The UK Bribery Act

Developing an anti-corruption compliance framework
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The UK Bribery Act

The UK's Bribery Act 2010 (the Act) which will come into force on 1 July 2011 represents a strengthening of the UK position on bribery and corruption and an important development in global anti-bribery legislation.

In keeping with the US Foreign Corrupt Practices Act (FCPA), the current global benchmark, the Act makes bribery of foreign public officials an offense and extends beyond company employees to include the behavior of third parties acting on behalf of a company. However, in certain respects the Act goes further than the FCPA. The Act:

- Covers all bribery, not just those that involve public officials
- Makes no exception for facilitation payments made to expedite routine governmental actions
- Makes it a corporate offense to fail to prevent bribery
- Makes it an offense not only to give but also to receive a bribe

With such wide-ranging scope, the Act is an important development in global anti-corruption efforts, especially because the UK's Serious Fraud Office (the SFO), the body tasked with enforcing the Act, has expressed a determination to enforce the Act internationally.

The extent to which it will be possible to use the Act to take action against overseas companies has not yet been legally tested, but these announcements are consistent with the recent aggressive cross-border enforcement of the FCPA and growing international coordination between regulators.

As a result, it is important that organizations review their anti-corruption policies and procedures to ensure compliance with all relevant statutes.

The purpose of this document is to provide some practical thoughts on leading practice in the development of an anti-corruption compliance framework.

The provisions of the Act

The Act specifies four offenses:

- The general offense of offering, promising or giving a bribe
- The general offense of requesting or agreeing to receive a bribe
- A separate offense of bribery of a foreign public official
- A new corporate offense of failing to prevent bribery (applies automatically if anyone associated with the organization has paid a bribe)

The Act is designed to have the maximum deterrent effect. The definition of what constitutes a bribe is extremely broad and covers any financial or other advantage offered (not just given) to someone to induce them to act improperly. Similarly, the penalties for those found guilty of an offense under the Act can be severe, including unlimited fines and up to 10 years' imprisonment.

“My own view is that we have a very wide jurisdiction ... I would say companies should not rely on over-technical interpretations of the Act.”

Richard Alderman
Director of the Serious Fraud Office
Interview with the Daily Telegraph
31 March 2011
The corporate offense of failing to prevent bribery also allows for unlimited fines and extends to include the activities of third parties acting on behalf of a company. This new offense is noteworthy because it expands the scope of the Act beyond an individual transaction or event, to consider the corporate environment in which the bribery took place.

The defense available to an organization is one of having “adequate procedures” in place to prevent bribery. What constitutes “adequate procedures” is a matter of opinion and has been the subject of extensive discussion and further guidance issued by the Ministry of Justice.

Guidance

In March 2011, the UK Ministry of Justice published guidance on the “adequate procedures” (Guidance) that an organization should adopt to protect against bribery and corruption risk. This Guidance is principles-based rather than prescriptive. The six principles covered by the Guidance are:

1. **Proportionate procedures**
   - Procedures to prevent bribery should be proportionate to the risk.
   - Policies need to be clear, practical, accessible, effectively implemented and enforced.

2. **Top level commitment**
   - There must be a commitment to confronting bribery across the business.
   - Management should foster a culture in which bribery is never acceptable.

3. **Risk assessment**
   - The risk assessment should consider both internal and external risks.
   - The assessment should be performed periodically and the results documented.

4. **Due diligence**
   - The approach should be proportionate and risk-based.
   - Due diligence should be conducted on parties performing services for the business.

5. **Communication (including training)**
   - Policies and procedures should be embedded and understood.
   - Training should be proportionate to risk and tailored to specific needs.

6. **Monitoring and review**
   - Evaluate the effectiveness of bribery prevention procedures and adapt where necessary.

In addition to the Guidance issued by the Ministry of Justice, the SFO and Director of Public Prosecutions (DPP) also issued Joint Prosecution Guidance for the Act. Taken together these documents provide practical commentary on how the Act will be interpreted and enforced.
When developing an anti-corruption compliance program, it is important to take the time to identify and analyze bribery and corruption risks in order to make the best use of limited compliance resources. The risk of bribery and corruption cannot always be accurately anticipated so it is essential that a robust risk assessment process is followed in order to record the basis of decisions.

