
# The UK Bribery Act: Set for Implementation

by Michael Osajda

**Statement of intent**

With the release of the Guidance, the UK Bribery Act (UKBA) is scheduled to enter into force on July 1, 2011. Similar to the FCPA on many points – for example, the criminalisation of a foreign public official – there are important differences too, such as the strict liability corporate offense as stipulated in the UKBA: failure to prevent bribery. Our detailed response looks at key differences.

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## Introduction

With the publication of the much anticipated Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010 by the UK Ministry of Justice on March 31, 2011[1] (the Guidance), the UK Bribery Act (the Act) is scheduled to enter into force on July 1, 2011.

The Act was passed by Parliament and given Royal assent on April 8, 2010. Its purposes were two fold. It was intended to 1) codify the disparate UK statutes addressing public and private corruption and 2) bring the UK into compliance with its treaty obligations as a signatory of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[2]. (OECD Convention).

The Act accomplished its two main objectives by creating a number of offenses. Generally, Sections 1 and 2 of the Act prohibit active and passive bribery, which will induce (or reward) or constitute improper performance of a relevant function or activity. The function or activity can be commercial or public. A bribe to a purchasing agent for a government office or a commercial enterprise, as well as a bribe to a juror or a judge are all covered by these sections.

The discrete offense of bribery of a foreign public official set forth in Section 6 of the Act, meets the requirements of the OECD Convention. It prohibits offers, promises or transactions of a financial or other advantage to a foreign public official with an intent to influence that foreign official in his official capacity to obtain or retain business or an advantage in the conduct of business.

The Act, however, goes further than the criminalization of bribery. In a departure that some commentators state puts the UK in the forefront of the fight against corruption, the Act creates a new strict liability corporate offense; failure to prevent bribery. The offense, contained in Section 7 of the Act, occurs if a person performing services on behalf of a relevant commercial organization bribes another person in connection with the organization's business. This offense may be mitigated by an absolute affirmative defense. If the commercial organization had "adequate procedures" in place to prevent bribery, liability can be avoided even if all of the elements of the offense can be proved.

By Section 9 of the Act, Parliament directed the Government to provide guidance about the procedure which relevant commercial organizations can put in place to prevent persons associated with them from committing bribery. The draft guidance was published in the Fall of 2010 for comment. It was subjected to significant public comment during the comment period. After a number of delays and much speculation, the final Guidance was published on March 30, 2011. It consists of the formal guidance required by the Act, some non-binding case examples, as well as Government policy with regard to some of the more troublesome portions of the Act as identified by the comments. Published on the same day was Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions[3] (the Directors Guidance) with regard to prosecutions under the Act. The Directors Guidance provides considerations that prosecutors from the SFO and Public Prosecutions are required to review before prosecuting under the Act. Taken together, the

documents provide useful information with regard to the ultimate interpretation of the Act and how it will be enforced.

When the Bribery Bill was first introduced into Parliament in 2009, and as it wound through Parliament and was finally passed into law, it was inevitably compared to the United States Foreign Corrupt Practices Act (the FCPA), the then "gold standard" in the battle against international official corruption. Businesses used to mitigating their FCPA risks were eager to learn what was necessary to comply with the Act. The publication of the Guidance and the Directors Guidance will now allow a more definitive comparison between the two thereby enabling these businesses to take the steps required to comply with the Act.

## The Act and the FCPA

### Scope

There are two scope differences between the Act and the FCPA. Both laws prohibit the bribery of a foreign public official to obtain or retain business or to gain a business advantage. The FCPA states additional offences that are commonly known as the "books and records" provisions. These provisions require that entities maintain books and records that accurately reflect their transactions and maintain internal controls to prevent and detect bribery. The Act does not mention books and records, limiting itself to bribery. That is not to say that actions that would constitute a books and records violation under the FCPA would not be of violation of UK law. But it would be prosecuted under a different Statute. BAE was convicted of essentially books and records violations in 2010 for a transaction in Tanzania[4].

