Update on UK Bribery Act 2010—Guidance Published and Implementation Date Announced

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The Government of the United Kingdom published its delayed guidance about the Bribery Act 2010 entitled "*Guidance about procedures which relevant commercial organizations can put into place to prevent persons associated with them from bribing*" on March 30. At the same time it confirmed that the Act will come into force on July 1.

The purpose of the Guidance is to assist commercial organizations and individuals in interpreting and complying with the provisions of the Act and, in particular, to understand what procedures must be in place if commercial organizations are to have a defense (indeed the only defense available) to the strict liability offense created by § 7 of the Act of failing to prevent bribery.

This article (1) summarizes the new offenses introduced by the Act; (2) explains the effect of the Guidance; and (3) suggests some practical steps that can now be taken, particularly by commercial organizations, to comply with the Act.

The New Offenses Created by the Act

The Act creates four new criminal offenses with broad extra-territorial effect. Awareness of these offenses and an appreciation of their operation will be important for commercial organizations and individual executives. These new criminal offenses in summary are:

- an active offense of bribing another person (§ 1);
- a passive offense of being bribed (§ 2);
- an active offense of bribing a foreign public official (§ 6); and
- a strict liability offense where a commercial organization fails to prevent bribery (§ 7).

No Cause for Concern?

When announcing the implementation date of the Act and the publication of the Guidance, Kenneth Clarke, the UK Justice Secretary, said that "most of these proposals should not make the slightest difference to any reputable company. They won't have to spend millions of pounds on new control systems, which the compliance industry will tell them they need." Many companies will, however, remain concerned by the numerous grey areas that remain despite the Guidance, the potential for activities such as corporate hospitality and promotional expenditure which have for years become an accepted feature of commercial life to become the basis for a criminal prosecution, and the prospect of having to take subjective judgments about such matters knowing that one day a prosecutor (and perhaps a court) might take a different view about that judgment. International businesses need to consider the concerns which the Act presents, even where they have hitherto been compliant with the equivalent US legislation—the Foreign Corrupt Practices Act (FCPA)—because in several respects the Act imposes more onerous obligations than the FCPA and has an extremely wide extra-territorial effect.

The Guidance does answer some of the outstanding questions although, in doing so, it makes clear that it expresses only the policy of the UK Government and that it will always be for the courts to decide what the Act means or requires to be done.

Liability of Commercial Organizations

The focus of much of the commentary to date on the Act has understandably been on the effect on commercial organizations of the new § 7 strict liability offense (dealt with below). However, it is worth noting that § 7 is not the only offense capable of being committed by a commercial organization. It is possible for a commercial organization itself to commit an offense under § 1, 2, or 6 of the Act by virtue of the common law "identification principle." However, as the Guidance acknowledges, for that to happen, a prosecutor would have to prove beyond reasonable doubt that a "directing mind" of the organization (*i.e.*, a high ranking individual within the organization whose decisions speak for the organization) was behind the commission of the offense under § 1, 2, or 6 of the Act. It is likely to be rare for an organization to be prosecuted, still less convicted, of anything other than a § 7 offense under the Act.

Section 1 Offense—Bribing Another Person

A § 1 offense is committed if a person offers, promises or gives a financial or other advantage to another person either:

- with the intention of inducing that person to, or rewarding that person for, performing a relevant function or activity improperly; or
- knowing that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

The meaning of "improper performance" can be summarized as the breach of an expectation to perform a function in good faith, impartially or in accordance with a position of trust. The Guidance emphasizes that the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned. The Guidance notes the requirement under the Act to disregard any local custom or practice (unless it is required by the "written law" applicable to that country) when assessing the performance of a function or activity which is not subject to UK law. The § 1 offense can be committed in relation to a public or private function.

There has been great concern that the provision of corporate hospitality could be treated as amounting to an offense under the Act. The Guidance seeks to assuage that concern by stressing that "the Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure" which seeks to improve the image of a business, better to present its products or to establish cordial relations. It does also make clear that such activities "can be employed as bribes." The problem for businesses is having to assess when an expenditure could at a later date be judged by others as having strayed over the line and having become a bribe.

