

U.K.'s Bribery Act 2010: Considerations for U.S. Companies

I. Historical and factual overview

Bribery law in the U.K. traces its roots to the Prevention of Corruption Acts 1889-1916 and the common law. In response to criticism that the current laws are outdated, U.K. has enacted *The Bribery Act 2010*, a comprehensive overhaul of the country's criminal bribery law. The Act, which will come into effect in April 2011, makes it easier for the criminal justice system to hold companies criminally liable for bribery committed on their behalf anywhere in the world. It also extends liability for such bribery to corporate officers and directors with British citizenship or residency. Notably, the Act abolishes the common law offenses of bribery and embracery under the law of England, Wales, and Northern Ireland, and the common law offenses of bribery and accepting a bribe under the law of Scotland.¹

The Act is very comprehensive in its overhaul of criminal bribery laws. This memo, however, only addresses the impact the new law will have on corporate criminal liability.

II. Jurisdictional Reach of the Act

The Act significantly impacts U.S. companies and partnerships doing business in the U.K. The Act gives the U.K. jurisdiction to prosecute any "relevant commercial organisation," which in addition to companies incorporated in the U.K. also includes "any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom"² The Act applies to partnerships in the same way.³ The Act provides jurisdiction to prosecute a company or partnership "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere."⁴

Thus, once a company comes within the Act's jurisdiction under Section 7(5), bribery committed by any "associated person" anywhere in the world is punishable under the Act. Read as a whole, the Act makes a U.S. company which "carries on a business" in the U.K. liable *in the U.K.* for bribery committed by an employee *anywhere in the world*.⁵

III. Punishable Offenses under the Act

In essence, the Act makes companies that carry on business in the U.K. criminally liable for bribery committed on their behalf anywhere in the world. Under Section 7 of the Act, a commercial organization or partnership may be guilty of an offense if a person "associated" with the organization "bribes another person intending (a) to obtain or retain business for [the organization], or (b) to obtain or retain an advantage in the

¹ Bribery Act, 2010, c. 23 (Eng.), at § 17(1).

² *Id.* at § 7(5)(b).

³ *Id.* at § 7(5)(c).

⁴ *Id.* at §12(5).

⁵ *See id.* at §§ 7(5), 12(5).

conduct of business for [the organization].”⁶ The Act defines an “associated person” to be “a person who performs services for or on behalf of” an organization.” The capacity in which a person performs such services for or on behalf of an organization does not matter and therefore an “associated person may, for example, be an employee, agent or subsidiary.”⁷ The Act does not propose a bright-line test for determining if an individual is an associated person. Whether a person is an “associated person,” the Act states, “is to be determined by reference to all the relevant circumstances and not merely by reference of the nature of the relationship between” the person and the organization.⁸ There is a rebuttable presumption, however, that an organization’s employee is an “associated person.”⁹

A violation of Section 7 is punishable by a fine, but the Act does not specify an amount.¹⁰

IV. Defense Created for Defendants with “Adequate Procedures” to Prevent Bribery

The Act carves out a defense for organizations that “prove that [they] had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct.”¹¹ While the Act does not provide any details about what procedures would be “adequate,” it requires the Secretary of State to “publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as [prohibited in the Act].”¹² The Act further provides that the Secretary of State “may, from time to time, publish revisions to [its] guidance”¹³

V. Liability of Corporate Directors

Section 14 of the Act extends liability for corporate bribery to the directors of a “body corporate.” A corporate director may be liable under the Act if an “offence is proved to have been committed with the [director’s] consent or connivance”¹⁴ Various news reports have suggested that U.S. corporate directors may be exposed to prosecution under the Act.¹⁵ As a practical matter such a scenario should only arise in fact specific instances since for a director to be liable under the Act, such director must have “a close connection with the

⁶ Bribery Act, 2010, c. 23 (Eng.), at §7(1).

⁷ *Id.* at §§ 8(1), (2) and (3).

⁸ *Id.* at §8(4).

⁹ *Id.* at §8(5).

¹⁰ *See id.* at §11(3).

¹¹ *Id.* at § 7(2).

¹² *Id.* at §9(1).

¹³ *Id.* at §9(2).

¹⁴ *Id.* at §§ 14(2), (4).

¹⁵ *See, e.g.,* Josh Martin, *New U.K. Fraud Law Targets U.S. Corporate Directors*, Agenda Week (A Financial Times Service), Mar. 8, 2010, available at http://www.agendaweek.com/account/?ref=/articles/print/20100308/fraud_targets_corpo.

United Kingdom.” As defined in the Act a person having a “close connection with the United Kingdom” is one that has British citizenship or nationality, or is “an individual ordinarily resident in the United Kingdom”¹⁶

VI. Conclusions

It should be noted that the Bribery Act’s jurisdictional reach appears to be broader than the Foreign Corrupt Practices Act (the “FCPA”) in the United States.¹⁷ In general, the FCPA prohibits “any individual who is a citizen, national, or resident of the United States” or business “which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States,”¹⁸ and issuers of securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), or required to file reports under Exchange Act Section 15(d),¹⁹ from bribing a foreign government official or political party in order to assist such person or entity in obtaining or retaining business. The Bribery Act seems to go further as it covers any commercial organization and certain officers of commercial organizations that “carry on” business in the U.K. Furthermore, as discussed, the Bribery Act prohibits bribing any person, not just foreign government officials or political parties.²⁰

Although U.S. companies should already have procedures and controls in place to ensure compliance with the FCPA, companies doing business in the U.K. should review those procedures and controls to assure compliance with the seemingly broader prohibitions of the Bribery Act and such guidance as the British Secretary of State will be required to publish thereunder.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; David N. Kelley at 212.701 3050 or dkelley@cahill.com; or Guillaume Buell at 212.701.3012 or gbuell@cahill.com.

¹⁶ See Bribery Act, 2010, c. 23 (Eng.), at §12(4), 14(3).

¹⁷ See The Foreign Corrupt Practices Act of 1977, P.L. 95-213 (1977) (codified as amended in 15 U.S.C. § 78).

¹⁸ See *id.* at § 104(a), (d)(1).

¹⁹ See *id.* at § 103 (Exchange Act Section 30A).

²⁰ While not the focus of this memo, it is noted that the FCPA also contains a “books and records” requirement which applies to issuers that have securities registered pursuant to Section 12 of the Exchange Act or are required to file reports under Exchange Act Section 15(d). See *id.* at § 102 (Exchange Act Section 13(b)(2)).