

Joe owns a pipe manufacturing company, Joe's Pipe Works, incorporated and based in Phoenix, which sells pipe to private wholesalers throughout the United States and the Caribbean.

One of Joe's American competitors, Yankee Pipe, accuses Joe's Pipe Works of securing large orders from Calypso Pipe, a Bermudan pipe distributor, in exchange for secretly kicking back five percent of each purchase to Calypso's vice president. Shaken by these allegations, Joe does some checking and notes that sales to Calypso Pipe have increased threefold over the last quarter. Further checking reveals payments being made by the Bermudan office of Joe's Pipe to a Bermudan bank account in the name of a new company that started about the same time as sales to Calypso Pipe dramatically increased.

BY MARC R. LIEBERMAN AND MARK E. LASEE

American Companies Abroad

Complying With the New U.K. Bribery Act

Fearing the worst, Joe consults his attorney. The lawyer warns Joe that it is illegal, under the U.S. Foreign Corrupt Practices Act,¹ for an American company to bribe a foreign governmental official or certain of the official's close relatives. The lawyer further notes that federal law prohibits kickbacks in connection with certain government contracts, as well as some real estate transactions.² The lawyer nevertheless opines that so long as the persons receiving the payments (or certain of their close relatives) are not foreign officials, and so long as the kickbacks do not involve government contracts, certain real estate transactions, or give rise to domestic mail or wire fraud,³ the "kickback" scheme did not seem actionable under American criminal law, although Calypso could certainly sue Joe's Pipe for fraud.



MARC R. LIEBERMAN is a partner in the Scottsdale Office of Kutak Rock LLP practicing in the areas of private equity, hedge fund, and real estate investments, as well as public pension matters.

MARK E. LASEE is a partner in the Scottsdale Office of Kutak Rock LLP practicing in the areas of private equity, hedge fund and real estate investments, as well as corporate matters.

Believing it unlikely Calypso would ever bother to sue, Joe interprets his lawyer's advice as giving him free rein to continue this scheme, for despite the additional "overhead," the relationship appears to be a profitable one, particularly given the downturn of the U.S. economy and the weak demand for pipe. Besides, Joe reasons, it is Joe's employee in Bermuda who actually handles the payoffs, and Joe need only feign ignorance of the entire scheme if Calypso ever complains.

But Joe's calculus of the liability resulting from the kickback scheme is missing one key element. Apart from any provision in Bermudan law prohibiting kickbacks, Joe and his company may be in big trouble under a new law recently enacted—in England, of all places. That law is the United Kingdom Bribery Act of 2010 (the "Act"),⁴ which subjects those bribing any British subject, or even citizens of any British offshore territory⁵ (including the Cayman Islands, Bermuda or the British Virgin Islands) to criminal prosecution in the United Kingdom, regardless of where the bribe occurred and where the person responsible for the payment

is domiciled.⁶ If Joe's Pipe Works has a "close connection" with the United Kingdom,⁷ it will be subject to the Act.

The Act is even more far reaching. Even if Joe knew nothing of the kickback scheme perpetrated on the sly by one of Joe's junior salesmen operating out of Joe's Bermudan sales office,⁸ the fact that Joe and his board of directors were ignorant of the scheme does not immunize their company from liability under the Act, for unless they had the foresight to adopt certain prophylactic policies prescribed by the Act, their company may be held vicariously liable for their salesman's dishonest conduct.⁹ And this would be so even if the kickback scheme involved payments only to U.S. companies, such as Calypso's U.S.-incorporated sales office, if Joe's company (1) regularly conducts business in the U.K. or its overseas territories (such as selling products there) or (2) otherwise has a "close connection" with the U.K. or its overseas territories, such as having a small office in Bermuda to market products.

Penalties for violating the Act are significant. The Act authorizes the imposition of sentences up to 10 years in prison, and unlimited fines.¹⁰ So given these sanctions, it might be worthwhile for American companies doing business with British subjects or citizens of British overseas territories, or who conduct a modest amount of business in the U.K. or otherwise have a close connection with the U.K., to pay close attention to the Act's provisions.

Vicarious Liability

As noted, a bribe secretly paid by Joe's salesman may nevertheless subject Joe's company to liability under the Act. The Act provides that companies may be prosecuted if persons merely "associated with" them bribe or receive a bribe, regardless of where the act takes place and whether the company's officers knew of the bribe.¹¹ One is "associated with" a company (and these rules hold true for entities of every stripe) if he merely performs services for the company in any capacity, including as an agent, employee or subsidiary.¹²

Section 1 and Section 2 Offenses—Individual Acts of Bribery

The Act contains offenses that address bribery undertaken by individuals for their own purposes or on behalf of organizations like partnerships, limited partnerships or companies. A "Section 1" offense relates to the person making the bribe. A "Section 2" offense pertains to the recipient of the bribe.

