U.K. Bribery Act – Implications for Companies Doing Business in the United Kingdom

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Presenters

**Bob Hirth** is the Executive Vice President and Global Managing Director of Internal Audit and Financial Controls at Protiviti, and is based in San Francisco. He has more than 25 years of professional services experience working with a broad range of global, public and local private organizations in a variety of industries, helping them deal with their most significant business risks and issues as well as providing advice on Corporate Governance. His experience includes external auditing, business and operational consulting as well as internal audit and business risk management.

robert.hirth@protiviti.com

**Jonathan Wyatt** is a Managing Director in Protiviti’s London office. Jonathan was a founding member of the Protiviti team in London and has been with Protiviti since its launch in the United Kingdom in 2004. Prior to joining Protiviti, Jonathan spent more than 10 years working for Arthur Andersen and Deloitte. Jonathan is currently working with our clients to help them respond to the increasing demands of international regulators, implementing efficient, pragmatic and integrated approaches to enterprisewide risk management and reporting. In this capacity, Jonathan has been leading our efforts to help clients in the U.K. understand and respond to new laws and regulations, including Schedule 46 Finance Act 2009 and Bribery Act 2010. In addition, Jonathan is a member of the global leadership team of our Information Technology Effectiveness and Control practice, with a focus on IT governance, IT risk management, portfolio management, programme management and IT sourcing.

jonathan.wyatt@protiviti.co.uk
John Cassey  an Associate Director who joined the Protiviti London office in October 2006 and is now solution lead for its Litigation, Restructuring and Investigative Services (LRIS) team. He brings nearly 30 years of experience in detecting and investigating fraud, tracing and recovering assets and stolen funds, and advising businesses on fraud detection and reduction using his considerable experience and the latest techniques. John has extensive experience throughout the world in interviewing both suspects and witnesses, often in hostile environments. He has frequently worked with legal teams, the police and other law enforcement agencies. He is experienced in the preparation of witness statements and affidavits and has given evidence in criminal and civil courts. He is frequently invited as a guest speaker on fraud-related topics for professional organizations and the media and also runs training courses.

john.cassey@protiviti.co.uk

Omar Qureshi  is a Partner in the dispute resolution team of CMS Cameron McKenna LLP. He advises on all aspects of disputes and litigation risks issues, including domestic and international litigation and arbitration under various rules and regimes. He specialises in complex commercial contract disputes, often involving allegations of fraud and corruption. He is currently advising clients in various industries in connection with corruption investigations and in developing procedures to meet the new requirements of the Bribery Act 2010. Omar has written extensively on corruption and fraud issues, most recently in the June 2010 edition of Fraud Intelligence. He is also the architect of the firm’s online “Anti-corruption Zone”, a one-stop shop for information on bribery and corruption law, policy, trends and cases. He is a member of the Commercial Fraud Lawyers Association and Fraud Advisory Panel, as well as the LCIA and ICC.

omar.qureshi@cms-cmck.com
Introduction

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Background: Bribery Act 2010

• Enacted in April 2010 and will come into force in April 2011
• Has extra-territorial application – particularly significant to U.S. companies with a U.K. subsidiary or presence.
• Fulfils the U.K.’s obligations under OECD treaty
• Enable the courts and prosecutors to respond in a more robust manner to bribery at home and abroad
• Corporate hospitality, facilitation payments, entertaining foreign officials and offset arrangements are limited by the “improper performance” test and subject to prosecutorial discretion
• Government to issue “adequate procedures” (to prevent bribery) by January 2011.
• Penalties are severe and include unlimited fines or imprisonment for up to 10 years
Overview of the act

- Two general offences: offering, promising or giving an advantage, and requesting, agreeing to receive or accepting an advantage.
- An offence of bribing a foreign public official.
- New offence of failure by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage.
Offences

1. **Bribing another person**

   It will be an offence to offer, promise or give an “advantage” to someone:
   - With the intention of inducing that person to behave improperly
   - As a reward for that person to behave improperly
   - Knowing or believing that the recipient’s acceptance of the “advantage” would constitute improper behaviour

