
U.K. Ministry of Justice Publishes Guidance on the Bribery Act 2010

On March 30, 2011, the United Kingdom's Ministry of Justice ("MOJ") published its long-awaited Guidance to the "Bribery Act 2010," the most far reaching anti-bribery legislation since the U.S. Foreign Corrupt Practices Act ("FCPA"). The Bribery Act makes it an offense to give or receive a bribe and to offer or agree to receive a bribe, whether the bribe is made or not. The Act also introduces the new offense of "failure ... to prevent bribery," imputing liability to a commercial organization if a person "associated with" the organization bribes another person, provided that the intent of the bribe is to obtain or retain business for the organization, or to obtain or retain an advantage in the conduct of the organization's business. The offense of "failure ... to prevent bribery" extends not only to U.K. corporations, but also to any company, wherever incorporated, which "carries on a business, or part of a business, in any part of the United Kingdom." Whether the corporation knows or has reason to know of the employee's bribery-related activity is irrelevant. Senior officers with a "close connection" to the United Kingdom may also be prosecuted if they "consent[ed] or conniv[ed]" in the commission of a bribery offense.

Like the FCPA, the Bribery Act criminalizes bribery of a foreign public official. Unlike the FCPA, however, the Bribery Act also applies to commercial bribery. Transparency International, noting the long reach of the Bribery Act, has said that it allows "almost no hiding place for companies which for some misguided reason decide to pay bribes."

Originally scheduled to come into force in April 2011, the effective date was delayed to July 1, 2011, as the MOJ sought to clarify the scope of the Act, given (among other things) that the statute, unlike the FCPA, makes no express allowance for bona fide promotional expenses, a serious concern for U.K. businesses. Further, although the Bribery Act provides a defense to the crime of "failure to prevent bribery" if a company "had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct," the statute does not define "adequate procedures."

The Guidance is titled "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing." Though not prescriptive, it sets out six principles that should inform an organization's anti-corruption procedures:

- (1) **Proportionate Procedures:** An organization's procedures should be "proportionate to the bribery risk ... and to the nature, scale, and complexity of the commercial organisation's activities," and should be "clear, practical, accessible, effectively implemented, and enforced." Thus, a key consideration is an evaluation of the bribery risk in the markets where the company does business, together with an assessment of appropriate controls, given the size of the business. A multinational business selling through agents to government customers in emerging markets, for example, is clearly at greater risk than a small business providing consulting services to private sector customers in the U.K.
- (2) **Top-Level Commitment:** Senior management should "foster a culture ... in which bribery is never acceptable," using both internal and external communications that promote this message.

- (3) **Risk Assessment:** The organization should make “periodic, informed, and documented” assessments of its exposure to potential external and internal bribery risks. Commonly encountered risks fall into five broad categories that include country risk, sectoral risk, transaction risk, business opportunity risk and business partnership risk.
- (4) **Due Diligence:** Due diligence should be performed concerning persons “who perform or will perform services for or on behalf of the organisation.”
- (5) **Communication and Training:** Bribery prevention policies should be “embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks [the organisation] faces.”
- (6) **Monitoring and Review:** Procedures should be monitored and reviewed periodically and improved where necessary.

The reach of the Bribery Act to all companies “carrying on a business” in the U.K. raised concern about the jurisdictional scope of the Act. Advocating a “common sense approach,” the Guidance observes that the “final arbiter” on jurisdiction will be the courts, although organizations without a “demonstrable business presence” in the U.K. would not be captured by the Act. In this regard, the Guidance provides two examples where, without more, the “business presence” test would not be satisfied: (1) “[t]he mere fact that a company’s securities have been admitted to the UK Listing Officials List and admitted to trading on the London Stock Exchange,” and (2) having a UK subsidiary (reasoning that “a subsidiary may act independently of its parent or other group of companies.”)

It is important to note that the Bribery Act, unlike the FCPA, contains no exception for “facilitating payments,” small payments to secure routine governmental services, such as telephone service. The omission is deliberate. The Guidance notes that “[e]xemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and business partners, and have the potential to be abused.” Nevertheless, again signaling a “common sense” approach to enforcement, the Guidance acknowledges “the problems commercial organizations face in some parts of the world and in some sectors” and notes that eradication of facilitation payments is a “long term objective.” It is clear, however, that the MOJ expects companies will phase out these types of payments. Indeed, the antipathy toward facilitation payments makes it prudent for U.S. companies doing business in the U.K. to re-examine policies that allow such payments, given that (i) any facilitating payment may be challenged under the Bribery Act, and (ii) MOJ officials have repeatedly stated that policies that allow facilitating payments will not be recognized as an “adequate” defense to a charge of “failure to prevent bribery.”

The Guidance took a kinder view of corporate hospitality, noting that “[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour.” As noted, the Bribery Act’s omission of an affirmative defense for bona fide promotional expenses had fostered arguments that the Act would result in prosecutions even for modest promotional gifts, such as T-shirts and ballcaps, as well as other bona fide hospitality expenses. The Guidance makes clear this is not the case. Nevertheless, while it appears that reasonable and appropriate hospitality will be tolerated under the Act, promotional and marketing expenses still merit close attention. Despite defining reasonable hospitality “for [an] individual and his or her partner” to include “fine dining,” the Guidance also emphasizes that expenditures that have a sufficient connection between a “financial or other advantage” and “the intention to influence” are actionable.

The Guidance includes numerous case examples, and is useful, not only as a guide to compliance with the Bribery Act, but also as a compendium of “best practices.” As with all new laws, questions will remain, but the MOJ professes to favor a balanced approach to enforcement. “[W]here hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act,” the MOJ asserts that “prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute.”

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