

Client Memorandum

Bribery Act 2010: The UK's New Anti-Bribery and Corruption Law And Its Interaction with the US Foreign Corrupt Practices Act

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Executive Summary

For any organisation doing business in the United Kingdom, the risks relating to corrupt payments will increase markedly beginning in April 2011, when The Bribery Act 2010 (the "Act") takes effect. The Act sets out a range of criminal offences in connection with corrupt payments to public officials and private parties anywhere in the world. It expands the range of organisations and individuals subject to UK corruption law, defines a much wider range of activities as criminal behaviour and increases the maximum penalty for certain offences from seven to ten years imprisonment, with an unlimited fine.

Of particular significance to commercial organisations conducting business in or from the UK will be the creation under the Act of a new strict criminal liability offence for failure to prevent bribery by a person associated with the organisation. The only defence will be for the organisation to prove that it had in place "adequate procedures" to prevent such payments occurring. This creates an enormous incentive for organisations to develop and implement corporate compliance programs directed at detecting and preventing corrupt payments. Importantly, it should not be assumed that procedures compliant with the US Foreign Corrupt Practices Act ("FCPA") will be adequate for the purposes of the Act. Organisations subject to the Act should review their policies and procedures and take this opportunity to protect themselves from liability.

For private fund advisers/managers, the issue of bribery may arise in connection with (i) soliciting investment into the fund and (ii) investments made by the adviser/manager in the course of managing the fund's assets.

Bribery Offences

The Act, which will come into force in April 2011 (and not in October 2010 as had previously been expected), will bring the UK into full compliance with the Organisation for Economic Development Anti-Bribery Convention¹. The Act will modernise and replace the UK's existing bribery laws² and sets out four principal offences (and several sub-offences) relating to the payment, request for, or receipt of a "financial or other advantage"³—referred to in this memorandum as a bribe. Further details of these offences are set out in the

¹ The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention") is aimed at reducing corruption in developing countries by encouraging sanctions against bribery in international business transactions carried out by companies based in OECD member countries. The Convention came into force on 15 February 1999 and all countries that have signed it are required to put in place legislation that criminalises the act of bribing a foreign public official. Thirty-eight countries (including the US and the UK) have ratified the Convention.

² The UK's bribery laws date from 1889, 1906 and 1916—all of which will be repealed on the coming into force of the Act

³ The term is not defined in the Act and so in accordance with UK legal convention its meaning should be interpreted as its natural meaning. Accordingly, and with an abundance of caution, it should be construed broadly until such time as the UK courts have adjudged it to have a more restricted meaning.

following paragraphs.

1. Bribing Another Person

Under the Act, a person is guilty of an offence where they offer, promise or give a bribe to another person:

- (1) Where the briber intends the advantage to bring about an improper performance of a relevant function or an activity by another person or to reward such improper performance; or
- (2) Where the briber knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

These offences are committed if (i) any act or omission forming part of the offence takes place in the UK, or (ii) if the relevant act or omission would form part of the offence if it had taken place in the UK (although it took place outside the UK) and the offender has a close connection with the UK⁴,

2. Being Bribed

It is also an offence for an individual to request, agree to receive or accept a bribe from another party:

- (1) Where the person requesting the bribe intends that, in consequence, he or another person will behave improperly; or
- (2) Where the request, agreement or acceptance itself constitutes improper behaviour by the person asking for the bribe; or
- (3) As a reward for improper behaviour by the requesting person or another person; or
- (4) Where, in anticipation or in consequence of the request, agreement or acceptance of the bribe, the person receiving the bribe or another person (at the requester's request or with their assent or acquiescence) behaves improperly.

"Improper behaviour" means performance or non-performance which, in contradiction to the normal expectation of a reasonable person in the UK in relation to the function or activity concerned, is not conducted in good faith or with impartiality.

It does not matter whether the relevant individual knows or believes that the behaviour in question is improper—the relevant individual will be guilty regardless of whether the advantage is for his own benefit or that of a third party or whether the request or agreement to receive or accept the advantage is direct or indirect.

3. Bribery of Foreign Public Officials

It is an offence to bribe a foreign public official ("FPO")⁵ if the briber's intention is (i) to influence an FPO in his professional capacity, and (ii) to obtain or retain business or an advantage in the conduct of business.

The offer, promise or giving of any bribe to an FPO or another person at an FPO's request or with an FPO's assent or acquiescence will also constitute bribery provided that the FPO is neither permitted nor required by written law applicable to the FPO to be influenced in the FPO's capacity as a foreign public official by the offer, promise or gift.

