

Intelligence Brief 1.4

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New U.K. Anti-Bribery Legislation

The United Kingdom will soon enact a law with provisions similar to those of the U.S. Foreign Corrupt Practices Act and the Federal Acquisition Regulations. Specifically, the proposed new law, titled the Bribery Act of 2009, creates a general bribery offense in the U.K., which previously had been imprecisely defined due to disparate anti-bribery provisions in law; creates a specific provision criminalizing bribery of foreign government officials, as well as of private individuals in some cases; and creates an offense for failing to prevent bribery by employees, agents or representatives in companies' employ through negligence. In other words, an anti-bribery compliance regime, and due diligence investigations of foreign agents and representatives, have become an indispensable consideration for U.K. corporate counsel, particularly for companies with overseas operations.

As we noted in a previous article (“Federal Acquisition Regulations: U.S. Government Contractors Face New Burdens”, *Intelligence Brief*, Issue 1.1ⁱ), the United States has recently strengthened rules on federal government contractors in regards to the actions of their foreign subcontractors, for which prime contractors are now liable. It now appears that British companies will similarly face exposure to potential violations of U.K. law committed by their foreign representatives and agents as relates to bribery.

As with anti-bribery provisions codified in U.S. law, under the new British anti-bribery legislation, companies will be well-advised to ensure that they have procedures in place to detect acts of bribery by persons in their employ, have an anti-bribery training program for employees, and conduct due diligence investigations of partner companies, vendors, and individuals

representing the British firms in overseas locations. Such pre-emptive actions and programs, and documented due diligence investigations of foreign partners/representatives, may mitigate penalties levied against a company by the British Government should the company later be implicated in an incident of bribery.

The proposed law was purportedly drafted in the wake of pressure brought by the Organization for Economic Cooperation and Development (OECD) on the British Government to strengthen its drive against corruption.ⁱⁱ Existing anti-bribery legislation in British law has been wholly inadequate, according to British officials as it dates back to the late nineteenth and early twentieth centuries.ⁱⁱⁱ

The proposed legislation would impose severe penalties against companies and partnerships found guilty of bribing foreign officials, as well as allowing for criminal charges and monetary penalties against executives of companies convicted of engaging in such practices. The bill is divided into two general offenses: promising, offering or giving a bribe, and accepting a bribe. The details of the law also make the bribery of a foreign government official a discrete offense, as noted above, and provides for corporate liability for negligently failing to prevent bribery. The entire text of the proposed law can be found [here](#).

Offenses under the proposed legislation are punishable by a maximum 10 years' imprisonment. This compares with the maximum 20 years' imprisonment per violation stipulated under the anti-bribery provisions of the U.S. FCPA. The “improper performance” (that is, what the bribe is supposed to achieve) of the draft U.K. law can occur either within or outside the U.K., and it does not matter whether the bribe is proffered or

accepted either within or outside the U.K. to be subject to the law.

If prosecutions under the U.S. Foreign Corrupt Practices Act are any indication of what may happen under the new U.K. law when it is enacted, British businessmen should take it very seriously. Beginning in 2004, the U.S. Justice Department became much more aggressive in its enforcement of the FCPA, bringing more prosecutions between 2004 and 2008 under the FCPA than it had in the prior 26 years of the law's existence.^{iv} The impetus for the increased prosecutions of the U.S. law is multi-faceted. In the current economic crisis, competitive pressures may drive some companies to resort to bribery to win contracts over rivals. Exacerbating the problem, corrupt officials in key positions in places like Nigeria, Afghanistan and Iraq, where huge government contracts are available for award, are part of the landscape, and often open to bribery. Additionally, self-reporting by companies has increased, as many companies recognize that once a potential FCPA violation by an employee has been uncovered, the resulting penalties levied by the U.S. Government may be mitigated should the company expose the violation itself, rather than have it disclosed by a third party.^v

U.S. companies with operating subsidiaries in the United Kingdom should also be wary of the new U.K. anti-bribery law, as the draft legislation covers any company with operations in the U.K., including foreign-headquartered companies. The draft law states, in part:

7. Offences under this Act: territorial application

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made –

(b) a body incorporated under the law of any part of the United Kingdom^{vi}

In addition to the prohibitions regarding the bribery of public officials, it should be noted that the proposed U.K. legislation also covers, in some cases, bribery of private officials (“commercial bribery”).

