After much deliberation, the United Kingdom’s (UK) Bribery Bill received Royal Assent on April 8, 2010, and became the Bribery Act. Now set to become effective in April 2011, the Bribery Act is the UK's effort to modernize its anti-corruption laws and potentially take a lead role alongside, if not an outright attempt to step ahead of, enforcement efforts of the United States.

The Bribery Act is far reaching and signals a significant shift in the criminalization of corruption as another major economic power seeks to police graft around the world.

Background
The previous statutory criminal law of bribery was “functional,” but “old and anachronistic” with “inconsistencies of language and concepts” resulting in a bribery law, which was “difficult to understand for the public and difficult to apply for prosecutors and the courts.” The foreword to the Bribery Bill noted the UK’s reputation as “one of the least corrupt countries in the world” as well as the perils of bribery: “Bribery is by its nature insidious; if it is not kept in check it will have potentially devastating consequences.” The UK has long been a party to international treaties that combat corruption and emphasize the seriousness of the problems that corruption poses, such as the United Nations Convention Against Corruption, the Organization of Economic

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Cooperation and Development (the OECD) Anti-Bribery Convention, and the Council of Europe Criminal Law Convention on Corruption. However, the UK’s patchwork of antiquated legislation simply did not reflect the modern commercial world. This, together with a number of failed prosecutions and the high-profile discontinuance of an investigation into a British corporation’s dealings in the Middle East, led the OECD to openly criticize the UK for its failure to bring its anti-bribery laws into line with its international obligations. Clearly, there was need for reform. The British government’s goals for the Bribery Act are noteworthy and even groundbreaking in a number of respects. First, the Bribery Act criminalizes private, commercial bribery. Second, it states that it is a crime to accept a bribe—extending beyond the traditional anti-bribery paradigm—by targeting the bribed in addition to the briber. Third, it prohibits bribery of foreign public officials, akin to the United States Foreign Corrupt Practices Act (FCPA). For commercial bribery, paying or receiving bribes is illegal when there is an intention that it induces or rewards for “improper performance.” There is no intent requirement for bribery of foreign officials; any attempt to influence the official is prohibited. As a result, the Bribery Act covers an extensive amount of existing business practices as any payment, gift, or benefit that may be categorized as a bribe.

The Act also establishes strict liability for corporations for failing to prevent acts of bribery unless a corporation can demonstrate that it had “adequate procedures [to prevent bribery]” in place. Effective implementation and regular review of corporate compliance programs is essential as a result. Equally important, counsel should understand the scope of the Bribery Act’s territorial reach. The provisions vary as to how they apply to conduct in the UK or those doing business in the UK.

### Bribery Act Basics

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### Requesting, Agreeing to Receive, or Accepting a Bribe

Section 2 of the Bribery Act criminalizes the acceptance of a bribe. Specifically, it is a violation where a person “requests, agrees to receive or accepts a financial or other advantage . . .”

- “intending that . . . a relevant function or activity should be performed improperly”
- “the request, agreement or acceptance itself constitutes the improper performance . . . of a relevant function or activity”
- “as a reward for the improper performance . . . of a relevant function or activity”
- “in anticipation of” the person “requesting, agreeing to receive or accepting a financial or other advantage . . . the advantage directly or through a third party” and where the advantage benefits the person or another.

### Offering, Promising or Giving a Bribe

Section 1 of the Bribery Act prohibits commercial bribery. The Act proscribes conduct where a person “offers, promises or gives a financial or other advantage to another” (including through a third party) and

- the person “intends the advantage to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity”
- the person “knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity”

### Bribing a Foreign Public Official

Under Section 6 of the Act, a person who bribes a foreign public official commits

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**Key Provisions of the Bribery Act**

There are three general offenses and one corporate offense in the Bribery Act. The three general offenses require either conduct in the UK or relatively strong ties to the UK. Specifically, the three general offenses apply (a) if any parts of the acts or omissions take place in the UK, or (b) if any person committing the act or omission has a “close connection” with the UK. The Act generally defines those with a “close connection” as British citizens, residents of the UK, and companies incorporated in the UK.

