



Overview of the United Kingdom Bribery Act

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Introduction

Like the *Corruption of Foreign Public Officials Act*¹ (“CFPOA”) and U.S. *Foreign Corrupt Practices Act*² (“FCPA”), the UK’s *Bribery Act 2010*³ (“UKBA”) has extra-territorial application. It also has unique offences and is considered more stringent than either the FCPA or the current CFPOA.

A company may satisfy the requirements of the CFPOA and FCPA but still run afoul of the UKBA. For this reason, it is recommended that Canadian companies assess their exposure to the UKBA, as well as the other foreign corrupt practices legislation, and implement compliance programs that meet the highest standards applicable to them.

General Scheme of the UKBA

Sections 1 and 2 of the UKBA make it an offence to offer or accept a bribe. Section 6 specifically makes it an offence to bribe a foreign public official. Section 7 of the UKBA makes it an offence for a commercial organization to fail to prevent bribery committed on its behalf.

The Corporate Offence

Section 7 is unique to the UKBA; there are no equivalent provisions contained in either the CFPOA or the FCPA. Section 7 also has extra-territorial applicability, which may expose Canadian companies to the UKBA.

Section 7 applies if a person “associated with” any “relevant commercial organization” bribes another person intending to obtain or retain business, or obtain or retain an advantage in the conduct of business for that relevant commercial organization.⁴ A “relevant commercial organization” is defined as any “body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom.”⁵

In 2011, the UK Ministry of Justice released guidance on the interpretation of the UKBA.⁶ This guidance stated that “organizations that do not have a demonstrable business presence in the United Kingdom would not be caught” by the UKBA.⁷ It also stated that the mere fact that a firm was listed on the London Stock Exchange would not, in itself, mean that a company was carrying on business in the UK for the purposes of the UKBA.⁸ Similarly, a corporation having a UK subsidiary would not, in itself, be considered to be

¹ S.C. 1998, c. 34.

² 15 U.S.C. §§78dd-1, et seq.

³ 2010 c. 23.

⁴ Id., s. 7(1).

⁵ Id., s. 7(5)(b).

⁶ Ministry of Justice *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing*, March 2011 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf>.

⁷ Id at 15.

⁸ Id at 16.

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carrying on business in the UK because the “subsidiary may act independently of its parent or other group companies.”⁹ Nonetheless, corporations with some connection to the UK would be captured by the UKBA, regardless of whether the bribery took place within or outside the United Kingdom.

A second requirement of the corporate offence is that a person “associated with” the company bribe “another person intending to obtain or retain business or a business advantage for the organization.”¹⁰ Section 8 of the UKBA defines an associated person as someone who performs services for or on behalf of the organization. This person can be an individual or an incorporated or unincorporated body.

Section 8 provides that the capacity in which a person performs services for or on behalf of the organization does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included.¹¹ The definition intentionally gives Section 7 a broad scope so as to embrace the whole range of persons connected to an organization who might be capable of committing bribery on the organization’s behalf.¹² Examples of associated persons include contractors and suppliers to the extent that they are performing services for or on behalf of a commercial organization. However, suppliers that are “simply acting as the seller of goods” are not likely to be considered an associated person, and therefore a commercial organization is unlikely to be liable for bribery in this scenario.¹³

Section 7(2) of the UKBA provides a defence to prosecution under Section 7. A company will not be guilty of bribery if it can prove that it had in place adequate procedures designed to prevent persons associated with the company from undertaking bribery. The guideline states that companies should take a risk-based approach to developing a compliance program and sets out six principles that should inform adequate compliance: (1) proportionality, (2) top level commitment, (3) risk assessment, (4) due diligence, (5) communication, and (6) monitoring and review.¹⁴ The content of an adequate compliance program will vary according to the risk assessment and the size of the organization, among other factors.

Facilitation Payments

Another significant difference between the UKBA, the CFPOA and the FCPA lies in the treatment of facilitation payments. These are small payments made to facilitate what would otherwise be routine government action, such as customs clearance or police protection.

The UKBA does not provide any exemption for such payments. In contrast, §78dd-1(b) of the FCPA¹⁵ provides an exemption from prosecution for such payments. The current CFPOA also provides a similar exemption for facilitation payments. However, it should be mentioned that 2013 amendments to the CFPOA included a provision to eliminate this exemption but the relevant provision is not yet in force.¹⁶

Conclusion

Due to the potential application of the UKBA to Canadian companies that have some connection to the United Kingdom, Canadian companies should assess their exposure to the UKBA (as well as the CFPOA and FCPA) and implement an appropriate compliance program that satisfies the requirements of all applicable legislation. ■

⁹ Id.

¹⁰ Id at 15.

¹¹ Id at 16.

¹² Id.

¹³ Id.

¹⁴ Id at 20-31.

¹⁵ <http://www.justice.gov/criminal/fraud/fcpa/docs/fcpa-english.pdf>.

¹⁶ *Corruption of Foreign Public Officials Act*, SC 1998, c 34, Amendments Not in Force <<http://laws-lois.justice.gc.ca/eng/acts/C-45.2/nifnev.html>>.