For now, the Guidance offers an example of an invitation to foreign clients to attend a Six Nations rugby match at Twickenham in order to cement good relations and comments that this is "extremely unlikely to engage § 1." This is because there is unlikely to be the requisite evidence of an intention to induce improper performance of a relevant function. Indeed, when announcing the publication of the Guidance, Justice Secretary Clarke said that "taking customers to Twickenham is normal" and that it would be "completely safe" to take clients motor racing or to a football match.

Section 6 Offense—Bribing a Foreign Public Official

The § 6 offense of bribery of foreign public officials (FPOs) will be committed where a person offers, promises or gives a financial or other advantage to another with the intention of influencing that person in their capacity as an FPO in order to obtain business or an advantage in the conduct of business. An FPO is defined in the Act as an individual who:

- holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK (or any subdivision of such a country or territory);

- exercises a public function for or on behalf of a country or territory outside the UK (or any subdivision of such a country or territory) or for any public agency or public enterprise of that country or territory (or subdivision); or
- is an official or agent of a public international organization.

Unlike the § 1 offense, the § 6 offense does not require proof of improper performance or an intention to induce improper performance. It is only necessary to show an *intention to influence* the person in their capacity as an FPO in order to obtain business or an advantage in the conduct of business. The Guidance explains that the reason for this seemingly lower threshold is that it is often difficult to ascertain the exact nature of the functions of an FPO and it will often be necessary to rely on assistance from the relevant foreign state to secure evidence in support of a prosecution. It is thought that, if it were necessary to prove that a § 1 offense had been committed, it would be more difficult to bring about convictions and therefore deter the bribing of FPOs.

The Guidance seeks to alleviate concerns that the offering of additional benefits when tendering for publicly funded government contracts, such as offers to make additional investment in the local economy, will amount to a financial or other advantage. If "written law" applicable to the relevant country permits or requires the official to be influenced by additional benefits such as these, then an offense under § 6 will not be committed. The Guidance uses the example of a local planning law which permits community investment or which requires an FPO to minimize administrative costs by sharing them with contractors. In such circumstances, a prospective contractor's offer of free training is said to be very unlikely to engage § 6.

It is possible that hospitality and promotional business expenditure could amount to bribes under § 6 if there is an intention for them to influence an FPO in his or her role and secure business or a business advantage as a result. Such expenditure might not, however, amount to an advantage to an FPO if it is a cost that would otherwise have been borne by the relevant foreign Government rather than the FPO.

As a general rule, the greater the hospitality provided, or the more that is spent in providing the advantage provided to an FPO, the more likely there is to be an inference of a connection between the provision of the advantage and an intention to influence and secure an advantage. The level of expenditure, however, will not though be the only factor taken into consideration.

Facilitation Payments

The Guidance confirms that facilitation payments will not be exempt from the requirements of the Act and will be treated as bribes. Facilitation payments are defined by the Guidance as "small bribes paid to facilitate routine Government action."

The making of such a payment could therefore amount to a § 6 offense or even a § 1 offense and, in either case, provide the basis for a § 7 prosecution of a relevant commercial organization.

The Guidance does deal expressly with the concern which had arisen in relation to the making of facilitation payments when an individual's safety is at risk. It acknowledges that, where an individual is left with no alternative but to make a facilitation payment in order to protect against loss of life, limb or liberty, the defense of duress is likely to be available.

Section 7 Offense

The § 7 offense is committed by a relevant commercial organization if a person, who is associated with the commercial organization, bribes another person intending to obtain or retain for the commercial organization business or an advantage in the conduct of business.

For the purposes of § 7, the associated person will be considered to have bribed another person if, and only if, the associated person has committed an offense under § 1 or 6 (though the associated person need not have been prosecuted). It is effectively a precondition of a commercial organization committing the § 7 offense of failing to prevent bribery that an offense of bribery (either

of a person under § 1 or an FPO under § 6) has been committed. So, the commercial organization cannot be prosecuted for a § 7 offense if the prosecution cannot prove beyond reasonable doubt that a § 1 or 6 offense has been committed by the associated person. But the question of who is or could be a "relevant commercial organization" or a person "associated" with it for the purposes of identifying the application of the § 7 offense has been of real concern. The Guidance deals with each and offers some help.

A commercial organization is not, however, guilty of the § 7 offenses simply by virtue of an associated person committing a § 2 offense (*i.e.*, being bribed).

Which Commercial Organizations Are Caught by § 7?