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an offense if the person’s “intention is to influence” the official in their “capacity as a foreign public official.” The person “must also intend to obtain or retain business, or an advantage in the conduct of business.” There is no requirement of intending an improper, illegal, or corrupt influence.

Further, a person bribes an official “if, and only if, directly, or through a third party, [the person] offers, promises or gives any financial or other advantage”

- to an official
- to another “at [the official’s] request or with [the official’s] consent or connivance”
- the official “is neither permitted nor required by the written law applicable to [the official] to be influenced in [the official’s] capacity as a foreign public official by the offer, promise or gift.”

Influencing an official in his or her capacity as a foreign public official means “influencing [the official] in the performance of [his or her] functions as such an official,” including

- “any omissions to exercise those functions”
- “any use of [the official’s] position as such an official, even if not within [the official’s] authority”

A “foreign public official” is an individual who

- “holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom” (or any subdivision)
- “exercises a public function” (a) “for or on behalf of a country or territory outside the United Kingdom” (or any subdivision), or (b) “for any public agency or public enterprise of that country or territory (or subdivision)”
- “is an official or agent of a public international organisation”

Liability of Corporate Officers

The Act also establishes liability for senior corporate officers who are involved in bribery schemes. Pursuant to Section 14, a “senior officer” with a “close connection” to the UK can be liable for any violation of Sections 1, 2, or 6 by a corporation (bribing, accepting a bribe, or bribing a foreign official) committed with their “consent or connivance.” A senior officer means “a director, manager, secretary or other similar officer” of the corporation.

Section 7 of the Act imposes strict liability on corporations for failing to prevent bribery. Under this section, a “Commercial Organization” is guilty of an offense if a person “associated with the [Commercial Organization] bribes another person intending

- “to obtain or retain business for [the Commercial Organization]”
- “to obtain or retain an advantage in the conduct of business for [the Commercial Organization]”

It is a defense for the commercial organization to “prove that [it] had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct.”

Under the Act, the Secretary of State must publish guidance about procedures that commercial organizations can put in place to prevent bribery. The UK government is scheduled to consult the public regarding guidance in September 2010 and publish detailed guidance in early 2011. Establishing procedures according to the guidance, however, will not be prescriptive, as the intention is to allow organizations to develop procedures appropriate to their own circumstances and business sectors. In the interim, the UK’s Serious Fraud Office (SFO), which is responsible for investigating and prosecuting allegations of corruption offences by UK nationals or corporations overseas, has given its own basic guidance on what would constitute “adequate procedures” in its more general guidance for corporations on self-reporting foreign corruption.

A commercial organization is defined as a UK corporation or partnership or any other corporation or partnership that “carries on a business, or part of a business, in any part of the United Kingdom.”

Associated persons include any person who performs services for or on behalf of the commercial organization, including, but not limited to, employees, agents, and subsidiaries.

The scope of the corporate offense is considerable. Under the Act, the corporate offense applies regardless of where the acts or omissions take place. To be clear, the corporate offense of the Bribery Act has no jurisdictional limitation—failure to prevent bribery anywhere in the world may result in corporate criminal liability for companies doing business in the UK.

Penalties

A conviction carries penalties of imprisonment for a maximum term of 10 years, a fine, or both for individuals, and a potentially unlimited fine and/or confiscation orders (of proceeds or profit) for corporations. As well as the obvious reputational impact, convicted organizations may face other serious consequences. For example, under the UK Public Contracts Regulations 2006, organizations will be permanently debarred from competing for UK public contracts where convicted of bribery.14

The Bribery Act Compared with the FCPA

Generally speaking, the anti-bribery provision of the FCPA states that a covered person may not corruptly pay, promise to pay, or offer anything of value to a foreign official to obtain or retain business. Covered persons include U.S. issuers, including foreign subsidiaries; private U.S. corporate entities; employees, agents, officers, and directors of either of the above; U.S. nationals, citizens, and residents; third-party consultants, agents, and joint venture partners.

