



## Global bribery and corruption and the impact on Canadian businesses

**In June 2011,** the Corruption of Foreign Public Officials Act (CFPOA) was used to indict a Canadian company for bribing a foreign official – only the second such indictment in Canadian history. On July 1, the new Bribery Act 2010 in the UK (Bribery Act) came into effect, which will present many Canadian commercial organizations with new risks and challenges, given that the mandate for particular offenses can extend to any company (wherever incorporated) which carries on any part of a business in the UK.

# Are these developments already being considered by your company?

## If not, you may be in for a rude awakening.

Many governments have enacted policies to support the fight against poverty in developing countries, which means Canadian commercial organizations face ever greater bribery risks. Penalties are now higher and the chances of being prosecuted much greater than just a few years ago. Canadian commercial organizations doing business overseas, or planning to acquire or start business activity, should already be familiar with the appropriate procedures and controls in place to comply with the CFPOA, Bribery Act and the US Foreign Corrupt Practices Act (FCPA).

The Bribery Act will determine on a case-by-case basis whether business is carried out in the UK, which will likely be assessed by the Courts. For instance, the UK Government has stated that the listing of a company's securities on the London Stock Exchange does not in itself qualify that company as carrying on a business in the UK .

## What is "bribery" under the Bribery Act?

The Bribery Act sweeps away most of the existing UK law, which dated largely from the 19th and early 20th centuries, and includes bribery of not only public officials, but also activity connected to business, including any trade or profession, or to the employment of the recipient.

### There will now be four offences:

1. **Promising or offering** a financial or other advantage which induces or rewards someone for improperly performing a function or activity, or where the offeror knows or believes that someone accepting the offer would represent improper performance.
2. **Requesting, receiving or agreeing** to receive a bribe, whether directly or indirectly, for oneself or a third party in connection with actual or intended improper performance of a relevant function or activity.
3. **Bribery** of foreign public officials.
4. **Failure** by a commercial corporation or partnership, wherever incorporated or formed, which carries on business, or part of a business, in the UK to prevent bribery offences by persons associated with it. (This offence is widely referred to as "the Corporate Offence".)



All of the offences can relate to bribery activity either within the UK or overseas. However, the first three offences require a close connection with the UK in order for a prosecution to proceed under the Bribery Act. Canadian commercial organizations will likely face risks in connection with these offences if they employ UK nationals or residents, or have subsidiaries incorporated in the UK. For the Corporate Offence, a Canadian commercial organization will be subject to the provisions of the Bribery Act if it “carries on business, or part of a business” in the UK.

### Bribery at what cost?

The costs of being involved in a bribery offence include not only the extensive penalties under the Bribery Act, but also penalties, including:

- **Summary conviction:** Fine of £5,000 and (for individuals) up to 12 months’ imprisonment.
- **Conviction on indictment:** Unlimited fine and (for individuals) up to 10 years’ imprisonment.
- **Potential personal liability** for senior officers of commercial organizations who have a close connection to the UK and who consent or connive with the commission of a bribery offence.

There are no provisions for the personal liability of directors or officers in respect to the Corporate Offence.

Other risks and costs can be even more significant than the penalties set out in the legislation and could include reputations costs such as convicted parties facing being banned from tendering for public contracts in the UK, civil lawsuits/other criminal lawsuits/tax investigations, loss in market/shareholder value and substantially increased compliance costs.

### Demonstrating “adequate procedures” for prevention

The Bribery Act offers a powerful incentive for commercial organizations to do more to prevent those associated with them from committing bribery offences; organizations can show they had “adequate procedures” in place to prevent offenses, which acts as a specific defense to the Corporate Offence provisions. The UK government refers to “adequate procedures” as procedures and programs that a commercial organization can implement to comply with the Bribery Act, specifically focusing on the Corporate Offence of failing to prevent bribery by people associated with the organization.

Some legal commentators have suggested that the guidance around these procedures is implicitly intended to provide reassurance to organizations on their ability to comply with the Act – that policies adopted and implemented by an organization “should be proportionate to the risks faced by an organization”. The government is also notably silent on addressing a minimum dollar amount that is likely to warrant prosecution under the Act, further emphasizing that the intention behind the offense – rather than the outcome – will be the basis for prosecution.

The UK government guideline outlines **six principles** for organizations to establish their own bribery prevention programs. These are:

- **Top-level commitment**

The importance of top-level commitment (although not clearly defined, this appears to refer to any and all of the Board of Directors, owners, officers or anyone of similar stature) in fostering a “culture of integrity where bribery is unacceptable”.

