International Alert

Official Guidance on U.K. Bribery Act Moderates Some Provisions, Curbs Extraterritorial Reach

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In planned coordination, the U.K. Ministry of Justice ("MOJ") and the U.K.'s Serious Fraud Office ("SFO") simultaneously issued guidance on March 30, 2011, regarding the U.K. Bribery Act (collectively, the "Guidance") and announced that the Act would become effective on July 1 of this year.

Read together, the two pronouncements soften the potential impact of the law in such areas as extraterritorial jurisdiction, business hospitality, vicarious liability, and corporate compliance standards. At the same time, the Guidance gives detailed suggestions on appropriate compliance measures, maintains a hard line on facilitating payments, and explicitly stakes out the importance of self-reporting and cooperation with enforcement officials. A number of key interpretive questions remain unanswered, and an overlay of uncertainty is preserved by repeated references to "public interest" considerations and the need in some areas for clarification through case-by-case judicial decisions.

The aggressive assertion of jurisdiction over conduct anywhere in the world of any company that "carries on a business or part of a business" in the United Kingdom remains; however, the Guidance reduces the types of activities that could constitute carrying on a business under the Act. In the name of a "common sense approach," the MOJ guidance states that having a subsidiary in the United Kingdom or being listed on the London Stock Exchange does not in and of itself constitute carrying on business in the United Kingdom. At the same time, in *The Daily Telegraph* and elsewhere, Richard Alderman, the Director of the SFO, has emphasized the Act's "very wide" jurisdiction and suggested that it would be unlikely that a company listed on the London exchange is not also otherwise carrying on part of a business in the United Kingdom. Perhaps more important, if less discussed, is the absence in the U.K. Bribery Act of counterparts to the FCPA's provisions on books and records and internal controls, which have allowed U.S. authorities to hold U.S.-listed companies accountable for the actions of their foreign subsidiaries even absent direct links to the United States.

Differences exist in other areas, as reflected in the comparison chart below, including topics that were the most debated, and subjected to the most intensive lobbying, in the run-up to the issuance of the Guidance. The tolerance for facilitation payments under the U.K. law will be, as anticipated, much lower than under the FCPA, although the SFO Guidance does suggest that "public interest" considerations may weigh against prosecuting isolated facilitation payments where the payments are discovered through self-reporting and remedial action is taken. At the same time, on the much-debated topic of business hospitality, the Guidance suggests a considerably softer standard than reflected in FCPA practice and references an intent test that, as a practical matter, may not be administrable.

The U.K. law and Guidance also offer more nuanced standards for imposing vicarious liability for the acts of third parties, some of which suggest limitations not found in U.S. cases. Of particular interest is the discussion of joint ventures, which is less stringent than that found in emerging U.S. enforcement policy on joint ventures. The Guidance first distinguishes between equity and contractual joint ventures. The Guidance also suggests that a bribe's indirect benefits to an individual joint venture partner created solely

by its equity ownership interest may be insufficient to create liability for the partner when there is no evidence that the bribe was paid specifically "with the intention of benefiting that" partner.

Notwithstanding the double-barreled MOJ/SOF Guidance, ambiguities remain. For instance, while the Act creates a full defense to Section 7 claims (failure by a commercial organization to prevent bribery) for companies with "adequate procedures" in place to prevent such acts and the MOJ Guidance sets forth "six principles" that should "inform" such procedures, the same Guidance nonetheless notes that these principles are "not prescriptive, but intended to be flexible and outcome focused." Similarly, the Guidance does not provide clear guidelines regarding the extent to which employees of state owned or controlled corporations are foreign officials; it quotes the standard articulated in Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials (defining a "foreign public official" as, *inter alia*, "officers exercising public functions in state-owned enterprises") without providing additional illustrations on "public" versus private functions. And the guidance is silent on successor liability following a merger or acquisition. Similarly, only time will show how voluntary disclosures ("self-reporting") and cooperation will be welcomed and rewarded and to what extent prosecutorial discretion, which the Guidance proclaims, will be exercised in fact.

