

Paul|Weiss



The U.K. Bribery Act and Its Impact on U.S. and Multinational Businesses

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Introduction

The implementation of the U.K. Bribery Act in April 2011 signals a clear break from the largely ineffective and outdated mixture of common law and statutory bribery offenses that currently exist in the U.K. in favor of a regime grounded in legislation that, on its face, is among the strictest and most far-reaching legislation on bribery in the world.

The U.K.'s move to reframe, toughen and consolidate its anti-bribery laws is a response to a longstanding but growing tide of criticism of the U.K.'s current regime by, among others, the OECD Working Group on Bribery which, in its 2008 Annual Report, stated that it was:

"...disappointed and seriously concerned with the unsatisfactory implementation of the OECD Anti-bribery Convention by the U.K." and that "...failing to enact effective and comprehensive legislation undermines the credibility of the U.K. legal framework and potentially triggers the need for increased due diligence over U.K. companies by their commercial partners or Multilateral Development Banks."

The Bribery Act is primarily of significance to U.S. and multinational businesses because it creates a new strict liability offense for companies and partnerships for failing to prevent bribery. This "corporate offense" has extra-territorial effect: it applies to companies and partnerships (wherever they are registered, incorporated or conduct their main business activities) as long as they carry on a business, or part of a business, in the U.K. This means, for example, that a U.S. business with a branch office in the U.K. could be found guilty of the "corporate offense" even if the offense is committed in a country outside of the U.K. by an employee of a non-U.K. subsidiary of the U.S. business.

Given the extra-territorial effect of the Bribery Act, U.S. and multinational businesses may also be concerned to learn that they may be found guilty of the "corporate offense" not only if they fail to prevent bribery by subsidiaries and employees but if they fail to prevent an "associated person" from committing bribery. An "associated person" is *"someone who performs services for or on behalf of"* the company or partnership. Depending on the circumstances, an "associated person" could be any number of individuals or entities associated with a business, for example, an agent, a supplier, a distributor, a sub-contractor or a joint venture partner.

It is a defense to the "corporate offense" for businesses to put in place "adequate procedures" to prevent bribery. Given the wide scope of the Bribery Act, its potential application to all businesses that conduct part of their business in the U.K., and the severity of the potential penalties (unlimited fines for companies and unlimited fines and/or up to 10 years' imprisonment for individuals), the Bribery Act is likely to impact the great majority of major U.S. and multinational businesses. It is, therefore, critical for those businesses to understand its effect, the risks to their business and how to limit those risks most effectively. Even those businesses that already have sophisticated anti-corruption policies and procedures in place are likely to have to amend them and widen their implementation to ensure that they are "adequate" for purposes of the Bribery Act.

The purpose of this publication is to provide you with a convenient and practical guide to the U.K. Bribery Act and, in particular, to highlight its key provisions, suggest what may amount to "adequate procedures," and compare and contrast its key provisions with those of the Foreign Corrupt Practices Act (FCPA). It is not intended to provide legal advice or a detailed analysis of the Bribery Act or its effect.

The Headlines

The U.K. Bribery Act:

- comes into force in April 2011;
- applies to bribery in the private and public sectors (i.e., it does not require the involvement of a public official for an offense to be committed);
- makes the offering, giving, requesting and receiving of bribes an offense (whether direct or indirect);
- contains a specific offense of bribing a foreign public official;
- creates a new strict liability corporate criminal offense for companies and partnerships of failing to prevent bribery;
- provides that the “corporate offense” can apply to any company or partnership that carries on any part of its business in the U.K. (including through an “associated person”) even if the bribery has no other connection with the U.K.;
- defines an “associated person” as “*someone who performs services for or on behalf of*” the company or partnership. This definition could include agents, suppliers, distributors, sub-contractors, joint venture partners, etc.;
- provides that it is a defense to the “corporate offense” to show that the company or partnership had “adequate procedures” in place to prevent bribery;
- requires companies and partnerships to implement, maintain and enforce rigorous anti-corruption policies and procedures to fall within the “adequate procedures” defense;
- prohibits facilitation payments and some types of corporate hospitality;
- carries a maximum penalty of an unlimited fine for a company or partnership and 10 years’ imprisonment and/or an unlimited fine for an individual;
- can make directors criminally liable if they consent or turn ‘a blind eye’ to an offense; and
- does not have retroactive effect, so any offenses committed before April 2011 will be subject to the current law.

