

# THE BRIBERY NET

Commercial bribery. Facilitation. Even failure to prevent a bribery from taking place. These are all serious offenses under the new U.K. Bribery Act. Will the Bribery Act really be like the Foreign Corrupt Practices Act on steroids?



**T**he United Kingdom's new Bribery Act, which went into effect on July 1, 2011, has dramatically changed bribery rules for any company with U.K. business interests. But many have yet to understand its impact.

In June 2011, a Thomson Reuters survey of more than 400 senior compliance officers, risk managers, internal auditors and lawyers found that almost 40% were unprepared for the most significant update to U.K. bribery rules in more than 100 years.

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In the past, U.K. bribery rules were typically seen as less stringent than those in the U.S. Foreign Corrupt Practices Act (FCPA). But now the United Kingdom's bribery laws match, and in some cases exceed, FCPA rules in both scope and intensity.

It is important to note that both acts are extraterritorial — companies with significant business interests in the United States or the United Kingdom can be prosecuted for alleged bribery in other jurisdictions.

Here are some of the other key differences and similarities between the FCPA and the Bribery Act:

**BRIBERY LAWS EXPAND TO THE COMMERCIAL REALM** Previous U.K. regulations focused on bribery or attempted bribery of government officials. The new act adds penalties for the commercial bribery of nongovernment officials — for example, for bribing a purchasing manager to order more goods from your company. The U.S. laws still cover only governmental bribery.

**FACILITATION EQUALS BRIBERY IN THE UNITED KINGDOM** In some countries, companies are expected to give government officials small “facilitation payments” to expedite a transaction or even to perform their official duties. For example, a truck driver may be expected to pay a customs official \$20 or \$30 to allow a shipment to be imported. U.K. Bribery Act rules define these facilitations as bribery and call for prosecution of those who engage in

the activity. In the United States, FCPA regulations still allow certain types of facilitation payments.

**BRIBERY CANNOT BE OUTSOURCED**

U.S. regulations already placed responsibility for the actions of corporate agents squarely on their employer; the United Kingdom now has similar rules.

**FAILURE TO PREVENT A CRIME IS NOW A CRIME**

The Bribery Act vaults beyond its U.S. counterpart in creating a new category of offense: failure to prevent bribery. If the U.K. Serious Fraud Office (SFO) can prove that a corporate employee or someone connected to the organization paid a bribe as part

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of doing business, the corporation could be held liable even if it did not authorize the bribery. In fact, the law specifies that the company bears automatic guilt unless it can prove it had adequate procedures intended to prevent bribery and corruption.

**LOOK BEFORE YOU MERGE** U.S. law states that companies may bear some liability for bribes that were paid by an acquired company, even if those bribes took place before the acquisition. The new U.K. law is comparatively vague about M&A bribery liability, but companies should still treat this area as a potential minefield and conduct due diligence.

The views expressed in this article are those of the authors and not necessarily those of FTI Consulting, Inc., or its other professionals.

### **DON'T DEPEND ON DEFERRED PROSECUTION**

The U.S. Securities and Exchange Commission and Department of Justice have the flexibility to offer deferred prosecution or nonprosecution agreements to companies that voluntarily report bribery problems, clean house and strengthen their antibribery controls. U.S. companies that scrutinize themselves by hiring third-party investigators and forensic accountants can often get a credit from the SEC against future fines and penalties.

To date, no such deferred prosecution option exists in the United Kingdom. That can have severe consequences, since European Union

procurement rules automatically and indefinitely bar firms convicted of corruption from competing for government contracts.

### **THE IMPORTANCE OF BEING HONEST**

It is still hard to predict exactly how the Bribery Act will be enforced. Deferred prosecution agreements may be put forward in the United Kingdom, but legislation could take at least a year. Meanwhile, the SFO may experiment with lower-cost, independent compliance-assistance models pioneered in the United States.

In the meantime, companies may wish to perform a comprehensive risk review to ensure that their policies and controls minimize the danger of running afoul of either U.S. or U.K. laws. The SFO has also indicated that it expects institutional investors to discuss Bribery Act compliance with the companies in which they invest.

FTI Consulting has partnered with respected anticorruption organization Transparency International and engineering consultancy Halcrow to produce a guide ([transparency.org.uk/working-with-companies/adequate-procedures](http://transparency.org.uk/working-with-companies/adequate-procedures)) for companies reviewing their bribery prevention policies.

Companies that commit to stamping out bribery and that establish a reputation for honesty not only reduce their risks but also gain a competitive advantage among employees, customers, investors, suppliers and other stakeholders. ■