4. Failure of Commercial Organisations to Prevent Bribery

This offence can only be committed by a commercial organisation—which will be guilty of an offence if a person associated with it⁶ bribes another person intending to obtain or retain business or an advantage in the conduct of business for the commercial organisation.

⁴ Having a "close connection with the UK" under the terms of the Act means being a British citizen, an individual ordinarily resident in the UK or a body incorporated in the UK. It does not include branches of overseas firms, registered foreign entities or EU firms that conduct business in the UK under EU single market "passport rights".

⁵ FPOs include officials or agents of a public international organisation, as well individuals holding a legislative, administrative or judicial position of a foreign country or who exercise a public function for a foreign country.

“Commercial organisations” for the purposes of this offence include bodies corporate and partnerships formed in the UK and those formed outside the UK which conduct their business (or any part of it) in the UK. Firms will be guilty of an offence wherever in the world the actions or omissions which form part of the offence take place⁷.

The offence bears strict liability and does not require any fault or negligence to be proved on the part of the commercial organisation. However, the commercial organisation will not be guilty of the offence if it can prove (on a balance of probabilities)⁸ that it had in place adequate procedures designed to prevent persons associated with the commercial organisation from engaging in bribery.

Adequate Procedures Defence

The Act does not provide a definition of "adequate procedures", although the UK Ministry of Justice has confirmed that a consultation exercise on procedures that commercial organisations can put in place to prevent bribery by persons associated with them (the "Guidance") will be launched in September 2010⁹. The Guidance will be published early in 2011 so as to allow businesses time to familiarise themselves and make necessary changes before the Act comes into force.

The member of the UK's previous Labour government who sponsored the Bribery Bill, stated that firms will be expected to develop procedures appropriate to their own circumstances and business sectors taking into account, for example, their size and the particular risks to which they might be exposed¹⁰. He also stated that the following publications could and should be drawn upon for the Guidance:

- The OECD's "Good Practice Guidance on Internal Controls, Ethics, and Compliance"¹¹
- Transparency International's "Business Principles for Countering Bribery"¹²
- The Global Infrastructure Anti-Corruption Centre's "Anti-corruption programme for companies"¹³
- Draft anti-corruption compliance guidance prepared by representatives of GC100, a group which brings together the senior legal officers of more than 85 FTSE 100 companies.¹⁴

Based on a review of the above sources, it seems likely that the Guidance will recommend that firms adopt procedures and practices including a code of conduct, anti-corruption programs designed to prevent and detect bribery with clear policies on gifts, hospitality, entertainment and expenses, customer travel, political contributions, charitable donations and sponsorships, facilitation payments, solicitation and extortion (binding on all partners, directors, officers and employees as well as all entities over which the firm has effective control, including subsidiaries), and appropriate internal controls including financial and accounting procedures to minimise risk of corruption and internal audit processes to detect corruption.

Given that there will only be a few months between the Guidance being published in early 2011 and the Act coming into force, it would be prudent for businesses to begin a review of their anti-bribery systems and

⁶ A "person associated with a commercial organisation" is any person who performs services for or on behalf of the commercial organisation, including employees, contractors, agents and subsidiaries. An employee will be presumed to be a person who performs services for the commercial organisation unless the contrary is shown.

⁷ Although the extraterritorial effect of the Act is judicially untested, it would appear that this offence would apply, for example, to an act of bribery committed by someone working in the US for a US firm with a UK office—even if the bribery is conducted in another country.

⁸ The burden of proof is the UK's civil burden—ie, a lesser test than would have to be satisfied in cases requiring satisfaction of the criminal burden of proof ("beyond reasonable doubt").

⁹ <http://www.justice.gov.uk/news/newsrelease200710a.htm>.

¹⁰ <http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf>.

¹¹ <http://www.oecd.org/dataoecd/5/51/44884389.pdf>.

¹² http://www.transparency.org/publications/publications/other/business_principles_for_countering_bribery.

¹³ http://www.giacentre.org/project_companies.php.

¹⁴ <http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf>.

procedures now, with particular attention being given to the sources of anti-corruption guidance referred to above. We will provide updates once the consultation and the final Guidance are published.

