From the FCPA to the UK Bribery Act: Are Your Compliance Policies Sufficient?

By Jaliya Stewart Faulkner and Teresa L. Bouchard

In July 2011, the United Kingdom (UK) took an aggressive step against corruption and bribery by passing the UK Bribery Act. The Act, by many measures, is a counterpart to the U.S. Foreign Corrupt Practices Act (FCPA). The Act’s expansive extra-territorial application, however, combined with its strict liability provisions for failure to prevent bribery and draconian penalties, may be more far-reaching than the FCPA. Given the recent increase in anti-corruption enforcement activity in the United States, many companies enhanced their FCPA compliance procedures; however, because of the UK Bribery Act’s broader scope, FCPA compliance programs may not be sufficient to comply with the UK Bribery Act. Hence, companies engaged in business abroad should reevaluate their compliance systems to address aspects of the UK Bribery Act that go well beyond the FCPA’s mandates.

The UK Bribery Act, like the FCPA, is an anti-corruption law. The Act makes it a crime to offer a bribe to a domestic or foreign government official, to engage in any commercial bribery, and to receive a bribe. On top of that, the Act also criminalizes the failure of a corporation to prevent bribery. Violation of the Act could result in imprisonment of up to 10 years and fines of an unlimited amount. Adding to the concerns raised by unlimited financial liability, the Act does not delineate how fines are to be calculated. The Serious Fraud Office (SFO) is responsible for prosecuting crimes under the Act. The SFO, like the Department of Justice, has expressed willingness to work with violators and negotiate settlements.

1. Background on the Act

In 1997, the United Kingdom signed the Organization for Economic Cooperation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, requiring all signatories to enact domestic legislation making it a crime to pay bribes overseas in pursuit of business. The
UK subsequently decided that the then existing anti-corruption laws met the Convention’s terms, despite the OECD’s outspoken objections, including a 2008 report published by the OECD detailing the UK’s persistent failure to address its deficient anti-corruption laws. Following over a decade of criticism that the country’s anti-corruption legislation was antiquated and inadequate, the UK conducted a complete revision of the country’s bribery and corruption statutes, resulting in the robust Bribery Act that was passed in 2011.

2. Differences Between UK Bribery Act and FCPA

The UK Bribery Act is similar in nature and purpose to the FCPA, but there are several significant differences that make the Bribery Act broader in scope than the FCPA. Some of the key differences are:

- The Bribery Act applies to any company that does business in the UK
- It does not require corrupt intent
- It is not limited to the bribery of public officials
- It prohibits the acceptance of a bribe, as well as the giving of a bribe
- It penalizes the failure to prevent bribery

a. The UK Bribery Act is Widely Enforceable

The Bribery Act states that “a relevant commercial organization” violates the Act when a person associated with the organization makes a bribe with the intent of obtaining or retaining business for the organization. By contrast, the FCPA only applies to U.S. issuers, domestic concerns and foreign nationals acting in the United States. Thus, the Act has a much broader reach than the FCPA. It applies to any company, regardless of its location, that “carries on a business or part of a business, in any part of the United Kingdom.” Therefore, any company that has any business dealings in the UK could be held criminally liable under the Act, even if the alleged bribe did not take place in the UK and the benefit is intended to accrue outside of the UK.

b. The UK Bribery Act Does Not Exempt Facilitation Payments

Unlike the FCPA, the Bribery Act contains no exception for “facilitation payments,” which are small payments made to secure routine governmental action. Whether the SFO will prosecute a corporation for bribery on the basis of facilitation payments depends on a number of factors, including whether the payments are large or repeated, whether the company has a procedure in place to address what employees should do in response to a request for a facilitation payment, and whether the company self-reported and took remedial action. Companies that allow facilitation payments may want to reconsider those policies.
c. The Bribery Act Contains a Strict Liability Standard for Corporate Failure to Prevent Bribery

The Bribery Act’s criminalization of a corporation’s failure to prevent corruption has no FCPA corollary. The Act provides, “A relevant commercial organization” violates the law when a person “associated” with the organization bribes another person, intending to obtain or retain business or a business advantage for the organization. The Bribery Act provides defenses if a corporation can show that there were “adequate procedures” designed to prevent bribery. “Adequate Procedures” is not defined within the Act, but the Ministry of Justice has stated that adequate anti-bribery procedures should be “[f]lexible and outcome-focused.” Guidance issued by the Ministry of Justice and OECD does provide six guiding principles, which are discussed in the next section.

