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## Are You Prepared For The UK Bribery Act?

The UK Ministry of Justice has published the long-awaited government guidance on the new anti-corruption legislation on public and private bribery offenses in the UK (the “Guidance”)<sup>1</sup>. The **Bribery Act 2010** (the “Act”)<sup>2</sup> received Royal Assent on April 8, 2010 and will now, after extended delay, come into force on July 1, 2011. The Act has far-reaching territorial scope, and international clients should note that these new provisions may impact businesses which have, on the face of it, limited nexus to the UK. The Act is more stringent, in certain ways, than the Foreign Corrupt Practices Act 1977 (“FCPA”). For example, unlike the FCPA the Act does not provide a safe-harbor for “facilitation payments”. It also catches bribery of private sector employees.

The Act creates four offenses. The first two are general bribery offenses: of bribing, and of being bribed, which make no distinction between public and private bribery. The Act also creates two specific offenses: one of bribing foreign public officials, and the other, a new offense which imposes liability on “**relevant commercial organizations**” which fail to prevent bribery anywhere in the world by any person performing services for or on behalf of them. This second offense will potentially catch not only UK companies and partnerships, but also non-UK entities which carry on “**part of a business**” in the UK. The sole defense to this offense is to prove that an organization has “**adequate procedures**” in place to prevent persons “**associated**” with it from engaging in such conduct. The Guidance provides limited assistance in determining which “relevant commercial organizations” will be caught by the new regime.

Accordingly, multinational businesses which have UK subsidiaries, or which carry on a part of a business in the UK, will need to consider their approach to compliance. Specifically, organizations impacted by the new Act will need to ensure that their anti-corruption policies reflect the requirements of the new UK regime, including the new Guidance on adequate procedures, to demonstrate their commitment to preventing bribery within their organization. Furthermore, companies which are not strictly caught by the Act will need to consider whether to implement such adequate procedures to satisfy the expectations of their lending banks, corporate counterparties or independent directors.

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<sup>1</sup> <http://tinyurl.com/cgsh-BriberyActGuidance>.

<sup>2</sup> <http://tinyurl.com/cgsh-BriberyAct2010>.

## **I. THE OFFENSES**

### **GIVING, PROMISING OR OFFERING A BRIBE (SECTION 1)**

The first general offense of bribery is committed where a person offers, promises or gives a financial or other advantage to induce a person to perform a relevant function or activity improperly,<sup>3</sup> or to reward the person for doing so. It is sufficient that the person offering, promising or giving, merely intended to induce or reward impropriety of function or activity. The meaning of “financial or other advantage” is undefined. There is no *de minimis* threshold or safe-harbor exemption from this provision.

### **REQUESTING, AGREEING TO RECEIVE OR ACCEPTING A BRIBE (SECTION 2)**

The second general offense applies to the act of being bribed. It is sufficient that a person “requests, agrees to receive or accepts” a bribe, whether or not that person actually receives it. This requirement must be linked with the improper performance of a relevant function or activity. Both offenses of bribing and being bribed apply equally to all functions of a public nature and all private activities connected with a business, trade or profession.

### **BRIBING FOREIGN PUBLIC OFFICIALS (SECTION 6)**

The third offense is a separate specific offense of bribing a foreign public official and follows closely the requirements of the OECD Anti-Bribery Convention. The person giving the bribe must intend to influence the recipient in the performance of his or her function as a public official, and must intend to obtain or retain business or a business advantage. “Foreign public official” includes any individual who exercises a “public function” for or on behalf of a territory outside the UK, and any person working for an international organization.

The general offenses of bribing, of being bribed, and of bribing a foreign public official, will be deemed committed in any part of the UK, if any part of the conduct element takes place in that part of the UK. In addition, even if all actions take place outside the UK, they still may constitute an offense under the Act if the person performing them is a UK national, or has “close connections”<sup>4</sup> with the UK, including persons ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership. The senior management of corporate entities will also be subject to prosecution, where they have “consented to or connived in” the commission of the offense<sup>5</sup>.

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<sup>3</sup> “Improper performance” is the breach of an expectation that the relevant function be carried out in good faith, impartially, or that the person performing it is in a position of trust. The expectation of performance is to be assessed according to the expectation of a reasonable person in the UK. Where functions or activities are not subject to UK laws however, it should be noted that local practice and custom must not be taken into account, unless such practice or custom is permitted or required by written law. Section 4 and Section 5.

<sup>4</sup> Section 12(4).

<sup>5</sup> Section 14(2).

