

Government Contracts Blog

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The Long Arm Of The Crown: New U.K. Anti-Bribery Law Reaches Private Sector Bribery And Creates Offence Of "Failing To Prevent" Bribery

By [Neil Ray](#)

The U.K. Bribery Act 2010 (the “Act”) represents a fundamental reform of the U.K. anti-bribery regime and greatly expands the potential legal exposure of companies and individuals that do business, including practice of a trade or profession, in the U.K. For example, it criminalizes purely private bribery with no involvement of a government official and creates a new corporate offence of “failing to prevent” bribery. These offences are subject to unlimited fines and a 10-year maximum prison sentence for individuals. The Act bears some similarity to its U.S. counterpart, the Foreign Corrupt Practices Act (“FCPA”), but is in general stricter and broader. Accordingly, companies with business operations in the U.K. must not assume that even robust FCPA compliance programs will assure compliance with the requirements of the Act.

The Act creates offences that cover a variety of situations and, in some instances, appear to create a form of strict liability. The provisions of each section of the Act are discussed briefly below.

Giving and Receiving Bribes

Section 1 deals with the “giving” side of the equation. It makes it an offence for a person to offer, promise or give a financial or other “advantage” to someone (1) with the intention of inducing that person to behave “improperly,” (2) as a reward for that person behaving in an “improper” manner, or (3) knowing or believing that the recipient’s acceptance of the “advantage” would constitute “improper” behavior of a “relevant function or activity.” The offence will apply to circumstances in which an agent is used to pay a bribe.

Section 2 addresses the “receiving” side. It makes the recipients of bribes guilty of an offence if they request, agree to receive or accept a financial or other “advantage” (1) with the intention that they or another will behave “improperly,” (2) as a reward for them or another person behaving in an “improper” manner, (3) when the request, agreement or acceptance itself constitutes “improper” behavior, or (4) when they or another person have/has behaved “improperly” either in anticipation or as a consequence of the request, agreement to receive or acceptance of an “advantage.” *Whether the “advantage” is for the benefit of the recipient and/or*

whether the recipient requested, agreed to receive or accepted the “advantage” directly is immaterial.

Section 3 states that relevant functions or activities “cover any function of a public nature; any activity connected with business; any activity performed in the course of a person’s employment; and any activity performed by or on behalf of a body of persons (for example, a company).” Thus, the Act’s offences apply to a wide range of potential actions including public *and* private or commercial conduct.

Sections 4 and 5 set out the test for “improper” behavior, which requires an assessment of whether the person performing the “relevant function/activity” was expected to perform it in good faith, expected to perform it impartially or was in a position of trust and, in turn, whether that person’s performance was in breach of the relevant expectation. The statute frames this test as though it were an objective one based on what a “reasonable person” in the U.K. would consider improper. But it clearly calls for an inherently subjective judgment the exact contours of which will emerge only as the standard comes to be applied by the enforcement authorities and the courts.

Section 12 states that the offences of giving and receiving bribes and bribing foreign public officials (below) apply to U.K. companies, U.K. partnerships, U.K. citizens and individuals ordinarily resident in the U.K. regardless of where the relevant act occurs. They also apply to non-U.K. nationals, companies and partnerships if an act or omission forming part of the offence takes place within the U.K.

Bribery of Foreign Public Officials

Section 6 of the Act contains a separate offence of bribing a foreign public official. A person will be guilty of this offence if he/she offers, promises or gives an “advantage” to a foreign public official that is not permitted or required to influence that person in his/her capacity as a foreign public official under the written constitution, legislation or case law of the official’s country. Giving an “advantage” to another person with the official’s permission, or at his or her request, also will constitute an offence. For this offence to be committed, the “advantage” must be intended to influence the person in their capacity as a foreign public official or to obtain or retain business or some other advantage in the conduct of business. A person charged with the foregoing offence is not permitted to claim a lack of knowledge that the foreign public official might act “improperly.” An intention to influence is sufficient. The Act defines a “foreign public official” to include those working for a foreign government and those working for international organizations. Such officials will be considered to have been “influenced” if they fail to exercise their official functions or seek to use their official position to a particular end, even if acting outside the scope of their authority when doing so.

