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# The UK Bribery Act 2010 – How Will It Impact the Energy Industry and How Does It Compare With the US Foreign Corrupt Practices Act?

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Pablo Ferrante  
*Partner, Houston*

+1 713 238 2662  
pferrante@mayerbrown.com

Simeon M. Kriesberg  
*Partner, Washington*

+1 202 263 3214  
skriesberg@mayerbrown.com

Andrew Legg  
*Partner, London*

+44 20 3130 3386  
alegg@mayerbrown.co

Lynn Neils  
*Partner, New York*

+1 212 506 2568  
lneils@mayerbrown.com

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## Outline

- Overview of the Bribery Act 2010
- The Bribery Act 2010 – the new offences and extra-territorial application
- Enforcement in the UK
- Comparison of the FCPA and the Bribery Act 2010
- Essentials for an effective global anti-corruption compliance program

# Overview of the Bribery Act 2010

- Received Royal Assent on 8 April 2010 – will abolish all existing UK anti-bribery laws but is not yet operative – announced in July 2010 that it will come into force in April 2011
- It is not retrospective, so existing anti-bribery laws are still relevant
- It introduces a suite of new bribery offences:
  - Two general offences of bribing another person and being bribed
  - A discrete offence of bribing a foreign public official
  - A wholly new offence – if a commercial organization fails to prevent bribery by persons associated with it acting in the course of its business
- If a commercial organization has committed one of the general offences or bribed a foreign public official, then “Senior Officers” who have “consented or connived” in the commission of the offence are also liable
- The Act applies to public and private sector bribery
- Penalties increased from seven to ten years’ imprisonment and/or unlimited fine
- The Act considerably widens the UK courts’ jurisdictional reach

# The Bribery Act 2010: First General Offence – bribing another person

- A person (“P”) will be guilty of bribing another person if, directly or indirectly, he offers, promises or gives a financial or other advantage to another person:
  - intending the advantage to induce a person to perform a function or activity improperly or to reward a person for the improper performance of a function or activity (**Case 1**); or
  - knowing or believing that the acceptance of the advantage in itself constitutes the improper performance of a relevant function or activity (**Case 2**)
- A bribe may take any form (“financial or other advantage”)
- An offence is committed by offering a bribe, irrespective of whether or not it is accepted
- “Directly or indirectly” – it is not necessary for the person to whom the bribe is promised to be the same person who acts improperly
- In contrast to the existing UK bribery laws, there is no requirement to establish an intention to corrupt – sufficient that the bribe is intended to induce a person to act improperly or to reward improper performance

# The Bribery Act 2010: Second General Offence – receiving a bribe

- A person (“R”) will be guilty of an offence in the following cases:
  - If R requests, agrees to receive or accepts a financial or other advantage, intending, in consequence, a relevant function or activity should be performed improperly (whether by R or another person) **(Case 3)**
  - If the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity **(Case 4)**
  - R asks for, agrees to receive, or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity **(Case 5)**
  - In anticipation or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R’s request or with R’s assent or acquiescence **(Case 6)**
- An offence may be committed by requesting a bribe, irrespective of whether or not one is given
- It is immaterial whether R or some third party on R’s behalf requests, agrees to receive or accepts a bribe (“financial or other advantage”)
- The financial or other advantage can be for the benefit of R or another person (e.g. a family member)
- In Cases 4 – 6, it is unnecessary to establish that R knows that performance is improper
- In Cases 4 and 6, an offence may be committed even if there is no intention to commit a criminal act

## The Bribery Act 2010 – what is a relevant function or activity?

- Two requirements
  - A function of a public nature, or an activity connected with a business or performed in the course of employment or by or on behalf of a body of persons AND
  - The person performing the function or activity is expected to perform it in good faith, impartially or is in a position of trust by virtue of performing it
- Covers virtually all activities
- Does not matter that the function or activity has no connection with the UK and is performed wholly outside it