Offenses, Defenses and Application

The offenses

The Bribery Act creates four primary offenses:

- two “general offenses” covering the offering, promising or giving of an advantage, and the requesting, agreeing to receive or accepting of an advantage;
- a discrete offense of bribing a foreign public official (“the FPO offense”); and
- the new “corporate offense” of failure by a commercial organization to prevent a bribe being paid to obtain or retain business or a business advantage.

The “general offenses”

In simple terms, the general offenses are triggered by the giving and receiving of bribes:

- “*Active*” offenses involve the promising, offering or giving and “*passive*” offenses involve the requesting, agreeing to receive or accepting, of an advantage (financial or otherwise), in circumstances involving the improper performance of a “relevant function or activity.”
- “*Relevant function or activity*” means a public or business activity which a reasonable person in the U.K. would expect to be performed in good faith, impartially, or in a particular way, by virtue of the fact that the person performing it is in a position of trust.
- “*Improper performance*” means a breach of the expectation of the good faith performance of a relevant function.

These offenses will capture public sector and, unlike the FCPA, private sector bribery by individuals or companies and, in some cases, they are capable of capturing acts of bribery committed overseas.

It is important to note that the general offenses are expressed as six scenarios (termed “cases”) in the legislation. There are some important technical distinctions between the six cases, in particular regarding the level of intent required for an offense to be committed which are outside of the scope of this guidance. However, the key terms of the six cases are set out below.

- *Case 1*: the defendant offers, promises or gives a financial or other advantage intending to induce another to perform improperly a relevant function or activity, or as a reward for improper performance.

- Case 2: the defendant offers, promises or gives a financial or other advantage to another, knowing or believing that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
- Case 3: the defendant requests, agrees to receive or accepts a financial or other advantage intending that a relevant function or activity should be performed improperly.
- Case 4: the defendant requests, agrees to receive or accepts a financial or other advantage, where the request, agreement or acceptance constitutes the improper performance of a relevant function or activity.
- Case 5: the defendant requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a relevant function or activity.
- Case 6: the defendant performs one of the functions or activities improperly in anticipation or in consequence of the receipt of a financial or other advantage.

Bribes paid through, or provided for the benefit of, third parties are caught by the “general offenses”.

The “Foreign Public Official (FPO) offense”

It is an offense to promise, offer or give an advantage (financial or otherwise) to an FPO intending to:

- influence the FPO in their capacity as such; and
- obtain or retain business or a business advantage.

The offense is committed even if the FPO does not perform their functions improperly: an intention to do so is sufficient.

The “corporate offense”

In basic terms, the corporate offense is implicated where a company or partnership fails to prevent someone working for it from giving a bribe and does not have in place “adequate procedures” to prevent bribery.

More specifically, a company or partnership may be guilty of an offense where:

- an “active” general (i.e., giving, not taking, a bribe including a private sector bribe) or FPO offense is committed;
- anywhere in the world (subject to jurisdictional issues which are explored below);
- by someone performing services on the corporate entity’s behalf in any capacity, e.g., an “associated person” (for example, an employee, agent, subsidiary, licensee, distributor, joint venture partner, sub-contractor or supplier);

- intending to obtain or retain an advantage for the corporate entity;
- regardless of whether the ‘advantage’ is offered, given, requested or received directly or through an intermediary;
- even if no director or senior management was aware that an offense was being committed;
- even if the company or partnership has done nothing to encourage or acquiesce in the payment of a bribe; and
- regardless of whether the person performing the services has been convicted of bribery.

The Act, despite containing a section devoted to the meaning of “*associated person*,” offers no more assistance on the specifics of what constitutes an “*associated person*” other than:

- being a person “*who performs services on behalf of*” the company or partnership;
- possibly being an agent or subsidiary; and
- there being a rebuttable presumption that an employee of a company or partnership performs services on its behalf.