The bribery prohibition of the FCPA is limited bribery of a foreign public official. The Act not only prohibits bribery of a foreign public official, but it also criminalizes private commercial bribery, wherever it occurs. As Kenneth Clarke states in this forward to the Guidance, making no distinction between public and private bribery, "Bribery blights lives. Its immediate victims include firms that lose unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted". The practical effect on persons or entities that may be subject to both the FCPA and the Act, is that a bribe that may not be an offense of the FCPA could violate the Act. And, because of the general prohibition of bribery set forth in Section 1 of the Act, a prosecution under Section 6 the Act may fail because the recipient may not meet the definition of foreign public official, but may be brought as a purely private bribe.

### Written law exception

Both the FCPA and the Act excuse a payment to a foreign official that is permitted or required by local law; the FCPA by an affirmative defense, and Act as an element of the offense. The value of this exemption is problematic. It has never been used successfully in an FCPA prosecution.

### Hospitality

The FCPA allows an affirmative defense to bribery of a foreign official for payments to or on behalf of foreign officials with regards to reasonable amounts for travel and lodging expenses incurred that are directly related to product promotion, demonstration, or explanation, or the execution or performance of a contract with a foreign government. A number of commentators worried that UK entities would be subject to a business disadvantage in that there was no exclusion in the Act for hospitality payments. Because neither the general bribery or bribery of a foreign public official offense in the Act require a corrupt intent, a strict reading of the Act could criminalize normal corporate hospitality in both private and public transactions. But Parliament, commenting that "Corporate hospitality is a legitimate part of doing business at home and abroad, provided it remains within appropriate limits", suggested they exercise prosecutorial discretion[5]. In the Guidance, the

Ministry of Justice agrees. The comments contained in the Guidance with regard to the principle of reasonableness and proportionality and the Directors Guidance make it clear that hospitality and promotional expenditures will be allowed. While no bright lines or safe harbors have been set forth, the Directors state, "Hospitality or promotional expenditures which is reasonable, proportionate, and made in good faith is an established and important part of doing business. The Act does not seek to penalize such activities." The effect and intent of the expenditures must be examined. The Directors warn, "The more lavish the hospitality or expenditure (beyond what may be reasonable standards in the particular circumstance) the greater the inference that it is intended to encourage or reward improper performance or influence an official."

**Facilitation payments**

The FCPA has an exception from liability for facilitation payments. These payments, also known as "grease payments," are generally defined as payments to local officials to induce the officials to perform a ministerial or non-discretionary act or to induce the official to perform it in a more timely manner. Adopting the approach promoted by the OECD, Parliament allowed no exception for these bribes. The Guidance lists a host of arguments against such an exemption. "Exemptions in the context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees or other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused." Nevertheless, the Government recognizes the practical difficulties in operating in countries where corruption is rampant and petty corruption is the expectation. While recommending prosecutorial discretion on this issue, the Guidance refers to the Directors Guidance. That document sets forth certain factors which would tend to favor or reject prosecution. Size, frequency amounting to a pattern, planning or inclusion in procedures, would tend to favor persecution. Small isolated payments that are against policy or when an organization was in a vulnerable position, such as actual duress would militate against prosecution. Neither guidance delivers clarity that the business community desires, but it does indicate a willingness to view this issue in the context of the real world.

**Jurisdiction**

As currently prosecuted by the US Department of Justice and Securities and Exchange Commission, the anti-bribery provisions of the FCPA are applicable to offenses committed world wide by US residents, US entities, their subsidiaries and affiliates, officers, directors, employees or agents, as well as foreign entities that are considered "issuers" under US securities law. In addition, a foreign person or entity with no association with the US may be subject to the statute if any action contributing to the bribe, such as the use of a US bank for money transfer, occurred in the US.

The Act generally tracks the jurisdictional scheme of the FCPA with regard to the offenses of bribery (active and passive) and bribery of a foreign official. UK residents, UK entities, and business organizations incorporated in the UK are subject to the Act regardless of where the activity took place. Also, if all or a portion of the offense takes place in the UK, persons or entities not otherwise subject to the Act may be prosecuted.