2. **Being bribed** (as the recipient of the bribe)

   It will be an offence to receive a bribe if that person requests, agrees to or receives an “advantage” to act in an improper manner. It does not matter whether the recipient receives or accepts the advantage directly or through a third party or whether it is for the recipient’s benefit or that of another.
Offences

3 Bribing a foreign public official

It will be an offence to bribe a foreign public official by offering an ‘advantage’ to the official which is not permitted or required by the written law applicable to that official, with the intention of influencing the official in his capacity as such and with the intention of obtaining or retaining a business advantage. No impropriety is required.

4 Failure to prevent bribery

A corporate (company or partnership) will be guilty of an offence if someone performing services on its behalf commits a bribery offence to win or retain business for the corporate.

It is a defence for the corporate to show it had “adequate procedures” in place to prevent bribery.
Improper Performance

• Conduct falling short of a reasonable person’s expectation of good faith, impartiality or trust

• Applies to what a reasonable person in the U.K. would expect (not what someone in the place where the bribe occurred might expect)

• Local practices or customs not to be taken into account unless permitted by written local law
Defining Bribery: Key Factors

• Improper payment / benefit / advantage

• Often paid in secret / surreptitious / off-record / hidden / concealed / disguised circumstances

• Designed to induce another party to act improperly:
  - breach a duty of trust
  - fail to act in good faith
  - fail to act with impartiality

• Likely to be of benefit to briber and bribed parties

• Likely to disadvantage honest parties

Except:

• Foreign Public Officials – intend to influence by giving an advantage.
  Impropiety does not necessarily have to be established. Can be allowed if permitted by local written law.
Who Will Be Impacted

- U.K. nationals
- U.K. residents
- U.K. incorporated businesses
- Any overseas corporation, wherever formed, which carries on business or part of a business in the U.K.
- Anyone else where an act forming part of the offence occurs in the U.K.
A Legal Perspective

Omar Qureshi
UK Bribery Act 2010: the new risks for businesses operating in the UK – example scenarios

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Omar Qureshi
Partner
CMS (London)
Tel: +44 (0)20 7367 2573
E: omar.qureshi@cms-cmck.com
Example scenario 1: Commissions

FonesRUs, a UK mobile phone store, has contracts with all the major mobile operators. The contract with one of the operators, Blue, provides that if individual sales agents of FonesRUs exceed certain volume customer targets it will pay them a £1,000 bonus.

John Smith, a sales agent at FonesRUs, is influenced by the prospect of obtaining the bonus to recommend Blue phone contracts to customers, even when they are not the most suitable deals for those customers.

– Has a bribery offence been committed?
– Would FonesRUs be liable?
– Would it make a difference if the bonus was £100?
Example scenario 2: Corporate hospitality

The board of ABC Brokers Ltd (a UK incorporated company) invites 20 of its best clients (none of whom are public officials) to watch the England v Slovenia 2010 World Cup match in South Africa, with full hospitality.

– Would this be an offence under the Bribery Act?
Example scenario 3: subsidiary/parent liability

Nuts Inc, a US conglomerate has a wholly-owned subsidiary in the UK, Bolts Limited. Bolts Limited is tendering for a contract to construct a dam in Bulgaria. To maximise its chances of winning the tender, Mr Jones, the Managing Director of Bolts Limited offers a bribe to the Bulgarian Minister of Finance (without Nuts Inc’s knowledge). It is not accepted and Bolts do not win the contract.

– Are Nuts and Bolts guilty of bribery offences under the UK Bribery Act?
Comparison with FCPA

Payment of Bribes

• FCPA focuses only on anti-corruption of foreign government officials.

• Bribery Act applies to corrupt payments to all persons, whether government officials, private citizens, agents, private company employees, etc. whether in the U.K. or overseas.

• Bribery Act also penalises the receipt of a bribe, whereas FCPA does not.