Until guidance is given by the U.K. Ministry of Justice or the U.K. courts, it is advisable to assume a broad interpretation of “*associated person*.”

Defenses

The “general offenses”

Other than in the special cases of the armed forces or intelligence services, there are no specific defenses to the general offenses other than proving that an offense has not been committed.

The “Foreign Public Official (FPO) offense”

The only defense to bribing a FPO (which is likely to be very rarely available) is if the payment at issue is permitted or required by the written law of the local jurisdiction: custom or tolerance will not suffice.

The “corporate offense”

It is a defense to the “corporate offense” if a company or partnership can show, on the balance of probabilities, that it had in place “adequate procedures” designed to prevent persons associated with the company or partnership from giving a bribe.

The critical question of what may amount to “adequate procedures” is the subject of a separate section in this publication.

Jurisdiction

The Bribery Act has extra-territorial reach which can extend to U.K. companies or partnerships operating abroad; overseas companies or partnerships with a presence in the U.K.; and U.K. citizens or foreign citizens ordinarily resident in the U.K. outside of the U.K.

Under the “corporate offense”

U.K. companies or partnerships doing business overseas

Companies or partnerships registered in the U.K. should take note of the extra-territorial reach of the Bribery Act. A company or partnership can commit the corporate offense of failure to prevent bribery if an “associated person” bribes another person anywhere in the world to obtain or retain business or a business advantage for that company or partnership.

A foreign subsidiary of a U.K. company or partnership (or any other “associated person” providing services for or on behalf of the company/partnership) can cause the U.K. parent to become liable for a corporate offense when the subsidiary (or other “associated person”) commits an “active” general or FPO offense in the context of performing services for the U.K. parent.

If the foreign subsidiary (or other “associated person”) were acting entirely independently, arguably, it would not cause the U.K. parent to be liable for failure to prevent bribery as it would not then be performing services for the U.K. parent. However, that is a fine distinction that should not be relied upon given: the number of contrary arguments that can be made (e.g., any act that benefits a subsidiary must benefit a parent); the untested status of the argument; and because the U.K. parent might still be liable for the actions of its subsidiaries in other ways such as false accounting offenses or under the Proceeds of Crime Act 2002.

Foreign companies with operations in the U.K.

The Bribery Act has important implications for U.S. and multinational companies which do business in the U.K. as its territorial scope is extensive.

The corporate offense applies to any relevant “commercial organization,” which is defined as:

- a body incorporated or partnership formed under the law of the United Kingdom and which carries out business anywhere in the world; or
- any other body corporation or partnership (wherever incorporated/formed) that carries on a business, *or part of a business*, in the U.K.

The Bribery Act does not define what constitutes “part of a business” so until this is clarified either through official guidance or by the U.K. courts, companies and partnerships should exercise caution and assume a broad interpretation. In addition to U.K. subsidiaries, a branch or representative office or U.K. agent may be sufficient to implicate the Bribery Act.

The sweep of the Bribery Act is surprisingly broad, such that a U.S. (or other non-U.K.) company or partnership which carries on any part of its business in the U.K. could be

prosecuted for failure to prevent bribery even where the bribe is given by an “associated person” outside the U.K., the benefit or advantage arising from the bribe is intended to accrue wholly outside the U.K., and all effects of the bribe occur outside the U.K.

Under the “general offenses” and the “FPO offense”

A person or entity can be prosecuted for the “active,” “passive” and FPO offenses if:

- any part of the offense takes place in the U.K.; or
- the offense takes place abroad but the person or entity is a British citizen, an individual ordinarily resident in the U.K. or a body incorporated under any U.K. law.

Accordingly, if U.S. companies and partnerships have in place “adequate procedures,” they will not be subject to prosecution in the U.K. for bribery committed overseas unless part of the offense takes place in the U.K. and/or a British citizen, a U.K. resident or a U.K. company is party to a “general offense” or an “FPO offense.”

Individual Liability

Any individual within a business (including any officer of a company or partnership) who commits acts or omissions forming part of the bribery offense may be liable for a primary bribery offense or for conspiracy to commit the offense with others (including, for example, the employer company or partnership).