The greatest unknown is how various authorities in the United Kingdom will shape the application and enforcement of the Bribery Act. The Guidance already suggests some tension between the perspectives of the MOJ and SFO, and both agencies scrupulously note that the resolution of certain issues will come on a "case-by-case" basis through judicial review.

Accepting these uncertainties, the Guidance does provide detail on many provisions and on preferred compliance measures; some relief from the draconian restrictions on business hospitality that some feared; and more definition -- and a bit more complexity -- on extraterritorial jurisdiction. Although the differences between the Bribery Act and the FCPA discussed below are unlikely to require wholesale revisions to strong anti-corruption compliance programs already in place, the contrasts that many of the provisions present will be of interest to any corporation that is potentially subject to both laws.

The Guidance: General Considerations

A threshold observation about the Guidance is that it does not have the force of law. In contrast, for example, to regulations issued in the United States to implement a statute, the Guidance is not legally binding -- on the SFO, other parts of the U.K. government, or private parties. The SFO's Guidance states that "prosecutors must take it into account," and private parties will undoubtedly cite the Guidance when it is to their advantage to do so, but U.K. courts are unlikely to hold that the government is legally bound by the Guidance.

A second theme found throughout the Guidance is that of "proportionality," a concept that Secretary of State Kenneth Clarke describes as "the core principle" of the Guidance. It appears most directly in discussions of compliance programs and procedures, the subject on which the Guidance is most detailed. The discussion of the applicable "six principles" notes at the outset that small organizations face different risks than multinationals. The first principle, "Proportionate procedures," says that compliance procedures should be proportionate to both the bribery risk a company faces and the "scale and complexity" of its commercial operations. And the introduction to the MOJ guidance invites small firms to consult the summary "'quick start' guidance" to understand their obligations. While good practice under the FCPA entails tailored programs and reasonable cost sensitivity, one question is whether the emphasis in the Guidance on "small firms that have limited resources" signals differences in how non-compliance provisions will be applied.

Another overlay to the Guidelines is that, under the Code for Crown Prosecutors, every decision to prosecute must include a determination of whether prosecution is "in the public interest." Under this standard, prosecutors would presumably be free to determine that a violation is too inconsequential or too isolated, that the effort or resources required would be disproportionate to the violation, or, possibly, that the matter is being prosecuted in other jurisdictions. The MOJ Guidance -- which is markedly more conciliatory than either the Act itself or the SFO's Guidance -- states that in the case of "hospitality, promotional expenditure or facilitation payments" prosecutors will "consider very carefully" whether prosecuting would be in the public interest.

This language will undoubtedly create some concerns about whether the "public interest" test might be used to decline to prosecute apparently serious crimes, citing factors of the sort that were advanced as justifications for aborting the U.K.'s investigation of allegations against BAE, a decision that produced a firestorm of criticism of the United Kingdom. To its credit, the SFO in its guidance includes in its discussion of the public interest test a specific reference to the United Kingdom's obligation under Article 5 of the OECD Convention "not to be influenced by considerations of national economic interest" or "the potential effect upon relations with another State" or the identity of the persons involved.

Finally, the Guidance repeatedly notes that the interpretation of many provisions will ultimately be determined "on a case-by-case basis" through judicial review. Although case-by-case elucidation is inherent in the common law (and likely a politic observation in the wake of the *Regina v. Innospec* case, in which a U.K. court raised significant questions regarding the SFO's ability to negotiate plea agreements and emphasized the role of the judiciary in setting sentences in each case), it does caution against over-reliance on the recent Guidance.

The Guidance: Jurisdiction

For "active bribery," "passive bribery," and bribery of foreign public officials prohibited by sections 1, 2 and 6, respectively, the extraterritorial reach of the Bribery Act is similar to that of the FCPA. The United Kingdom has jurisdiction (1) if the conduct occurred in the United Kingdom, or (2) if the conduct occurred outside the United Kingdom and the person committing it has a "close connection" with the United Kingdom by virtue of being a British citizen, national, or resident, or are incorporated in the United Kingdom.