An anti-corruption risk assessment is likely to include the following stages at a minimum:

1. A review of the risks posed by the nature of a company’s operations (e.g., the value of business with governmental entities and other high risk organizations, use of agents and other intermediaries, the countries where the company operates and the regulatory environment)

2. Identification of all policies and controls the company has in place which are relevant to mitigating corruption risk, regardless of the primary purpose of the policy or control

3. An assessment of any gaps or deficiencies in these policies and controls (i.e. the residual corruption risk still facing the company)

4. Production of a plan to build an effective anti-corruption compliance program based on the present risk, the current controls in place and additional measures required to provide a reasonable level of confidence in compliance

As part of a risk assessment program, companies will typically perform procedures including document collection, interviews, financial analysis and transaction testing. The extent of the procedures will vary depending on several factors, including the industry and geographies in which a company operates and any previous corruption issues it has encountered. When performing transaction testing, a risk-based approach should be used to determine the scope of testing required at each location or operational unit.

Most importantly, the risk assessment should produce detailed recommendations for any required remediation of the company’s anti-corruption compliance program.

“Companies should undertake a proper risk assessment to determine whether their bribery and corruption policies and procedures are sufficient and appropriate for their risk profile. It is important that this review covers not only staff but also third parties such as suppliers and agents.”

David Stulb
Global Leader,
Fraud Investigation & Dispute Services
Designing and implementing the program

As with the risk assessment, the elements of an effective anti-corruption compliance program will vary by organization. At a minimum, companies should consider the following leading practices when designing, implementing and assessing their programs:

- Developing a practical corporate anti-corruption policy
- Conducting anti-corruption compliance and awareness training
- Adopting policies for third parties
- Documenting contemporaneous effectiveness

Corporate anti-corruption policy

Companies should develop an organization-wide anti-corruption policy based on the requirements of all applicable statutes. In our experience, it is essential that any compliance policy begins with a clear and unambiguous statement that bribery of any kind will not be tolerated. The policy should also provide operational guidance on how compliance will be achieved in certain high-risk areas, including:

- Interactions with government officials
- Use of third-party agents, consultants and other intermediaries
- Facilitation payments
- Travel, entertaining and gift giving to customers and other relevant commercial organizations
- Charitable giving and community payments
- Controls around cash, petty cash, vendor disbursements and other high-risk transactions
- Corruption risk in mergers and acquisitions
- Other areas of high risk such as customs, offset arrangements and licensing

The policy should encourage employees to seek guidance and report potential violations. It should also offer examples of “red flags” for employees to recognize and avoid problem situations. It is important that employees are able to report concerns in a quick and confidential manner. The policy should therefore provide details of any whistleblower hotline or other reporting systems operated by the company. In our experience, whistleblower hotlines are an important component of an effective anti-corruption program.
Practical considerations

1. Facilitation payments

Facilitation payments are common practice in many countries and not prohibited by the FCPA. However, facilitation payments are banned under the Act. Companies should therefore take a fresh look at their policies on facilitation payments to ensure they are compliant with the Act.

The Prosecution Guidance provides further detail on how the SFO and DPP will approach facilitation payments:

- There is no exemption in the Act for facilitation payments
- A prosecution will usually take place unless public interest factors against prosecution outweigh those in favor
- Factors in favor include large or repeat payments, payments as part of a standard way of doing business and payments where the company procedure was not followed
- Factors against prosecution include a single small payment, payments proactively identified and reported by the company and payments given under duress

Companies should consider the steps they can take to address facilitation payments. One approach is to encourage internal transparency in the reporting of such payments, possibly through a log. Using a log to collect information on facilitation payments may help companies identify the underlying causes of these payments and develop an appropriate response. However, internal identification of facilitation payments can create reporting obligations under relevant anti-money laundering legislation as well as self-reporting considerations with respect to anti-bribery statutes.