If the individual performed the act or omission in the U.K., their nationality should not affect the Act’s application. However, where the offense takes place entirely outside the U.K., broadly speaking only British nationals and those ordinarily resident in the U.K. can be liable.

In addition, any senior officer (including directors, company secretaries, managers or those purporting to act as such) who “*consented or connived*” in any general (i.e., active or passive) or FPO offense committed by the corporate entity, may be held personally criminally liable together with the corporate entity for the offense.

Penalties

The potential penalties for committing an offense under the Bribery Act are significant.

A company or partnership

An unlimited fine.

An individual

Up to ten years’ imprisonment and/or an unlimited fine.

Potential further consequences of committing an offense

The potential implications of an offense being committed under the Bribery Act are not limited to the penalties noted above.

Money laundering offenses

Any corporate entity or individual who deals with funds received as a result of a bribe, with knowledge or suspicion that they amount to criminal property, may be guilty of a money laundering offense under the U.K.'s Proceeds of Crime Act 2002.

Exclusion from public procurement

Although there is ongoing debate concerning the impact of the U.K. Bribery Act in this context, if a company or director is convicted of bribery under the Bribery Act (or for money laundering under the Proceeds of Crime Act), European Union (E.U.) law currently requires the mandatory and permanent exclusion of the relevant company from public sector contracts E.U.-wide.

Guidance

In September 2010, the Ministry of Justice issued a consultation paper on guidance about the "corporate offense" which also contained draft guidance relating to the Bribery Act generally and draft illustrative scenarios. That guidance will be finalized and published in January 2011.

The U.K. Attorney General is also likely to provide guidance regarding prosecution. However, as with the Ministry of Justice's guidance, this is likely to only amount to general statements of principle. No date has been given for when this will be published but it is anticipated to be available in the first quarter of 2011.

Unofficial guidance to the Bribery Act has already been issued by, among others, the Association of General Counsel and Company Secretaries of the U.K. FTSE 100 ("the GC100") and Transparency International's U.K. Chapter.

Facilitation Payments, Corporate Gifts and Hospitality

The outlawing of facilitation payments and certain types of corporate gifts and hospitality under the U.K. Bribery Act has caused a considerable amount of debate both among legal commentators and in the press. This section provides a brief discussion of these topics and some of the indications given by the U.K. Government as to if, and how, facilitation payments and corporate gifts and hospitality will be prosecuted.

Facilitation Payments

Unlike under the FCPA, all facilitation or “grease” payments (payments to ensure performance of a routine non-discretionary function) are illegal under the “FPO offense” and, if there is an intent, to induce “improper conduct,” the “active” general offense of the Bribery Act.

The outlawing of all facilitation payments under the Bribery Act has, not unsurprisingly, sparked considerable discussion given at least the perception that, in certain jurisdictions, important administrative wheels will not turn without “grease” payments being applied. Despite any concern expressed by the private sector, the U.K. Government has decided not to amend the Bribery Act to allow certain types of facilitation payments, citing the clear views expressed in the 2009 OECD Anti-Bribery Recommendation.

However, while making clear its commitment to eliminate all facilitation payments, the U.K. Government has indicated in its September 2010 draft guidance that prosecuting facilitation payments will be a matter of prosecutorial discretion. Despite this indication and the clear sense that facilitation payments will not be prosecuted as a matter of course, absent official guidance from the U.K. Ministry of Justice or the Serious Fraud Office, there remains no certainty that the making of facilitation payments will not result in prosecution. Moreover, it seems unlikely that a corporate anti-corruption compliance program will be deemed “adequate” if it permits facilitation payments in a commercial organization which is subject to the U.K. Bribery Act. Accordingly, best practice for a company must be not to allow facilitation payments to be made in circumstances where the Bribery Act may apply, and to reflect this approach in company policy.

Gifts and Hospitality

Promotional expenses (such as corporate hospitality, gifts and client expenses) may also be caught by the Bribery Act. This is of particular concern with respect to FPO corporate hospitality where, under the Act, almost any form of corporate hospitality could potentially create a technical offense (unless permitted by the written law of the FPO’s jurisdiction).

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However, the U.K. Government, in its September 2010 draft guidance to the Bribery Act, has clearly indicated that:

“reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organization, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business.”