Proactive measures on the part of British firms, such as implementing anti-bribery compliance regimes and conducting due diligence investigations of foreign agents and partners (since the proposed U.K. law

covers bribes offered by third party intermediaries), are going to be more important than ever when this proposed legislation becomes law. The proposed U.K. law specifically addresses the ameliorating effects of proactive measures implemented by companies to thwart bribery by employees, should the company later become implicated in bribery. Additionally, comprehensive Know Your Customer procedures should be employed to mitigate the risk of entering into transactions with Politically Exposed Persons. Corporate counsel have a duty to take such preemptive measures to ensure that their companies are as insulated as possible from the dangers posed by potential high-risk involvements in developing and unfamiliar countries.

The In-Person Interview: A Crucial Insurance Investigation Tool

When validating a life insurance claim, particularly one with indications of potential fraud, it is important that insurance companies conduct well-structured, well-prepared interviews of persons knowledgeable about the insured's activities, his/her prior medical history, and the circumstances of their death.

Documents provided as proof-of-death in a life insurance claim should not be relied on as the sole means of authenticating a claim. Technology has increased the ease of producing authentic-looking documents. The internet enables fraud perpetrators to locate and download exact replicas of many countries' “official” documents, such as death certificates, from virtually anywhere in the world. Even in those cases in which an actual official document is presented to an insurance company, corruption and incompetence are frequently so rampant in many parts of the world, that the mere existence of a death record in a county's archives should not be considered proof of death. The information actually contained in any document provided by the beneficiary should be verified through independent channels. Usually that means interviews must be conducted.

In most death investigations, individuals typically interviewed as part of the claim validation process include family members of the insured, the insured's employer and co-workers, doctors who treated the insured, funeral home staff who handled the insured's

remains, the insured's friends, and police officers who may have investigated the insured's death. Depending on the circumstances of the death, others who may possess information pertinent to the investigation may include an insured's landlord, the insured's neighbors, hotel staff if an insured died or became ill while staying at a hotel, the insurance agent who wrote the insured's policy, and the travel agent involved in planning the insured's travel, if he died overseas.

Whenever practicable, interviews should be conducted face-to-face by the insurance investigator. Much communication that occurs in an interview is non-verbal, and interview subjects are less likely to dissemble when facing their interlocutor. The remoteness and anonymity of a telephone interview works to the interviewee's advantage if they have something to hide.

The key to a successful interview is preparation. Prior to conducting the interview, the investigator will want to review the claim and underwriting files, making notes of any discrepancies or points of clarification they wish to raise with the interview subject. Information provided by an interview subject that is inconsistent with information contained in the insured's application and other underwriting documents, proof of death documentation, or information provided by other interview subjects should be politely challenged by the investigator. Sometimes, such discrepancies are innocent or due to misunderstandings, but other times may point to fraud or prevarication.

The interviewer will want to prepare a list of written questions to ask the interview subject in advance of the interview, to ensure that no key questions are overlooked. Generally speaking, such a list will include 15 to 20 prepared questions regarding the insured's relationship to the interview subject, how long they had known each other and in what capacity, whether the insured suffered from any illnesses, was taking any medications, smoked, drank, used illicit drugs, and similar lifestyle questions. The questions will largely confirm the information contained on the insured's life insurance application. Additionally, the circumstances of the insured's death will comprise a significant portion of the interview.

Normally, we will include several questions to which we know the answers, in order to confirm the veracity of the interview subjects' responses.

Some investigators will prepare a written or typed statement at the conclusion of the interview, summarizing what the subject said, for the interviewee to sign and date. From an evidentiary standpoint, we prefer to record interviews using a high-quality digital voice recorder, in addition to taking hand-written notes of the subject's responses. Our reports will contain a summary of the interview subject's responses, and the recording will both support the contents of our written report, as well as serve as evidence in a potential legal proceeding. The digital format of the interview allows us to send the recording as an email attachment to our clients or download them to digital media for easier transmission.

We are always careful to initiate the recording with a statement read by the investigator, in which we indicate the date and location of the interview, the names of the investigator and interview subject, the purpose of the interview (indicating the name of the insured whose death we are investigating for the purpose of a life insurance investigation), and ask the interview subject if he/she consents to have the interview recorded. This step precludes the recording later being deemed inadmissible should it be challenged on privacy grounds.