2. Promotional expenditure

In contrast to the FCPA, the offense of bribing another person set out in the Act makes no exception for business promotion expense. If there is an intention to induce improper behavior, then marketing and entertaining activities fall within the scope of the Act, regardless of the value of expense.

The Ministry of Justice has recognized that promotional expense is an established part of doing business and stated that “it is not the intention of the Act to criminalize such behavior.” The Guidance goes on to say that “it is, however, clear that promotional expenditure can be employed as bribes.”

SFO announcements have also stressed that there is no public interest in prosecuting “technical” breaches of the Act where promotional expenses are “reasonable, and not lavish.”

Organizations, therefore, should not fear carrying out normal business entertaining, but they should introduce more transparency in giving gifts and providing entertainment.

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1 “Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions,” SFO and DPP, pp. 8-9 (see “Facilitation payments”).

2 “The Bribery Act 2010: Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing” Ministry of Justice, p. 12, para. 26.
While companies may choose to address specific corruption issues in a more detailed manner, it is important for there to be one clear and definitive expression of the company’s position on corruption, which should be presented in the anti-corruption policy. The anti-corruption policy should be approved by the board of directors, distributed to company management and made available to all employees through training and communication.

Compliance with the anti-corruption policy should have a prominent place in the company’s code of conduct and in the overall corporate compliance program. Many factors will ensure that the anti-corruption policy is given appropriate attention, including support from the top, education and training, effective monitoring and appropriate investigative and disciplinary actions.

Conducting anti-corruption compliance and awareness training

Anti-corruption training is a necessity. This is especially true for global organizations entering or active in countries with a history of corruption. At a minimum, all employees and agents in a position to give or receive bribes, or to detect such activity, should receive anti-corruption compliance training.

Training should highlight:
- Corporate anti-corruption policies and procedures
- Details of how employees can get further guidance on matters that they are unsure about
- Potential “red flags” or problem situations
- How to report and escalate potential violations
- That corruption will not be tolerated

Consider a mixture of live training for some higher-risk employees and web-based training for all employees. Along with senior management, employees in sales, marketing, finance, legal, M&A and internal audit should receive enhanced training, customized to their particular roles. The training program should be regularly updated and provided to new or transitioning employees. It should include a test, which must be passed, to demonstrate that employees understand the concepts and practical implications of the material. Many companies complement their training programs with a certification program, whereby the employee certifies that he or she has taken the training, understands his or her responsibility and has reported any and all incidents of corruption that they are aware of.
Employ an anti-corruption compliance certification program

Many companies have formal programs requiring senior employees to regularly certify and re-certify compliance with regulations such as the FCPA and the Sarbanes-Oxley Act of 2002. Certifications will not stop the deliberate wrongdoer, but the requirement serves as a continuing reminder of a manager’s compliance responsibility. Certification processes can also identify issues that might not have surfaced otherwise. A specific certification of compliance with the company’s anti-corruption policy could be included as part of an existing business conduct certification program.

Adopting policies for third parties

The Act, like the FCPA, also extends to the use of third parties such as agents, consultants, distributors and other vendors. This is a very important area and one that should be given greater attention by companies as part of their anti-corruption compliance programs. It is also perhaps the most complex in terms of effort and resources needed to address the potential risks.

We have observed organizations performing the following activities in order to mitigate corruption risks posed by third parties:

- Pre-contract and recurring periodic due diligence and acceptance procedures
- Contracting provisions with anti-bribery representations and warranties
- Vendor certifications and anti-corruption training
- Special payments review and approval for high-risk vendors

Such programs can be costly, and a great deal of thought is needed to determine the right level of oversight required to manage the risk effectively. A first step in managing the risk is to identify the number and type of third parties with which the company does business. Third parties can be categorized according to the nature of the relationship, the goods and services supplied, the countries in which they do business or the financial profile of transactions. Once categorized, the risks posed by each category should be assessed to determine whether any further work is required. Different types of third parties pose different risks – for example standard suppliers of goods and services are unlikely to be affected by the Act – so the procedures to be adopted may vary by vendor type or specific provider.

The program may differentiate the steps taken to check new relationships from the assessment procedures performed for existing providers. A review of past contracts and transactions can be used to qualify existing providers into the program, although the Guidance makes clear that enforcement will not be retrospective. Once the program is established, it will also be necessary to determine how frequently existing providers will be assessed.