Recent FSA Thematic Review

The FSA has recently conducted a thematic review on how FSA regulated insurance brokers have addressed the risks of becoming involved in corrupt practices, such as bribery, particularly where third parties are used to win business. Its findings have been published in a report¹⁵ (the “Report”), in which the FSA stated that it considers that at present there are serious weaknesses in some firms’ systems and controls, which means that there is a significant risk of illicit payments or inducements being made to, or on behalf of, third parties to win business. The FSA identified a number of serious concerns, particularly around due diligence of third party relationships. Although the Report focuses on insurance brokers, the FSA noted that many of the issues covered are relevant to firms in other sectors, all of whom should take note. The tables at the back of the Report set out examples of good and bad practice in connection with anti-bribery policies and procedures and the recommended action that should be followed when dealing with third parties. Many of these examples may be included within the Guidance, when it is published early in 2011.

Interaction with the US Foreign Corrupt Practices Act of 1977 (“FCPA”)¹⁶

For those used to complying with the FCPA, it is significant that the Act is wider in scope than the FCPA in a number of respects including:

- *Strict liability.* The Act creates a strict liability offence for corporate entities and organisations. In contrast, the FCPA has no corporate strict liability offence written into the statute.
- *Public and private bribery.* The FCPA focuses solely on bribery of foreign governmental officials (although there are other US laws that criminalize commercial bribery). In contrast, the Act applies to both public and private bribery.
- *Recipients.* The Act makes it an offence to request, agree to receive or accept a bribe. The FCPA does not criminalize recipients of bribes, though other US laws—particularly, money laundering statutes - have been applied against bribe recipients who are FPOs.
- *Corrupt intent.* The bribery of an FPO offence does not require that there be any intention that the FPO will perform his duties improperly, nor does the payment need to be made “corruptly”, as is required by the FCPA. Under the FCPA, the person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his or her official position.
- *Adequate procedures.* The Act has a statutory defence against a corporate failure to prevent bribery if “adequate procedures” are in place. Although the FCPA does not contain such a statutory defence, the existence of an effective compliance and ethics program is a critical factor in the exercise of prosecutorial discretion by US law enforcement authorities. In the United States Attorneys’ Manual¹⁷, the existence and effectiveness of a corporation’s pre-existing compliance program is one of several factors for federal prosecutors to consider in determining whether to bring criminal charges against a corporation. Where a corporation is criminally charged, under the Federal Sentencing Guidelines, substantial reductions in potential fines are available if an effective compliance program exists. Thus, in the eyes of the US government, the existence of an effective compliance program is an important factor in both charging and sentencing considerations.
- *Facilitation payments.* Although the exception is narrowly construed and rarely invoked, the FCPA contains a statutory exception for small facilitation, or “grease”, payments paid to officials to facilitate

¹⁵ http://www.fsa.gov.uk/pubs/anti_bribery.pdf.

¹⁶ See, eg, Betty Santangelo, Gary Stein and Margaret Jacobs, “The Foreign Corrupt Practices Act: Recent Cases and Enforcement Trends”, *J. Investment Compliance*, Dec. 20, 2007, available at http://www.srz.com/Santangelo_Stein_Jacobs_Journal_of_Investment_Compliance_FCPA/.

¹⁷ http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

or expedite the performance of a routine governmental action. The Act makes no such exception; all payments, no matter how small or routine, or expected by local customs, would be illegal.

- *Reasonable and bona fide expenditures.* The FCPA contains a defence where reasonable and bona fide expenditures, such as travel, lodging and entertainment expenses, were paid as part of demonstrating a product or performing a contractual obligation. These expenses, however, must be connected to a legitimate business purpose, such as training, factory tours or other direct promotion of a company's products and services. In contrast, the Act makes no exception for corporate hospitality. However, the UK government has said¹⁸ that it does not intend to penalise "legitimate and proportionate use of corporate hospitality" but at the same time warned *that* it will not countenance the use of "lavish corporate hospitality" as a "bribe to secure advantages".

As a result of the differences between the Act and the FCPA, commercial organisations which conduct business from or in the UK should apply the strictest standards applicable in this area—and it appears that (from April 2011) compliance with the FCPA standards may not be adequate.

Consequences of Conviction

An individual who is found guilty of any of the offences of bribing another person, being bribed or bribing an FPO will be liable to imprisonment for a maximum of ten years and/or an unlimited fine.¹⁹

An organisation guilty of the corporate offence of the failure of a commercial organisation to prevent bribery will be liable to an unlimited fine.