Section 7's corporate liability provisions similarly apply regardless of where the offending acts or omissions occur. However, the "close connection" requirement does not apply. Rather, a section 7 offense occurs only if committed by a "relevant commercial organization," a term that is broadly defined to cover any corporation, wherever incorporated, that "carries on a business, or part of a business" in any part of the United Kingdom. That definition requires a "demonstrable business presence" in the United Kingdom, something that would presumably be satisfied by a regional or national office, sales activities, resident employees or agents, or numerous other types of business activities. It is this broad "carrying on a business" language that has been seen as the statutory authority for unprecedented extraterritoriality.

The Guidance, however, trims the sails of this unqualified definition a bit. The MOJ guidance says that it "would not expect" this definition to cover a corporation because of "the mere fact" that its securities are listed on the London Stock Exchange. This interpretation of the statute obviously limits potential extraterritorial scope -- and does so through a principle that is the opposite of the FCPA's assertion of extraterritorial jurisdiction over all "issuers," regardless of country of incorporation. Notwithstanding the Guidance, however, Richard Alderman of the SFO has taken a step in the other direction, publicly cautioning that companies should "not rely on over-technical interpretations" of the Act's jurisdictional provisions and noting that if a company is listed on the London Stock Exchange, it is likely to be "carrying on a business" in the United Kingdom in other ways.

The Guidance also draws a line between parent companies and their subsidiaries, noting that having a U.K. subsidiary "will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies." From this language, one may also infer that the jurisdictional reach of section 1 and section 6 will not extend to bribes paid by a non-U.K. subsidiary of a U.K. company since the foreign subsidiary would be a separate legal entity and thus would not have a "close connection" to the United Kingdom, as the Act defines that term.

It is with respect to foreign subsidiaries that the jurisdictional reach of the U.K. Bribery Act is significantly narrower than that of the FCPA. Under the FCPA, the SEC can indirectly reach foreign bribery by foreign subsidiaries of U.S.-listed companies by sanctioning the parent for the accounting failures of controlled foreign subsidiaries that commonly accompany improper payments. As a result, foreign subsidiaries come under strong pressure from their U.S.-listed parents and, not uncommonly, become parties to FCPA settlements whether or not there is direct jurisdiction over the subsidiaries under "section dd3" of the FCPA.

Finally, in terms of how aggressively the SFO may exercise the broad jurisdictional terms of section 7, Mr. Alderman has added a very significant limitation. Contrary to predictions of global jurisdiction over the activities of any corporation that "carries on a business" in the United Kingdom, Mr. Alderman -- publicly and in conversations with Miller & Chevalier -- indicated that prosecuting a non-U.K. corporation under section 7 for corrupt payments having no other connection to the United Kingdom will be in the "public interest" only if the bribes paid have harmed a U.K. company. This qualification may obviously shrink the jurisdictional universe of section 7 violations. Under this test, prosecuting a Chinese company that has paid bribes to get business for which a U.K. company is competing would be in the public interest, whereas prosecuting the same company under otherwise identical circumstances would not be in the public interest if the competitors for the business were only American or German companies.

The Guidance: Prohibitions

The Act enumerates four separate bribery prohibitions. Sections 1 and 2, which cover commercial as well as official bribery, prohibits supply side bribery (offering, promising or giving of a bribe, which the Act calls "active bribery") and demand side bribery (requesting, accepting, or agreeing to receive a bribe, which the Act calls "passive bribery"). Offenses parallel to FCPA prohibitions are found in section 6, which prohibits bribery of foreign public officials, and section 7, which criminalizes the failure of commercial organizations to prevent bribery.

Section 1. The MOJ Guidance states that section 1 applies when the person offering a bribe intends to bring about the "improper performance" of another person or to reward such improper performance. It also applies when the payor knows or believes that accepting the bribe in and of itself constitutes improper performance. "Improper performance," according to the MOJ Guidance, means action that "amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust." Because section 1 covers bribery relating to any business function performed in the course of an individual's employment or on behalf of a company, it applies to bribery in both the public and private sectors.

Section 6. Section 6 of the Act proscribes bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business. This stand-alone offense is committed when a person "offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions." Thus, as with the FCPA, a necessary element is an intent "to obtain or retain business or an advantage in the conduct of business." A corporation may violate section 6 (as well as section 7) if the offense is committed by "a natural person who is the *directing mind or will* of the organization." (Emphasis added.)

