

“UK Bribery Act’s Potential Impact on Business and Commercial Hospitality”

By William J. Brady, Esquire and Steven G. Bazil, Esquire

I. Imagine if you will.....

You are taking potential clients visiting from the United Kingdom to a “baseball match” in Philadelphia. In order to impress, you hire a limo, book a fancy steak dinner and purchase seats in a Luxury Suite. At dinner, you learn that your client is a wine connoisseur. As a result, you opt for a \$100 Bottle of Malbec instead of selecting a moderate \$25 Bottle of Cabernet. You are hopeful that the evening’s festivities will show your prospective client a nice time and provide optimal settings to discuss a potential business opportunity. As long as the above happens on or before June 30, 2011, you should not have much to worry about. However, if the game is postponed due to rain until July 1, 2011, you can potentially face prosecution for bribery by running afoul of a soon-to-be enacted U.K. Law aimed at combating corruption. In order to allow for maximum appreciation to any potential readers located outside of the United States, the above hypothetical prospective client interaction would be perfectly acceptable for a 1st Round Match of Wimbledon but not for the Gentlemen’s Final. While the above scenarios did not necessarily warrant much discussion until most recently, a presumably normal occurrence is about to undergo a significant amount of scrutiny in just a few short days.

Once in effect, The UK Bribery Act of 2010 (“Act”) will arguably be the most far-reaching and ambitious anti-corruption law in the entire world.¹ Unfortunately the Act is necessary as bribery permeates all facets of the public and private sectors and even includes certain International Soccer Federations.

The Act’s objectives are simple: The elimination of bribery and corruption in both the public and private spheres. However, despite recent guidance, the Act’s application is convoluted as far as corporate hospitality. Violators could face a fine and/or a maximum of ten years in prison while companies can be fined an unlimited amount for violations.²

II. The Act:

This article will attempt to examine a host company’s hospitality to employees of a U.K. Company in order to determine whether the above interaction raises any concerns of a potential violation of the Act. Finally, the authors will provide their thoughts on the Act’s potential impact on business in both the short and long term.

The Sections pertaining to agents and employees of a host company’s hospitality expenditures are the most relevant to our discussion:

¹ The Act received Royal Assent on April 8, 2010 but will not go into effect on July 1, 2011.

² U.K. Bribery Act 2010 c. 23 s 11(1)(b).

The Act sets forth offenses relating to both active and passive forms³ of bribery. However, for our purposes, we are focusing on the more explicit and overt forms of bribery.

Section One states that a bribery offense occurs when a “Person offers, promises or gives a financial or other advantage to another and the Person intends the advantage to, *inter alia*, reward a person for the improper performance of such a function or activity.”⁴

The Act sets forth that a person must know or believe that acceptance of the advantage would constitute an improper performance.⁵

Companies, no matter where they are domiciled or wherever the alleged act(s) take(s) place, fall under the jurisdiction of the Act through Sections 3 and 7 when they are dealing with a person or persons having a “close connection with the United Kingdom.”⁶ If an alleged act or omission of an act would be an offense in the U.K., the very same act or omission occurring outside of the U.K. (with a person having a close connection to the U.K.) would be treated as if the occurred in the U.K. Close connections include British Citizens, British Nationals living Overseas and or ordinary residents in the United Kingdom.⁷

Companies and those that act on their behalf in the connection of business activities must adhere to the Act’s requirements if there is a close connection to the U.K as defined above.⁸ If an agent or employee acting on behalf of a company intends to retain an advantage through bribery for the company’s behalf, a company can potentially be guilty of the Act for “Failure of Commercial Organization to Prevent Bribery and subjected to an unlimited amount in fines.”⁹

Finally, what will keep attorneys up at night is that this strict liability offense is viewed under the Reasonable Person Standard in the U.K. Furthermore, the Act allows deference to local customs or practice only under extremely limited circumstances.¹⁰ So now you may be wondering the best way to stay on the right side of the line.

III. Defense and Guidance:

If you move too quickly, you may miss Chapter 7(2) of the Act. The section sets forth a possible complete defense to a failure to prevent commercial bribery charge if adequate procedures to

³ Passive Bribery is, *inter alia*, where a recipient requests, agrees to receive or accepts a financial or other advantage.

⁴ U.K. Bribery Act 2010 c. 23 s 1(2)(a-b).

⁵ *Id.*

⁶ U.K. Bribery Act 2010 c. 23 s 12(4)(a-i).

⁷ U.K. Bribery Act 2010 c. 23 s 12(2)(b-c) and 12(4)(a-i).

⁸ U.K. Bribery Act 2010 c. 23 s 3(2)(b) & s. (6).

⁹ U.K. Bribery Act 2010 c. 23 s 7.