What amounts to “*reasonable and proportionate*” will, no doubt, be a matter of some debate, but the General Counsel to the U.K.’s Serious Fraud Office, Vivian Robinson QC, in order to try to clarify where the prosecutorial line will be drawn, has recently used the Ryder Cup as an example. His view was that a company providing hospitality to clients in the form of tickets to the Ryder Cup fell on the right side of the line (so long as this was not wholly disproportionate to the nature of the business) but that providing a Rolex watch to clients to commemorate the event was likely to fall on the wrong side of the line.

“Adequate procedures”

Introduction

The offense which is of primary significance to U.S. and multinational businesses is the “corporate offense” of failing to prevent bribery because: it has extra-territorial effect (a company only has to conduct part of its business in the U.K. to implicate the Act); the offense may be triggered by an “associated person” (such as an agent, a supplier, a distributor, a sub-contractor or a joint venture partner) giving a bribe anywhere in the world; and it is a strict liability offense with potentially very significant penalties (unlimited fines for companies and unlimited fines and/or up to 10 years imprisonment for individuals).

It is, therefore, critical for U.S. and multinational businesses to understand the effect of the “corporate offense,” the risks it causes to their business and how to mitigate those risks most effectively. The single most important way that businesses can limit their risk of committing the “corporate offense” is by putting in place “adequate procedures” to prevent bribery, as this would amount to a complete defense under the Act. Accordingly, a crucial question for businesses to ask is “what amounts to adequate procedures?”

Unfortunately, there is not yet, nor is there likely to be, a definitive answer to that question. In September 2010, the U.K. Ministry of Justice released draft guidance regarding “adequate procedures” which, while it does not provide a prescriptive “safe harbour” checklist, is helpful in highlighting six key principles that the U.K. Government considers essential to any robust and effective anti-corruption systems and controls (i.e. “adequate procedures”). Final guidance will be released in January 2011 following the conclusion of the current consultation period.

It is clear that the combination of the wide scope of the “corporate offense” and the requirements set out in the six principles is very likely to require even those businesses with sophisticated anti-corruption policies and procedures to have to amend them and widen their implementation to ensure that they are “adequate” for purposes of the Bribery Act. For example, a company with a long-standing and robust FCPA policy will need to ensure that facilitation payments and private sector bribery are addressed in company policy in a manner consistent with the Bribery Act in order to have the “adequate procedures” necessary to defend a charge of violating the “corporate offense.”

In this section, we explore the six principles governing “adequate procedures” set out in the U.K. Government’s draft guidance.

Principle 1: Risk Assessment

“The commercial organization regularly and comprehensively assesses the nature and extent of the risks relating to bribery to which it is exposed.”

A comprehensive understanding of the bribery risks a business faces is the foundation of any effective anti-corruption program and will ensure that its policies and procedures are properly tailored to the scale and complexity of its activities and the risks to which it is exposed. Accordingly, businesses should carry out regular, in-depth corruption risk assessments. The draft guidance stresses the following key elements of an effective risk assessment.

Assessment procedures

- Take into account the size of an organization, its activities, its customers and the markets in which it operates to determine what is adequate.
- Consider whether risk assessments should be conducted in-house or whether using external professionals may be appropriate.
- Determine how best to inform the risk assessment: consider internal information (such as annual audit reports, internal investigation reports, complaints, etc.) and analyze publicly available information on bribery issues in particular sectors, overseas markets and jurisdictions.

Key bribery risks

- Consider internal risk factors such as deficiencies in employee knowledge of the business’ profile and associated bribery risks, employee training or skills sets, or lack of clarity in the organization’s policy on gifts, entertaining and travel expenses.
- Analyze external risk factors including country risk, (e.g., corruption rankings, absence of anti-bribery legislation and implementation, etc.), transaction risk (e.g., transactions involving charitable or political contributions, licenses and permits, public procurement, high value projects or intermediaries) and partnership risk (e.g., business partners located in higher-risk jurisdictions, associations with prominent public office holders, insufficient knowledge or transparency of third-party processes and controls).

Ongoing risk review and monitoring

- As the business evolves, and external circumstances change, an organization needs to ensure that it is devoting sufficient resources to the assessment and mitigation of corruption risks as they emerge.