The FCPA also requires that issuers maintain accurate books and records and adequate internal controls to prevent an improper accounting of corrupt payments and ensure the accuracy of financial statements. The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) are responsible for enforcement of the FCPA.

Jurisdiction

U.S. jurisdiction is expansive, covering individuals and U.S. companies, and virtually all persons affiliated with U.S. companies for illegal conduct that
happens anywhere. Illegal conduct may be entirely outside of the U.S., but regulators may seek any connection to the U.S. to assert U.S. jurisdiction.

Jurisdiction of British authorities under the Bribery Act is more limited for individuals under the general anti-bribery offenses, where liability is limited to acts or omissions within the UK or for conduct anywhere for individuals who are closely connected to the UK. The jurisdictional reach of the corporate offense is much broader, as it covers conduct anywhere if the company is incorporated in the UK or does any business in the UK. Because bribery that happens anywhere may put corporations at risk, corporations must ensure that those acting on its behalf and its business partners are FCPA and Bribery Act compliant, especially in regions and industries with reputations for corruption.

Books and Records and Internal Controls
Books and records and internal controls provisions apply only to U.S. issuers, their officers, and employees, though conduct anywhere is covered. The Bribery Act does not include books and records or internal controls violations. At the same time, the “adequate procedures” defense may be absolute, and strong internal controls and a commitment to anti-corruption may be mitigating factors to avoid or limit liability.

Scope of Corporate Liability
Under the Bribery Act, commercial organizations are strictly liable for failing to prevent bribery by associated persons. As noted above, corporations with “adequate procedures” may be entitled to a complete defense. The FCPA has no “adequate procedures” defense, but authorities consider the adequacy of internal controls, corporate culture, and policies in various contexts. The SEC and DOJ have policies to consider corporate culture, remediation, cooperation, and effectiveness of controls and compliance programs when determining whether to give credit for self-policing or self-reporting or to charge a business organization. Similarly, courts may consider the effectiveness of a corporation’s compliance and ethics program as well as self-reporting and cooperation when calculating a culpability score to determine a fine or sentence.

Commercial Bribery
The Bribery Act prohibits offering, promising, or giving a bribe to private citizens in addition to bribery of a foreign official. The FCPA does not cover foreign commercial bribery, though prosecutors have pursued such conduct through the Travel Act and state laws where defendants bribed both foreign public officials and private individuals.

Accepting a Bribe
The Bribery Act makes it unlawful to make or take a bribe. It is a crime to request, agree to receive, or accept a bribe. The FCPA is more limited, as the statute does not extend to acceptance of a bribe.

Foreign Officials
The Bribery Act defines a foreign public official as an elected or appointed official who exercises a public function in a legislative, administrative, or judicial position of any kind. The FCPA is similar in scope, broadly defining a foreign official as any officer or employee of a foreign government or any subdivision. The FCPA also applies to foreign political parties, party officials, and candidates for foreign political offices, while the Bribery Act does not address such persons.

Intended Benefit
The Bribery Act follows the OECD Convention as it prohibits bribes to foreign public officials where the person intends to obtain or retain business or an advantage in the conduct of business. The FCPA’s prohibition is slightly more limited, as it proscribes bribes to obtain or retain business or direct business to any person; however, recent enforcement trends suggest authorities may consider a broader standard, including bribery where the intention is to gain any commercial advantage.

Intent
For commercial bribery, the Bribery Act prohibits paying or receiving bribes with the intention that it induce or reward for “improper performance.” For bribery of foreign officials, the Bribery Act covers any attempt to influence the official. It is not limited to “improper” performance or influence. The FCPA requires corrupt intent in offering, promising, or paying a bribe to a foreign official. Specifically, the FCPA prohibits “corruptly” giving, offering, or promising anything of value for the purposes of “(i) influencing any act or decision of that person, (ii) inducing such person to do or omit any action in violation of his lawful duty, or (iii) securing an improper advantage.”

