwarding remarks upon introduction of the Bribery Bill, the current statutory criminal law of bribery was "...old and anachronistic—dating back to around the turn of the twentieth century—and it has never been consolidated."<sup>2</sup> The Bribery Bill was also meant to implement the UN Convention against Corruption, the OECD Bribery Convention and the Council of Europe's Criminal Law Convention on Corruption.

The Bribery Bill worked its way through both Houses of Parliament and was finally passed on April 8, 2010. It received Royal Assent on April 9, 2010, is now the law of the land in the UK and should be fully in force by October, 2010 (the Bribery Act of 2010 or the Act).

Because of its substance, its scope and its jurisdiction, the Bribery Act will be of significant interest to practitioners in the ethics and compliance area and persons or entities that do business in or have a connection with the United Kingdom.

## Purpose of the Act

The Bribery Act was meant to consolidate the statutory and common law offense of bribery. It does so by abolishing the common law offense of bribery and embracery and various statutory offenses. In their place, it promulgates the criminal offense of private and public bribery. The Act also sets a separate offense of bribery of a foreign public official and creates a new offense of failure to prevent bribery.

Bribery occurs when a person "offers, promises or gives a financial or other advantage to another person" with the intent that the activity will induce or reward a person to perform improperly a function of a public nature, an activity related to trade, business or a profession, an employment activity or activity performed by or for a body of persons.<sup>3</sup> This is a broad prohibition that appears to encompass bribery in all public and commercial activity, including bribery involving non-profit or charitable activity if that activity was performed by a body of persons. Perhaps the only bribery that would not be covered by the Act would be purely private bribery e.g. a bribe to induce the recipient to publish or withhold personal information. The Act covers not only the giving of a bribe, but also the receipt of a bribe.

## THE UK BRIBERY ACT OF 2010

Bribery of a foreign public official occurs if a person directly or through an intermediary offers, promises or gives a financial or other advantage to a foreign official with an intent to influence that foreign official in his capacity as a foreign official to obtain or retain business or an advantage in the conduct of business. If the advantage is due the foreign official pursuant to applicable law or if applicable law permits or requires the official to accept it, the offense has not occurred. A foreign public official includes elected or appointed persons who hold legislative, administrative or judicial positions of a country or territory outside the UK and exercise a public function for a country or territory outside the UK or any public agency or public enterprise of that country or territory. Unlike the general bribery prohibition, the Act does not criminalize the receipt or solicitation of a bribe by a foreign public official.

The new offense provides for strict criminal liability for organizations for failure to prevent bribery by that organization. The offense occurs if a person performing services on behalf of a relevant commercial organization bribes another person in connection with the organization's business. If the organization can demonstrate that it had "adequate procedures" to prevent the bribery it may interpose that affirmative defense to the charge. The UK government is required to give guidance as to what constitutes "adequate procedures."

### Scope of the Act

The scope and jurisdiction of the Act should be noted by practitioners and persons or entities that have connection with the UK. The Act applies extraterritorially to persons or entities that have a connection with the UK. They include UK companies, UK citizens and residents. Non-UK nationals or companies may be liable if acts in furtherance of the offense take place within the UK. With the exception of bribery of a foreign public official, if a senior officer of a company has consented or connived to commit a covered offense, that person is also guilty of the offense. The offense of failure of a commercial organization to prevent bribery has broader scope and jurisdiction. Any company or partnership that conducts any of its business in the UK violates this section of the Act when a person acting on behalf of the entity bribes another person, wherever situated, in connection with business.

The Act provides for criminal fines that are unlimited by the legislation as well as imprisonment for up to 10 years. The Bribery Act is landmark legislation in the fight against corruption worldwide. It may set new standards for individuals and entities engaging in commerce on an international scale.

### UK Bribery Act vs US FCPA

For the compliance community and entities engaged in international commerce that have used the Foreign Corrupt Practice Act (FCPA) as the international compliance model, a comparison of the two statutes may provide guidance for ongoing compliance efforts.

The Bribery Act casts a wider snare than the FCPA. The Act criminalizes a class of behavior that is ignored by the FCPA. The FCPA sanctions the bribery of foreign government officials. In addition to the offense of bribing foreign public officials, the Bribery Act criminalizes private commercial bribery, wherever it occurs. This provision is applicable to all UK nationals, resident and UK companies, but also non-UK persons and entities whose actions or omissions in furtherance of the bribe occur in the UK. This is a significant substantive expansion of the law in the fight against international corruption. Bribery of government officials in support of commercial activity cheats certain stakeholders such as taxpayers and deprives them of their right to good government service. But any corrupt commercial transaction skews the economic transactions and cheats other stakeholders. Perhaps recognizing that local law enforcement may not be vigorous in prosecuting private bribery abroad, the UK has moved to the forefront in the fight against all corruption by applying extraterritorial jurisdiction to the private bribery provision.