Principle 2: Top Level Commitment

“The top level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery. They establish a culture within the organization in which bribery is never acceptable. They take steps to ensure that the organization’s policy to operate without bribery is clearly communicated to all levels of management, the workforce and any relevant external actors.”

This principle reflects the importance of the “tone from the top” in fostering a culture in which bribery is not tolerated. The draft guidance suggests that businesses do the following:

- issue a statement of commitment to counter bribery in all parts of the organization’s operation, including a commitment to carry out business fairly, honestly and openly (this should be communicated internally and externally);
- adopt a zero tolerance policy towards bribery and set out the consequences of breaching the provisions of the regimes for employees and management or for any contractual bribery prevention provisions with business partners;
- avoid doing business with others who do not commit to doing business without bribery;
- involve top-level managers in developing a code of conduct and ensuring anti-corruption policies are published and communicated to employees, subsidiaries and business partners; and
- appoint a senior manager to oversee the development of an anti-bribery program and to ensure its effective implementation throughout the organization.

Principle 3 - Due Diligence

“The commercial organization has due diligence policies and procedures which cover all parties to a business relationship, including the organization’s supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the commercial organization does business.”

Businesses need to know who they are doing business with if their risk assessment and mitigation are to be effective. Given the Bribery Act’s wide definition of who may be an “associated person,” businesses must conduct proportionate due diligence across the spectrum with regard to employees, agents, intermediaries, subsidiaries, joint venture and consortium partners, contractors, and other third party service providers in order to ensure appropriate measures can be taken.

It is critical to have due diligence policies and procedures which cover all new (including, in the context of potential mergers and acquisitions) and existing business and employment relationships and that any issues arising from the due diligence are acted upon.

The draft guidance notes the following areas as important in the context of conducting appropriate due diligence.

- *Location*: making inquiries about the risk of bribery in a particular country in which an organization is seeking a business relationship, the types of bribery most commonly encountered, and any information about the preventive actions which are most effective.
- *Business opportunity*: making inquiries about the risks that a particular business opportunity raises (e.g., establishing whether the project is to be undertaken at market prices, or has a defined legitimate objective and specification).
- *Business partners*: making inquiries to establish whether individuals or other organizations involved in key decisions, such as intermediaries, consortium or joint venture partners, contractors or suppliers, have a reputation for bribery and whether anyone associated with them is being investigated or prosecuted, or has been convicted or debarred, for bribery or related offenses.

Principle 4: Clear, Practical and Accessible Policies and Procedures

“The commercial organization’s policies and procedures to prevent bribery being committed on its behalf are clear, practical, accessible and enforceable. Policies and procedures take account of the roles of the whole work force, from the owners or board of directors to all employees, and all people and entities over which the commercial organization has control.”

This principle stresses the need for businesses not only to have robust anti-corruption policies and procedures but to make them visible and intelligible to all individuals and entities that could be considered as “associated persons.”

The draft guidance makes clear that an effective anti-corruption policy should do the following:

- set out a clear prohibition of all forms of bribery including a strategy for building this prohibition into the decision making processes of the organization;
- identify the senior individuals responsible for implementing the policy, monitoring compliance and for oversight of any internal sanctions process;
- specify a communications strategy to reassure investors, employees, customers, business partners and others possibly exposed to consequences from any incident;
- set out a clear and workable code of conduct covering the key risk areas, for example, expenses, gifts and corporate hospitality, facilitation payments, political and charitable donations and sponsorships and other activities which can form part of an employment contract;
- indicate how existing procedures can be used for bribery prevention purposes (e.g., using financial and auditing controls, disciplinary procedures, performance appraisals, and selection criteria as an effective bribery deterrent);

- explain due diligence procedures in with respect to its business partners; and
- provide clear procedures for reporting suspected bribery (including blackmail or extortion), including an emergency helpline where appropriate, and explain the mechanism for investigating and dealing with allegations.

Principle 5: Effective Implementation

“The commercial organization effectively implements its anti-bribery policies and procedures and ensures they are embedded throughout the organization. This process ensures that the development of policies and procedures reflects the practical business issues that an organization’s management and workforce face when seeking to conduct business without bribery.”