A Section 1 offense includes the offer, promise or grant of financial or other advantage to another to "perform improperly" or reward performance of a "relevant function."¹³ Improper performance occurs when such an act or omission breaches the expectations of what a reasonable person in the United Kingdom would normally expect of such performance.¹⁴ This has been interpreted to mean a breach of an "act in good faith, impartially, or in accor-

dance with a position of trust."¹⁵

In determining what a reasonable person would expect, where performance is not otherwise subject to U.K. law, local custom or practice will be disregarded, unless otherwise permitted by written law applicable to the country concerned.¹⁶ A "relevant function" includes the functions of a government official as well as those of private individuals in the performance of business, employment or corporate activities.¹⁷ The performance of a relevant function can occur within or outside of the U.K. and, importantly, need not to be shown to have any connection with the U.K. at all. Section 1 offenses cover British citizens, U.K. residents and even nationals of its overseas territories,¹⁸ including offshore tax centers such as Bermuda, the British Virgin Islands and the Cayman Islands. Of course, that is where many offshore companies are domiciled.¹⁹

Companies may be prosecuted if persons merely "associated with" them bribe or receive a bribe, regardless of where the act takes place and whether the company's officers knew of the bribe.

Section 6 Offenses—Bribing Foreign Public Officials

Section 6 of the Act creates a standalone offense of bribing foreign public officials holding office outside of the U.K., and includes individuals who perform public functions in any branch of government.²⁰ An offense occurs when there is an offer or gift of any financial or other incentive with the intent to gain a business advantage and the official is not permitted or allowed to be influenced in such a manner by written law applicable to such official.²¹

This provision has met with controversy as it intends, among other things, to prohibit what is commonly known as “facilitation payments.”²² A facilitation payment is made for the purpose of expediting or facilitating the performance by a public official of a routine governmental action and not to obtain or retain business or any other undue advantage. Such payments are typically demanded by low level (and correspondingly, poorly paid) officials in exchange for providing services to which one is legally entitled without such payments.

The concern for American companies with respect to Sections 1, 2 and 6 offenses relate to bribery occurring in the U.K.,

or anywhere in the world, if undertaken by companies domiciled or incorporated in the U.K. or involving its citizens or individuals with close connections to the U.K., including citizens of British offshore territories.²³

Section 7 Offenses—Failure of Commercial Organizations to Prevent Bribery

Section 7 of the Act creates criminal exposure for companies that fail to implement adequate measures to prevent bribery by persons associated with them. In many ways, this vicarious liability provision may be the most important, as most senior officers would never condone bribery.

On March 28, 2011, the British Ministry of Justice published its Guidance on the minimum measures required to prevent bribery and avoid Section 7 liability. The Guidance provides, “A relevant commercial organization will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization.”²⁴ A “relevant commercial organization” includes a company or partnership

formed or established under the law of any part of the U.K., which carries on business anywhere and any other body corporate or partnership, wherever incorporated or formed, which carries on business in any part of the U.K.²⁵ Bribery in this context is essentially the same as set forth in Section 1 or Section 6 offenses.

Commercial organizations are liable and subject to prosecution for bribery caused by persons associated with them. An “associated person” is broadly defined as a person who performs services for or on behalf of the organization.²⁶ It does not matter in what capacity such services are performed, and it could include services provided by an employee, agent or subsidiary.²⁷ The associated person may be an individual or an incorporated or unincorporated association.²⁸

Furthermore, whether a person has performed services on behalf of the organization will be determined by the totality of the facts and circumstances, not just the relationship between the organization and the actor. However, if the actor is an employee of the organization, a rebuttable presumption arises in favor of establishing such performance. The provision is intended “to give Section 7 broad scope so as to embrace the whole range of persons connected to an organization who might be capable of committing bribery on the organization’s behalf.”²⁹ This includes contractors, subcontractors and others in the supply chain in which the organization contracts. It may go so far as to accord liability for the acts of attorneys for bribes paid by them on behalf of their corporate clients, and members of a joint venture may be prosecuted for the bribes committed by the venture’s agents.³⁰

Although it is clear that Section 7 offenses apply to entities formed in the U.K., the scope of the provision extends jurisdiction to foreign entities conducting business in any part of the U.K. Unlike Sections 1, 2 and 6 of the Act, there is no requirement in Section 7 of a need for a close connection to the U.K. Accordingly, despite not having such a “close connection,” a company may still be prosecuted under Section 7 of the Act if it is “carry-



An American company risks liability under the Act so long as it reasonably carries on some business in the U.K. or otherwise has a close connection with the U.K.

ing on a business or part of a business” in the U.K. The Guidance provides that organizations that do not have a “demonstrable business presence” in the U.K. would not be carrying on a business in the U.K. and thereby would not be subject to the Act.

