



UK BRIBERY ACT 2010

Exposure for Canadian Corporates

Summary

The UK *Bribery Act* (the “Act”) which came into force in July 2011 will have a significant impact on many foreign companies with operations, subsidiaries and business partners in the UK. A Canadian company which carries on any “part of its business” or which has agents in the UK could be prosecuted under the Act for failing to prevent bribery committed without its knowledge or involvement by any of its employees, agents or other representatives, even if the bribery takes place outside the UK and involves non-UK persons.

The Act contains general offences covering offering, promising or giving of a bribe (active bribery), requesting, agreeing to receive or accepting of a bribe (passive bribery) as well as bribery of a foreign public official. The Act also importantly creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation. Companies which are able to demonstrate that they had “adequate procedures” in place to prevent bribery occurring will have a defence to this new corporate offence.

Canadian companies should be reviewing their business operations to see if they may be caught by the Act with a view to implementing “adequate procedures” to prevent bribery by or on their behalf, just as UK-incorporated companies are doing.

The UK Ministry of Justice (MOJ) has published guidance designed to assist corporates in developing adequate anti-bribery procedures.

What Are The Offences Under The Act?

General Offences

Under the Act an offence is committed when:

- Promising, offering or giving, or requesting, agreeing to receive or accepting an advantage (financial or otherwise), in circumstances involving the improper performance of a “relevant function or activity”.
 - “**relevant function or activity**” means a public or business activity, which a reasonable person in the UK would expect to be performed in good faith, impartially, or in a particular way by virtue of the fact that the person performing it is in a position of trust.
 - “**improper performance**” means breach of that expectation.
- Promising, offering or giving advantage (financial or otherwise) to a foreign public official (FPO) intending to influence the FPO in his capacity as such and, to obtain/retain business or a business advantage.

Corporate Offences

A corporate can itself be directly liable for any act of bribery, constituting any of those general offences including soliciting or accepting a bribe, if the “directing mind and will” of the corporate (i.e. board members or senior executives with power to bind the company) was implicated in the wrongdoing and was in the UK.

But, in addition, a corporate will also be guilty of an offence under the Act where an act of bribery is committed anywhere in the world by someone performing services on its behalf in any capacity intending to obtain/retain business or a business advantage for the corporate unless it can establish it had “adequate procedures” in place to prevent such bribery occurring.

Whether a person is performing services on behalf of the corporate is a question of fact to be determined from all of the circumstances, but it will be presumed to cover an employee unless the contrary is shown. It may also include subsidiaries, intermediaries, agents, distributors and joint venture partners – if they were in fact performing services for the corporate and committed an act of bribery in that regard. It is also not necessary for the person performing the services for the corporate itself to have been convicted of the bribery offence for the corporate to be held liable.

For all of the offences, it does not matter where the advantage is offered, given, requested, or received directly or through an intermediary.

Extra-Territorial Application

All of these bribery offences will have extra-territorial application, so may be prosecuted if:

- done by a British national or corporate or by a person who is a UK citizen or ordinarily resident in the UK (defined in the Act as a person with a “close connection with the UK”) regardless of whether the act or omission which forms part of the offence took place outside the UK; and/or
- if any act or omission which forms part of the offence occurs within the UK;
- in addition, the corporate criminal offence will apply to commercial organisations which are incorporated in the UK or carry on business or “part of a business” in the UK regardless of where the bribe is paid. Therefore, it is not crucial where the acts of bribery occur, but where the corporate conducts business. Foreign subsidiaries of UK companies and foreign companies with no UK parent can be liable under the corporate offence if they carry on business or “part of a business” in the UK. “Part of a business” is not defined in the Act, but even a UK representative office or agent may be sufficient for the purposes of the corporate offence. However, a London listing without any demonstrable UK business presence will not be sufficient to trigger liability under the Act and merely having a subsidiary in the UK would only be likely to do so if the subsidiary were acting as agent for or on behalf of its parent rather than for its own business purposes.