Not unlike the FCPA definition of "foreign official," "foreign public official" includes elected and appointed "officials" who hold legislative, administrative, or judicial positions in any kind of a country or territory outside the United Kingdom and officials or agents of public international organizations, such as the UN or the World Bank. Similar to the FCPA's coverage of persons "acting in an official capacity" language, the definition also includes any person "who performs public functions" in any branch of the national, local or municipal government, in any public agency, or in a public enterprises. Without further explaining what a "public function" is (as noted, the term is found in the OECD Anti-Bribery Convention), the Guidance cites as examples "officers exercising public functions in state-owned enterprises." It remains to be seen whether the parameters of the term will deffer from the broad definition the U.S. Department of Justice applies in the case of "instrumentalities" under the FCPA.

Hospitality. The subject of great anticipation and concern, the impact of sections 1 and 6 on business entertainment, promotional activities, and gifts, is addressed at some length in the Guidance. Although the Act contains no exception or other explicit qualification for business expenditures, the Guidance affords businesses considerable latitude for hospitality that is "reasonable and proportionate." Bona fide hospitality and promotional . . . expenditures" are not intended targets of the Act, according to the Guidance.

Moderating the Act's prohibitions to permit reasonable business promotional activities was not a surprise (we predicted that outcome in previous publications), and prior to the Guidance there were numerous reports of intense lobbying on this subject. What has surprised some is the extent to which the Guidance has excluded business hospitality from the prohibitions of the Act, both in its substance and in the tone of the Guidance, particularly the comments of Secretary of State for Justice Kenneth Clarke.

Expressly excusing business hospitality and expenses designed to "improve the image of a commercial organization" or "establish cordial relations," the Guidance then goes on to say that to prosecute hospitality or promotional expenses under section 6 a prosecutor has the burden of showing a "sufficient connection" between the benefits provided and an intention to "influence and secure business." Absent such proof, the Guidance suggests that there would be no violation. The congenial tone is reinforced by approving references to "fine dining," entertainment of both an official "and his or her partner," and the admonition that the prosecution of any violation based on hospitality must also pass the hurdle of being in "the public interest."

Of particular interest with the London Olympics approaching is the statement in the Guidance relating to that "an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise" would be "extremely unlikely to violate section 1." Similarly, case study 4 on hospitality posits paying the travel and accommodation costs of foreign public officials to attend an annual event providing entertainment, quality dining and attendance at various sporting occasions," for which the Guidance suggests only some procedural safeguards.

Read for both substance and tone, the Guidance suggests a more relaxed standard for business hospitality, promotional activities, and gifts than has emerged under the FCPA. While companies subject to both the Bribery Act and the FCPA may have to worry more about the Bribery Act with respect to facilitating payments (see below), they may have to be more concerned about FCPA standards for acceptable business hospitality, travel, and promotional activities.

Section 7. The section of the Act that has inspired the most discussion thus far is section 7, which creates liability for the "failure of commercial organizations to prevent bribery." Under this section, a "relevant commercial organization" can violate the Act if a person "associated" with the organization pays bribes for the purpose of obtaining or retaining business. Through these definitions, section 7 defines a jurisdictional-

type limitation on its scope, deals with the concept of "associated persons," and addresses facilitating payments.

In key respects, section 7 is independent of other sections of the Act. It can be applied whether or not an "associated person" has, in fact, been prosecuted and convicted of bribery, so long as evidence of the bribe exists. At the same time, a corporation charged with violations of section 7 may also, depending on the circumstances, be charged with having violated section 1 or section 6.

Relevant Commercial Organizations. The scope of section 7 is defined, in part, by the fact that it applies only to "relevant commercial organizations," the defined term noted above that includes any company, wherever incorporated, that "carries on a business or part of a business" in the United Kingdom.

Associated Persons. Section 7 liability can arise when a company fails to prevent bribery on its behalf by an "associated person." This construct, which the SFO Guidance distinguishes from "vicarious liability" (a common shorthand FCPA term), defines associated persons as persons who "perform services" for or on behalf of an organization, which is intended to encompass the "whole range" of persons who might bribe on a company's behalf. Employees are presumed to be associated persons; agents and subsidiaries are included; and contractors and services suppliers may be, according to the Guidance. Sub-contractors in the supply chain may not be "associated," although the Guidance suggests extending anti-bribery policies to them.