The Ministry of Justice provides examples that do not qualify as carrying on a U.K. business. For instance, if a company’s securities have been admitted to trading on the London Stock Exchange, this would not, in itself, qualify that company as carrying on a business or part of a business in the U.K.³¹ Similarly, a parent company having a U.K. subsidiary will not, without more, mean that the parent company would qualify as carrying on a business in the U.K. because a subsidiary may act independently of its parent.³² The Guidance provides that a common-sense approach will be taken in determining the proof necessary, but that such determination is ultimately within the purview of the British courts.³³

How To Mitigate Liability

An American company risks liability under the Act so long as it reasonably carries on some business in the U.K. or otherwise has a close connection with the U.K., or its operations involve citizens or individuals with close connections to the U.K., including citizens of British offshore territories like the Cayman Islands, Bermuda or the British Virgin Islands. So, how does such a company protect itself from Section 7-type violations?

First, consideration might be given to structuring all transactions to avoid “close connections” with the U.K. and eliminating any activities that could be construed as carrying on a business in any part of the U.K., thereby avoiding jurisdiction of the U.K. courts. If none of the entities or staff employed by a company is formed or operating in the U.K., then one need only limit business with those individuals with close connections with the U.K. This may not be possible for financial, logistical or market-based reasons, given the significant impact of U.K. citizens and U.K. subjects in world commerce, particularly in off-

shore business or finance transactions.

When such restrictions are insufficient, the Act provides an absolute defense to criminal prosecution of a company if the company has in place “adequate procedures” designed to prevent persons associated with it from violating the Act.³⁴ The Act charges the Ministry of Justice to identify such adequate procedures in the Guidance published by the U.K. Ministry of Justice. Unfortunately, the Guidance issued does not provide bright-line rules from which corporate officers can draw comfort.

The Guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The six principles are intended to be flexible and outcome-focused, allowing for the huge variety of circumstances in which commercial organizations find themselves. For example, small organizations will face challenges that are different from those faced by large multinational enterprises.³⁵

The principles as described in the Guidance are as follows:

⊙ Principle 1—Proportionate

Procedures: A commercial organization must implement procedures to prevent bribery by persons associated with it, and these procedures should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization’s activities. They are also to be clear, practical, accessible, effectively implemented and enforced.

⊙ Principle 2—Top-Level

Commitment: The top-level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) must be committed to preventing bribery by persons associated with it. They should foster a culture within the organization in which bribery is never acceptable.

⊙ **Principle 3—Risk Assessment:** The commercial organization must assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and documented.

⊙ **Principle 4—Due Diligence:** The commercial organization must adopt and implement due-diligence procedures, taking a proportionate and risk-based approach, in respect to persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.

⊙ **Principle 5—Communication (including Training):** The commercial organization must ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training that is proportionate to the risks it faces.

⊙ **Principle 6—Monitoring and Review:** The commercial organization must monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.³⁶



The Guidance provides detailed commentary on each of the principles, and firms thinking about formulating an anti-bribery policy sufficient to achieve safe harbor under the Guidance should study this commentary carefully.

Best Solutions

So, what should American companies do

to best protect themselves from the broad reach of the Act? In our view, management should aggressively adopt and implement the procedures outlined by the Guidance to largely immunize management and its company from liability.

Correspondingly, companies should consider insisting that those with whom they do business also are (1) abiding by

the Act and (2) have themselves adopted the procedures described in the Guidance in connection with their business subject to the Act.