Ministry of Justice Guidance

The MOJ has published guidance about procedures which commercial organizations can put in place to prevent persons associated with them from bribing. If an organization can prove that it has adequate procedures in place, then they can form the basis of a defence to the offence of failing to prevent bribery.

Although following the MoJ guidance will not be a safe harbour from prosecution, it will be a good starting point, particularly for businesses without existing UK *Bribery Act* compliant policies and procedures. Equally, departing from the guidance will not lead to a presumption that an organisation does not have adequate procedures in place if it has sound reasons for doing so.

The “adequate procedures” defence is, according to the MOJ, designed to effect a change of behaviour among businesses with any presence in the UK, by incentivising them to carry out a thorough risk assessment in light of their potential liability under the Act, and to beef up their internal controls and procedures so that they are in a position to detect and deal with incidents of bribery in their organisation.

The Six Principles

The MOJ guidance sets out six principles that are intended to give all commercial organisations a starting point for planning, implementing, monitoring and reviewing their bribery free business regime.

The principles as set out in the guidance are:

Principle 1: Proportionate Procedures

This principle provides guidance on a commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. The guidance suggested that internal procedures should be clear, practical, accessible, effectively implemented and enforced.

The guidance notes the difference between policies (statements of an organisation's stance) and procedures. Policies are likely to:

- Include a statement of the organisation's commitment to bribery prevention.
- Set out the general approach to reducing bribery risks.
- Give an overview of implementation strategy.

Principle 2: Top Level Commitment

This principle provides guidance for top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) and addresses the commitment to preventing bribery by persons associated with it.

Principle 3: Risk Assessment

The guidance provides that organisation should assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be is periodic, informed and documented.

The guidance states that risk assessment for bribery may be part of the organisation's general risk assessment or may form a stand alone process but in either case it should be proportionate to the organisation's size and structure and to the nature, scale and location of its activities.

The guidance categorises external risks as follows:

- **Country risk:** the guidance suggests countries are high risk where there are perceived high levels of corruption and no effectively implemented anti-bribery legislation or promotion of transparent procurement and investment policies.
- **Sectoral risk:** higher risk sectors include the extractive industries and the large scale infrastructure sector.
- **Transaction risk:** these could include charitable or political contributions, obtaining licences and permits and transactions relating to public procurement.
- **Business opportunity risk:** these could include projects which are of high value, involve many contractors or intermediaries, are not undertaken at market prices or have no clear legitimate objective.
- **Business partnership risk:** the guidance cites the use of intermediaries in transactions with foreign public officials, consortia or joint venture partners and relationships with politically exposed persons where the business relationship involves a prominent public official, as examples of high risk business partnerships.

Principle 4: Due Diligence

Companies should apply due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Principle 5: Communication

The guidance suggests that communication will vary according to the risks faced by the relevant organisation. Internal communications should include both a clear statement of policies and the procedures of the organisation and the procedures for raising concerns about bribery, should it be detected. External communications may include a code of conduct and can include information on the organisation's procedures, controls and sanctions.

Principle 6: Monitoring and Review

This principle provides that companies should monitor and review procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

The guidance notes that as bribery risks will change from time to time policies and procedures should be kept under constant review. Financial control mechanisms are particularly important in this respect as they will help indicate the effectiveness of anti-bribery procedures. Periodic reviews should be supplied to top management and organisations should also consider external appraisal of its policies and procedures.

For further information, please contact your Stikeman Elliott lawyer or the author:

Stikeman Elliott London
Dauntsey House
4B Frederick's Place
London, EC2R 8AB
+44 20 7367 0150

Jeffrey Keey
+44 20 7367 0170
jkeey@stikeman.com

Jeffrey Keey is a partner practising English law at Stikeman Elliott London*. Jeffrey's wide corporate and commercial experience covers corporate finance, mergers and acquisitions, joint ventures, privatisations and public private partnerships, private equity, securities and public and private offerings.

If you require advice or assistance in determining whether the UK *Bribery Act* is likely to apply to you or your organisation or on what steps you should be taking in such a case, please contact Stikeman Elliott London.

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