

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

The United Kingdom's Bribery Act 2010 ("Bribery Act" or "Act"), which becomes effective on July 1, 2011, presents compliance challenges that may well exceed those presented by the Foreign Corrupt Practices Act ("FCPA") in the United States. Among those, Section 7 of the Bribery Act criminalizes an organization's failure to prevent an "associated person" from engaging in commercial or official bribery prohibited by the Act,¹ although the existence of "adequate procedures" to prevent bribery—such as a well tailored and effective compliance program—provides a defense under the Act. On March 30, 2011, the U.K. Ministry of Justice issued the long awaited and much anticipated Guidance² on how businesses can effectively comply with the Act, and the Serious Fraud Office and the Director of Public Prosecutions issued Joint Prosecution Guidance ("SFO Prosecution Guidance") to prosecutors enforcing the Bribery Act.³ The Guidance makes clear that there will be a large number of U.S. companies subject to the Act and that their compliance and business programs designed to comply with the FCPA should be evaluated in order to make certain that they are consistent with the new Act's requirements.

I. Jurisdiction under the Bribery Act 2010

The Bribery Act applies to bribery—both commercial and of government officials—occurring within the United Kingdom or bribery committed in any jurisdiction by a person with a "close connection" with the U.K., such as a British citizen or national or a body incorporated in the U.K. In addition, Section 7 of the Act applies to any organization, wherever it is formed, "which carries on a business, or part of a business, in any part of the United Kingdom[.]" The applicability of the Act to organizations carrying on a business within the U.K. under Section 7 was the subject of some controversy when the legislation was first introduced, and may well remain so.

Under the Guidance, whether an organization, even a U.S. company, is carrying on a business in the U.K. will be determined "applying a common sense approach." That approach would require an organization to have a "demonstrable business presence" in the U.K. before the Act applied. Examples of what do *not* amount to a demonstrable business presence are the "mere fact" that a company's securities are listed in the U.K. or the presence of a U.K. subsidiary—provided that the subsidiary acts "independently" of its parent. The substitution of one ambiguity (what is "carries on a business") with another (what is "independently") means that there is a possibility that the Guidance's call for a "common sense approach" will cast a net over more organizations than expected—particularly if U.K. regulators take the expansive interpretation of the Bribery Act's jurisdiction that U.S. regulators take of the FCPA's. In addition, in the past, the concept of "*carrying on business*" in the jurisdiction has produced substantial jurisprudence in the U.K., occasionally leading to surprising, if not inconsistent, results. Given these uncertainties, the facts of each case must be examined closely.

¹ An associated person is any "person who performs services for or on behalf of" the organization. The associated person's capacity (whether an employee, agent, or subsidiary) is irrelevant, and the determination is made "by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between" the organization and the associated person, although an employee is presumed to be an associated person.

² Available at <http://www.justice.gov.uk/guidance/bribery.htm>.

³ Available at <http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>.

II. Facilitating Payments

In addition, while the FCPA excludes from its ambit facilitating payments,⁴ no such exception has ever existed under U.K. law, and the Bribery Act continues that approach. Given that such payments are common in some areas of the globe and in certain industries, organizations may have relied on the FCPA's exception and, until the new Act, the less-muscular approach of UK regulators to justify making such payments. Now the Guidance expressly indicates that while facilitation payments (as well as hospitality and promotional expenditures) *prima facie* trigger the provisions of the Act, prosecutors will consider "very carefully" the public interest prior to deciding whether to prosecute. The SFO Prosecution Guidance issued to Crown Prosecutors specifies factors governing the decision to prosecute, including the size and frequency of payments, the organization's policy governing those payments, and whether the organization self-reported the payments. For organizations that have implemented controls and procedures to ensure that facilitating payments comply with the FCPA, such provisions may lead to the increased prospect of liability under the Bribery Act because it might be suggested that these payments are systemic and are therefore premeditated and worthy of prosecution.