# The Bribery Act 2010 – what is “improper performance”?

- The function or activity will be performed improperly if the person performing it is in breach of an expectation that it will be performed:
  - in good faith;
  - impartially; or
  - in accordance with an obligation of trust
- “Expectation” = what a reasonable person in the UK would expect unless permitted by local written law
- “Improper Performance” includes non-performance

# The Bribery Act 2010: new discrete offence of bribing a foreign public official

- A person will be guilty of an offence if he offers, promises or gives a financial or other advantage to a foreign public official intending (i) to influence the official in his capacity as a foreign public official and (ii) to obtain or retain business or an advantage in the conduct of business, and the official is not permitted or required by written law to be so influenced
- No dishonesty or criminal impropriety is required
- “Foreign Public Official” = an individual who holds a legislative, administrative or judicial position in a country or territory outside the UK OR exercises a public function for or on behalf of a country or territory outside the UK or for any public agency or enterprise of that country or territory OR is an official or agent of a public international organization
- Concern that this offence is too wide (facilitation payments; any kind of corporate hospitality provided to a foreign public official)

# The Bribery Act 2010 – new offence of failing to prevent bribery

- A commercial organization will commit an offence if a person associated with it bribes another intending to obtain or retain business for that commercial organization or to obtain or retain a business advantage
- The term “associated persons” is broadly defined and includes any person who “performs services for or on behalf of the relevant commercial organization” – may include subsidiaries, employees, agents, JV partners, consortium members
- The bribery may occur anywhere in the world – a conviction for bribery is not required
- Extends to all commercial organizations that “carry on a business or part of a business in the UK”
- Strict liability offence – one statutory defence – the commercial organization had “adequate procedures” in place to prevent such bribery from occurring

# The Bribery Act 2010 – liability of Senior Officers

- If a company commits one of the general bribery offences (bribing or receiving a bribe) or the offence of bribing a foreign public official, a “Senior Officer” may also be liable if he “consented or connived” in the commission of that offence
- “Senior Officer” = director, secretary, manager, partner or someone purporting to act in that capacity
- “Consented and connived” – both require an awareness of the material facts but for the former, an agreement to the course of action must also be established; for the latter, tacit agreement (“turning a blind eye”) will be sufficient
- The Senior Officer need not be aware that the conduct constitutes a bribery offence
- In the case of overseas bribery only Senior Officers who have a “close connection” to the UK may be prosecuted

## The Bribery Act 2010 – meaning of “close connection” to the UK

- Persons with a “close connection” to the UK include:
  - British citizens
  - those who have British citizenship rights
  - those who are considered British subjects or British protected persons
  - those who are ordinarily resident in the UK
  - a company incorporated in any part of the UK

# The Bribery Act 2010 – territorial application

## **Bribing, being bribed, bribing a foreign public official**

- If the conduct element of these bribery offences take place in the UK, the UK courts will have jurisdiction
- Those persons who have a “close connection” to the UK and who commit acts of bribery abroad are subject to prosecution in the UK even if no part of the bribery offence takes place in the UK

## **New offence of failing to prevent bribery**

- The bribery offence may occur anywhere
- Applies to all companies and partnerships who carry on business or part of a business in the UK – potentially a very low threshold test
- The SFO has stated that it intends to assert broad jurisdiction in respect of this new offence

## Enforcement in the UK – Enforcement Authorities

- The Serious Fraud Office has the lead role in investigating and prosecuting cases of serious or complex fraud – it is the UK's principal enforcement agency for overseas bribery
- The City of London Police Overseas Anti-Corruption Unit (est. 2007) – will investigate cases of overseas bribery which do not fulfil the SFO's acceptance criteria
- Only the SFO and the Crown Prosecution Service are authorized to prosecute offences of bribery
- Serious Organised Crime Agency – money laundering offences
- Financial Services Authority – regulated firms