**Failure to prevent bribery**

A significant addition to the prosecutor's arsenal is the offense of failure to prevent bribery on behalf of a commercial organization set forth in Section 7 of the Act. The offense occurs if a person performing services on behalf of a relevant commercial organization (an "associated person") bribes another person to obtain or retain business or an advantage in the conduct of business. There is no counterpart to the provision in the FCPA. This strict liability offense has raised a number of questions that the Guidance addresses. The Act proposes broader jurisdiction for this corporate offense than for the substantive bribery offenses.

This offense is only applicable to active bribery, but it includes a class of potential defendants that are not subject to the substantive offenses. Besides UK entities, any company or partnership that conducts a business or part of a business in the UK is subject to this offense, wherever in the world the substantive bribe occurs. A consistent question during the comment period related to the definition of "carrying on business or part of a business." Most would agree that an established marketing organization or manufacturing facility in the UK would clearly fall within the definition. But, would an unsolicited mail-order sale be considered "carrying on a business or part of a business" in the UK? Without listing specific tests, and stating that it will be that the Courts will be the final arbiters, the Guidance suggests a common-sense approach. An organization would need to have a demonstrable business presence to be subject to the provision. Neither mere listing on the London Stock Exchange, nor subsidiary status would satisfy the common-sense approach. Presumably some nexus to the UK or direct benefit to the non-UK entity would have to exist for jurisdiction to attach.

Another area of concern is the definition of "associated person." In that definition, the Act includes persons who perform services for the organization. This would clearly include individuals or entities such as employees, agents or consultants. But the definition is also meant to apply to those person connected to the organization who might be capable of committing bribery on the organizations "behalf." The Guidance discusses a number of associations. With regard to suppliers or subcontractors, the Guidance warns that the counter-party, that is the person or entity with the direct contractual relationship with the organization, would be an "associated person." If a subsidiary or legal entity joint venture is acting on behalf of the parent or member, and pays a bribe, liability will accrue to the parent or member. If a person acting on behalf of a subsidiary or legal joint venture pays a bribe, liability will accrue only if the parent or member receives direct benefit from the bribe. With regard to a contracted joint venture the degree of control of the member will be significant in determining if there is liability associated with a bribe by the joint venture, agent, or employee thereof.

If a bribe has been made that would be a substantive offence under the Act by an associated person of a commercial organization that carries on business in the UK, the commercial organization may interpose an absolute affirmative defense if it can prove, on the balance of probabilities, that it had adequate procedures in place to prevent bribery. In the Guidance the Government stresses that the question of adequate procedures will ultimately be determined by the courts, but the Directors Guidance indicates that the defense of "adequate procedures is likely to be relevant with considering whether there is sufficient evidence to provide a realistic prospect of conviction."

To aid commercial organizations in establishing adequate procedures, the Guidance has set forth six principles to be considered. Not only is the Guidance mandated by Parliament, prosecutors are required to "take it into account when considering whether the procedures are put in place by commercial organizations are adequate to prevent persons performing services for or on their behalf from bribery."

## The six principles set forth in the guidance

**Principle 1: Proportional Procedures**
The Guidance abjures a one size fits all approach. The procedures should be proportionate to the bribery risks the commercial organization "faces and to the nature, scale, and complexity of the commercial organization's activities." This principle contemplates both policies that set the organization's anti-bribery stance and help create the anti-bribery culture, and procedures that would include an initial and continuing risk assessment and activities designed to mitigate risks found and prevent unethical conduct.

**Principle 2: Top Level Commitment**
An anti-bribery culture is fostered through commitment of the most senior elements of the organization, whether it be the Board of Directors, or owners. This top-level management should communicate its commitment both internally and externally and be involved in setting policy and procedures to implement the anti-bribery culture. Though the commitment should be absolute, the actions may be proportionate to the risks faced and other factors, including the size and complexity of the commercial organization.