However good policies and procedures are, the failure of a business to properly implement those policies and procedures will mean that they will fall short of being “adequate.” Paying lip service to the Bribery Act by putting a comprehensive policy together but not following through on it will not be sufficient.

Accordingly, if a business is going to be able to rely on the “adequate procedures” defense, it is critical that it can demonstrate not only that it has an effective and properly tailored anti-corruption policy, but that it has followed through with workable procedures in place to enforce it, and, crucially, can produce documentary evidence to support this (including records of training and monitoring compliance and dealing with incidents of bribery or suspected bribery).

The draft guidance stresses the importance of businesses, in particular larger organizations, having an implementation strategy in place which covers who is responsible for implementing the policy, how and when it will be implemented, and how the policy can be most effectively communicated both internally and externally.

Principle 6: Monitoring and Review

“The commercial organization institutes monitoring and review mechanisms to ensure compliance with relevant policies and procedures and identifies any issues as they arise. The organization implements improvements where appropriate.”

The monitoring of compliance with existing policies and the review and development of those policies and procedures over time are identified as the final key principle required to establish “adequate procedures” under the U.K. Bribery Act.

The draft guidance makes a number of non-prescriptive suggestions as to what may amount to effective monitoring and review of policies and procedures.

Internal monitoring and review mechanisms

- *In smaller organizations:* effective financial and auditing controls that pick up potential and actual irregularities and taking into account the views and comments of

employees and key business partners regarding the improvement of anti-corruption policies.

- In larger organizations: financial monitoring, bribery reporting and incident management procedures. Periodic reporting to the Audit Committee, the Board of Directors or equivalent body may be appropriate, allowing for an independent assessment of the adequacy of anti-corruption policies to be included in the Annual Report to shareholders.

Transparency

- Lack of transparency can facilitate the payment, receipt and concealment of bribes.
- Given the challenges posed by distance and unfamiliarity with overseas customs and regulations, businesses should consider carefully monitoring the implementation of anti-corruption policies and procedures in overseas offices and business partners.

External verification

- Higher risk and larger organizations should consider commissioning external verification or assurance of the effectiveness of anti-corruption policies which will highlight the strengths and weaknesses of its policies and procedures and may also enhance its credibility with business partners and customers.

Again, documenting all monitoring and reviews may be crucial in establishing the "adequate procedures" defense and should be done as a matter of course.

Conclusion

The U.K. Ministry of Justice's draft guidance does not prescribe what would constitute "adequate procedures" for the purposes of the Bribery Act but instead provides universally applicable principles to guide businesses in crafting and implementing their anti-corruption policies and procedures.

Given the very wide variety of shapes and sizes of businesses the Bribery Act will apply to, it is not surprising that the draft guidance does not contain a list of 'hard and fast' rules. To do so would prove disproportionately onerous for some businesses while insufficient for others. As a result, however, there is a continuing lack of certainty as to what does amount to "adequate procedures."

Even if further guidance is given in January 2011 as a result of the ongoing consultation process, it is advisable that, before April 2011, businesses consider carefully how existing anti-corruption policies and procedures should be adapted so as to be "adequate" for the purposes of the Bribery Act and seek expert advice.