## Enforcement in the UK – the SFO’s general approach

*“It is a two fold approach. First of all, we want to help corporates ensure that bribery does not take place. This means helping to support the many good ethical UK corporates that have set a strong lead in having an anti-corruption culture and vigorously enforce that. We recognise that no system can ever be perfect and that mistakes will happen. Within that context we want to provide help for those corporates in getting it right. ...*

*The other aspect is to pursue, very vigorously, those that have no intention of establishing an anti-corruption culture and indeed see every advantage in using corruption to gain a business advantage over those ethical corporates that are committed to anti-corruption. Ethical corporates expect us to pursue those corporates and individuals very vigorously and that is exactly what we do. I want ethical corporates to know that they will not suffer a business disadvantage from doing what is right. The lead responsibility for enforcing this lies with us although, of course, we look for help and information from corporates, advisers and from many others.”*

(Richard Alderman, Director, Serious Fraud Office – 23 June 2010)

# Enforcement in the UK – SFO’s approach to dealing with overseas corruption

- The SFO has made overseas corruption offences a priority
- In July 2009, the SFO issued a guide on its approach to dealing with overseas corruption – encouraged self reporting
- The aim of the SFO is to settle self referral cases civilly but this may not always be possible (e.g. if board members are involved in the corrupt activities)
- Self reporting to the SFO does not remove the liability of a corporate or a professional adviser to make any report required by UK law or the laws of another jurisdiction
- Scope of any internal investigation will be agreed with the SFO – SFO take a “proportionate” approach – investigation carried out at expense of the corporate and by its own advisers
- Outcome of investigation discussed with the SFO who will determine whether the case merits civil fines as opposed to criminal sanctions

# Enforcement in the UK – advantages/disadvantages of self reporting

- Advantages
  - May face only civil fines rather than criminal sanctions
  - Agree scope of internal investigation
  - Manage issues and publicity
  - Be seen to have acted responsibly
  - If no conviction for corruption offence, avoid the mandatory debarment provisions under Article 45 of the EU Public Sector Procurement Directive 2004
- Disadvantages
  - SFO may still apply criminal sanctions
  - Potential criminal penalties for senior management personally, including imprisonment

## Enforcement in the UK – what happens if there is no self referral?

- SFO may learn about the corruption issue from another agency (UK or overseas), a whistleblower, a competitor or a statutory report such as a Suspicious Activity Report (money laundering)
- If a corporate is aware of a problem and decides not to self report, if the SFO finds out there is an increased prospect of a criminal investigation and prosecution with heavy sanctions being imposed following conviction (NB: in **Innospec Limited** (March 2010), Thomas LJ said that self reporting should lead to a discount of at least 50% in the fine to be imposed)
- SFO has considerable investigative powers at its disposal (e.g. Criminal Justice Act 1987; Regulation of Investigatory Powers Act 2000)
- An SFO investigation is lengthy and costly and involves considerable publicity and disruption to the business of the corporate

## Recent cases

- UK now categorised as having “active enforcement” of the OECD Anti-Bribery Convention (Transparency International Progress Report – Enforcement of the OECD Anti-Bribery Convention 2010)
- Cases involving overseas corruption: two in 2008; two in 2009; and four in 2010
- Cases involving overseas corruption
  - **CBRN Team Limited** (9/08) – an employee of CBRN and a Ugandan Government Official pleaded guilty to bribery offences – first UK conviction for bribery of a foreign public official
  - **Balfour Beatty Plc** (10/08) – self reported following an internal investigation – in a Civil Recovery Order, Balfour Beatty agreed to repay £2.25m, make a contribution towards the SFO’s costs, to introduce new compliance processes and to appoint an external monitor