**Principle 3: Risk assessment**
The organization should assess the nature and extent of its exposure to external and internal risks of bribery in a periodic, informed, and documented manner. Commonly encountered risks highlighted in the Guidance include: country risk, sectorial risk, transaction risk, business opportunity risk, and business partner risk. Internal risks, such as programmatic deficiencies, faulty internal controls, or lack of training should also be addressed.

**Principle 4: Due diligence**
The Guidance sets forth a proportionate and risk-based approach to due diligence on those persons who will perform services for the organization. The due diligence should be reflected in the procedures of the organization and may mandate different levels of due diligence based on the risk profile of the potential service provider, nature of the transaction, location of that transaction and other risk factors. By way of example, engagement of a local agent is highlighted by the Guidance as worthy of thorough due diligence and risk mitigation.

**Principle 5: Communication (including training)**
The policies and procedures should be embedded and well known to the organization through both external and internal communication. Not only should the organization's anti-bribery stance be communicated, but training should be delivered to provide the knowledge and skills needed to employ the organization's procedures and deal with problems or issues as they arise. The communication scheme should provide a mechanism for feedback and reporting that will protect those who report concerns. Training, both internal and external, should contain initial and continuing phases.

**Principle 6: Monitoring and Review**
The organization should monitor and review the procedures and make improvements as necessary. As the risks and the business case change, procedures should reflect those changes. A good program will review itself to detect changes and deficiencies and implement adjustments. Review of overall effectiveness is also a part of good procedures as are appropriate adjustments dictated by the results.

The principles set forth in the Guidance are generally consistent with those that were published for comment in 2010. The approach of the Government has not changed. The principles are also generally consistent with good practices set forth in Chapter Eight of the US Sentencing Guidelines for the establishment of an effective ethics and compliance program[6], as well as the OECD Good practice guidance on internal controls, ethics and compliance[7]. All of these documents call for the establishment of a real culture of ethical behavior in organizations and the implementation of that culture throughout the organization. Practices such as risk assessment, due diligence, training and monitoring and review are logical steps to implement and live such a culture. The principles of reasonableness and proportionality are also logical business practices.

All UK entities should review the Act and the Guidance carefully and make good business judgments with regard to implementation. Multi-nationals with policies and procedures that have been focused toward compliance with the FCPA should look at the differences between the FCPA and the Act supplemented by

the Guidance and the Directors Guidance to determine what changes, if any, are warranted in existing practices. At a minimum, these will include a review and possible adjustment to hospitality expenditures and facilitation payments policies, a review of engagement procedures for supply chain partners and a comparison of existing programs to the six principles. Although the Act sets forth new challenges, a healthy and effective program that has already established an ethical culture should need but minor changes to comply with the principles set forth in the Guidance prior to full implementation of the Act on July 1, 2011.

## References

[1] The Ministry of Justice Guidance may be found at: http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf

[2] The OECD Convention may be found at: http://www.oecd.org/dataoecd/4/18/38028044.pdf

[3] The Directors Guidance may be found at: http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf

[4] See Serious Fraud Office Press Release at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-fined-in-tanzania-defence-contract-case.aspx

[5] Draft Bribery Bill - Joint Committee on the Draft Bribery Bill at: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11510.htm

[6] Chapter Eight of the US Sentencing Guidelines may be found at: http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/Chapter_8.pdf P, 495, et seq.

[7] Annex II, OECD Convention

## About the author

Michael Osajda resides in Illinois and specialises in foreign corrupt practices act, corporate ethics & compliance. He has been an Attorney with highly diversified experience in both domestic and international contract negotiation, working effectively in many cultural environments. As a FCPA compliance expert and former Lead Counsel for Motorola Broadband Mobility Solutions, Mr Osajda drafted Motorola's FCPA policy. Mr Osajda is a guest lecturer at Dominican University in Chicago and Georgetown University in Washington, DC.

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