Joint Ventures. For joint ventures, the Guidance articulates an ambitious number of distinctions. In the case of an equity joint venture, in which participants create a "separate legal entity" or joint venture company, payment of a bribe by the joint venture will not necessarily create liability for an individual joint venture member. The joint venture itself will not be considered to be "associated" with an individual JV member unless the joint venture entity is performing services for the member and the bribe is intended to benefit the member. Thus, a part-owner of an equity joint venture, even a majority owner, would not be liable for a bribe paid by a joint venture employee or agent, notwithstanding the ultimate commercial benefit that may result for the owner.

For contractual joint ventures, liability for a bribe paid by an individual will normally run to that person's employer. Thus, a bribe paid by the employee of one joint venture partner would not create liability for the other joint venture partners. The Guidance says that the degree of control one partner has is a "relevant circumstance" in determining liability and implies that an individual who pays a bribe may create liability for the partner that controls the joint venture. The person paying the bribe in that circumstance may be an "associated person" of the partner with the controlling interest, even if not that company's employee.

These distinctions, which have not yet been reflected in FCPA practice, likely will generate issues in the United Kingdom, but may also create new arguments for companies to advance under the FCPA.

Facilitating Payments. In contrast to the FCPA, the Guidance confirms that "facilitation payments" can trigger prosecutions under sections 1 (active bribery), 6 (bribery of a foreign official) or 7 (failure of an organization to prevent bribery) of the Bribery Act. The MOJ acknowledges the problems faced by companies "in some parts of the world and in certain sectors" but insists that the "eradication of facilitation payments is recognized at the national and international levels as a long term objective that will require… sustained commitment to the rule of law in those parts of the world where the problem is most prevalent." Nonetheless, with regard to whether such payments will actually be prosecuted under the Bribery Act, the MOJ again refers to the parallel SFO Guidance.

The SFO confirms that there "is no exemption in respect of facilitation payments" under the Act, but it also notes a series of public interest factors that must be weighed prior to bringing a prosecution for facilitation payments. The Guidance cites as likely candidates for prosecution large repeated payments, payments that are "planned for or accepted as part of a standard way of conducting business," payments suggesting "active corruption" of the official to whom they were made, and payments made contrary to an organization's clear policy and procedures for dealing with solicitations for facilitation payments. The last example does not indicate whether the SFO is signaling possible prosecution of the individual who made the payment. Neither does it suggest either way whether such behavior could affect the "adequate procedures" defense discussed below.

Situations that the SFO cites as weighing against prosecution under the public interest factors include: single small payments that would carry only a "nominal" penalty; payments that come to light as a result of a self-reporting and remedial action, where an organization has a clear policy setting out procedures to be followed if facilitation payments are solicited and the procedures were followed; or the payer was in a "vulnerable position arising from the circumstances in which the payment was demanded." "Vulnerable position" is not defined, but presumably would include situations of serious extortion, threats of imprisonment, or risks to personal health and safety.

Adequate Procedures. Perhaps the most discussed provision of the entire Bribery Act is the defense to a section 7 violation for companies that can demonstrate that they had in place "adequate procedures" designed to prevent associated persons from paying bribes on their behalf. The Guidance touts "adequate procedures" as a "full defence," particular instances of bribery notwithstanding.

To this affirmative defense, the Guidance devote twelve pages of discussion, enumerating and commenting on the six principles (which have evolved from prior drafts), plus 12 additional pages setting forth eleven case studies. Although the Guidance states that the principles are not "prescriptive," the discussions and specific compliance measures that companies are told they "may wish" to consider are detailed.

In contrast to the FCPA, which contains no compliance-related requirements or defenses, and which has addressed compliance elements only in appendices to settlements, the copious commentary on compliance may have unforeseen consequences. The six principles are separately discussed below.