Demonstrating effectiveness

The design, implementation and monitoring of an anti-corruption compliance program must be accurately documented. This documentation provides vital evidence of the organization’s commitment to meeting its requirements under applicable statutes. In the event that potential bribery is identified, anti-corruption compliance documentation will help to demonstrate that the bribery was performed in violation of the company’s policies. The documentation may also show that the perpetrator knew or should have known that they were in breach of company policy.

In our experience, the effectiveness of a global anti-corruption compliance program is dependent on a clear requirement for consistency and a rigorous approach to documentation. Implementing a program that is not consistent or rigorous creates a greater risk for the business.
The purpose of anti-corruption compliance reviews should be both to check procedural compliance with the anti-corruption program and to test for substantive compliance by seeking to identify potential violations or “red flags.” Regular reviews may also uncover new risks not previously seen or fully appreciated. In this way, they act as part of an ongoing corruption risk assessment process.

Creating an effective anti-corruption compliance review program requires having the right people, processes and resources. Anti-corruption compliance review programs should address the areas of elevated corruption risk faced by the company and test the controls in place to mitigate the risk. Reviews should be conducted at the various business units on a periodic basis to rank business units and locations by anti-corruption compliance risk. The review program should be designed to ensure adequate coverage over a defined time period of locations ranked as higher risk.

The individuals performing the review need to be trained in the particulars of applicable anti-corruption statutes. Core skill sets to have on the review team include good interviewing skills, the knowledge and experience to select high-risk transactions for testing and the experience to recognize red flags for potential violations. Some companies choose to have their internal audit department conduct these reviews. Others employ different strategies – pairing legal or compliance department personnel with internal auditors or using external forensic accountants.

Anti-corruption reviews should be stand-alone projects that are not integrated with a larger internal audit program. Generally we have found that integrating anti-corruption review procedures into larger audit programs is ineffective; it leads to situations where the auditor doing the testing lacks the necessary training, focus or supervision to do the work properly or applies materiality principles not relevant to bribery.

In recognition of the fact that these reviews may uncover instances of corruption, companies should consider involving external counsel in order to create legal privilege and enable them to manage the associated disclosure requirements more effectively.

Anti-corruption reviews have a powerful deterrent effect. They send a message that the senior management is committed to compliance and actively taking steps to make it happen. This message should be reinforced with appropriate follow-up and disciplinary action where necessary.
Including anti-corruption due diligence in corporate transactions

Companies should develop a policy and specific procedures for anti-corruption due diligence in any contemplated merger, acquisition or joint venture. Conducting anti-corruption due diligence makes good business sense in order to address risks, including:

- Becoming liable for continuing corrupt activities that were not identified and stopped
- Overpaying for a business that has benefited from corruption
- Inheriting corrupt employees, third parties or customers from the acquired company
- Taking on significant and expensive compliance requirements with the new business

The amount of anti-corruption due diligence that can be performed in the context of a merger or acquisition is subject to negotiation between the buyer and the seller and is often conducted under intense time constraints and with limited access to information. The scope and nature of the due diligence is also likely to vary with the anticipated level of post-acquisition integration between the target and the acquirer. If the situation permits, anti-corruption due diligence should include some or all of the following activities:

- Background investigation and public database searches of key executives, vendors and customers
- Interviews of key executives relating to past conduct and risks of corruption in the business
- Review of documents related to the acquired company’s anti-corruption compliance program, past incidents of corruption and risks of corruption in the business
- Testing procedures related to transactions with a higher risk of corruption

Statements accurately disclosing past violations of anti-corruption regulations, along with any associated remediation requirements, should be included in the seller’s representations and warranties. However, taken in isolation, warranties are unlikely to adequately protect the buyer from a potential loss. The contract should also address future compliance with applicable anti-corruption laws.

