



# CROSSING THE LINE

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Britain's new anticorruption statute puts companies on the spot for the actions of anyone working on their behalf. And ignorance of an agent's bribes is no excuse.

**I**n 2010 the United Kingdom's Bribery Act went into effect, superseding 19th-century legislation that was widely regarded as no longer fit to tackle overseas corruption. The new legislation, one of the world's toughest anticorruption laws, makes it a criminal corporate offense to fail to stop bribes from being paid on a company's behalf. Ian Trumper, senior managing director with FTI Consulting in London, explains what the law, which will start being enforced sometime this year, means both to companies based in the United Kingdom and to foreign firms doing business there.



## What was the impetus for these reforms?

There has been increasing international pressure for the U.K. government to introduce an effective anticorruption measure similar to the Foreign Corrupt Practices Act in the United States. The existing U.K. law had a very poor track record in prosecuting overseas corruption cases and had been criticized for failing to meet its obligations under the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials. Pressure increased when the U.K. Serious Fraud Office, citing

concerns about national security, decided to abandon a major part of a case against BAE Systems concerning alleged corrupt practices in securing contracts with Saudi Arabia.

## What are the key goals of the new law?

The primary objective is to create an effective legal framework to combat bribery in both the public and private sectors. The Bribery Act creates four prime offenses: two that cover offering, promising or giving an advantage, and requesting, agreeing to receive or accepting an advantage (Sections 1 and 2); one for bribing a foreign public



How far is too far? The U.K. Bribery Act specifies who must watch their steps.

official (Section 6); and a corporate offense of failing to prevent a bribe from being paid (Section 7).

The first two offenses cover bribes in both the public and private sectors, but a person (or corporation) is guilty only if there was an intention to induce another to do something improper or to reward

*“Where do you draw the line between bona fide marketing to display a company’s capabilities and more lavish expenditures that may influence the official’s decision?”*

someone for such an action. These types of bribes already were illegal, but under the new law it will be easier to bring charges. The offense of bribing a foreign public official brings the U.K. law into line with the OECD Convention, which criminalizes bribes intended to influence a public official in obtaining or retaining business.

But if the first three offenses merely clarified or modified existing legislation, the fourth is entirely new. Under Section 7, any corporation with a business presence in the United Kingdom can be held criminally liable if any person associated with it, including any of its employees or agents anywhere in the world, is found guilty of giving or receiving a bribe. The only defense will be that the organization had put adequate procedures in place to prevent such bribery.

### **What does that mean for companies based in the United Kingdom?**

You have to look at specific wording within Sections 6 and 7 to understand the new law’s significance. For example, in Section 6 there is no test for improper performance, so if you offer anyone working in a public capacity a financial reward with the intention of influencing that person to obtain or retain business, that is an offense — even if that person does nothing improper. But there’s no definition of what constitutes a “financial or other advantage.” What if a company pays for a government official to fly overseas to inspect its manufacturing plant or to attend a business meeting? Where do you draw the line between bona fide marketing to display a company’s capabilities and more lavish expenditures that may influence the official’s decision? There also is no exemption for de minimis payments, including facilitation payments.

In addition, companies are questioning what constitutes adequate procedures under Section 7 and how much responsibility they must take for the actions of overseas subsidiaries, agents and suppliers. What if you are working with an agent and you don’t know that person is paying a bribe? The new law has been drafted to enable prosecutions of bribery; the onus is on the company to prove its defense.

The defense to a charge under Section 7 is the ability to demonstrate that the company had adequate procedures in place to stop bribes from



being paid. [These provisions are similar to accounting rules in the United States that focus on ensuring that there are policies and procedures in place to prevent fraud or embezzlement.] It may be difficult, however, for a company to convince a prosecutor that its procedures were adequate.

**What are the implications for companies based outside the United Kingdom?**

The jurisdictional reach of this law is very wide. Anyone who is a U.K. resident and any company incorporated in the United Kingdom is subject to the act. Beyond that, though, if you have a place of business in the United Kingdom, Section 7 applies. For example, if a U.S. or Chinese company carried on only a small part of its business in the United Kingdom, say, through a small representative office, and that company is shown to have paid bribes in Africa, the company could be prosecuted in the United Kingdom. My own view is that enforcement will continue to focus on companies with extensive operations in the United Kingdom. But I think we can see the United Kingdom following the approach of the U.S. Department of Justice on Foreign Corrupt Practices Act investigations — many more cases being settled through large fines, with some individuals being prosecuted.

**What procedures should companies implement to ensure that they remain in compliance with the new law?**

The U.K. government has published draft guidance based on the Committee

of Sponsoring Organizations model. [COSO of the Treadway Commission provides international guidance on organizational governance, business ethics, internal controls and financial reporting.] In essence the advice was to assess a business’s corruption risks, devise appropriate control and compliance procedures, and implement continuous monitoring. These principles were accompanied by some examples of appropriate procedures. Transparency International, with funding from FTI Consulting, also published guidance that sought to provide practical advice.

In recent weeks there has been a lot of lobbying by businesses arguing that there is insufficient guidance on certain features of the act, particularly about facilitation payments and marketing expenditure. The government’s publication on the adequate procedures has been delayed, as has guidance from the Ministry of Justice on prosecution policy. As a result, the act, which was due to come into force in April, is more likely to become effective as of early summer. ■

If just one employee oversteps the limits of the new law, the whole company could be held accountable.