Conduct of Third Parties
It is illegal under the Bribery Act to make payments through third parties to the official or to make payments to another person at the official’s request or with the official’s assent or acquiescence. Similarly, the FCPA makes it unlawful to know that the bribe will be offered, given, or promised—directly or indirectly—to any foreign official. Knowledge also includes conscious avoidance.

Facilitating Payments
Following the OECD Convention, the Bribery Act provides no facilitating payments exception. The FCPA does not apply to facilitating payments to officials to expedite or secure performance of a routine governmental action. In November 2009, the OECD, instrumental in the international effort to combat corruption, issued recommendations that its members eliminate facilitating payment exceptions due to their “corrosive effect” on “sustainable development and the rule of law.” The influential OECD went further, encouraging companies to prohibit or discourage the use of facilitation payments in internal controls and ethics and compliance programs.

The recommendations are commendable and their implementation would essentially establish a zero tolerance policy for bribery, creating consistency for how corporations account for and prosecutors regard such payments, and eliminating the mixed message that some corrupt payments are permissible. Until Congress acts, however, the exception is in place and at odds with the OECD Recommendations.
No Amount Too Small
There is no de minimis exception; a bribe of any value may be a violation under the Bribery Act and the FCPA.

Local Law
Under the Bribery Act, one bribes a foreign official only if the official is neither permitted nor required by the written law applicable to the official to be influenced by the offer, promise, or gift. The FCPA provides an affirmative defense where the payment or promise was lawful under the written laws and regulations of the relevant country. This defense is essentially nonexistent, because even countries with widespread corruption typically enact anti-bribery laws. Bribery remains pervasive because governments choose not to enforce the law.

Bona Fide Business Expenses
The Bribery Act provides no exception or affirmative defense for legitimate business expenses on the basis that legitimate business expenses will not be paid with the necessary corrupt intent to fall within the Act. An affirmative defense under the FCPA includes reasonable and bona fide expenditures, such as travel and lodging expenses, incurred by officials when directly related to promotion, demonstration or explanation of products or services, or execution or performance of a contract with a foreign government.

Government Review Procedures
The Bribery Act does not set forth a formal process by which corporations can seek the SFO’s opinion on proposed activities. The SFO’s Self Reporting Overseas Corruption Guidance states that companies and the SFO may have a dialogue about conduct, compliance, and enforcement, so informal consultation is available, but there is no possibility of a guaranteed outcome.

The FCPA established a DOJ opinion procedure to respond to corporate inquiries about prospective conduct.

Recent Developments
The Bribery Act is the result of lengthy and careful deliberation. The announced delay to the implementation of the Act and production of the guidance so that another consultation with the public can take place is well advised. The further consultation appears to be a response to some of the concerns expressed by businesses regarding the wide-ranging impact of the Act and the uncertainty it introduces to a range of normal business activities, such as corporate hospitality, and previously exempted practices, such as facilitating payments. It may well signal that the UK government recognizes that more detailed guidance is required than originally envisaged, which is likely to be welcomed by those who will be affected when the Act comes into force.

Conclusion
As global anti-corruption enforcement increases, U.S. corporations must have strong compliance programs in place if they operate in foreign markets or contemplate entering them. If these foreign markets include the UK, or if key personnel include British nationals, counsel must consider whether company policies and programs satisfy the Bribery Act where it is more stringent than the FCPA or where it covers conduct outside the scope of the FCPA. Counsel must further consider what other anti-corruption laws the company’s operations are subject to and carefully develop, implement, and monitor robust ethics and compliance programs to minimize risk and promote a culture of compliance.

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Endnotes
4. Bribery Act 2010, c. 23, § 12 (Eng.).
5. Id. at § 1.
6. Id. at § 2.
7. Id. at § 6.
8. Id.
9. Id. at § 14.
10. Id. at § 7.
14. Public Contracts Regulations 2006, 2006 No. 5 § 23(1)(c) (Eng.).
19. The Travel Act prohibits travel in or use of the mail or any facility in interstate or foreign commerce to further or facilitate any unlawful activity.