**a. Foreign Public Officials**

The Act codifies bribery of foreign public officials. The Act requires that the payment be to influence the official in his capacity as an official to obtain or retain business or an advantage in the conduct of business. That language comports with the OECD convention and is in conformity with the FCPA as it has been expanded by the business nexus requirement of *United States v. Kay*.<sup>4</sup> It is unclear whether or not it will be interpreted by the Serious Fraud Office (SFO) and the courts in the same way as it is in the United States. The United States Justice Department has aggressively enforced the FCPA, taking positions with regard to business connections of certain activities that are sometimes difficult to understand. Because many cases are settled with non or deferred prosecution agreements or guilty pleas with sentencing agreements, there is unclear precedential value of fact patterns in which there has been an admission of a violation of the anti bribery provisions of the FCPA but no analysis of the business nexus of the factual predicate of the violation. What is known is that the enforcers of the FCPA and the persons or entities under investigation have agreed that a certain fact pattern in specific circumstances violate the FCPA. Accordingly, most practitioners, when advising on the FCPA, take a conservative approach to both of these issues. Given the fact patterns that have been agreed as violations of the anti bribery provisions of the FCPA, the conservative approach is to advise that any bribery of a foreign government official is banned by the FCPA. They further advise that virtually all elected and appointed officials, as well as employees of state owned and state related enterprises, even if minority owned, are foreign government officials subject to the FCPA. It is unknown what position the SFO will take with regard to the definition of "advantage in the conduct of business". A narrow view would place many of the FCPA fact patterns outside the foreign public bribery prohibition. Also unknown is the SFO's application of the definition of foreign public official. Elected or appointed legislative, administrative or judicial officials of a country or territory are clearly within the Act's definition of foreign public officials. But it may be argued, as a number of commentators have urged, that the employee of an enterprise that has the foreign government as a shareholder does not fall within the definition.

The distinction may be without a difference. If the SFO narrowly interprets the business nexus requirement or the definition of foreign public official so as to remove the person or activity from the bribery of a foreign public official provision, it should still be able to charge a person or entity with the offense of bribery under the Act. The general bribery offense is broader in scope and extra territorial in jurisdiction. There is no need to prove a business nexus, only an intent to have the recipient act improperly in most non public situations. And if an employee of a state owned enterprise is not deemed to be a foreign official that person may still be "a person" under the general bribery prohibition. In such case, unlike the public bribery provision, the recipient could be in jeopardy of being charged with receipt of a bribe, if there is jurisdiction over that person.

**b. Facilitation payments**

Unlike the FCPA, there is no facilitation payment exception in the Act. During debate in which a facilitating payment exception was proposed, the Joint Committee on the Draft Bribery Bill analyzed the Bill and commented: "We agree with the Government that facilitation payments should continue to be criminalised. A specific defence risks legitimising corruption at the thin end of the wedge."<sup>5</sup> The legislative attitude follows the OECD Working Group on Bribery in International Business Transactions recommendations to "encourage companies to prohibit or discourage" facilitating payments, "recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records", as well as the subsequent call to businesses to implement the recommendations.<sup>6</sup> But, recognizing the difficult issue that small scale corruption can have on day to day business activity the Director of the SFO has endorsed "prosecutorial discretion, backed by appropriate guidance."<sup>7</sup> Many commentators opine that facilitation payments are a slippery slope, even if exempted by the FCPA. The OECD guidance and the Bribery Act should make companies even more wary of this petty corruption.

**c. Affirmative defenses**

The FCPA contains two affirmative defenses. The first relates to the bribery of a foreign official. If the otherwise illegal payment to a foreign official was lawful under the written laws and regulations of the recipient's country, the affirmative defense will be established. This defense is mirrored in the Bribery Act, in the list of the elements of the offense. To violate the Act, the payment to a foreign public official must be "not legitimately due" to that official. The Act then excepts out those payments that are legitimately due to that official or permitted or required by applicable law or regulation. If there are distinctions between the two approaches they should have little practical effect. This defense is rarely interposed. This commentator only knows of one case in which the defendant attempted to establish it. Frederic Bourke tried to use it in his corruption trial on charges of, inter alia, conspiracy to violate the FCPA, that resulted from the failed attempt to gain control of the State Oil Company of Azerbaijan. The defense was not accepted by the court and the defendant was convicted.<sup>8</sup> From a compliance perspective, it would not be prudent to rely on this potential defense when structuring a transaction.

The other affirmative defense involves payments to or on behalf of foreign officials of reasonable and reasonable bona fide expenditures, such as travel and lodging expenses incurred by or on behalf of the recipient and directly related to product promotion, demonstration or explanation or the execution or performance of a contract with a foreign government. There is no similar affirmative defense in the Bribery Act. But commentators have long questioned the need for this defense in the FCPA. If the expenditures are reasonable, bona fide, and made for legitimate business purposes the expenditures would lack corrupt intent. It would seem that there no need for this affirmative defense. Parliament specifically chose not except out these expenditures in the Act. Parliament relies on the discretion of the prosecutors.

