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Enforcement of Bribery Act Against Foreign Corporations a High UK Priority

Richard Alderman, director of the Serious Fraud Office (SFO) in the United Kingdom reiterated last week that **a top priority for the SFO's enforcement of the U.K. Bribery Act is the prosecution of foreign corporations.** This latest warning—previously given in Russia and the European Union—came on October 5, 2011, during a presentation by Alderman just steps from the White House in Washington, D.C. It is clear that the SFO sees the Bribery Act as a powerful new force in the global anti-corruption effort. It is equally clear that Alderman hopes to galvanize U.K. public support by aggressively pursuing foreign corporations that have disadvantaged U.K. companies through corrupt business activities. The Bribery Act reaches private, as well as public, corruption and represents a dramatic expansion of the reach of U.K. law enforcement.

Given the SFO's focus, coupled with similar U.S. efforts, now is the time to reevaluate corporate anti-corruption policies and training. For those corporations that engage in any form of business in the U.K., reliance on the outdated Foreign Corrupt Practices Act (FCPA) anti-corruption policies may well put them in the cross-hairs of the SFO.

The Bribery Act

The Bribery Act, which expands on the enforcement goals of the now familiar FCPA, went into effect in July 2011. It creates severe criminal penalties and focuses on commercial bribery, that is, bribery between private persons and companies. The Bribery Act does have a provision separately prohibiting bribery of foreign government officials, much like the FCPA, but it is focused on stamping out all forms of corruption, not just public corruption. Moreover, unlike the FCPA, it makes no exceptions for “facilitation” payments.

Under the Bribery Act, bribery is defined as "any advantage given to a person to encourage that person to perform their functions improperly or as a reward for previous improper performance." Improper performance is defined as a breach of an expectation that the bribed person will act in "good faith, impartially, or in accordance with a position of trust." Plainly, this dramatically expands the type of corrupt behavior that can result in criminal liability for both corporations and their executives.

Failing to Prevent Bribery — the "Corporate Offense"

In addition, Alderman highlighted a brand new corporate bribery offense—failing to prevent bribery. Now global corporations that conduct business in the U.K. can be **prosecuted for failing to have anti-corruption policies and procedures** if an associated person engages in bribery anywhere in the world.

Fortunately, there is a defense to this new corporate crime: a system of "adequate procedures" that a company implements to prevent bribery. Unlike the U.S. system, **this defense is absolute**, not merely a means to mitigate the penalty imposed as a result of rogue conduct. The Ministry of Justice and the SFO have provided six key principals for creating a system of adequate procedures:

1. **Proportionate Procedures:** A system should be proportionate to the size of the business and the risks faced.
2. **Top Level Commitment:** The highest officials and management should be actively involved in fighting bribery and should be promoting a culture in which bribery is never acceptable.
3. **Risk Assessment:** Companies should regularly analyze the risks particular to their markets, industry and organization.
4. **Due Diligence:** Companies should investigate their potential employees, partners, agents and markets in order to mitigate bribery risks.
5. **Communication:** Policies and procedures should be communicated to employees and others performing services on the corporation's behalf.
6. **Monitoring and Review:** Companies should routinely review their current policies and procedures to keep up with the changing needs of bribery prevention.

Interestingly, these measures mirror the U.S. Sentencing Guidelines' definition of an effective compliance program.

Personal Liability

Alderman also addressed the issue of personal liability for directors and senior managers of corporations with a close connection to the U.K. Just as they do under the FCPA, those individuals face **personal criminal liability** under the Bribery Act for consenting to bribery. Those directors and managers are responsible for the ethical conduct of their corporations, Alderman provided. "If they are unhappy then they need to consider their position. If they cannot change the corporation's approach then they may have to resign."

What This Means to You

Husch Blackwell's White Collar, Internal Investigations & Compliance team can conduct an attorney-client **privileged audit** of your existing compliance program or we can create an anti-corruption program from scratch for small, medium and large corporations. Our attorneys regularly conduct confidential, privileged internal investigations into allegations of bribery and help individuals and corporations respond to investigations initiated by the U.S. Department of Justice, the Securities and Exchange Commission, and other agencies around the world.

In addition, we are able to work seamlessly with our U.K. Principal Partner firm, McGrigors LLP, to provide comprehensive support on both sides of the Atlantic for corporations responding to dual U.S.-U.K. anti-corruption investigations. Let us provide your leadership, your financial controllers and your front-line sales personnel with the training they need to ensure compliance with these and other anti-corruption laws around the world.

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