The Guidance: The Six Principles of Corporate Compliance

The Bribery Act offers a full defense for an organization to a violation under section 7 if the organization can show that it had adequate procedures in place to prevent bribery on its behalf by associated persons. The six principles that the MOJ says should inform an organization's compliance and anti-corruption procedures:

1. **Proportionality:** an organization's procedures to prevent bribery by persons associated with it must be proportionate to the bribery risks the organization faces, and the "nature, scale and complexity" of the organization's activities. Thus, an organization that is large or operates in an overseas market where bribery is "known to be commonplace" may need to do more to prevent bribery than an organization that is small or operates in markets where bribery is not prevalent;

2. **Top-Level Commitment:** the organization will need to show that individuals at the top of the corporate structure ("be it a board of directors, the owners or any other equivalent body or person") have been actively involved in making sure that their staff (including middle management) and the key people with whom and for whom they do business understand that bribery is not tolerated;

3. **Risk Assessment:** the organization must periodically gauge and document the bribery risks it might face (for example, researching the markets in which the organization operates and the people with whom it deals), "especially if [the organization is] entering into new business arrangements and new markets overseas";

4. **Due Diligence:** With proportionality as a constant theme, the Guidance suggests a range of conventional due diligence steps to take with respect to "associated persons," including employees. Noting the importance of due diligence in an M&A context, the Guidance, through case studies, suggests due diligence steps ranging from internet research to face-to-face meetings to reasonableness of compensation;

5. **Communication:** to enhance awareness and help deter bribery, the organization must communicate -- both internally (through, for example, additional training) and externally (through, for example, a code of conduct) -- its policies and procedures to staff and to others who will perform services for it to ensure that those policies and procedures are embedded and understood throughout the organization; and

6. **Monitoring and Review:** because the risks an organization faces and the effectiveness of the organization's procedures may change over time, the organization should routinely take stock of its anti-bribery procedures, to keep up with any changes in the bribery risks the organization faces.

As noted, the MOJ Guidance includes "case studies" covering facilitation payments, proportionate procedures, joint ventures, hospitality and promotional expenditures, assessing risks, due diligence of agents, communication and training, community benefits and charitable donations, and top-level commitment. The numerous steps the Guidance suggests that organizations may "consider" will add to the debate about compliance "best practices" and also, perhaps, influence prosecutors and courts about what constitutes "adequate procedures" under section 7.

Conclusion

Overall, the Guidance moderates some of the provisions of the Bribery Act that were not qualified in the statute itself. In areas such as jurisdiction, joint ventures, and "adequate procedures," the Guidance is often detailed and specific. At the same time, recurring language about "proportionality," "public interest" considerations," "case-by-case" interpretations through judicial review, and "common sense" suggests that clarifications of many important provisions of the Act still lie ahead.

In numerous ways, the Guidance articulates standards and policies that differ from practices that have developed under the FCPA. Many of these differences are of minor importance. Among the differences most likely to attract attention are jurisdiction, facilitating payments, hospitality, "adequate procedures" as a defense or standard for best practices, and the asymmetry created by the absence of accounting provisions in the Bribery Act.

For U.K. companies, the Guidance provides some relief from what some companies feared. For companies subject to both the U.K. Bribery Act and the FCPA, the points of departure between the two may occasionally be significant and will slightly raise compliance expectations and practices when the two laws are read together. For non-U.K., non-U.S. companies likely to be caught only by extraterritorial application of these laws, the addition of the U.K. Bribery Act to the established extraterritorial reach of the FCPA will create a higher risk of being held accountable for bribes paid in third countries unrelated to business in the United Kingdom or United States.