Following the completion of a transaction, the acquiring company should put anti-corruption compliance high on its integration plan and ensure it has a good understanding of the corruption risks posed by the new organization. A US Department of Justice opinion release issued in 2008 offers an instructive guide on what anti-corruption procedures should be considered as part of a wider post-acquisition exercise.3

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3 US Department of Justice Opinion Procedure Release 08-02, 13 June 2008
Periodically re-assessing risk and modifying the program

Comprehensive corruption risk assessments should be conducted periodically to ensure that the anti-corruption program is evolving with the business. Assuming a robust monitoring structure is already in place, we would suggest a process that provides an extensive review of corruption risk every three to five years. Targeted assessments of particular geographies or business divisions could be carried out more frequently if there are significant changes in local circumstances or applicable anti-corruption regulations.
Reacting to allegations of misconduct

“If an instance of bribery or corruption is suspected, companies need to conduct an independent investigation. In any final review of conduct, the regulator will not only consider the specific allegations of bribery, but also how the company responded to those allegations.”

David Stulb
Global Leader,
Fraud Investigation & Dispute Services

Responding to corruption allegations is fraught with difficulties but organizations can significantly mitigate many of these challenges by incorporating appropriate policies and procedures into their compliance programs.

From the outset, companies need contingency plans to react swiftly — often within 24 hours — to gauge the impact of the allegations, to establish an effective crisis management approach, and to identify and secure the relevant evidence. Careful consideration should also be given to the treatment of whistleblowers and the immediate steps that should be taken to investigate any allegations.

In order to conduct an effective and detailed investigation, it will also be necessary to consider:

• Who should be involved, if anyone, from legal, human resources, finance, internal audit, IT, security, the board, external advisors
• The division of responsibility between these functions
• When regulators and auditors should be informed
• The implications of local labor and data protection laws
• The further steps, if any, that need to be taken with respect to third parties that may be implicated

Voluntary disclosure

Prosecutors are encouraging companies to voluntarily disclose violations and cooperate with them in return for more lenient treatment. This has led to evidence of wrongdoing being provided by companies and raised the pressure on others to self-report.

The SFO issued guidance on self-reporting overseas corruption in July 2009. This guidance considered issues such as the timing of any reporting to the SFO, the degree of cooperation offered by the organization and the remedial steps the company will take. The SFO is currently performing a review of this self-reporting guidance.

Pressure to self-report has also increased for companies registered with the US Securities and Exchange Commission (SEC) following passage of the Dodd-Frank Act in June 2010. This legislation created a new Whistleblower Bounty Program which, under certain conditions, allows employees of SEC registrants to receive up to 30% of any financial penalty arising out of allegations they report.

Proposed Rules issued last year suggest that there will be no requirement on employees to first raise a matter internally before going to the SEC. Consequently, SEC registrants need to carefully consider when they approach their regulators: if they do not appear to deal with the matter swiftly, their employees might report it for them.

The merits of a whistleblower bounty program have been the subject of debate by industry commentators and we can expect that other regulators are paying close attention to the practical impact of the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.
Independent monitors

The resolution of corruption violations is often accompanied by regulators imposing an independent monitor or outside consultant to scrutinize the implementation of remedial compliance measures and controls. Given their broad scope, the costs associated with monitors — all borne by the companies — are substantial. In addition, their involvement can lead to forced changes to the business, which management have little say in or control over.

We stress that monitors are not always imposed by regulators. Recent trends suggest that in return for voluntary disclosure and close cooperation with the prosecuting authorities, companies investigated for corruption may be allowed to self-monitor the effectiveness of any corrective action. But, as before, companies should be aware of this possibility and its broader implications.
Conclusion

Bribery is a serious risk that should be treated as a priority by business and actively managed to avoid prosecution. It is now clear that if you have not carried out a thorough assessment of the bribery risks faced by your business, you should do so immediately.

The challenge is interpreting the Guidance issued by the UK authorities in order to assess what, if any, further steps your company will need to take to establish leading practice anti-bribery procedures. Companies must ensure that any additional measures they adopt are proportionate to their bribery and corruption risk. An appropriate compliance framework must therefore be customized for the needs of the company and should include the following steps:

- Risk assessment and gap analysis
- Development of appropriate policies and procedures
- Implementation of required changes
- Monitoring and review of the program

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