The UK Bribery Act and what US companies need to know about it

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Bribing (s.1)

It is an offence to offer, promise or give a financial or other advantage to another person with the intention of:

- Inducing a person to perform improperly a relevant function or activity; or
- Rewarding a person for the improper performance of a relevant function or activity
Being bribed (s.2)

It is an offence to request, agree to accept or to accept a financial or other advantage in return for the improper performance of a relevant function or activity.
Bribing a foreign public official (s.6)

It is an offence for a person to intend to influence an FPO by offering, promising or giving any financial or other advantage:

- to an FPO; or
- to another person at an FPO’s request or with an FPO’s assent or acquiescence,

in order to obtain or retain business or an advantage in the conduct of business.
Failure of commercial organisations to prevent bribery (s.7)

A relevant commercial organisation is guilty of an offence if a person associated with the organisation bribes another person with the intention of either:

- Obtaining or retaining business for the organisation, or
- Obtaining or retaining an advantage in the conduct of business for the organisation
“Relevant commercial organisation”

A relevant commercial organisation is defined as either:

- A body or partnership incorporated or formed in the UK and which carries on a business; or
- A body corporate or partnership incorporated or formed outside the UK which carries on a business, or part of a business, in any part of the UK.
“Associated person”

Someone who performs services for or on behalf of the organisation e.g.:

- Employees
- Agents
- Subsidiaries
- Consultants
- Joint Venture Partners
- Consortium Partners
- Intermediaries
- Contractors
- Distributors
- Advisers
The defence to Section 7: adequate anti-corruption procedures in place

It is a defence if the relevant commercial organisation can show that it had in place **adequate procedures** designed to prevent persons associated with the organisation from undertaking corrupt activities.
What are adequate procedures?

Ministry of Justice Guidance, required by s.9, was (finally) issued on 30 March 2011 and identified six principles for bribery prevention:
1. Proportionate procedures
2. Top level commitment
3. Risk assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

Enforcement

Underlying policy of the Serious Fraud Office

Applying the policy by:

- Targeting the real offenders
- Exercising prosecutorial discretion
Enforcing the Corporate Offence

Serious Fraud Office approach would be influenced by:

- Adequate anti-bribery procedures within the company
- Self-referral by company of discovered bribery
Facilitation Payments

- Eradication a long-term objective
- Sector initiatives
- Size of payments
SFO Guidance on Facilitation Payments

- Clear company policy
- Written guidance to employees on procedures
- Procedures being followed by employees
- Recording of payments
- Informing authorities in countries concerned
- Practical steps to curtail such payments
Gifts and Hospitality

- Must be reasonable and proportionate
- Care needed because a risk area
- Application of common sense
SFO Guidance on Gifts and Hospitality

- Clear company policy
- Expenditure must fall within policy confines
- Need for expenditure to be proportionate
- Recording of such expenditure
- Receipt of hospitality to be legal in recipient’s country

BRIBERY ACT 2010
Liability of senior officers (s.14)

Where an offence is committed under ss.1, 2 or 6 by a company, then:

- A senior officer of the company will be personally liable for the offence under ss.1, 2 or 6 if they are found to have connived in or consented to the offence and they have a close connection with the UK, e.g. British citizen, an individual ordinarily resident in the UK, a body incorporated under the laws of the UK.
Legal and Other Consequences

- Unlimited fines
- Huge legal costs
- Possible debarment from public contracts
- Up to 10 years in prison
- Affect upon shareholders
- Civil suit
- Difficulty of selling its business if no “adequate procedures”
Where Next?

- Risk analysis in both public and private sectors
- Particular focus upon third parties
- Update of policies and procedures
- Update of existing training programmes