



The UK Bribery Act and the US FCPA: the Key Differences

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Overview

The [UK Bribery Act 2010](#) (the “Bribery Act”) has been the cause of some considerable controversy, in particular, given the implications which the breadth of some of its provisions may have for British companies operating abroad. The Bribery Act is due to come into force in July 2011, bringing with it some significant changes in the approach taken by the UK to bribery and corruption, in particular when contrasted with its US counterpart.

The Bribery Act is in some respects similar to the [U.S. Foreign Corrupt Practices Act](#) (FCPA). There are, however, crucial differences between the two pieces of legislation which corporates should be aware of, and which are set out below. The Bribery Act is materially different in terms of its scope and straddles the “public/private” divide to encompass all commercial activities, and is not like the FCPA restricted to the bribing of foreign public officials. Therefore, corporates which have already adopted FCPA-compliance programs and best practices are unlikely to be able merely to rely on those to the extent that the US corporate is doing business in the UK and has a “place of business” there.

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Giving and Receiving Bribes

The scope of the Bribery Act is wider than that of the FCPA in three major respects. First, in contrast to the FCPA which applies only to the corruption of foreign officials, the Bribery Act catches bribes offered or given to any person. To commit the [offence of bribing another person](#) under the Bribery Act, the briber must intend to bring about or to reward improper performance of a function or activity. This is determined by an objective standard. The function or activity may be within the private or public sector, and the test of whether it has been improperly performed is “*a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned*” (the “[Expectation Test](#)” as provided under Section 5(1) of the Bribery Act).

Secondly, although the Bribery Act contains a stand-alone offence of bribing a foreign public official, this offence does not (unlike the FCPA bribery offence) require a corrupt intent on the part of the briber. An [offence of bribing a foreign public official](#) is committed under the Bribery Act by a person if (i) he intends to influence the foreign public official in his capacity as such, and (ii) he intends to obtain or retain business (or an advantage in the conduct of business) and (iii) the payment/advantage is not permitted or required by the written law applicable to the foreign public official.

Thirdly, it is an [offence under the Bribery Act](#) to request, to agree to receive, or to accept a bribe. The FCPA, on the other hand, applies

only to persons giving or offering a bribe and not to those accepting one.

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Failure to Prevent Bribery

The Bribery Act creates an offence of [failure by a commercial organisation to prevent bribery](#). A “commercial organisation” is widely defined to include: a body incorporated under the law of any part of the UK which carries on business in the UK or elsewhere, a UK partnership which carries on business in the UK or elsewhere, and any other body corporate or partnership wherever incorporated or formed which carries on business in any part of the UK. The offence is one of strict liability (that is, the organisation commits the offence even if it does not have knowledge of all the relevant factors), subject to a defence that the organisation had [adequate procedures](#) in place which were designed to prevent bribery by people associated with the organisation. This new offence created by the Bribery Act is a significant departure from the previous law which is now repealed. The “old” law was criticised for being anachronistic, ineffectual, difficult to understand and difficult to apply by the prosecutor and the courts in practice. Successful prosecutions under the “old” law were difficult because prosecutors had to prove complicity of the “controlling mind and will” of the corporate, i.e. the board of directors or its senior executives, which proved to be too high a threshold.

There is no provision equivalent to the Bribery Act offence of failure to prevent bribery in the FCPA and so organisations will not be able to look to historical US investigations/prosecutions for guidance as to what will constitute “*adequate procedures*.” However, on 30 March 2011, the Secretary of State published its [guidance](#) about the procedures that can be put in place by commercial organisations to prevent bribery. The guidance will clearly be of importance to commercial organisations seeking to reduce their risk of liability for failure to prevent bribery. However, each organisation should consider what procedures will be adequate in its own particular circumstances, as highlighted by the guidance which states that it “is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case.” The guidance is constructed around the following six guiding principles: proportionate procedures; top-level commitment; risk assessment; due diligence; communication (including training); and monitoring and review. A series of case studies are annexed to the guidance to help illustrate the application of the six guiding principles.