However, there are other implications of being found guilty of a bribery offence:

- *Debarment from EU contracts.* Any conviction under the Act may lead to the relevant individual or entity being debarred from public-sector contracts within the European Union.
- *Director disqualification.* Any conviction under the Act may lead to the relevant individual finding that s/he is the subject of company director disqualification proceedings—which can, in serious cases, prohibit an individual from acting as director or shadow director of any UK company for up to 15 years.
- *FSA restrictions.* Any conviction under the Act may lead to the relevant individual or entity being debarred from owning 10% or more of the shares or interests in any Financial Services Authority ("FSA") regulated entity or from performing a controlled function²⁰ for an FSA authorised firm. Being convicted of a bribery offence would invariably mean that the relevant individual or entity fails the FSA 'fitness and propriety' test²¹—which is applied in respect of both approved persons and controllers. Failing this test could mean that a controller is forced to sell or otherwise reduce his/her/its interests in any FSA regulated business to less than 10% or that an approved person has his/her/its personal authorisation withdrawn—effectively debarring that individual or entity from working in the UK financial services industry. Any FSA regulated entity that is convicted of the commercial organisations' offence of failing to prevent bribery may find that the FSA withdraws its authorisation—effectively terminating its ability to conduct regulated financial services business in the UK.
- *Money laundering.* The payment of bribes in breach of the Act is likely to raise money laundering issues under the UK's Proceeds of Crime Act 2002 since income derived from business obtained as a result of the bribe may be considered to be the proceeds of criminal activity. It therefore follows that

¹⁸ Page 15 of <http://www.official-documents.gov.uk/document/cm77/7748/7748.pdf>.

¹⁹ No guidance has yet been given to UK courts as to what the level of fines should be for breaches of the Act.

²⁰ FSA approved persons controlled functions include among others directors, partners, compliance officers, money laundering reporting officers, traders, asset managers and advisers.

²¹ A test that assesses an individual's: (i) honesty, integrity and reputation; (ii) competence and capability and (iii) financial soundness.

the risk of money laundering violations may arise in circumstances where an organisation knows or suspects that income received might be as a result of a bribery offence.

Implications for Fund Managers

Fund managers located in the UK or doing business in the UK should ensure that their policies, procedures, systems and controls are sufficient to minimise or reduce risk of bribery—whether in the UK or elsewhere. Any third party agents whose services are used to solicit investment into the fund or acquire assets etc for a fund²² should also be required to be subject to the same or equivalent policies, procedures, systems and controls to avoid the payment of bribes. In addition, the fund vehicle itself may be subject to the Act. A UK-based manager providing a fund with management services from within the UK will be a person ‘associated with’ the fund for the purposes of the Act. Where the manager has discretionary investment management authority for the fund the manager will be conducting the fund’s business in the UK.

The implications for a fund manager found guilty under the Act are, as set out above, extremely serious. The entity itself could have its authorisation removed by the FSA and the individuals could be imprisoned and/or debarred from working in the UK financial services industry; both the entity and the individuals could also be faced with an unlimited fine.

The implications for a fund and its investors are principally financial, since an unlimited fine could materially diminish the value of a fund if the UK courts were to impose a fine on the fund as well as prosecuting the relevant fund manager. In order to avail themselves of the “adequate procedures” defence (to the offence of failing to prevent bribery), directors of funds should ensure that any UK manager that manages the fund’s assets has implemented anti-bribery policies and procedures in compliance with the Guidelines.

Recommended Action

The Guidance will be published in early 2011 and the Act comes into force in April 2011. Organisations located in, or doing business in, the UK should review their anti-bribery systems and procedures. The task of identifying risks, drafting new policies, training staff and getting the agreement of relevant stakeholders is likely to be time-consuming. In particular, it should not be assumed that procedures already in place that are compliant with the US FCPA will be adequate to avoid committing an offence under the Act. While the Ministry of Justice’s forthcoming guidance on “adequate procedures” is likely to be similar to guidance provided by the US authorities²³, it should be noted that the existing FCPA compliance programs may not necessarily be deemed to be “adequate procedures” for the purpose of the Act. Organisations with FCPA-based compliance programs would be advised to re-examine them in light of the Act.

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²² Which will be particularly pertinent for funds investing in infrastructure projects or for private equity-style funds.

²³ http://www.usssc.gov/2007quid/8b2_1.html (Chapter 8, “Effective Compliance and Ethics Program” of the 2007 Federal Sentencing Guidelines); and <http://www.usssc.gov/NOTICE.HTM> (proposed amendments to the US sentencing guidelines, which will become effective on 1 November 2010 absent any Congressional action).

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