## Recent cases

- **Mabey & Johnson Limited** (07/09) – self reported following an internal investigation; pleaded guilty to corruption offences - £4.6m imposed by way of fines and disgorgement, £1.5m of which was paid in reparations to the affected countries. This was the first prosecution by the SFO of a UK corporate for overseas corruption. The case was described as *“a model for other companies who want to self report corruption and have it dealt with quickly and fairly by the SFO.”* (Richard Alderman, Director of the SFO – 10 July 2009)
- **Amec Plc** (10/09) – self reported following an internal investigation – Civil Recovery Order of £4.9m agreed
- **Innospec Limited** (3/10) – resulted from information passed to the SFO by the DoJ following the UN Inquiry into the Oil for Food Program – Innospec pleaded guilty to corruption offences and a financial penalty of US\$12.7m (or £ equivalent) was agreed – concluded as part of a global settlement involving Innospec, the SFO, the DoJ, the SEC and OFAC

## Recent cases

- **Dougall** (4/10) – former executive of a UK subsidiary of Johnson & Johnson pleaded guilty to involvement in overseas corruption offences – co-operated fully with the SFO and, following an appeal, received a 12 month suspended sentence
- **Messent** (10/10) – former CEO of PWS International Ltd pleaded guilty to overseas bribery offences – 21 month jail sentence and ordered to pay £100,000 compensation to the country affected (Costa Rica) within 28 days or serve an additional 12 months in prison – disqualified from acting as a company director for 5 years. The SFO stated:

*“This case shows how determined we are to pursue businessmen who bribe. Working with agencies in other countries is a key feature of our approach which can result in action being taken against both sides of the bribe”*

(Richard Alderman, Director of the SFO, 26 October 2010)

- **BAE Systems Plc** (12/10) – in 2/10, the SFO and the US DoJ announced settlements with BAE Systems – BAE Systems agreed with the SFO to plead guilty to accounting offences under s221 Companies Act 1985 and to pay £30m by way of fine and ex gratia payment to the country affected – this is the largest fine ever levied in the UK – settlement sanctioned by the court 12/10

# FCPA v the Bribery Act: Key differences

## - Offences and defences

FCPA	Bribery Act
Bribery of <u>foreign government officials</u> (including <u>state enterprise employees, political parties, party officials, political candidates, public international organization employees</u> )	Bribery of <u>public and private sector individuals</u> – includes a discrete offence of bribing a foreign public official
Only penalizes those <u>making</u> bribes	<u>Accepting</u> bribes is also punishable
Prosecutes active participation in bribery, though internal controls requirement is independent of any bribery activity	New strict liability corporate offence of <u>failing to prevent</u> bribery
Penalizes failure to keep <u>books and records</u> that accurately reflect business transactions and failure to <u>maintain effective internal controls</u>	No accounting offence in the Bribery Act but <u>Companies Act 2006</u> includes an offence of failing to <u>keep adequate accounting records</u>
Consideration of compliance programmes at prosecution and sentencing stages	“adequate procedures” is the only potential defence available against failing to prevent bribery
Statutory exception for “ <u>facilitation payments</u> ” narrowly defined	Facilitation payments only permitted if local written law so permits
<u>Reasonable</u> and <u>bona fide</u> expenditure on travel, lodging and entertainment expenses permitted if directly related to promotion of product or service or to performance of government contract	<u>No express exception</u> for corporate hospitality or promotional activities – particular care needed when dealing with foreign public officials