Corporate Failure to Prevent Bribery

The corporate offense of failing to prevent bribery set out in Section 7 is committed by a corporation if an associated person performing services on its behalf attempts to bribe or bribes another person in order to obtain or retain business or a business advantage for the company.

The offence is one of strict liability—the associated person can have attempted the bribery without the knowledge of anyone else in the company. Under the Act, employees, consultants, subsidiaries and other persons performing services on behalf of an organization are considered “associated” with it. In addition, joint venture partners and members of consortia may be considered “associated” with an organization because the Act requires the courts to assess “all the relevant circumstances” in making this determination.

All companies and partnerships that carry on any part of their business in the U.K. are subject to this legislation, regardless of where they are incorporated or formed and regardless of where the alleged bribe takes place. This is clearly a far-reaching offense, both jurisdictionally and in terms of the apparent provision for strict liability. For example, criminal liability may be imposed on a corporation based on the actions of an associated person or entity even though that person or entity

- Has no connection with the U.K.
- Has no formal contract with the corporation
- Has no degree of control over the corporation and
- Is in no way controlled by the corporation.

Moreover, the associated person or entity need not have been prosecuted for bribery.

This *prima facie* offence can be rebutted if the company shows that it had in place “adequate procedures” designed to prevent persons associated with it from engaging in bribery. What procedures are “adequate” is not defined, although the Act requires the U.K. government to publish guidance on this issue. No timetable for the issuance of such guidance has yet been announced, however. The outgoing Labour Government indicated that the guidance would only provide relevant principles and examples of good practice rather than a prescription of what is required. This would leave tremendous discretion to prosecutors to decide what is “adequate” enough to trigger the defense, inviting the potential for significant disparities in enforcement. In any case, this provision of the Act makes it essential for companies and partnerships operating in the U.K. to implement robust compliance programs.

Criminal Liability of Senior Company Management

A senior corporate officer (defined as a director, manager, secretary or other similar officer) may not be prosecuted under the Act for the corporate offense of failing to prevent bribery, but such officers may be prosecuted if they have British nationality or are ordinarily resident in the U.K. and the company committed a bribery offense with their consent or connivance.

Facilitation Payments

Unlike the FCPA, the Act does not provide a defense or exception for facilitation or “grease” payments – payments to officials to expedite a routine government function. The outgoing Government, however, indicated that the policing of such payments would be by means of prosecutorial discretion exercised in the public interest.

Corporate Hospitality

The Act does not seek to characterize corporate hospitality as bribery, but also does not contain a specific exception for reasonable and bona fide promotional and demonstration expenses like the FCPA does. Thus, the Act allows U.K. regulators to prosecute corporate hospitality given with the intention of influencing a foreign public official or inducing a private recipient to act improperly, provided that there is no applicable written law that permits the hospitality. It seems likely that under the Act, as under the FCPA, bona fides and reasonableness will play a role in determining whether hospitality is regarded as improper and subject to prosecution as a form of bribery.

Some Practical Recommendations

Companies subject to the Act need to provide:

- Clear policy statements and anti-corruption guidance from the highest levels of the company;
- Training on the company’s anti-corruption code, policies and procedures; and
- Compliance procedures for outside agents, consultants, advisers and joint venture or consortium partners, including effective due diligence prior to entering into such business relationships.

Companies with anti-corruption procedures already in place should review them to be sure they cover the private sector and address the other elements of the Act that expand upon prior law.

Not surprisingly, the U.K. Government has said that paper policies will not suffice and that companies must take tangible compliance steps and create a culture that actively resists corruption.

Authored by:

[Neil Ray](#)

(619) 338-6595

nray@sheppardmullin.com