

## The UK Bribery Act 2010: Recent Guidance for Commercial Organizations

On March 30, 2011, the British Ministry of Justice released its much-awaited guidance (“[Guidance](#)”) for commercial organizations subject to the [Bribery Act 2010](#) (“Act”), a sweeping restructuring of United Kingdom bribery law. The Act, which will go into force on July 1, 2011, poses potentially substantial risks to any company that “carries on business” in the United Kingdom. The Guidance provides important color on how the Act will be applied and how companies may guard against prosecution.

The Act itself replaces the UK’s assorted bribery laws with a comprehensive set of four punishable offenses. Two general offenses cover variations on active and passive bribery, respectively, the offering and accepting of a financial or other advantage. (§§ 1-2). A third standalone offense exists for bribing a foreign public official for a business purpose. (§ 6). Most significantly, the Act creates a new attribution offense that imposes liability on a business for failing to prevent “associated persons” (see below) from committing any of the previous offenses for the organization’s benefit. (§ 7). This offense has no analogue in the *Foreign Corrupt Practices Act* (“FCPA”). Notably, however, a full defense to this attribution offense is available by showing that adequate anti-bribery procedures were maintained when an associated person committed bribery. (§ 7(2)).

Moreover, the Act provides far-reaching jurisdiction for prosecution. (§ 12). If any part of an offense violating §§ 1, 2, or 6 occurs in the UK, or if any part of an offense is committed abroad by a person with a “close connection” to the UK, prosecutors may act. For the attribution offense, a commercial organization that is formed or incorporated in the UK, or that carries on business in the UK, may be subject to prosecution regardless of where any part of the offense took place.

Significant takeaways from the recent Guidance include:

- A “common sense approach” will govern both the identification of whether a UK organization is “carrying on a business” and whether a foreign organization has a demonstrable UK business presence to make it subject to the Act, with the courts as the final arbiter of these questions. Listing on the London Stock Exchange or having a UK subsidiary is not, by itself, sufficient to do so. (pp. 15-16; ¶¶ 35-36).
- In contrast to the FCPA, the use of facilitation payments to secure routine government action may constitute a bribery offense. (p. 18; ¶¶ 44-45).
- Hospitality and promotional spending may be identified as bribery, but “reasonable and proportionate” expenditures should not invite prosecution. (pp. 12-13; ¶¶ 26-29).
- The group of “associated persons” for which an organization is liable under § 7 is not limited to employees. The term encompasses “the whole range of persons connected to an organization,” covering any person or entity that “performs services” for an organization, regardless of capacity. This includes agents, subsidiaries and, under certain circumstances, suppliers and contractors. (p. 16; ¶¶ 37-38).

- The offense of bribing a foreign official potentially includes investments sought by foreign governments in the awarding of public contracts. (p. 12; ¶ 25).
- Active bribery rests on “improper performance,” which involves conduct that breaches an expectation of good faith, impartially, or a position of trust. This test asks what a reasonable person in the UK would expect, such that foreign local customs or practices must be ignored unless the conduct is permitted by a written constitution, legislation, or published judicial decision. (p. 10; ¶¶ 18-19).
- As a general rule, where prosecutors believe there is sufficient evidence of an offense to pursue prosecution, they will consider the general public interest in discouraging bribery, and they will be more likely to act against more serious offenses. (p. 19; ¶¶ 49-51).

The Guidance provides six principles to structure organizations’ implementation of adequate anti-bribery procedures. (pp. 21-31). For each of these principles, the Guidance offers a non-exhaustive breakdown of policies or issues for organizations to consider.

1. *Proportionality*: An organization’s anti-bribery policies and procedures should be proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization’s activities.
2. *Top-level commitment*: The top-level management of a commercial organization should be committed to preventing bribery by persons associated with it, and it should actively promote an internal culture of zero-tolerance for bribery.
3. *Risk assessment*: An organization should evaluate, on a periodic, informed and documented basis, the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by associated persons.
4. *Due diligence*: An organization should apply proportionate and risk based due diligence procedures with respect to persons who perform or will perform services for or on behalf of the organization to mitigate identified bribery risks.
5. *Communication and training*: An organization should seek to ensure that its bribery prevention policies and procedures are integrated and understood throughout the organization through internal and external communication, including training, proportionate to the risks it faces.
6. *Monitoring and review*: An organization should maintain a monitoring process of its procedures for preventing bribery by associated persons, and it should make improvements where necessary.

Given the prospect of company liability through attribution and the jurisdictional reach of the law, the *Bribery Act 2010* warrants the attention of any organization carrying on business in the UK. However, companies do have the opportunity to be well prepared when the new law enters into force in July. By maintaining “adequate procedures,” companies can ensure that they are not exposed to prosecution and liability by the acts of employees, consultants, suppliers, or other associated persons.

If you have any questions concerning the *Bribery Act 2010*, please contact your usual Ropes & Gray lawyer.