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## Take Five: Understanding the UK Bribery Act

*Corporate Board Member* recently spoke with Daniel Smith, a senior associate in Latham & Watkins' London office and member of the Securities and Professional Indemnity Litigation and International Dispute Resolution Practice Groups, about the UK Bribery Act and its impact on multi-national corporations, whether they are based in the UK or not. Excerpts:

### **Corporate Board Member: Would you give a little background information on the UK Bribery Act?**

Daniel Smith: There are three general offenses set out in the Bribery Act: the first of bribing someone else, the second of being bribed, and the third a specific offense of bribing a foreign public official. I won't go into the precise details of what constitutes bribing or being bribed, but effectively it would cover most natural situations you'd describe as bribery. It's the offering of a financial or other advantage in return for the improper performance of functions or activities. There are definitions about precisely which activities they are, but they're quite broad and could cover any kind of corporate activity.

The second major type of offense is what we call corporate failure offense, which says that commercial organizations will commit an offense if a person associated with them bribes someone else intending to either obtain or retain business for the company, or to obtain or retain an advantage in the conduct of business. And that is essentially all that's required to prove an offense; it's quite broad. It doesn't require the company to actually do anything, nor does it require the company to intend anything, any sort of criminal state of mind. It's guilty of an offense if someone associated with it bribes someone else. Now that other person could be a commercial agent, a third party, it could be an employee, it could be someone down the supply chain. That's very wide, but the act provides a defense—a company will not commit the offense if it can show that it had in place adequate procedures to prevent those persons from undertaking the bribery. So in practical terms it criminalizes companies who fail to put in place appropriate sorts of compliance and systems and controls procedures.

As far as the international reach goes, for the general offenses and the foreign public official offense they will apply to any person—and that can be an individual or it can be a company or a partnership—if any of the constituent acts of offering the bribe or carrying out the improper performance of the activity take place in the UK. That's the first limb. So it can catch U.S. companies and companies around the world, if the relevant act or the omissions take place in the UK.

The second way you can be caught is if any UK company, or British citizen, commits acts anywhere in the world. The second limb won't really apply to foreign companies.

**CBM: So U.S. companies really fall under number one.**

DS: That's right. The corporate failure offense is much wider. It will apply to commercial organizations—UK commercial organizations carrying on business anywhere in the world and any company or partnership, a part of whose business takes place in the UK. That's the significant feature.

If you have a U.S. or other non-UK company carrying on business anywhere in the world, but part of whose business is conducted in the UK, then it will potentially be liable of an offense under the corporate failure sections of the act. The corporate failure offense and relevant bribery could take place anywhere in the world and have absolutely no connection with the UK.

**CBM: When will the UK begin bringing cases against companies?**

DS: The act went onto the statute books in April this year but hasn't yet come into force so currently no one can be committing an offense under it. We believe it will come into force before the end of this calendar year. And the person to decide that is the relevant minister in the UK government, which we expect will be the minister in charge of the Ministry of Justice, but it will be by a statutory instrument that's just in the government's control.

**CBM: How are UK corporations and boards preparing themselves for UK Bribery Act?**

DS: The real concern for corporations worldwide, particularly in the UK, is their potential liability for this corporate failure offense. The single defense that they can have for that is that they have in place adequate procedures, so companies will be installing these procedures, testing them, and consulting with their advisors as to whether they're adequate. This inevitably will take some time and it's not something you can start doing simply when the act comes into force. Corporations need to be able to show that these procedures are fully in place by the time any offenses might be committed. That obviously means that they're hard at work thinking about these things now and certainly if they're not they'd be well advised to start doing so.

Also, there is a requirement in the act for the UK government to publish guidance on what might constitute adequate procedures. We don't know what form this will take. My feeling is that it will be relatively general and will not be something you could simply copy out and follow, be a set of general procedures and general principles. It also will not guarantee you a safe harbor if you comply with it because of the way the act is drafted. It will be for the UK courts to assess whether a company has adequate procedures. But companies can expect guidance and we expect it to come out maybe in the next month or two.