

The United Kingdom's Bribery Act 2010: Implications for Companies on a Global Basis

Insights

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Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Ultimately, the Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading role in stamping out corruption and supporting trade-led international developments. But I would argue too that the Act is directly beneficial for business. That's because it creates clarity and a level playing field, helping to align trading nations around decent standards.

Kenneth Clarke

UK Secretary of State for Justice

Preamble to UK Bribery Act Guidance

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On July 1, 2011, the United Kingdom's Bribery Act 2010 ("the UK Bribery Act") will go into effect. This law, which was approved on April 8, 2010, is landmark legislation enacted in the UK to combat bribery in both the private and public sector. It replaces less effective bribery prohibitions found in British common law and the Prevention of Corruption Acts. On March 30, 2011, the Ministry of Justice published comprehensive Guidance on the Bribery Act ("the Guidance"), which applies to England, Wales, Scotland and Northern Ireland. The Guidance sets forth procedures which companies can implement to prevent persons associated with them from committing bribery in violation of Section 9 of the UK Bribery Act. The purpose of this article is to provide key information about the UK Bribery Act for companies which may fall under its purview, with an emphasis on the steps organizations can take to prevent acts which would be in violation of this law. This law is especially of interest to multi-national companies that may fall under the jurisdiction of both the U. S. Foreign Corrupt Practices Act (the "FCPA") and the UK Bribery Act due to the broader implications of the British law.

Overview of the UK Bribery Act

- The UK Bribery Act makes the following acts criminal offenses, as set forth in its Sections 1, 2, 6,

and /, respectively:

- o **Active bribery (Section 1):** When a person offers, promises or gives a bribe
- o **Passive bribery (Section 2):** When a person requests, agrees to receive or accepts a bribe
- o **Commercial bribery (Section 6):** Bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business (including “facilitation” or “grease” payments)
- o **Commercial entity’s failing to prevent bribery (Section 7).** When a commercial organization fails to prevent bribery by a person acting on its behalf
- **Broad definition of “Person”:** “Person” is broadly defined, and includes foreign officials, business entities, and individuals, as well as UK citizens and companies and those who are “closely connected” to the UK, such as foreign UK residents and business organizations that carry on business in the UK.
- **Definition of “bribery”:** The Guidance states that, very generally, bribery is defined as “giving someone a financial advantage to encourage that person to perform their functions or activities improperly to reward that person for having already done so”. Bribery could include seeking to influence a decision maker by giving him or her some extra kind of benefit rather than what can legitimately be offered as part of a legal tender process.
- **Acts committed outside of the UK:** UK courts will have jurisdiction of the offenses of active, passive and commercial bribery that occur in the UK as well as offenses committed outside the UK where the person committing them has a “close connection” with the UK by virtue of being a British national or ordinary resident in the UK, a “body” incorporated in the UK, or a Scottish partnership.
- **Offense of failing to prevent bribery.** Section 7 of the UK Bribery Act provides that a commercial body can be liable for conduct amounting to a Section 9 active or commercial bribery on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated, sectioned or formed in the UK. The UK Bribery Act states that it does not matter whether the acts or omissions which form part of the section 7 offenses take part in the UK or elsewhere. Therefore, provided that the organization is incorporated or formed in the UK, or it “carries on” a business or part of a business in the UK (wherever in the world it may be incorporated or formed), then UK courts will have jurisdiction.
- **Section 7’s key phrase of “carries on a business”:** Under the UK Bribery Act, only a “relevant commercial organization” can commit an offense under Section 7. A “relevant commercial organization” is defined as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business in the UK irrespective of its place of incorporation or formation. The Guidance provides that the courts will be the final arbiter as to whether an organization “carries on a business” in the UK, taking into account the particular facts in individual cases, and recognizing the Government’s intentions regarding this phrase, which will include: 1) a common sense approach; 2) as long as the organization in question is incorporated, or is a partnership, it does not matter if it pursues primarily charitable or education aims or purely public functions; and 3) entities formed outside of the UK would not be covered by the UK Bribery Act if they do not have a

demonstrable presence in the UK, such as:

- o the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List, or
- o if the entity has a UK subsidiary, which will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