Facilitation Payments / hospitality

• The FCPA has a specific exception for facilitation payments (except if payments are intended to facilitate corrupt behaviour) and a defence for legitimate business expenditure.

• The Bribery Act has no such exception/ defence. All facilitation payments, however small, and even if paid to ensure that persons do what they are in any event obliged to do, are illegal. There is no defence for corporate hospitality and it will be in a prosecutor’s discretion whether any instance falls the wrong side of the line.
Comparison with FCPA (cont’d)

Liability for Failing to Prevent Bribery

• The Bribery Act creates a new form of corporate strict liability for failure to prevent bribery. There is an “adequate procedures” defence when companies fail to prevent bribery.

• The FCPA contains no such defence. Under U.S. law, an effective internal compliance programme may mitigate penalties but does not necessarily prevent prosecution of a corporation.

Books and Records

• FCPA 'books and records' provisions could be used to prosecute the bribery of private individuals as well as public officials.

• There is no equivalent provision to the FCPA 'books and records' provisions in the U.K. legislation, but similar false accounting offences exist elsewhere in U.K. law (e.g. companies are required to maintain accurate accounts by the Companies Act 2006).
Comparison with FCPA (cont’d)

**Penalties**

- The FCPA has criminal penalties of 5 years per offence.
- The Bribery Act has penalties of up to 10 years per offence plus unlimited fines for companies that fail to implement ‘adequate procedures.’
What Companies Should Do

“…a company’s anti-bribery programme is more likely to be regarded as constituting ‘adequate procedures’ if it is based on good practice rather than an approach that solely uses compliance with laws to determine the structure of the programme.”

Transparency International
What Companies Should Do (cont’d)

• A clear statement of anti-corruption culture supported at the highest levels of management
• A code of ethics
• Undertake a top level risk assessment to identify potential risk areas
• Define a corporate policy and supporting guidance for all high risk areas
• Assess adequacy of processes in place to prevent bribery in key risk areas
• Provide training to employees
• Implement processes for detecting bribery
• Define investigation and disciplinary processes
• Implement a system of reporting/whistleblowing
• Regularly monitor adequacy of the policies/processes so that they can be constantly improved
Focus areas include:

- Approval / authorisation levels
- Bank accounts and bank payments
- Bidding / contracting (specific consideration given to use of third party agents)
- Bonuses and remuneration
- Cash management and petty cash
- Charitable and political contributions
- Commission
- Equipment and supply purchases / lease arrangements
- Entertainment and hospitality
- Expenses claims
- Facilitation payments
- High risk locations
- Large payments to individuals (bonuses, commissions, expense claims etc.)
- Local community improvement schemes
- Marketing and promotional activities
- Procurement / purchasing
- Wire transfer policy and procedures
What Companies Should Do (cont’d)

Awaiting government guidelines but the following sources can provide guidance on expectations and minimum standards:

– Organisation for Economic Cooperation and Development (OECD)
– United Kingdom Serious Fraud Office (SFO)
– Transparency International (has recently published its own interpretation of guidelines working closely with U.K. government)
– United Kingdom Financial Services Authority (FSA) – recently issued guidelines to the insurance industry but these principles can be adapted by other industry sectors.
For more information, please see our Anti-Corruption Zone:

www.law-now.com/anticorruptionzone
Thank You

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Contact Information

Bob Hirth  
Managing Director – Protiviti  
San Francisco U.S.  
+1.415.402.3621  
robert.hirth@protiviti.com

Jonathan Wyatt  
Managing Director – Protiviti  
London U.K.  
+44.207.024.7522  
jonathan.wyatt@protiviti.co.uk

John Cassey  
Associate Director – Protiviti  
London, U.K.  
+44.774.005.1573  
john.cassey@protiviti.co.uk

Omar Qureshi  
Partner – CMS Cameron McKenna LLP  
London, U.K.  
+44.207.367.2573  
omar.QUreshi@cms-cmck.com