

**THE UK BRIBERY ACT 2010: UPDATE
ON IMPLEMENTATION AND GUIDANCE**

30 March 2011

To Our Clients and Friends:

Today, the Ministry of Justice released its much-delayed¹ and long-awaited guidance (“MoJ Guidance”) on adequate procedures to prevent bribery, pursuant to the U.K. Bribery Act 2010 (the “Act”). It also announced that the Act will come into force on 1 July 2011, thus allowing a three-month familiarisation period to give businesses time to prepare. As expected, the MoJ Guidance—which is not prescriptive and not a one-size-fits-all document—sets out six principles that should inform the procedures put in place by commercial organisations to prevent bribery. It also addresses a number of topics of importance to business, including facilitation payments, hospitality, the jurisdictional reach of the Act and the meaning of “associated persons,” particularly in the context of joint ventures and supply chains. The MoJ Guidance also includes eleven hypothetical case studies containing illustrative examples to assist organisations in shaping their policies, procedures and specific responses in given situations. The case studies are merely intended to complement the guidance and are not formally part of it. They are said not to be standard-setting or establishing any presumption of minimum standards appropriate for all organisations, whatever their size.

The MoJ also published a “Quick-Start Guide” for small- and medium-sized enterprises (“SMEs”), which sets out what SMEs need to know about the Act to prepare for its implementation.

In addition, the Director of Public Prosecutions and the Director of the Serious Fraud Office—one of whom will be required to consent to any prosecution under the Act—have also published the “Directors’ Guidance” setting out, for each offence under the Act, what needs to be proved for a conviction, along with the public interest considerations prosecutors are required to take into account when deciding whether to bring a prosecution. It specifically addresses facilitation payments as well as hospitality and promotional expenditure.

¹ Please see *Bribery Act Update: Implementation of the Act Delayed* for our previous update on the delay to the Act. This and all other Bribery Act updates are available at <http://www.debevoise.com/thebriberyact>

Kenneth Clarke, Secretary of State for Justice, stressed that he had listened to business representatives very carefully to ensure that the Act was implemented in a “workable way – especially for small firms that have limited resources” and the MoJ Guidance clearly reflects the importance for organisations to adopt a risk-based and proportionate approach to assessing and updating their policies and procedures. The MoJ Guidance also reiterates the government’s policy to encourage organisations to self-report incidents of bribery to the SFO and points out that the willingness to cooperate with an SFO investigation under the Act will be taken into account in any decision as to whether to bring proceedings against the organisation.

The MoJ Guidance has already been praised by business representatives for providing greater clarity on the Act and adopting a common-sense approach, particularly for SMEs.

The key features contained in the MoJ Guidance, the Quick-Start Guide and the Directors’ Guidance are as follows:

- **Jurisdiction.** The MoJ Guidance starts by reiterating the broad jurisdictional reach of the section 7 corporate offence of failure to prevent bribery: as long as an organisation carries on business or part of a business in the UK, the UK courts would have jurisdiction under section 7 even where the underlying bribery was committed by a non-UK national or—resident, and wholly outside the UK. However, and contrary to previous indications from the SFO, it refers to the requirement to show a “demonstrable business presence” in the UK and states the government’s intention that the Act not apply simply by virtue of a foreign company’s listing on the London Stock Exchange which does not, in itself, constitute “carrying on business” in the UK. Likewise, having a UK subsidiary does not necessarily mean that the foreign parent “carries on business” in the UK where such subsidiary acts independently of the parent. The MoJ Guidance makes it clear that the final arbiters of the terms “carry on business or part of a business,” and thus the jurisdictional scope of the Act, will be the courts.
- **Facilitation payments.** Unsurprisingly, the MoJ Guidance confirms that the prohibition on facilitation payments will remain, although it stresses that prosecutors will look to all the surrounding circumstances to determine whether such a payment amounts to a bribe and, if so, whether a prosecution is in the public interest. In one of the hypothetical case studies appended to the MoJ Guidance, the list of proportionate responses to a risk assessment identifying facilitation payments as a potential problem in effecting imports include, among others, requesting the organisation’s local agent company to train its staff

on the requirements of local law and the Act, as well as informing those demanding payments that compliance with the demand may mean that the organisation (and possibly the agent) would commit an offence under UK law.