III. Hospitality and Promotional Expenses

Like the FCPA, the Guidance states that the Bribery Act permits bona fide hospitality and promotional, or other business, expenditures seeking to improve the image of the organization, better present products and services, or establish or maintain cordial relations. The Guidance notes that hospitality and entertainment may constitute bribery in certain circumstances and that the totality of circumstances surrounding the hospitality and promotional expenses will determine whether such expenses are legitimate. Similarly, the connection of the hospitality and promotional expenditures to the business activity must be considered, as well as the type and level of advantage offered, the influence that the foreign official might exert to benefit the organization, and the norms in a particular sector and industry.

IV. The Six Principles

Section 7 of the Bribery Act presents significant risks to multinational organizations. Pursuant to that section, the failure to prevent an "associated" person's bribery—whether commercial or official, however remote, and regardless of whether the bribery was sanctioned by the organization—may lead to exposure under the Act for a company. But the Act and the Guidance recognize that even organizations employing best practices cannot prevent every instance of bribery. The Act therefore allows that an organization may escape liability under Section 7 of the Act if it has in place an effective compliance program that is closely tailored to that organization's particular business and circumstances.

The Guidance provides six principles as the foundation of anti-bribery controls that may be implemented differently in organizations depending on their size, risk of bribery, and other factors. While such flexibility permits companies to develop and implement controls that make sense for their business circumstance, it may also create uncertainty for companies.

⁴ Facilitating (or "grease") payments are payments made to induce officials to "expedite or to secure the performance of a routine governmental action." Such "routine" actions are defined those as ordinary and commonly performed by the official, such as issuing a license or visa, scheduling an inspection, or other non-discretionary acts.

1. Proportionate procedures

The Guidance requires that a commercial organization's procedures to prevent bribery be proportionate to its bribery risk and the nature, scale, and complexity of its activities. The organization's procedures must be clear, practical, accessible, and effectively implemented and enforced. Once the areas of risk are identified, bribery-prevention procedures can be implemented to address those risks in a manner tailored to the organization's circumstances.

2. Top-level commitment

The Guidance requires that the top-level management of the organization be committed to preventing bribery by persons associated with it. Demonstration of top-level commitment includes internal and external communication of the management's commitment to bribery prevention. The Guidance states that such commitment also involves appropriate top-level involvement in the development of anti-bribery protocols.

3. Risk assessment

The Guidance requires organizations to assess the nature and extent of their exposure to potential external and internal bribery risks. These assessments should be periodic and documented, particularly as an organization's business evolves, such as through an acquisition. The scope of the assessment should reflect the scale of the organization's business so that all relevant risks may be identified and prioritized.

4. Due diligence

The Guidance requires companies to apply proportionate due-diligence procedures with respect to persons who perform services for an organization in order to mitigate bribery risks.

5. Communication and Training

The Guidance requires organizations to ensure that their bribery-prevention policies and procedures are embedded and understood throughout the organization through communications and training that are proportionate to the risks the organization faces. Similarly, with respect to training, the Guidance calls for proportionate training programs on bribery. Training may be tailored to persons involved in high-risk activities, and it should be continuous, monitored, and evaluated.

6. Monitoring and review

The Guidance requires that companies monitor and review procedures designed to prevent bribery and make improvements when necessary. Such monitoring may include periodic reviews and reviews to account for external circumstances, e.g., governmental changes or press reports, that may affect bribery risk.

V. Conclusion

In the uncertain environment created by the Bribery Act, organizations "carrying on business" in the UK must navigate not only the additional risks and requirements imposed by the Act, but also the conflicts between the Bribery Act and the FCPA. The Ministry of Justice Guidance requires that companies develop customized and effective anti-bribery policies and procedures and undertake periodic risk assessments. These requirements may present immediate challenges, even for companies with strong FCPA compliance programs.

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If you have any questions about the Act or any of the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to contact David N. Kelley at 212.701.3050 or dkelley@cahill.com; Anirudh Bansal at 212.701.3207 or abansal@cahill.com; or Victor Suthammanont at 212.701.3339 or vsuthammanont@cahill.com.

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