¹⁰ U.K. Bribery Act 2010 c. 23 s 5(1-2).

prevent a company's employees or agents from violating the Act are in place and maintained. The U.K. Ministry of Justice released its Guiding Principles so companies can proactively and effectively shield themselves from violations.¹¹

I. Proportionate Procedures - A company's procedures to prevent bribery should be reasonable and commensurate to the bribery challenges it would face in the ordinary course of business.

II. Top-Level Commitment - Management should commit themselves to preventing bribery by fostering a culture within the organization in which bribery is never acceptable.

III. Risk Assessment - Similar to Proportionate Procedures, companies should assess the potential external and internal risks of bribery on its behalf by persons associated with it on a regular basis.

IV. Due Diligence - Companies should apply due diligence procedures in order to eliminate or mitigate identified bribery risks.

V. Communication - Companies should seek to ensure anti-bribery policies are acknowledged and appreciated throughout the organization.

VI. Monitoring and Review- Companies should actively monitor and review their procedures designed to prevent bribery and make improvements where necessary on a regular basis or as needed.

IV. Applying the Act:

Now that we have a better understanding as to what types of actions would violate the Act, let's return to our original hypothetical.

One caveat, The Ministry of Justice Published Guidance ("MOJ Guidance") attempted to allay concerns about the Act's chilling effect on corporate hospitality by stating that that "no one wants to stop firms getting to know their clients by taking them to Wimbledon or Grand Prix."¹² "The [U.K.] Government does not intend for the Act to prohibit reasonable and proportionate hospitality intended to establish cordial relations."¹³ However, it is clear that there can be instances where hospitality, combined with other factors, can potentially violate the Act.

Our initial hurdle is whether the Act applies to our original hypothetical. Although the client interaction takes place in Philadelphia, Pennsylvania, the Act still applies to the host company

¹¹ See Clarke, Kenneth "The U.K. Ministry of Justice Bribery Act 2010 Guidance."

¹² *Id.* at Foreword.

¹³ *Id.* at Paragraph 26.

and its employees since they are entertaining British Nationals who ordinarily reside in the United Kingdom.¹⁴

Next, the hosts take the prospective clients to a steak dinner and deliberately order a \$100 bottle of Malbec. While you specifically ordered a nice bottle of wine to impress your prospective client and play upon his love of fine wine, it is unlikely that this action in and of itself would rise to bribery. However, if this bottle of wine costs \$1,000, questions about the reasonableness of the purchase could certainly be raised. While the wine and limo ride may raise some red flags both within the company and with the U.K. Director of the Serious Fraud Office, if it can be demonstrated that a steak dinner and a limo are reasonable and proportionate expenses in the industry, it should be permissible.

What about taking the prospective clients to a baseball match in a Luxury Suite? As the MOJ Guidance sets out, taking prospective clients to a sporting event is permissible. However, employees or agents should refrain from framing the event or any conversations in terms of an expected *quid pro quid* arrangement.

Finally, how did the prospective clients arrive on your doorstep? The MOJ Guidance makes clear that the Act can be violated in instances where travel is paid for by the hosts when the recipient could have just as easily met on a recent business trip. Simply stated, the Act wants to ensure that any travel is business-related and not an all-expenses-paid holiday around the globe. If the prospective clients paid for their accommodations in town then the hosts should be in the clear.

V. Walking the Line:

Companies will avoid pitfalls if they are able to implement policies with a view toward the 6 Guidance Principles. Companies should take the time to assess bribery risks, implement anti-bribery directives and educate and train their employees on the consequences of bribery. Employees should be reminded of a zero-tolerance policy for any bribery. In all instances, these measures should be extremely documented in order to probably contest any future charges (if necessary).

When corporate hospitality events take place, all expenditures should be well-documented, pre-approved, and remain within the company's specific guidelines for hospitality expenditures. Finally, employees should be reminded about their obligations under the Act prior to any events. Companies should also revisit events in order to determine any areas where anti-bribery policies can be improved for future events.

¹⁴U.K. Bribery Act 2010 c. 23 s 12(4)(a)(g) and s 12(5).

VI. Final Comments:

While the above hypothetical is probably acceptable under the Act, no one has yet to be either charged or convicted. If prosecuted, companies would face a stigma of bribery that may be worse than any fine. Foreign attorneys may cringe as it would be difficult to determine how an “Ordinary person in the United Kingdom” would determine the reasonableness of a client interaction in Philadelphia or anywhere else outside of Her Majesty’s Kingdom. As a consequence, this should lead to uncertainty and a downturn in corporate hospitality as companies find their way. It is without question that companies will not be thrilled about the prospects of incurring the time and expense necessary to comply with the Act’s requirements in the economic climate. However, in the long-run, companies will adjust and the Act’s objectives should be furthered to everyone’s benefit. However, just as in the baseball game, it’s the little things that determine victory or defeat.