According to the Director's Guidance, the chief public interest factors in favour of prosecution are: (i) large or repeated facilitation payments; (ii) payments that are accepted as a standard way of doing business and (iii) the fact that policies regarding facilitation payments have not been correctly followed.

The chief factors tending against prosecution for facilitation payments are: (i) one-off small payments; (ii) the payments having come to light through self-reporting by the organisation, with appropriate remedial action having been taken; (iii) the fact that policies regarding facilitation payments have been correctly followed and (iv) the fact that the payer was placed in a vulnerable position by the demand for payment.

- **Hospitality.** Echoing MoJ and SFO pronouncements made in the past, the MoJ Guidance states that genuine hospitality that is reasonable and proportionate is not caught by the Act. It specifically states that businesses can, within those confines, continue to provide tickets to sporting events such as the Grand Prix or Wimbledon, take clients to dinner, offer gifts to clients as a reflection of good relations or pay for reasonable travel expenses in order to demonstrate goods or services to clients. The real-life example provided is that of an invitation to a foreign client to attend a rugby match at Twickenham as part of a PR exercise to cement good relations. Such a case is said to be “extremely unlikely” to engage responsibility under the section 1 general bribery offence given the absence of any intention to induce “improper performance of a relevant function.”

Importantly, the MoJ Guidance makes it clear that the section 6 offence of bribing a foreign public official (FPO)—which does not require proof of any intention to induce improper performance—is aimed at similar “mischief”: “the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of [FPOs].” It clarifies that, in some circumstances, the provision of hospitality would not pass the threshold test under section 6 of constituting an “advantage” to the FPO, given that the costs would otherwise be borne by his/her government. Examples of hospitality that does qualify as an “advantage” but does not provide a sufficient connection to the requisite intention to

influence the FPO and secure business or a business advantage – and would thus not fall foul of section 6 – include: (i) reasonable travel and accommodation provided by a UK mining company for FPOs to visit a distant mine and (ii) flights to and accommodation in New York to meet with executives of a UK organisation, including “fine dining” and attendance at a baseball match for the FPO and his or her partner. The second example may be viewed differently if the organisation cannot demonstrate that the meeting was scheduled in New York by reason of genuine mutual convenience. Absent such objective justification of the hospitality provided, and depending on the lavishness of the hospitality, an inference might be raised that the advantage was bestowed on the FPO with an intention to influence him or her to grant business or a business advantage in return.

The hypothetical case study on hospitality and promotional expenditure also underscores the importance of ensuring that expenditures over a certain limit are approved by an appropriately senior level of management, as well as the need for good record-keeping.

The Directors’ Guidance states that prosecutors will be more likely to prosecute instances of hospitality if the person giving or receiving the hospitality is taking advantage of a position of trust or authority, or if the hospitality looks like it may facilitate more serious offences. Conversely, prosecution is unlikely for a single incident or if the organisation proactively self-reports and takes remedial action.

As far as FPOs are concerned, the Directors’ Guidance, consistent with the MoJ Guidance, confirms that the more lavish the hospitality provided, the greater the inference that the hospitality is intended to influence the FPO in order to obtain or retain business, which would render the payer liable for prosecution.

- **Associated persons—supply chains.** The MoJ Guidance states that a mere supplier of goods is unlikely to qualify as an associated person under section 7 and that doing due diligence further down a supply chain is therefore very unlikely to be required. But where a supplier can properly be said to be performing services for an organisation rather than simply acting as the seller of goods, it may qualify as an associated person. The MoJ Guidance recognises that in a more complex supply chain, an organisation is likely only to exercise control over its contractual counterparty; the suggested way to deal with the bribery risks arising in such circumstances is to use risk-based due diligence and

anti-bribery terms and conditions vis-à-vis the contractual counterparty, and, in turn, request that counterparty to adopt a similar approach with the next party in the chain.

- **Associated persons—joint ventures.** The MoJ Guidance crucially points out that the question of adequacy of bribery prevention measures will depend on all the facts of the case, including the level of control of an organisation over the activities of the “associated person.” This goes some way to addressing the concerns of business that section 7 imposed strict liability for bribery by third parties acting independently. Specifically in the context of joint ventures, the MoJ Guidance distinguishes between (i) joint ventures operating through a separate legal entity and (ii) those operating through a contractual arrangement.

