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What You Should Know About the UK Bribery Act

The Bribery Offenses. The UK Bribery Act 2010 (the “Act”) criminalizes bribery in both the public and private sectors. It contains five categories of offense: offering, promising or giving a bribe; requesting, agreeing to receive or receiving a bribe; bribing a foreign public official; failing to prevent bribery (for companies and other commercial organizations); and ignoring or consenting to bribery (for directors or senior managers). Penalties include an unlimited fine and/or imprisonment for up to 10 years.

Failing to Prevent Bribery. A “commercial organization” may have committed an offense if a bribe is paid on its behalf by an “associated person” to obtain or retain business, or an advantage in business. “Associated persons” are defined as “anyone performing services” for or on behalf of the organization. That includes directors and employees, agents and other intermediaries, subsidiaries and affiliated companies. The most challenging issue for many companies will be preventing bribery by third parties used to win business.

Adequate Procedures. Failing to prevent bribery is akin to a strict liability offense. The only defense is to prove that “adequate procedures” were in place to prevent bribery. Guidance issued by the UK’s Ministry of Justice emphasizes that adequate procedures will include “top-level” commitment to preventing bribery; a meaningful risk assessment evaluating the extent to which an organization is exposed to the risk of bribery; proportionate policies and procedures to address identified risks; due diligence on associated persons; appropriate communication of policies and procedures and training; and regular monitoring and review.

Jurisdiction. The Act extends to bribes paid overseas by British citizens, UK residents and companies or partnerships incorporated in the United Kingdom. The offense of failing to prevent bribery applies to any company or commercial organization incorporated or “carrying on business” in the UK, wherever in the world a bribe is paid.

Bribery of Foreign Public Officials. It is an offense to offer or pay a bribe with the intention of influencing a foreign public official, in his or her official capacity, in order to obtain or retain business, or an advantage in business. The definition of a

foreign public official is broad and would extend to officials of state-owned companies. An offense is not committed if the foreign public official is permitted or required by written law to be influenced by a payment, for example, if local law permitted a foreign public official to be influenced by offers of legitimate investments in the local economy or “good works.”

Officer, Director and Affiliate Liability. Directors, company secretaries and “managers” commit an offense if they consent to or ignore bribery.

Gifts and Hospitality. Lavish hospitality or gifts could be bribes. However, the government has stated that it does not wish to criminalize ordinary business practices. Any gifts and hospitality during formal procurement processes will need particular care.

Facilitation Payments. The Act criminalizes facilitation payments, unlike the FCPA.

Self-reporting and Deferred Prosecution Agreements. Self-reporting of bribery is encouraged. In February 2014, the UK introduced deferred prosecution agreements. Under a DPA, if offered by the prosecution and approved by a judge, a company can avoid prosecution in exchange, for example, for the payment of a financial penalty, commitments as to future behavior, implementation of a compliance program, compensation for victims and payment of costs. A prosecution can reopen if the terms of a DPA are breached.

Mergers & Acquisitions. Assessing bribery risks is an important part of M&A due diligence, particularly where a target company is engaged in high-risk industries or countries or where it is dependent on agents to win business. A change of management is no defense to historical bribery, although an acquiring company that can demonstrate adequate due diligence, that it has put an end to corrupt practices and/or that it has implemented an appropriate compliance program should be in a strong position to avoid prosecution.

*Please contact **James Maton**, a partner in our London office, at jmaton@cooley.com or **+44 207 556 4547**, if you require further assistance.*

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