

The British Are Coming...with New Bribery Rules

The United Kingdom's Bribery Act of 2010 surpasses the Foreign Corrupt Practices Act as the ultimate antibribery legislation. With reports that bribery and corruption are increasing around the world, the Act couldn't be more relevant.

Since the Foreign Corrupt Practices Act (FCPA) was enacted in 1977, it had been considered the global gold standard for the prevention and detection of bribery of foreign officials. In recent years, the Securities & Exchange Commission (SEC) and Department of Justice placed new emphasis on enforcing this statute, with eight of the top 10 all-time FCPA violators earning their dubious distinction in either 2009 or 2010. At the very top, Siemens, Inc. disgorged \$350 million in profits and paid criminal fines of \$448.5 million, while KBR/Halliburton disgorged \$177 million in profits and paid \$402 million in criminal fines.

The newest tool in the global fight against bribery is the enactment of the U.K. Bribery Act of 2010 (the Act). After several decades of debate and drafting, the Act received final approval with the Royal Assent in April 2011. The high-sounding premise for the legislation indicates its

context:

Bribery blights lives. Its immediate victims include firms that lose out 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 application of the new U.K. statute is extensive, allowing for prosecution of an individual or company with links to the United Kingdom regardless of where the crime occurred. Failure of a commercial organization to prevent bribery committed on its behalf is also now criminal. The Act has been described as the toughest anticorruption legislation in the world and is now considered the new gold standard for prosecuting corruption. Penalties are severe, including up to 10 years of imprisonment, fines of unlimited amount, the potential for property confiscation, and disqualification of directors of involved organizations.

The Act defines bribery as offering an advantage intending to per-

suade or reward someone to perform duties improperly. The advantage may be either financial or nonfinancial. The law applies to persons associated with any company that employs U.K. citizens, provides any services to a U.K. organization, or has an office in the U.K. Thus many U.S. organizations will be subject to its provisions. U.K. officials have indicated they will initiate enforcement actions involving corrupt acts wherever they might occur.

One of the significant differences between the definitions of bribery in the FCPA and in the Act concerns facilitating payments. These minor gratuities of relatively small amount paid to functionaries to speed their handling of a routine transaction are specifically allowed by the FCPA and differentiated from payments made to obtain business. There is no such exclusion in the Act. Guidance to the Act notes that "exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused."

Another difference between the two statutes is the Act's scope, which involves its application to bribery or attempted bribery activities involving any entities or individuals. The FCPA is directed only to the crime of bribing a foreign public official, but the U.K. law has no such limitation. Further, the Act applies to transactions between entities or individuals in either the public or private sector.

The Act specifically mentions that acts of hospitality could be considered a bribe. But the Guidance to the Act notes that bona fide hospitality and promotional expenditures that seek to improve organizational image, better present products and services, or establish cordial relations are recognized as an established and important part of doing business, and it isn't the intention of the Act to make such behavior criminal.

Unlike the FCPA, the Act criminalizes the failure of an organization to prevent corruption being undertaken on its behalf. The U.K. Ministry of Justice (MOJ) has prepared guidance on how to avoid violating the "failure to prevent bribery" provisions. The Act has six principles of adequacy upon which a company's performance will be judged. The MOJ's guidance calls these principles "procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing." They should be considered "best practices" by every organization on how to prevent and detect corruption:

1. Proportionate Procedures. A company's procedures should be proportionate to the bribery risks it faces and to the nature,

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scale, and complexity of the commercial organization's activities. They should also be clear, practical, accessible, effectively implemented, and enforced.

- 2. Top-level Commitment.** Senior management should foster a culture in which bribery is never acceptable.
- 3. Risk Assessment.** A company should make periodic, informed, and documented assessments of the potential internal and external risks of bribery.
- 4. Due Diligence.** A company should mitigate identified bribery risks by exercising due diligence.
- 5. Communication (including training).** A company should ensure through internal and external communications that its bribery prevention policies and procedures are embedded and understood throughout the organization.
- 6. Monitoring and Review.** A company should monitor and review its bribery prevention practices and make improvements where necessary.

The MOJ guidance presents 11 case studies (comprising 12 case study scenarios) explaining how each of the principles can be put into practice.

Corruption on the Rise

The U.K. Act comes at a critical time in the fight against corruption. Red flags highlighting the need for greater attention to corruption in business are contained in reports issued by Transparency International (TI). TI's *Corruptions Perceptions Index 2010* shows that only 25% of the 178 countries in the study earned a score of five or better on a 10-point evaluation scale. The *Index* assesses a country's relative stance concerning bribery of public officials, kickbacks in public procurement, embezzlement of public funds, and questions that probe the strength and effectiveness of public-sector anticorruption efforts.

Companies looking to invest in or doing more business in rapidly growing developing countries should be concerned the most. Countries that have recently attracted considerable investment attention—Brazil, Russia, India, and China—have relatively low *Index* percentile rankings. None is in the top third. Brazil, the highest ranked, improved to the 63rd percentile from 58th in 2009. China and India stayed virtually the same during the year at the 56th and 51st percentiles, respectively. Russia brought up the rear, slipping to the 13th percentile in 2010 from 19th in 2009. All of these countries have risk of corruption.

Another TI publication to note is *Global Corruption Report 2009*:

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Corruption and the Private Sector.

This report summarizes research, commentary, and essays by more than 75 experts who examined the scale, scope, and devastating consequences of a wide range of corruption issues: bribery and policy capture, corporate fraud, cartels, corruption in supply chains and transnational transactions, emerging challenges for carbon trading markets, sovereign wealth funds, and growing economic centers such as Brazil, China, and India. TI has developed a Self-Evaluation Tool (SET) that organizations can use to examine the design of their antibribery program and assess its effectiveness.

The Executive Summary of TI's *Global Corruption Report 2009* provides recommendations "to ensure that corruption in the business sector is tackled effectively:

- ◆ *Business* needs to recognize that corruption risks start with bribery and go beyond, requiring an integrated approach to corporate integrity and corporate citizenship.
- ◆ *Governments* need to take advantage of a new generation of innovative tools and thereby put much more emphasis on regulatory capabilities, actual enforcement, and international cooperation.
- ◆ *Civil society* needs to become fully aware of how corruption in business is at the core of many other social, developmental, and environmental challenges and must forge much broader and more effective partnerships to support corporate integrity.

- ◆ *Stakeholders*—from business owners, executives and workers to auditors, investors regulators, and anticorruption activists—have to acknowledge that corporate integrity is a multi-stakeholder effort that requires collective action across sectors, borders and institutional boundaries.”

In spite of increasing governmental efforts to quell bribery, corruption still seems to be omnipresent in the business scene. According to TI's *2010 Global Corruption Barometer*, 60% of people around the world say corruption has increased over the last three years. The survey covered 91,500 people in 86 countries. People in Western Europe and North America were most pessimistic, as 73% and 67%, respectively, thought corruption had increased over the three years.

Although maintaining a corruption-free organization can be difficult, especially when conducting business in other cultures, it's still the best policy in the long run. **SF**

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