The § 7 offense applies to a "relevant commercial organization." The Act defines a "relevant commercial organization" as including:

- companies or partnerships incorporated or formed in the UK which carry on a business or part of a business in the UK or elsewhere; *and*
- those which, although incorporated or formed outside the UK, carry on at least part of their business in the UK

Prior to the publication of the Guidance, there was concern at the absence of any precision as to what would amount to carrying on part of a business in the UK Although the Guidance makes clear that it will be for the courts to determine these issues, it does provide some helpful pointers.

The Guidance anticipates a common sense approach being taken so that organizations which do not have a *demonstrable business presence* in the UK will not be caught. For example, it is anticipated that admission to the London Stock Exchange should not, in itself, mean that a company constitutes a "relevant commercial organization" for the purposes of § 7. Similarly, a parent company should not fall within the scope of § 7 just because it has a UK subsidiary, as the subsidiary may act independently of its parent. Nonetheless there is potential for a prosecutor to challenge that independence if, in a particular case, it regards the subsidiary as simply doing its parent's bidding for it and as having little or no autonomy.

Associated Persons

A relevant commercial organization will commit an offense under § 7 if a person "associated" with it bribes another person. The Act provides that an "associated" person is one who performs services for or on behalf of an organization. The Guidance acknowledges that, in addition to the obvious categories of associated persons such as employees, agents and subsidiaries, contractors, and suppliers could also be "associated" persons if they are performing services for or on behalf of a commercial organization. However, this is not likely to be the case if the contractor is merely acting as a seller of goods.

The Guidance suggests that, where a contractor is just one link in a long supply chain involving several entities, it is likely that it will only be performing services for its contractual counterparty (although this will also depend on the particular facts and circumstances). In that context the Guidance therefore recommends that commercial organizations employ antibribery procedures in their relationships with their direct contractual counterparties, as discussed below, and request that their counterparties adopt a similar approach with the next party in the chain.

The relationship of the concept "associated" persons is particularly difficult to assess in the context of joint ventures (JVs). The Guidance stresses that the § 7 offense is only committed where the bribing by the "associated" person is done with the intention of obtaining or retaining *for the relevant commercial organization* either business or an advantage in the conduct of business. So, if a JV operates through a separate legal entity and that entity pays a bribe which is intended to benefit an owner of the JV, that owner may be liable under § 7 if the JV is performing services for or on behalf of that owner. However, a bribe paid on behalf of a JV entity by one of its employees or agents is unlikely to trigger liability for the owners of the JV if it was the JV itself

(rather than the owners) which was intended to benefit from the bribe. This will be a particularly fact-sensitive issue.

Extra-Territoriality—"Close Connection" with the UK

An offense under § 1, 2, or 6 will take place if any person's act or omission which forms part of the offense takes place in the UK However, even if this is not the case, and the relevant act or omission occurs outside the UK, the UK courts will still have jurisdiction if the person committing the relevant act or omission has a "close connection" with the UK For these purposes, the person committing the offense will have a "close connection" with the UK by virtue of being a British national, or ordinarily resident in the UK, or a body incorporated in the UK or a Scottish partnership.

The extra-territorial effect of the § 7 offense is even wider. The requirement for a close connection with the UK does not apply, meaning that a relevant commercial organization is liable for the associated person's bribery regardless of the associated person's nationality and regardless of where the bribery occurred. For international businesses, this is perhaps one of the most dramatic potential consequences of the Act. This is because bribery committed outside the UK by an executive with no connection to the UK could lead to a § 7 offense on the part of his/her employer because the employer conducts part of its business in the UK (even though the executive would not himself commit an offense under the Act).

Section 7 Defenses—Adequate Procedures

A relevant commercial organization will only have a defense to a § 7 prosecution if it can prove that it had "adequate procedures" in place designed to prevent persons associated with the organization from taking part in bribery offenses under the Act.

Adequate procedures are not defined in the Act, but the Guidance sets out six key principles intended to assist organizations in avoiding falling afoul of the Act.

The Guidance places great weight on organizations taking a risk-based and proportionate approach to antibribery measures. This emphasises that there is no "one size fits all" approach to compliance measures and the Guidance stresses that the principles are not prescriptive but the outcome should always be robust and effective antibribery procedures.

The principles can be briefly summarised as follows:

Principle 1: Proportionate Procedures

An organization's antibribery procedures should be proportionate to the risks faced and the size, nature and scale of the organization's business.