- **Risk assessment**

The need for a commercial organization to periodically assess and document the nature and extent of internal and external risks of bribery faced by persons associated with the organization.

- **Proportionate procedures**

An organization’s policies and procedures should be proportionate to its specific assessed risks, as well as to the “nature, scale and complexity” of the organization’s activities.

- **Communication (including training)**

Embedding bribery prevention policies through a combination of communication and training is vital throughout all levels of the organization

- **Due diligence**

An organization should apply proper due diligence procedures in response to the risk assessment, in respect of any parties with which it may have a business relationship. As such, due diligence related to bribery prevention will be incorporated into an organization’s established due diligence framework.

- **Monitoring and review**

An organization should proactively and periodically review its bribery prevention program to ensure that it remains relevant and consistent with the external environment.

The Bribery Act’s guidance stresses that the above six principles are not exhaustive and that the final interpreters of the Act are the courts themselves. It does, however, provide further commentary, along with a number of case studies, on issues such as the definition of associated persons, clarity on the term “carries on a business” and hospitality. For example, the guidance outlines the case of inviting foreign clients to view a rugby match as part of a public relations or business relations exercise, which is unlikely to amount to a bribery offense.

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The focus of the legislation is on whether the potential bribery offence is or would be considered illegal in the UK, regardless of whether such activity is permitted in the jurisdictions where the activity took place.

## How does the Bribery Act compare with North American legislation?

Issue	Bribery Act (UK)	Corruption of Foreign Public Officials Act (Canada)	Foreign Corrupt Practices Act (US)
<b>Jurisdiction</b>	Jurisdiction extends to any offense committed anywhere the world, as long as the company has a branch or subsidiary in the UK.	Requires a “real and substantial” link between an offense and Canada before criminal liability is imposed.	In practice, requires a US nexus.
<b>Offenses</b>	Anti-bribery and record keeping offences (e.g. failure to develop and maintain adequate control systems).	Anti-bribery offences only.	Receipt of bribes not prohibited.
<b>Senior officer liability</b>	Liable only if he/she consents or connives with the commission of a bribery offence.	Not specifically addressed.	Liable for offense as well as for failing to devise or maintain anti-corruption controls.
<b>Facilitation Payments Act</b>	Illegal	Specific exemption provided.	Specific exemption provided.
<b>Payments or offer of hospitality to foreign public officials (e.g. for marketing purposes)</b>	Potentially illegal, based on the intention behind the payment, but the UK government has stated that prosecutorial discretion will apply for legitimate payments. It is anticipated that organizations will have policies to adhere to for such payments.	Exemption for reasonable expenditures made in order to develop a business relationship.	Exemption for “reasonable and bona fide payments” in connection with promoting products and performing contract.
<b>Legality of payments in foreign countries</b>	No exemption for payments which are lawful under the laws and regulations of foreign nations where they were received.	Exemption for payments which are permitted or required under the laws of the foreign country.	Exemption for payments which are permitted or required under the written laws of the foreign country.

Clearly, the provisions of the Bribery Act are expected to be wide-reaching to extend bribery risks well beyond the public sector focus of the CFPOA and the FCPA. In particular, the focus of the legislation is on whether the potential bribery offence is or would be considered illegal in the UK, regardless of whether such activity is permitted in the jurisdictions where the activity took place.

We consider the lack of exemptions for facilitation payments of key importance. While some commentators believe that small facilitation payments are unlikely to give rise, by themselves, to prosecution, the UK’s Serious Fraud Squad is on record as suggesting that such payments are a “major contributor to the belief that bribery is a necessary part of business culture” and the UK authorities are expected to adopt a firm approach on this issue. This represents a significant risk for any Canadian commercial organizations which find themselves subject to the UK legislation, which could impede their ability to compete with other organizations who face no such restrictions.

# Getting ahead of the Bribery Act

Canadian commercial organizations with a nexus to the UK will need to carefully consider their existing anti-bribery procedures and whether controls are “adequate” in light of any further guidance issued by the UK government. Given that the historical focus has been on bribery controls in the public arena, it is unlikely that existing systems will be equipped to handle the identification and management of risks relating to offences involving commercial bribery in the private sector.

The global nature of this new UK legislation also means that it will factor in the legal strategies of Canadian commercial organizations when dealing with bribery issues – admissions in one jurisdiction which may not represent significant offences may actually run afoul of the Bribery Act. In addition, UK authorities are less keen to tie their hands with respect to sentencing in plea bargains than, for example, US authorities.

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