**FAILING TO PREVENT BRIBERY (SECTION 7)**

The most controversial provision of the Act is a new “corporate offense” of failing to prevent bribery. That offense is committed where a person “associated” with a “relevant commercial organization” bribes another person intending to obtain or retain business or a business advantage. Organizations should note that relevant commercial organizations will be criminally liable for a failure to prevent any person associated with it from committing bribery in the conduct of its business, regardless of the absence of any active involvement in the bribery by the organization itself. The sole defense for an organization is to prove that it had in place “adequate procedures” designed to prevent persons associated with it from undertaking the conduct constituting bribery.<sup>6</sup> This provision has potentially far-reaching extra-territorial application.

*“Relevant commercial organization”*

A “relevant commercial organization”<sup>7</sup> includes not only UK companies and partnerships, but also any overseas entity which “carries on a business” or “part of a business” in the UK. Notably, the Act does not contain a definition of what it means to “carry on business” in the UK. The UK’s prosecuting authority under the Act, the Serious Fraud Office (the “SFO”), has indicated that it will construe the concept broadly.

The Guidance provides that a “common sense approach” will be applied by courts in determining this territorial element, and organizations that do not have a “demonstrable business presence” in the UK would not be caught by the Act. In particular, the Guidance makes it clear that a mere listing of securities on the London Stock Exchange would not “in itself” mean that the company was carrying on a business or part of a business in the UK. Similarly, the existence of a UK subsidiary would not, of itself, mean that a parent company was carrying on a business in the UK “since a subsidiary may act independently of its parent or other group companies”. However, companies will need to consider whether any of their activities constitute carrying on a part of a business in the UK: for example, because they hold regular meetings in the UK, or have a significant UK client base.

*“Associated person”*

The Act defines an associated person as one who “performs services for or on behalf” of such organization<sup>8</sup>. An employee will, presumptively, be an associated person. It is also possible that an agent, contractor or subsidiary operating anywhere in the world will qualify as an “associated person”. Whether or not a person performs services for or on behalf of an organization is to be determined by reference to “all relevant circumstances” and not merely by reference to the formal nature of the relationship between the two parties. Commercial organizations must take particular

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<sup>6</sup> Section 7(2).

<sup>7</sup> Section 7(5).

<sup>8</sup> Section 8.

care when dealing with external parties. Where a supplier, for example, can properly be said to be performing services for a commercial organization rather than simply acting as the seller of goods, it may also be an “associated person”. Joint venture and consortia arrangements will also be subject to scrutiny.

Any offense under the Act committed by an individual is punishable either by a fine or imprisonment for up to ten years, or both. An offense committed by a person other than an individual is punishable by up to an unlimited fine.<sup>9</sup>

## **II. “ADEQUATE PROCEDURES”**

The sole defense to the “failing to prevent bribery” offense requires that the company demonstrate that it had in place “adequate procedures” designed to prevent persons “associated” with it from committing bribery. Organizations will therefore need to review their existing anti-corruption procedures, update these measures where necessary, and demonstrate that they seek to engender a culture of compliance within their wider organizations. The Ministry of Justice’s Guidance is intended to assist organizations in designing appropriate and “adequate procedures”. The Guidance is formulated around six general principles. The Ministry of Justice has explained that these six principles are not intended to be prescriptive, and that they do not of themselves impose any direct obligation on business. However, anti-corruption policies which reflect these six principles are likely to be evidence that compliant “adequate procedures” are in place.

The six principles are as follows:

### **PROPORTIONALITY**

A commercial organization should put in place procedures which are “proportionate” to the bribery risks it faces and the nature, scale and complexity of the commercial organization’s activities. This is the core principle in the Guidance. Procedures should also be clear, practical, accessible, effectively implemented and enforced; and could embrace, for example, risk assessments, due diligence, transparency of transactions and policies governing corporate hospitality, gifts and promotional expenditure.

### **TOP-LEVEL COMMITMENT**

Commercial organizations and their boards should develop a “tone from the top” in order to establish a “zero-tolerance” approach to bribery matters throughout their organizations. Boards should take steps to ensure that anti-bribery policies are clearly communicated to all levels of management, the workforce and also, importantly, any relevant external actors and associated persons. Effective formal statements that demonstrate top-level commitment should be disseminated, and drawn to people’s attention on a periodic basis through effective procedures.

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<sup>9</sup> Section 11.

## **RISK ASSESSMENT**

A commercial organization may adopt a “risk-based” approach to procedures, regularly and comprehensively assessing the nature and extent of the risks relating to bribery to which it is exposed. Types of risk may include jurisdictional (i.e., operations in those countries which may feature highly on international corruption indices<sup>10</sup>), transactional (e.g., those involving charitable or political contributions, public procurement, or high-value projects), or partnership risks (e.g., those where associated persons and business partners are located in higher-risk jurisdictions, or where there is insufficient knowledge or transparency of third party processes).