An initial risk assessment is therefore a necessary first step. It may be of comfort to smaller business that the Guidance confirms that "small organizations are unlikely to need procedures that are as extensive as those of a large multi-national organization." Furthermore, the Guidance suggests that organizations can potentially avoid implementing unnecessary controls, and the resultant costs, if they assess that there is no risk of bribery on the part of its associated persons.

By contrast, there may be much greater bribery risks associated with relying on third-party agents negotiating with FPOs, and so comprehensive procedures may be required to mitigate the risks posed by such activity.

The Guidance indicates that an organization's bribery prevention procedures and policies (which should be clear, easy to read and accessible) may be stand-alone or form part of wider guidance. Policies on topics such as hospitality and promotional expenditure, recruitment, disciplinary action and remuneration, reporting of bribery (including whistleblowing procedures) and financial, and commercial controls may need to be updated or established to deal with the introduction of the Guidance.

Principle 2: Top Level Commitment

Top level management (*i.e.*, the Board, owners or equivalent) needs to be openly and formally committed to preventing bribery. Organizations should foster and communicate a zero-tolerance culture regarding bribery and ensure that policies are clearly communicated to all workers and those they do business with.

Again, proportionality pervades this principle: effective leadership in bribery prevention will take a variety of forms appropriate to an organization's size, management structure and circumstances. Commitment may take the form of personal involvement of owner-managers or Board-level consideration and review of bribery prevention policies in the context of larger organizations. Specific examples of top-level engagement given by the Guidance include selection and training of senior managers, leadership in awareness-raising and engagement with external organizations to articulate policies.

Principle 3: Risk Assessment

Organizations must keep up to date with the external and internal bribery risks they face, adopting proportionate risk assessment procedures having regard to the nature and extent of the risks relating to bribery and corruption.

With respect to external risks, in addition to country risk and transaction risk, the Guidance suggests that organizations consider "sectoral risk," noting that higher risk sectors include the extractive industries and the large-scale infrastructure sector. Assessment of business opportunity risk and business partnership risk are also suggested in the Guidance.

Principle 4: Due Diligence

The purpose of this principle is to encourage organizations to put in place due diligence procedures designed to prevent persons associated with them from bribing on their behalf.

Organizations should apply risk-based due diligence procedures in respect of persons associated with them (*i.e.*, their employees, workers, agents, intermediaries, etc.) In addition, as discussed above, the Guidance recommends that organizations employ antibribery procedures with direct contractual counterparties as they may be classed as associated persons of the organization. The Guidance notes that in low-risk situations an organization may not need to do much in the way of due diligence. In high-risk situations, investigations or direct inquiries may be needed.

Principle 5: Communication (including Training)

Communication of antibribery principles both internally and externally and providing appropriate training are all aspects of the effective implementation of bribery prevention policies.

Communication may involve internally detailing policies and procedures on particular areas and establishing an appropriate forum for persons to raise concerns or provide suggestions about bribery related issues. In addition, external communications may be made to a wider audience, such as sectoral organizations or the general public.

Training should be risk-based and tailored to the specific risks associated with specific posts. The Guidance suggests that mandatory training for all new starters or agents could be incorporated into the induction process, and that further training for associated persons in high-risk positions may be appropriate.

Principle 6: Monitoring and Review

Organizations must monitor and review their antibribery procedures and make improvements where necessary. Internal mechanisms, such as financial control processes and staff surveys can provide information on the effectiveness of policies. Furthermore, organizations may consider undertaking formal periodic reviews, or seek external verification of compliance with antibribery standards. However, the Guidance notes that accreditation from an external antibribery body may not of itself mean that an organization's bribery prevention procedures are adequate.

Prosecutorial Discretion

Prosecutors will consider first the prospects of securing a conviction and then the general public interest when assessing whether a prosecution should be brought. Whilst the latter might give comfort to those worried about the risk of prosecution for minor and isolated indiscretions, what is plain, given the breadth of the potential application of the Act, is that businesses preparing for the Act coming into force on July 1 will need to ensure that they have robust anti-bribery procedures in place.

Practical Steps

Organizations therefore need to consider a variety of practical steps to address the risks posed by the Act and to ensure that their antibribery and employment procedures are appropriate both to reduce the risk of breaches of the Act and to ensure that they are well placed in employment terms to deal with any problems arising from the conduct of their employees.