Although the SFO has not prosecuted a corporation for failure to prevent bribery, the UK Financial Conduct Authority (FCA) has been enforcing the underlying principles of the Act. Recently, a UK insurance company was fined approximately £315,000 for having insufficient controls against bribery. The FCA only has jurisdiction over firms in the UK that provide financial products and services to the UK and abroad. Given the recent trend of increased enforcement of anti-bribery laws, it is likely only a matter of time before the SFO flexes its muscle and tests the limits of the Bribery Act against corporations and, quite likely, foreign corporations.

3. An Effective Compliance Program: Guiding Principles

The far-reaching nature of the Bribery Act has added to an already hot regulatory climate, making it more important now than ever for corporations to heighten their focus on the prevention of bribery. To prevent bribery, and thereby avoid violation of anti-bribery laws, companies should consider implementing, maintaining, enforcing and reevaluating internal compliance policies. The Ministry of Justice and the OECD have both issued guidance on the best practices for the prevention of bribery, which focuses on six principles. Below are those principles, followed by our more specific suggestions for implementing each principle.
Proportionate Procedures
- Stay abreast of the bribery risks specific to the relevant industry
- Create clear, practical, accessible, and effectively implemented and enforced bribery prevention procedures

Top-Level Commitment
- Foster a culture in which bribery is never permitted
- Ensure that top-level compliance is reinforced and implemented by employees at all levels of business
- Provide strong, explicit and visible support to corporate bribery prevention policies

Risk Assessment
- Conduct an independent assessment of the company’s bribery prevention internal controls
- When assessing the company’s overall risk profile, consider geographical risks, sectoral risks, transaction risks, business opportunity risks and business partnership risks

Due Diligence
- Document carefully the sufficiency of internal controls, and be mindful of audit reports
- Audit business partners for their bribery prevention policies
- Implement specific policies regarding outside agents and third parties, including appropriate due diligence policies and procedures

Communication and Training
- In codes of conduct, compliance programs and company policies, use language to make clear that they are globally focused rather than U.S.-centric
- Maintain an open line of communication about bribery concerns among all levels of employees
- Create a code of ethics and anti-corruption principles that are applicable regardless of whether local laws prohibit bribery and whether improper payments may be culturally accepted
- Utilize individual accountability, such as appropriate disciplinary and incentive programs

Monitoring and Review
- Actively benchmark compliance programs against peer corporations’ compliance programs
- Follow up on any reports of misconduct
- Conduct a counsel-led independent internal investigation if concerns of misconduct are expressed

Conclusion

The UK Bribery Act has only begun to rear its regulatory head. Assuming the UK follows the trend of increasingly robust investigation and prosecution of corruption issues, it can be expected that enforcement of the Act will only increase. In light of the broadness of the Act and the heightened focus on enforcement, companies with operations in the UK should review and evaluate their existing anti-corruption compliance programs with a careful eye, and if appropriate, seek the advice of counsel. 

Jaliya Faulkner and Teri Bouchard are members of Sutherland’s Securities Enforcement and Litigation team. They may be reached at jaliya.faulkner@sutherland.com and teri.bouchard@sutherland.com.

1 The Bribery Act, 2010, c. 23, § 1 (Eng.).
2 Id. § 11(1)-(3).
4 Org. for Econ. Coop. and Dev., United Kingdom: Phase 2BIS, 5-6 (2008).
5 Id.
6 The Bribery Act at § 7.
7 Ministry of Justice, Guidance on Section 9 of the Bribery Act, 2010.