## **DUE DILIGENCE**

A commercial organization should maintain due diligence policies and procedures which cover all parties to a business relationship and are proportionate to the risks faced. Diligence should be conducted using a risk-based approach, and extend to any parties which may constitute “associated persons” for such a commercial organization.

## **COMMUNICATION AND TRAINING**

A commercial organizations should seek to ensure that its bribery prevention policies and procedures are “embedded” and understood throughout the organization through internal and external communication, including training that is proportionate to the risks it faces. Commercial organizations should communicate procedures to all individuals associated with the company, and could cover, for example, decision making, financial control, hospitality, facilitation payments and penalties for breach of rules.

## **MONITORING AND REVIEW**

Organizations should consider what internal checks and balances are needed for transparency of behaviour to monitor and review anti-bribery policies and make improvements where necessary. Systems may be set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms. Organizations could also consider formal periodic reviews and the preparation of reports for top-level management.

In the UK, Financial Services Authority regulated financial institutions are already required to maintain suitable anti-money laundering procedures for monitoring, compliance and reporting<sup>11</sup>, and will also be subject to the FSA Principles for Business and the Senior Management Arrangements, Systems and Controls (“SYSC”) Handbook<sup>12</sup>. US groups which are presently subject

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<sup>10</sup> E.g., the Transparency International Bribe Payers Index and the Transparency International Corruption Perceptions Index 2009.

<sup>11</sup> Proceeds of Crime Act 2002, Money Laundering Regulations 2007.

<sup>12</sup> In 2009, the FSA fined AON Limited, £5.25 million for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals.

to the FCPA are likely also to have anti-corruption procedures in place. It will be necessary to redraft such existing procedures to ensure that they meet the requirements of the Act.

### **III. NO SAFE HARBORS**

The Act provides no exemptions, safe harbors or *de minimis* thresholds, notably in relation to facilitation payments and corporate hospitality. However, the SFO and the Director of Public Prosecutions (the “DPP”) have discretion whether or not to prosecute an individual or entity for a criminal offense under the Act.

In deciding whether to proceed, the SFO will apply a two-stage test: whether there is sufficient evidence to provide a realistic prospect of a conviction and if so, whether a prosecution is in the public interest, having regard to factors such as deterrence, justice, seriousness of the offense, prevalence of misconduct at the company, past conduct, and national economic interest<sup>13</sup>. The Ministry of Justice believes that the exercise of prosecutorial discretion provides the degree of flexibility required to ensure the “just and fair operation of the Act”, and notes that the SFO may pursue a civil settlement in the form of a civil recovery order, in lieu of prosecution. In particular, the Guidance and the parallel SFO and DPP guidance emphasize the importance of companies self-reporting breaches of the Act to the SFO, which is a factor which may avert prosecution.

### **FACILITATION PAYMENTS**

Facilitation payments are small payments made to foreign officials to expedite or secure routine governmental actions, which they are already bound to carry out. The US FCPA presently provides a safe-harbor for such payments, although companies rely on it only with caution. In addition, the OECD Anti-Bribery Convention does not treat facilitation payments as a criminal offense, but nevertheless strongly discourages them, noting their “corrosive effect”<sup>14</sup>. By contrast, the Act does not provide an exemption for such payments, and it is likely that such payments will be on their face bribes under the Act.

In appropriate cases, irregular facilitation payments that are self-reported to the SFO may result in a decision not to prosecute. Similarly, if a company has a “clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested”, which have generally been observed, the SFO has indicated that this factor will weigh against prosecution. However, it is possible that such payments will result in criminal proceedings against companies.

### **CORPORATE HOSPITALITY, GIFTS AND MARKETING**

Additional scrutiny is also likely to fall on the making of promotional expenditure and corporate hospitality. The Guidance indicates that it is not the government’s intention to criminalize “bona fide hospitality and promotional... expenditure which seeks to improve the image of a

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<sup>13</sup> Link to the SFO and DPP guidance accessible here: <http://tinyurl.com/cgsh-SFO-DPPGuidance>.

<sup>14</sup> Commentary to the OECD Anti-Bribery Convention, *op. cit.*, paragraph 9.

commercial organization”. The Act does not seek to prohibit or penalize “reasonable and proportionate” expenditure in this regard.

However, clients should remain cautious, particularly in ensuring that no “sufficient connection” can be demonstrated between an advantage (financial or otherwise) and the intention to influence and secure specific business or a business advantage. In particular, organizations and individuals should note that, with respect to the offense of bribing a foreign public official, there is no requirement to show improper performance of a function or activity but merely the intention to influence a foreign public official to retain business or a business advantage. As such, it may be that specific targeted and lavish corporate entertainment of officials at sensitive transactional times may result in prosecution.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under the ‘Practices’ section of our website at <http://www.clearygottlieb.com>.

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