- **Liability for failing to prevent bribery.** A company may be liable for failing to prevent a person from bribing on its behalf but only if that person performs services for that business.
- **Procedures as a full defense to infractions.** An organization has a full defense if it can show it had adequate procedures in place to prevent bribery.
- **Hospitality, promotional or other business expenditures.** The Guidance states that in cases where it is alleged that hospitality is actually a cover for bribing someone, the authorities will look at factors such as the level of hospitality offered, the way in which it was provided and the level of influence the person receiving it had on the business decision in question. Hospitality or promotional expenditures that are "proportionate and reasonable" given the sort of business conducted are very unlikely to violate the UK Bribery Act. Therefore, businesses can continue to provide tickets to sporting events, take clients to dinner, offer gifts to clients as a reflection of good relations, or pay for reasonable travel expenses in order to demonstrate the entity's goods and services to clients if that is reasonable and proportionate to the specific business. As Secretary of State Clarke wrote in the Guidance, "[r]est assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix."
- **Facilitation payments.** Facilitation ("grease") payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform, are bribes under the UK Bribery Act as they were under the former UK bribery laws.
- **Penalties.** The UK Bribery Act provides penalties ranging from a fine to ten years' imprisonment, depending upon the specific facts regarding the infraction.

Comparison of the UK Bribery Act to the U. S. Foreign Corrupt Practices Act. Companies which may fall under the purview of both the UK Bribery Act and the U. S. Foreign Corrupt Practices Act (the "FCPA") should take note of some of the differences between the two laws, and the generally more expansive reach of the UK Bribery Act, including:

- **Individuals and corporations.** The FCPA forbids only bribery of foreign public officials; the UK Bribery Act forbids bribery of not only public officials, but also bribery involving individuals and corporate organizations.
- **Facilitation payments.** The FCPA does not cover "facilitation" or "grease" payments which are allowed by the local law of the country where business is being conducted; the UK Bribery Act forbids small bribes made to facilitate routine government action in the local country as it recognizes "the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments."

Advice to Companies. Business entities that could be governed by the UK Bribery Act, including those that operate multi-nationally but are not incorporated in the UK, should review and implement, as appropriate, the Principles of Bribery Prevention that are set forth in the Guidance. These following six principles of bribery prevention recognize that the preventive measures are flexible and proportionate and depend on many factors, including the size of the organization:

- **Proportionate procedures.** A company's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks faced by the entity, and to the "nature, scale and complexity" of the organization's activities. The procedures are to be "clear, practical, accessible, effectively implemented and enforced". Therefore, the first step for each company in determining the appropriate bribery prevention procedures should be to conduct a risk assessment of its entire organization. Bribery prevention procedures may be stand-alone procedures or part of more expansive guidance.
- **Top-level commitment of zero tolerance towards bribery.** The top level of a company must be committed to preventing bribery by persons associated with it, and must foster a corporate culture in which bribery is never acceptable. Top-level management commitment, no matter the size or structure of an organization, is likely to include communication of the company's stance against bribery, and an "appropriate degree of involvement in developing bribery prevention procedures". Such communications are likely to include a commitment to zero tolerance towards bribery and an articulation of the business benefits of a prohibition against bribery.
- **Risk assessment.** Companies are expected to assess the nature and extent of their exposure to "potential external and internal risks of bribery" by individuals associated with them. Business entities are to ensure that this assessment is "periodic, informed and documented". Some of the risk assessment tools could include oversight of the risk assessment by top management, appropriate resourcing of these efforts depending upon the size of the business, and due diligence inquiries as a risk mitigation tool.
- **Due Diligence.** Business entities should apply due diligence procedures, taking a proportionate and risk-based approach, regarding all persons who "perform or will perform services for or on behalf" of the company in order to mitigate risks it has identified regarding bribery. These efforts can be taken by either internal company resources or external consultants.
- **Communications and Training.** Businesses are to ensure that bribery prevention policies and procedures are "embedded and understood" through their organizations through internal and external communications and training proportionate to the risks faced that bribery could be committed by those who work in the organization. Recommended communications are those pertaining to policies on such matters as decision making, financial controls, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations, penalties for breach of company rules, and the explanation of management roles at all levels to prevent bribery.

- **Monitoring and Review.** Companies should monitor and review procedures created to prevent bribery by individuals associated with the business, and to make necessary improvements. Examples of such procedures include: 1) systems established to deter, detect and investigate bribery; 2) programs to monitor the ethical quality of business transactions; and 3) internal financial control mechanisms.