*Corporate hospitality is a legitimate part of doing business at home and abroad, provided it remains within appropriate limits. The general offences impose an appropriate limit on this activity under the "improper" performance test. However, the main limit under clause 4 is based on prosecutorial discretion. We are content with this and call on the Government to reassure the business community that it does not risk facing prosecution for providing proportionate levels of hospitality as part of competing fairly in the international arena.<sup>9</sup>*

**d. Adequate procedures**

Perhaps the most interesting aspect of the Bribery Act is the new offense of failure to have adequate procedures to prevent bribery. An entity may be held criminally liable for failure to prevent bribery. In what appears to be a codification of the principle of respondeat superior, the Act will hold an entity criminally liable if a person acting on behalf of that entity commits bribery. The statute states that the person associated with the organization must bribe another person with the intent to obtain or retain business or an advantage in the conduct of business. This is the same standard adopted in the bribery of a foreign public official, but not as broad as the general bribery standard. As discussed above, the breadth of that standard will be determined by the zeal of the SFO and the interpretation of the UK Courts. Any commercial enterprise (corporate body or partnership) that carries on any part of their business in the UK is subject to this provision. The only defense is demonstration that the entity had (as yet undefined) "adequate procedures" in place to prevent bribery.

In comparison, the book keeping provisions of the FCPA have a requirement that issuers (publicly traded companies) maintain accurate books and records and maintain a system of business controls. And the Department of Justice has stated that it will look at the existence of a compliance program that comports with Chapter 8 of the US Federal Sentencing Guidelines to determine, in some cases, whether or not to indict. But the Act goes far beyond the FCPA in criminalizing the failure to have adequate procedures to prevent bribery. And the Act establishes an absolute defense to the violation if "adequate procedures" are in place.

The adoption of “adequate procedures” move from the status of a best practice for entities concerned about the FCPA to an urgent requirement under the Act. As a prophylactic measure, the adoption of “adequate procedures” by a commercial organization will 1) reduce the likelihood of the occurrence of a bribe and 2) establish an affirmative defense if a covered bribe does occur. The Act contains no guidance with regard to the content of the “adequate procedures”, but requires the Secretary of State to publish them. Although no time line is set forth in the statute, commentators anticipate that the guidance will be published by Fall, 2010. The Secretary of State may look to other standards that have been published and may be relevant to the issue. The three most relevant are: Chapter 8 of the U.S. Federal Sentencing Guidelines,<sup>10</sup> Good practice guidance on internal controls, ethics, and compliance of the Working Group on Bribery in International Business Transactions<sup>11</sup> and the July 2009 guidelines on self reporting published by the SFO.<sup>12</sup> Whatever guidance is ultimately adopted, it should be closely reviewed by organizations that may be subject to the Act. This includes all UK organizations, but also organizations that may do business in the UK. If the guidance is more comprehensive than the elements of the U.S. Federal Sentencing Guidelines, it may be that the UK guidance becomes the standard for compliance for multi-national organizations.

## Groundbreaking Legislation

The Bribery Act of 2010 is groundbreaking legislation that places the United Kingdom in the forefront of the struggle against international corruption. By criminalizing private bribery wherever it occurs, it underscores the need for totally transparent business transactions. It closes the loophole of facilitating payments that emphasizes that corruption of government officials, even on a small scale, is wrong. And by criminalizing the failure to have adequate procedures to prevent bribery, it will prompt organizations to adopt policies to reduce the occurrence of bribery through a change in corporate culture and training.

Because the ultimate effects of the Act depend on the enforcement by the Serious Fraud Office, its impact cannot be predicted. But the statute itself may have shifted the legal focus in the fight against international corruption from the United States to the United Kingdom.

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### References

- 1 Her Royal Highness Queen Elizabeth II, speech November 18, 2009
- 2 Forward by Jack Straw to Bribery Draft Legislation Presented to Parliament by the Lord Chancellor and Secretary of State for Justice March 2009
- 3 Bribery Act, 2010 (Eng.), Section 1
- 4 United States v. Kay, 359 F.3d 738, 739 (5th Cir., 2004)
- 5 <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11510.htm>
- 6 OECD Working Group on Bribery in International Business Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, § VI (Nov. 26, 2009, adopted by the Council Feb. 18, 2010 with amendments), available at <http://www.oecd.org/dataoecd/11/40/44176910.pdf>. and [http://www.oecd.org/documentprint/0,3455,en\\_2649\\_34487\\_44697385\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/documentprint/0,3455,en_2649_34487_44697385_1_1_1_1,00.html).
- 7 <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11510.htm>
- 8 United States v. Kozeny, 541 F.3d 166 (2d Cir., 2008)
- 9 <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11510.htm>
- 10 <http://www.ussc.gov/2009guid/CHAP8.pdf>
- 11 <http://www.oecd.org/dataoecd/11/40/44176910.pdf>
- 12 <http://www.sfo.gov.uk/media/28313/approach%20of%20the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf>



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