# FCPA v the Bribery Act: Key differences

## - Territorial effect and punishment

FCPA	Bribery Act
Conduct within the US by anyone	Conduct ( <u>including omissions</u> ) within the UK by anyone
Conduct <u>outside of the US</u> if by an <u>issuer</u> of US Securities or a “ <u>domestic concern</u> ” (e.g. a company organized under US law or having its principal place of business in the US) – or anyone acting on its behalf; foreign persons who commit an act in the United States in furtherance of a subject act are also covered	Conduct ( <u>including omissions</u> ) <u>outside of the UK</u> by persons (natural and legal) with a <u>close connection to the UK</u> , if that conduct would form an offence if committed in the UK. If a commercial organization “carries on a business or part of a business in the UK” then may be prosecuted for “failing to prevent” bribery even if the bribery occurs entirely outside of the UK
Up to <u>5 years</u> prison sentence for bribery, <u>20 years</u> for accounting offences	Up to <u>10 years</u> prison sentence – accounting offences may be prosecuted under other Statutes
Criminal fine for entities up to \$2m for bribery or \$25m for violation of accounting provisions, or twice the benefit sought, and debarment; for individuals, fines of up to \$100,000 (bribery) or \$5 million (accounting offences)	Unlimited fine; additionally Serious Crime Prevention Orders, Confiscation Orders, Winding up proceedings, debarment, director disqualification and regulatory/disciplinary action
Civil penalties up to \$10,000 per bribery violation or \$500,000 per corporate accountancy violation	Civil Recovery Orders – no criminal conviction required (lower threshold of proof)

# Compliance Essentials

Principles	Practical Impact
<p><b><u>1: Risk Assessment</u></b> <i>Regularly and comprehensively assess the nature and extent of the risks relating to bribery to which the organization is exposed</i></p>	<p>Detailed gap analysis, taking into account risks posed to the organization not only by its own core business activities but also by procurement of premises and infrastructure (supply chain) to deliver that business; focus groups and existing staff awareness; existing control environment. Consider business counterparties and geographies in the widest sense</p>
<p><b><u>2: Top Level Commitment</u></b> <i>The top level management are committed to preventing bribery. They establish a culture in which bribery is never acceptable. The organization's policy against bribery is clearly communicated to all levels of management, the workforce and any relevant external actors</i></p>	<p>A public statement of the board's commitment to counter bribery in all parts of the operation. Consequences of breaching this commitment for staff and business partners. Personal involvement of top-level managers in developing a code of conduct and ensuring anti-bribery policies are published and communicated to employees, subsidiaries and business partners</p>

# Compliance essentials

Principles	Practical Impact
<p><b><u>3. Due Diligence</u></b> <i>Due diligence policies and procedures covering all parties to a business relationship, including the supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the entity does business</i></p>	<p>Risk by geography – where your business, customers, counterparties, agents, suppliers etc. are or will be located</p> <p>Risks associated with a particular business line or business opportunity, e.g. establishing whether a project will be done at market prices, or has a defined legitimate objective. Track record and reputation of business partners, etc.; government links</p>
<p><b><u>4: Clear, Practical and Accessible Policies and Procedures</u></b> <i>Policies and procedures take account of the roles of the whole work force from the owners or board of directors to all employees, and all people and entities over which the commercial organization has control</i></p>	<p>Use staff expertise to develop policies and so secure buy-in. Embed the bribery prohibition into all decision making processes. Cover third-party payments, including political and charitable contributions, business promotional gifts, hospitality and entertainment. Adapt existing procedures such as financial and auditing controls, disciplinary procedures, performance appraisals and selection criteria. Institute procedures to facilitate whistle blowing and investigate suspected incidents</p>

# Compliance Essentials

Principles	Practical Impact
<p><b><u>5: Effective Implementation</u></b> <i>Ensure anti-bribery policies and procedures are embedded throughout the organization. Ensure the development of policies and procedures reflects the practical business issues that the organization and any of its staff face when seeking to conduct business without bribery</i></p>	<p>Project plan - allocation of roles and responsibilities across the organization, milestones for delivery, including communication and training. Review, enforcement, reporting to top management. External advice and/or assurance? Revision of contractual terms with customers, staff, counterparties, etc</p>
<p><b><u>6 : Monitoring and Review</u></b> <i>Institute monitoring and review mechanisms to ensure compliance with relevant policies and procedures and to identify any issues as they arise. Implement improvements where appropriate</i></p>	<p>Who takes ownership? Accounting controls, compliance monitoring, internal audit, mechanism to appraise and react to comments, complaints and incidents. Mechanism to keep abreast of and disseminate developments in law and practice. Audit committee/Board agenda item. Regular external assurance and benchmarking?</p>

# Questions