Interviews, in our opinion, should not be confrontational. A well-conducted, diplomatic interview should seek to elicit as many facts as possible, and the facts should speak for themselves. It does not serve the interests of the investigation to turn the interview subject into a hostile witness. The insurance investigator has no criminal investigatory powers, and should not imply otherwise. Of course, the investigator will want to plumb deeply, and if he suspects evasion or deception on the part of the interviewee, he should follow up on any discrepancies and inconsistencies. A dishonest interview subject should be allowed enough rope to hang themselves, but the investigator must remain impartial and not appear to be badgering or leading the interviewee.

Interviews are a critical aspect of any insurance investigation, and the investigator has several advantages going into the interview. He should comport himself professionally, be well dressed (men

with coats/ties, women in skirts/blouses), and treat the interview subject with dignity and respect. It is in the interest of people being interviewed for the purpose of an insurance investigation to be cooperative and to please the insurance investigator; otherwise, the death benefit associated with the insurance policy will not be paid. The investigator should take an interest in the person being interviewed, enjoy the challenge of solving a mystery, and have fun.

The Growing Challenge of Public Records Research in Mexico

For many years it was relatively simple for investigators to conduct due diligence investigations, insurance claim investigations, and background research in Mexico. That all changed a few years ago when it became much more difficult to obtain a company's articles of incorporation, criminal records, death certificates, and many other records which are generally readily available in most countries.

Historically, Mexico has been a highly authoritarian country, with the Institutional Revolutionary Party (PRI) controlling the executive branch from 1929 to 2000. The PRI's dominance of the government stemmed in part from a desire for stability on the part of the Mexican people following the social and political chaos and violence of the Revolution led by Emiliano Zapata. One survey of 40 countries conducted in 1980, using a Power Distance Index (PDI), created to measure relative authoritarianism, ranked Mexico as the second most authoritarian country among those examined.^{vii} According to sociologist Emily Smith, in authoritarian cultures, the populace tends not to value privacy very highly and is willing to forego it in subservience to what they deem to be the superior interest of the state.^{viii} This partly explains why public records had historically been very accessible to researchers in Mexico.

In recent years, however, it has become much more difficult to obtain very basic records on individuals and companies. The cause of these frustrations was initially unknown, but we have since learned of two reasons that account for the obstacles many investigators now face: one is political and another is practical.

Politically, there has been a general shift in individuals' attitudes toward privacy in Mexico, particularly following the defeat of the PRI party in the Presidential election of 2000, by the PAN candidate, Vicente Fox. That election presaged an advancement of democratization in Mexico, as the rival PAN finally broke the PRI's stranglehold on power. As Ms. Smith argues, democratization leads people to place a greater emphasis on individual rights and their own privacy. Indeed, she notes that "Privacy issues will likely be of growing concern to the Mexican people with the spread of democracy and e-commerce."^{ix}

This shift in popular attitudes toward privacy manifested itself publicly with the passage in 2002 of the Federal Freedom of Information Act (FOIA), which contains provisions regarding the protection of government-held personal data on individual Mexicans. It pertains to information held by executive agencies, the judicial and legislative branches, and autonomous entities created by the Mexican Constitution. The law is very comprehensive regarding what is defined as persona data – including a person's ethnic background, physical characteristics, family life, address, telephone number, employment history, political opinions, religious belief, health history, and other data deemed to be of an "intimate nature."^x

Practically, security-related concerns among the country's growing middle classes have encouraged the new government to tighten access to personal information and improve its data protection. The main fear among the country's wealthier citizens is the kidnapping epidemic that is orchestrated by professional criminals who undertake sophisticated "target selection" prior to taking hostages.

Target selection, as explained by Fred Burton and Scott Stewart, writing in Stratfor's *Global Security & Intelligence Report*, is an integral part of the kidnapping process. As kidnapping has exploded as a criminal enterprise in Mexico, making Mexico the "kidnapping capital of the world" today, its better practitioners have become proficient in its preparation and execution.

As Messrs. Burton and Stewart explain: "[B]ecause of the particular steps involved in conducting a kidnapping, the process is not unlike that followed to execute a [terrorist attack](#). The common steps are target selection, planning, deployment, attack, escape and exploitation."^{xi}

Learning as much as they can about the potential kidnap victim is a key part of the target selection process. Much information can be gleaned about the target from public records, such as birth certificates, which contain the names of the victim's parents, who can then be extorted for ransom money. Similarly, tax records can be used to identify and target high net worth individuals.