FCPA and the UK Bribery Act Compared		
	FCPA	***UK Bribery Act and MOJ/SFO Guidance***
Scope of Prohibition		
Bribery of Foreign Officials	Prohibits the offering, payment, promise to pay (or authorization of such) of a bribe (anything of value) to a foreign official	Prohibits the offering, promising, or giving of a bribe of foreign public officials (§ 6)
Other Active Bribery (Public or Commercial)		Prohibits the offering, promising, or giving of a bribe to any person (§ 1)
Passive Bribery		Prohibits the requesting, agreeing to receive, or accepting of a bribe (§ 2)
Accounting	Requires issuers to keep accurate books and records (in reasonable detail) and to establish and maintain a system of internal controls adequate to ensure accountability for assets	
Indirect Liability	Corporations and individuals can be held liable for payments made through intermediaries or third parties while "knowing" that all or a portion of the funds will be offered or provided to a foreign official	Organizational liability if person "associated" with organization (who "performs services" for organization) pays bribe specifically to get business, keep business, or gain a business advantage for the organization (§§ 7, 8) Member/owner of joint venture is liable only "if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member"; indirect benefits to member from mere ownership of joint venture are not sufficient for liability (MOJ)
Defenses		
Local Law	Payment, gift, offer, or promise of anything of value lawful under the written laws and regulations of the relevant foreign country	Official permitted or required to be influenced by the advantage offered, promised or given, as determined by written law applicable to foreign official (§ 6)
Legitimate Promotional Expenses	Affirmative defense for reasonable and bona fide expenses that are directly related to product	Genuine hospitality or similar business expenditure that is "reasonable and proportionate" is

	demonstrations, tours of company facilities or "the execution or performance of a contract" with a foreign government or agency; defendants bear burden of proving the elements of this defense	exempt (MOJ)
Adequate Procedures		Affirmative defense available to corporations with procedures in place to prevent bribery (§ 7) Adequate organizational procedures, viewed in light of six principles (MOJ): (1) Proportionality; (2) Top-Level Commitment; (3) Risk Assessment; (4) Due Diligence; (5) Communication (including training); (6) Monitoring and Review
Facilitating Payments	Exception for "facilitating" or "grease" payments, which are payments to expedite or secure the performance of "routine" governmental actions; actions involving the exercise of discretion are specifically excluded	There is no exception for "facilitation" payments (payments to induce officials to perform routine functions that they are otherwise obligated to perform) (MOJ); whether to prosecute such payments decided in light of public policy considerations (SFO).
Jurisdiction		
Citizens and Residents	U.S. persons acting anywhere in the world	Persons having "close connection" with the United Kingdom, which includes all British citizens and residents of the United Kingdom (§ 12).
Companies	U.S. corporations, corporations that operate within the United States, and corporations listed on U.S. stock exchanges (issuers) acting anywhere in the world	Corporate bodies or partnerships incorporated or formed in the United Kingdom (irrespective of where they carry on business), or corporate bodies or partnerships that carry on business or part of a business in the United Kingdom (irrespective of their place of incorporation or formation) (§ 7); Existence of a U.K. subsidiary is not "in itself" sufficient for jurisdiction over parent and mere listing on U.K. exchanges is not sufficient for jurisdiction (MOJ) (though public statements from

		SFO suggest their disagreement with MOJ guidance).
Territory	Non-U.S. persons and corporations whose actions take place in whole or in part within the territory of the United States (this has been broadly interpreted by enforcement authorities to include jurisdiction over acts in furtherance of an improper payment in the territory of the United States)	An offense is committed if any act or omission which forms part of the offense takes place in the United Kingdom (§ 12)
Enforcement	Civil and criminal enforcement of the FCPA	Only criminal enforcement of the Bribery Act
Negotiated Plea Agreements	Enforcement authorities regularly negotiate corporate settlement agreements, including penalty and disgorgement levels, that are accepted by U.S. courts	Prosecutors can decline cases in "public interest" (SFO); authority of prosecutors to negotiate sentences is questionable, with some U.K. courts holding that an agreement between the prosecution and defense as to sentencing is unconstitutional
Penalties		
Criminal Penalties	Individuals: up to $250,000 per violation (or the greater of twice the gross pecuniary gain or loss) and/or up to five years' imprisonment. Corporations: up to $2M per violation (or the greater of twice the gross pecuniary gain or loss)	Individuals: up to 10 years in prison with no limit on amount of fines Corporations: no limit on amount of fines
Civil Penalties	Anti-bribery Violations: up to US$10,000 per violation and/or disgorgement of ill-gotten gains. Books and Records or Internal Controls Violations: from $5,000 to $100,000 (for individuals) or $50,000 to $500,000 (for corporations) per violation (or the gross pecuniary gain) and/or disgorgement of ill-gotten gains.	

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