U.K. Bribery Act v. FCPA: a snapshot comparison

Provision	U.K. Bribery Act	FCPA
<i>Bribery of foreign public officials</i>	Yes (<i>Section 6</i>).	Yes - the FCPA's anti-bribery provisions only apply to bribery of foreign officials (including political parties, party officials and candidates for office) (<i>15 U.S.C. §§78dd-1(a)(1)-(3)</i>).
<i>Commercial bribery</i>	Yes – except for the Foreign Public Official offense (the “FPO offense”), the Act applies to “private to private” bribery.	No - except that the books and records provisions mandate accurate record-keeping by issuers with respect to all transactions. The Travel Act and the Wire Fraud statute have also been used to prosecute commercial bribery.
<i>Receipt of a bribe</i>	Yes (<i>Section 2</i>).	No.
<i>Intent</i>	Mixed: some of the “general offenses” (<i>Sections 1 and 2</i>) require an intention for a relevant function or activity to be performed improperly; the “FPO offense” (<i>Section 6</i>) requires an intent to influence the FPO and to obtain/retain a business or a business advantage; and the “corporate offense” (<i>Section 7</i>) requires no intent.	Yes - the anti-bribery provisions of the FCPA require that the defendant act “corruptly,” “willfully,” and “knowingly.” Knowledge is expressly defined to include willful blindness (<i>15 U.S.C. § 78dd-1(f)(2)</i>).
<i>Facilitation payments exception</i>	No – facilitation payments are not excluded under the Act.	Yes – in limited circumstances, small facilitation payments are permitted when made to expedite or secure the performance of ‘routine governmental action’ (<i>15 U.S.C. §78dd-1(b) and §78dd-1(f)(3)</i>).
<i>Failure to keep accurate books and records</i>	No specific offense but failure to keep accurate books and records may constitute a failure to have “adequate procedures” in place and if it is a U.K. company, that failure may amount to breaches of other U.K. legislation including the Companies Act 2006.	Yes – for U.S. and foreign companies required to file periodic reports with the SEC (<i>15 U.S.C. § 78m(b)(2)</i>).

Provision	U.K. Bribery Act	FCPA
<i>Promotional expenses exception</i>	No – there is no specific exception but the U.K. Government’s draft guidance indicates that “reasonable and proportionate” promotional expenditure will not be prosecuted.	Yes - the FCPA provides an affirmative defense for payments that are reasonable and bona fide business expenses that are directly related to the promotion, demonstration or explanation of products or services, or in connection with the execution or performance of a contract with a foreign government or agency (<i>See 15 U.S.C. §78dd-1(c)(2)</i>).
<i>Extra-territorial application</i>	Yes – individuals and corporate entities may be liable for “general offenses” and the “FPO offense”, if committed outside the U.K. and if they have a “close connection” with the U.K. (i.e., if they are U.K. citizens, ordinarily resident or incorporated in the U.K.) (<i>Section 12(4)</i>). The “corporate offense” applies to U.K. entities and any body corporate (wherever formed) which carries on part of its business in the U.K. (<i>Section 7(5)</i>).	Yes - the FCPA applies to acts by U.S. issuers, domestic concerns and their agents and employees that occur wholly outside the U.S., and to acts by U.S. citizens or residents wherever they occur.
<i>Liability for actions of third parties</i>	Yes – liability for “general offenses” and the “FPO offense” can accrue for bribery conducted through third party intermediaries, and liability under the “corporate offense” can arise if the bribery is conducted by an “associated person” (a person performing services on behalf of the commercial organization – <i>Section 8</i>).	Yes – there is a prohibition on corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing (including conscious disregard and deliberate ignorance) that any portion of the payment will go directly or indirectly to a foreign official.
<i>Penalties</i>	Individuals: up to ten years’ imprisonment and/or an unlimited fine. Corporations: an unlimited fine.	Corporations: an unlimited fine. Individuals: a criminal fine of up to \$250,000 per violation and imprisonment for up to five years. Corporations: a criminal fine of up to \$2,000,000 per violation. N.B. Under the Alternative Fine Act, criminal fines may be considerably higher. In addition, criminal penalties may also be considerably higher for books and records/internal control violations. Civil remedies include civil penalties and disgorgement of profits.
<i>Statute of limitations</i>	None.	5 years (subject to tolling by a court for up to an additional 3 years while mutual legal assistance is being sought).

This publication was prepared by Mark F. Mendelsohn, Partner
with Matt McCahearty, Associate (U.K. qualified)

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This document is not intended to provide legal advice and no legal or business decision should be based on its content. Questions concerning the issues addressed in this publication may be directed to:

Mark F. Mendelsohn
Partner
2001 K Street, NW
Washington, DC 20006-1047
Tel: (202) 223-7377
Fax: (202) 204-7377
mmendelsohn@paulweiss.com

NEW YORK

1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING

Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG

12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852-2846-0300

LONDON

Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO

Fukoku Seimei Building, 2nd Floor
2-2 Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

WASHINGTON, D.C.

2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON

500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410