Appoint a Compliance Officer

If an organization does not already have a compliance officer or team which deals with regulatory compliance, it may consider it worthwhile nominating an appropriate senior manager to handle the implementation and ongoing monitoring of adequate procedures.

Conduct a Risk Assessment

In conducting a risk assessment, factors the organization should consider include whether it:

- operates in high-risk sectors or countries;
- comes into regular contact with FPOs;
- uses agents in countries where its presence is limited;
- has been involved in high-value projects or projects involving many contractors or intermediaries; and
- has evidence that persons associated with the organization are currently paying bribes or facilitation payments, or have done so in the past.

After the initial risk assessment, reviews should be undertaken on at least an annual basis or if the organization begins operating in a high-risk area.

Review Gifts, Hospitality and Donations Policies

Organizations should consider implementing a clear gifts, hospitality and donations policy, either prohibiting or limiting officers and employees from giving or receiving gifts, hospitality or donations from or to any person or organization.

If the policy allows gifts, the organization should specify the permitted levels and maintain a publicly available register of them. However, for the reasons discussed above, gifts to FPOs should be prohibited in all circumstances.

Depending on the risk of bribery which the organization identifies, it may want to take steps so far as possible to prohibit associated persons from accepting business gifts, or alternatively to allow them to do so only if appropriate records are kept and/or prior approval is granted.

In respect of hospitality, an organization may wish to put in place mechanisms to ensure so far as possible that associated persons seek approval before either offering or accepting corporate hospitality.

If an organization's policy permits political, charitable or other donations, it may consider specifying an upper limit over which donations cannot be made. The employer should also maintain a register of donations made which should be reviewed by management and the organization's auditors.

An organization should highlight in its antibribery policy that facilitation payments are bribes and therefore illegal under the Act. Practically speaking, where an organization has identified a high potential risk of facilitation payments being requested, it could consider training employees, workers and consultants in how to recognise and resist them as well as how to manage the impact of refusing to pay.

Review Disciplinary Procedures, Contractual Terms and Whistleblowing Policies

The Guidance suggests that organizations should consider how they plan to enforce their antibribery policies. Employers may therefore wish to amend their employee handbooks expressly to include their antibribery polices. Disciplinary procedures may need to be updated specifically to address bribery issues. Furthermore, in respect of employees, compliance with antibribery policies could be factored into an organization's appraisal structure.

In addition, where an organization has identified areas of high risk, it may wish to make compliance with antibribery policies and procedures an explicit contractual requirement. It should also consider whether reporting suspicions or knowledge of breach of such policies should be a contractual requirement for certain workers.

Organizations who already have whistleblowing policies may wish to update their policies to reflect the Act and to remind staff of the existence and importance of their whistleblowing policies. Employers who do not have whistleblowing policies should consider introducing one. Such a policy encourages staff to come forward with concerns about bribery and other issues without fear of retribution where their concerns are in good faith. Such a policy also is a key tool in encouraging compliance, disclosure of concerns and the careful management of complaints.

Where Appropriate, Conduct Due Diligence on Associated Persons

Where an organization's risk assessment highlights areas of potential risk in respect of actual or proposed associated persons, an organization should carry out due diligence. This may form part of a wider due diligence framework and, depending on the risk involved, may consist of general research, making direct inquires of (or undertaking an investigation into) the associated person.

Issue Internal and Public Statements of the Organization's Zero Tolerance of Bribery

The level of communication will depend on the risks an employer has identified. Internal statements to employees, workers and consultants should include a clear statement of the employer's policies plus the procedures for raising concerns about bribery. Public communications could be in the form of a code of conduct or could include information on the employer's procedures and sanctions.

The *Assured Guaranty Case* & New York's *Martin Act*: Pre-emption Delayed is Justice Denied

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More than eight years ago, when then-New York Attorney General Eliot Spitzer was just beginning to reinvent New York's long-dormant blue sky law, I asked in a 2003 article, somewhat facetiously, "Who's afraid of the Martin Act?"[1] Eight years later, the answer to that question is quite a long list. Those in fear now include virtually every type of institution in the mosaic of modern finance, industrial companies as well, and senior executives, who have now written settlement checks, aggregating in the billions of dol-