Both measures will minimize the possibility that anyone associated with a transaction has violated the Act, or if they do, neither party, nor its management, will suffer the fall. ¹⁷

endnotes

1. 15 U.S.C. § 78dd-2.
2. For example, *see* 31 U.S.C. §§ 3729–3733 (False Claims Act), 18 U.S.C. § 874 (kickbacks from public works employees), 41 U.S.C. § 51 *et seq.* (Anti-Kickback Act of 1986), 12 U.S.C. § 2607 (real estate settlement procedure prohibitions against kickbacks and unearned fees).
3. 18 U.S.C. § 1341 *et seq.*
4. Bribery Act 2010, Chapter 23, enacted April 8, 2010, with an effective date of July 1, 2011.
5. The British Overseas Territories consist of 14 territories: Anguilla; British Antarctic Territory; Bermuda; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Saint Helena and Dependencies (Ascension Island and Tristan da Cunha); Turk and Caicos Islands; Pitcairn Island; South Georgia and South Sandwich Islands; and the Sovereign Base Areas on Cyprus.
6. Section 12(3) of the Bribery Act provides that the bribery may occur outside of England, Wales, Scotland or Northern Ireland, if such acts would amount to bribery within the U.K. and the briber has a close connection with the U.K., meaning that such person was a British citizen or British overseas territories citizen.
7. *See infra* note 23.
8. Vicarious liability attaches to a “Relevant Commercial Organization,” which is either formed under U.K. law or carries on business or part of a business in any part of the U.K. § 7(5)(b), Bribery Act.
9. A “Relevant Commercial Organization” is guilty of an offense if a person associated with it bribes another, intending to retain business or a business advantage for the organization. § 7, Bribery Act.
10. Section 11, Bribery Act.
11. Ministry of Justice; Bribery Act 2010 Guidance, ¶ 33, at 15.
12. Whether a person who performs services on behalf of the organization is “associated” with it will be determined by the totality of the facts and circumstances, not just the relationship between the organization and the actor; however, a rebuttable presumption arises in favor of establishing such performance if the actor is an employee of the organization. Ministry of Justice; Bribery Act 2010 Guidance, ¶ 37, at 16.
13. Section 1(2)(b), Bribery Act.
14. *Id.* §§ 4 and 5.
15. Ministry of Justice; Bribery Act 2010 Guidance, ¶ 18, at 10.
16. *See infra* note 20.
17. Corporate activities subject to the Act include any form of incorporated or unincorporated business activity.
18. The British Overseas Territories consist of the 14 territories referenced in note 5, *supra*.
19. The territories of Jersey, Guernsey and the Isle of Man, though also under the sovereignty of the British Crown, have a different constitutional relationship with the United Kingdom, and are classed as Crown Dependencies.
20. The definition is interpreted broadly. It includes elected or appointed officials holding legislative, administrative or judicial position of any kind and any person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency. Ministry of Justice; Bribery Act 2010 Guidance, ¶ 22, at 11.
21. *Id.* ¶ 24, at 11 *ff.*
22. Unlike in the United States, where facilitation payments are one of the few exceptions to anti-bribery legislation set forth in the U.S. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, *et seq.*
23. The Act provides that any of the following persons would have “close connections” with the UK: (1) a British citizen, (2) a British Overseas Territories citizen, (3) a British National (Overseas), (4) a British Overseas citizen, (5) a person who under the British Nationality Act 1981 was a British subject, (6) a British protected person within the meaning of that Act, (7) an individual ordinarily resident in the United Kingdom, (8) a body incorporated under the law of any part of the United Kingdom, or (9) a Scottish partnership. Bribery Act, § 12(4).
24. Ministry of Justice; Bribery Act 2010 Guidance, ¶ 33, at 15.
25. Section 7(5)(b), Bribery Act.
26. *See supra* note 12.
27. However, the Bribery Act looks at the totality of the facts and circumstances, not just the relationship between the organization and the actor. In certain instances a company having a subsidiary in the U.K. may not be held to be carrying on business in the U.K. for the purpose of a Section 7 offense. Having a U.K. subsidiary, without more, does not necessarily mean that a parent company is carrying on a business in the U.K., because a subsidiary may act independently of its parent or other group companies. Ministry of Justice; Bribery Act 2010 Guidance, ¶ 33, at 15.
28. *Id.* ¶ 37, at 16.
29. *Id.*
30. The Guidance draws a distinction between joint ventures operated through a separate legal entity and one established through a contractual arrangement. In the latter case, rather than merely determining whether services were provided to the joint venture as an entity, the Ministry of Justice would look to the degree of control that a participant has over the arrangement and other relevant circumstances. *Id.* ¶ 40, at 17.
31. *Id.* ¶ 36, at 15-16.
32. *Id.*
33. *Id.* ¶ 36, page 16.
34. Bribery Act, § 7(2).
35. Ministry of Justice; Bribery Act 2010 Guidance, at 20.
36. *Id.* at 21-31.