

**Changes Coming:
US Sentencing Guidelines, UK Bribery Bill
and the OECD on Facilitation Payments
Part II**

At its April 7, 2010 meeting the United States Sentencing Commission approved amendments to its Sentencing Guidelines. The next day on April 8, 2010, the UK Bribery Bill received Royal Assent. These two events follow the December 9, 2009 release by the Organization for Economic Co-Operation and Development's (OECD) *Recommendation for Further Combating Bribery of Foreign Public Officials*, when the OECD marked the tenth anniversary of the entry into force of the OECD Anti-Bribery Convention.

These three releases, which comprise of two changes in the legal schemes by two of the world's largest economic players and the proposal of one of the largest Non-Governmental Organizations (NGO) dedicated to ending corruption across the globe portend significant changes in how companies will be structured and transact business going forward in the new decade. This is the second of three postings in which will discuss the changes that companies, with any US or UK presence, will be required to implement. The initial post will was on the changes to the US *Sentencing Guidelines*; in this post, we will consider the changes required by the UK *Bribery Bill*; and in the third and final post we will consider the recommendations as found in the OECD's *Recommendation for Further Combating Bribery of Foreign Public Officials* regarding ending of facilitation payments.

There are several differences between the FPCA and the UK Bribery Bill which all companies should understand. These include:

- The Bribery Bill
 - has no exception for facilitation payments.
 - creates strict liability of corporate offense for the failure of a corporate official to prevent bribery.
 - specifically prohibits the bribery or attempted bribery of private citizens, not just governmental officials.
 - not only bans the actual or attempted bribery of private citizens and public officials but all the receipt of such bribes.
 - has criminal penalties of up to 10 years per offense not 5 years as under the FCPA.

There is one affirmative defense listed in the Bribery Bill and it is listed as the "adequate procedures" defense. The Explanatory Notes to the Bribery Bill indicate that this narrow defense would allow a corporation to put forward credible evidence that it had adequate procedures in place to prevent persons associated from committing bribery offences. The legislation requires the Secretary of State for Justice to publish guidance on procedures that relevant commercial organizations can put in place to prevent bribery by persons associated with their entity.

Other than this commentary, the Bill provides no further information on what might constitute “adequate procedures” as a defense but the Government has signaled that it will work with the UK business community to provide appropriate guidance to this critical component of the Bribery Bill. The UK law firm KattenMuchin has indicated that they expect the Government will apply a test regarding the “adequate procedures” defense “with regard to the size of the company, its business sector and the degree to which it operates in high risk markets”. The law firm of Covington and Burling, in a client advisory dated March 31, 2010, has opined that the Bribery Bill will not come into force until late 2010 because it will take the UK government until then to issue guidance on what may constitute “adequate procedures”.

The Bribery Bill is a significant departure for the UK in the area of foreign anti-corruption. It cannot be emphasized too strongly that the Bribery Bill is significantly stronger than the US FCPA. The Bribery Bill provides for two general types of offence: bribing and being bribed, and for two further specific offences of bribing a foreign public official and corporate failure to prevent bribery. All the offences apply to behavior taking place either inside the UK, or outside it provided the person has a "close connection" with the UK. A person has a "close connection" if they were at the relevant time, among other things, a British citizen, an individual ordinarily resident in the UK, or a body incorporated under the law of any part of the UK. Many internationally focused US companies have offices in the UK or employ UK citizens in their world-wide operations. This legislation could open them to prosecution in the UK under a law similar to, but stronger than, the relevant US legislation.

These changes include the outright banning of facilitation payments and the outright banning of all bribery and corrupt payments by US companies to not only foreign governmental officials but all private citizens. The Bribery Bill certainly does away with any legal question of “who is a foreign governmental official” under the FCPA and the use of other legislation, such as the Travel Act, which bans bribery generally, to back corrupt actions made to a foreign person who is not a governmental official, into an FCPA violation. All US companies with UK subsidiaries or UK citizens as employees, should ban such acts as part of their overall compliance and ethics policies sooner rather than later.

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