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Business Expenses and Facilitation Payments

Under the FCPA, it is a defence to a bribery offence that the payments made were reasonable and bona fide business expenses. There is no such defence under the Bribery Act, and so organisations should ensure that business expenses paid to third parties are reasonable in the circumstances.

Facilitation payments made to foreign officials to speed up or secure the performance of routine governmental action are excepted from the FCPA’s general prohibition of bribery. To be exempt, these facilitation payments must not influence the decision-making process, but be directed to speeding up the administrative act. There is no such exception under the Bribery Act, and “*local custom or practice*” is to be disregarded when applying the Expectation Test (unless it is permitted by the written law applicable to the territory concerned). Although this may cause practical difficulties in some circumstances, it should help organisations to adopt clear zero-tolerance, anti-bribery policies – something which should assist an organisation that later seeks to rely on the statutory defence to the (strict liability) offence of failing to prevent bribery.

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Penalties and Future Public Procurement

Individuals convicted of a criminal offence under the Bribery Act can be sentenced on indictment to imprisonment for a maximum of 10 years. The FCPA has criminal penalties of up to 5 years per offence.

A person who has been convicted of corruption may not participate in tenders for public contracts for works, supply or services in the EU ([Article 45 of the Public Procurement Directive 2004](#)). Therefore, a criminal conviction (as opposed to a negotiated settlement with the Serious Fraud Office) may lead to an organisation being permanently debarred from tendering for public contracts in the EU.

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Application of the UK Bribery Act to Foreign Corporates

The Bribery Act has a potentially wide territorial reach. A non-UK corporation will commit an offence of offering or accepting a bribe or of bribing a foreign public official under the Bribery Act if an act which forms part of that offence takes place in the UK. Even if the relevant act takes place outside UK, proceedings for the offence may still be brought in the UK if the person who does that act has a “close connection” with the UK. The Bribery Act provides an exhaustive list of people who will be considered to have a “close connection” with the UK, which includes, by way of example, British citizens and British Nationals (Overseas).

The Bribery Act offence of failure of commercial organisations to prevent bribery applies to the broadly-defined “relevant commercial organisations” and applies even if all the acts which form part of the offence take place outside the UK. For the offence to arise, the briber must be “associated” with the commercial organisation, a term which will apply to, amongst others, the organisation’s agents, employees and subsidiaries. A foreign corporation which “carries on a business, or part of a business” in the UK may therefore be guilty of the UK offence even if, for example, the relevant acts were performed by the corporation’s agent outside the UK. The Bribery Act does not expand on what will constitute the carrying on of “part of a business” in the UK and so this will be an issue for the courts to decide. However, the guidance on adequate procedures suggests that having a UK subsidiary or securities listed in the UK will not, of itself, be sufficient.

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Conclusion

The Bribery Act has a significantly wider scope than the FCPA (and carries higher maximum penalties) and so FCPA-compliance programs are unlikely to be sufficient to ensure compliance with the Bribery Act. While the FCPA applies only to the bribery of foreign public officials, the Bribery Act covers bribery in both the public and private sectors. In addition, the Bribery Act, unlike the FCPA, does not have an exclusion for facilitation payments and so such payments will constitute bribery offences if they fulfill the other criteria. The Bribery Act also creates a new strict liability offence of failure by a commercial organisation to prevent bribery. As the only defence available to such an offence is that adequate procedures to prevent bribery were in place, commercial organisations will need to ensure that their anti-bribery policies are adequate in light of the extensive scope of the Bribery Act.

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Recent UPDATE:

[Guidance on Adequate Procedures Commercial Organizations can implement to Prevent Bribery](#)

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ADDITIONAL RESOURCES

Sponsor Resources

- [Article \(2010\): New bribery laws are imminent – do you have adequate procedures in place?](#)

Government Resources

- US Department of Justice: [Foreign Corrupt Practices Act](#)
- A Resource Guide to the U.S. Foreign Corrupt Practices Act

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