Mexico overtook Colombia as the global leader in kidnappings in 2006 when more than 3,000 persons were abducted. In recent years, the target of kidnappings has shifted in Mexico from upper income to middle and lower income individuals. There is also evidence indicating that drug cartels are becoming increasingly involved in what can be a very lucrative business. Kidnappings carried out by less professional groups tend to be more violent and likelier to end in the death of the victim. "Express kidnappings", in which a victim is only held for short periods (typically up to 48 hours) during which time they are forced to withdraw money from ATMs multiple times, skirting the daily withdrawal limits, are also growing more frequent. .xii

Security expert Mario Loaiza, a retired U.S. Army criminal investigator who runs a security consulting firm with operations in Mexico, advises us that it is the fear that releasing personal information could be used to perpetrate kidnapping and violence, not breaking the new privacy laws, which is of greater concern to Mexicans. He notes: "Even with basic investigations, people are so reluctant to talk and provide personal information of any kind... [T]heir concern is survival and fear of kidnapping rather than the laws."

The increased emphasis in Mexico on privacy of data, both of individuals and companies, will in our view conflict with the need for transparency that is required for the country's economy to prosper. Good business practices, fair dealing and the attraction of outside investment all require the ability to conduct proper due diligence of individuals and companies. If Mexico hopes to grow its economy, excessive restrictions on access to data will eventually have to be eased.

About Veritas Intelligence

Veritas Intelligence enables its clients to succeed in complex or hostile business environments. To this end, Veritas Intelligence provides a broad range of investigative, intelligence, financial and research services to help clients reduce risks, solve problems, and capitalize on opportunities.

Veritas Intelligence is headquartered in the Washington, DC metropolitan area with a branch office in London, United Kingdom. Veritas Intelligence serves a global clientele of law firms, financial institutions, multinational corporations, insurance carriers, investment organizations, non-profit organizations, and high net worth individuals. Our operational hubs in the Washington, DC area and London oversee our global network of investigators who are located across the world.

William F. Marshall, President & CEO

Prior to founding Veritas, Mr. Marshall was Managing Director of global investigations firm GlobalSource LLC. He has also served as the head of the North American Investigations Division of ArmorGroup, Senior Investigator for the Investigative Group International, and as an Intelligence Analyst with the U.S. Drug Enforcement Administration, specializing in money laundering methodologies, trends and detection techniques.



ⁱ Available:

http://veritasintelligence.com/VI_newsletter_01.pdf

ⁱⁱ “Draft Bribery Billed Welcomed, say MPs in Report,” July 28, 2009, found at

<http://news.parliament.U.K./2009/07/draft-bribery-bill-welcomed-say-mps-in-report/>.

ⁱⁱⁱ Ibid.

^{iv} *Compliance Week*, “Increased Enforcement of FCPA Violations,” Melissa Klein Aguilar, December 7, 2008, found at

<http://www.complianceweek.com/article/5084/increased-enforcement-of-fcpa-violations>.

^v Ibid.

^{vi} Draft U.K. Bribery Act of 2009, found at

<http://www.official-documents.gov.U.K./document/cm75/7570/7570.pdf>.

^{vii} Queen’s University, Ontario, Canada research paper, “For the Globalization of Personal Data Project”, Emily Smith, June 2005, citing Geert Hofstede, *Culture’s Consequences: International Differences in Work-Related Values*, Sage Publications, 1980, found at http://www.surveillanceproject.org/files/Mexico_Backgro_under_GPD.pdf.

^{viii} Ibid.

^{ix} Ibid.

^x Federal Institute of Access to Public Information (IFAI), “Personal Data Protection in Mexico,” PowerPoint presentation created April 19, 2006 provided by IAFI to the U.S. Dept. of Homeland Security, found at http://www.dhs.gov/xlibrary/assets/privacy/privacy_wks_hop_04-2006_personal.pdf.

^{xi} Stratfor, *Global Security & Intelligence Report*, “Mexico: The Third War”, Fred Burton and Scott Stewart, February 18, 2009, found at http://www.stratfor.com/weekly/20090218_mexico_third_war.

^{xii} UT System 2007 Risk Mitigation Conference, “The Kidnap for Ransom Industry”, Jack Cloonan, PowerPoint presentation, December 7, 2007, found at <http://www.authorstream.com/Presentation/BAWAre-32521-tues-RMI-cloonan-valuable-assets-Definition-Kidnapping-Types-Kidnappings-Political-Religious-as-Entertainment-ppt-powerpoint/>.