In the former case, the questions of whether the joint venture entity was performing services for the member and engaged in bribery to benefit the member will be decisive in determining that member’s potential liability under the Act. However, the existence of a joint venture does not of itself make the joint venture entity an “associated person” that will trigger member liability. Possible practical anti-bribery measures that could be included in a joint venture arrangement are said to include, among others, insisting on the establishment of an audit committee with at least one representative from each member and the power to view accounts and certain expenditures, and extracting binding commitments from the joint venture partner to comply with the Act in relation to the operation of the joint venture entity, breach of which would constitute a breach of the agreement between the partners.

Importantly, in the second case, the degree of control exercised by an organisation over the joint venture arrangement will be taken into account in determining whether bribery at the joint venture level will trigger section 7 liability. The example given is that of an agent engaged by one participant in a contractual joint venture who will, absent other evidence, likely be regarded as being an associated person of that participant, rather than the contractual joint venture as a whole.

These are important clarifications regarding the extent to which the actions of joint ventures will engage the members’ liability. The MoJ Guidance does not expressly state how this approach would effect private equity structures, although it does provide, still in the context of joint ventures, that section 7 liability will not accrue through simple

corporate ownership or investment, even where the organisation benefits indirectly from the bribe.

More generally on steps required to rely on the adequate procedures defence enshrined in section 7, the MoJ Guidance sets out six principles organisations need to consider:

- **Proportionality.** The MoJ Guidance puts significant emphasis on the fact that any action must be proportionate to the risks faced by the particular organisation. It also specifically envisages situations where a risk assessment results in no anti-bribery measures being required at all.
- **Top Level Commitment.** The MoJ Guidance emphasises the importance of an appropriate “tone at the top,” including an active engagement by senior management to ensure that middle management understands the zero tolerance attitude to bribery.
- **Risk Assessment.** The MoJ Guidance provides practical advice on how a risk assessment should be performed (ranging from a simple internet search to the consultation of UK diplomatic posts or the engagement of external advisers) but also recognises that many organisations will face little or no risk of bribery, especially if they operate primarily in the UK.
- **Due Diligence.** Depending on the results of the risk assessment, appropriate due diligence steps can be anything from simply asking an agent for a CV, financial statements or accounts to more sophisticated techniques involving external advisers where the risks are higher. The Quick-Start Guide as well as the hypothetical case study on the issue also stress the desirability of personal contact and face-to-face meetings with third parties such as agents, in order to arrive at personal assessments about the risk of doing business with them. The case study also proposes such measures as requesting to see the agent’s own anti-bribery policies or, where a corporate body, its reporting procedures and records, as well as making enquiries with local authorities in the country in question to verify the agent’s responses to due diligence questionnaires.
- **Communication.** The MoJ Guidance reiterates the importance of clear communication of the organisation’s anti-bribery policies and procedures internally but also to associated persons. The greatest practical impact of this principle vis-à-vis third parties will be in circumstances where an organisation has little to no actual control of an entity performing services for or on its behalf. The organisation can go some way towards

reducing its risks under the section 7 offence by communicating to that party its zero tolerance policy, explaining its systems and procedures and, where appropriate, even requiring that third party to attend anti-bribery training.

- **Monitoring and Review.** In addition to regular review and updating of policies and procedures, the MoJ Guidance also states that such reviews and updates may be appropriate in situations where, for example, there have been governmental changes in countries where an organisation operates, or there have been incidents of bribery or negative press reports. The actual review procedures envisaged can include internal financial controls mechanisms, as well as staff surveys and training feedback. Formal periodic reviews and reports for senior management should also be considered, as well as drawing on information from trade associations or regulators which highlight good or bad practice examples. In addition, organisations may consider seeking external verification or assurance of the effectiveness of their anti-bribery procedures, although that will not necessarily render their procedures adequate for the purposes of section 7.

The importance of adequate procedures is repeated in the Directors' Guidance, which directs prosecutors to consider an organisation's procedures before determining whether to bring a prosecution at all. It restates earlier advice that a single instance of bribery does not necessarily mean procedures are inadequate.

For more on the Bribery Act, including all our previous client updates, please see our website at <http://www.debevoise.com/thebriberyact>

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We welcome the opportunity to discuss with our clients and friends the issues raised by the guidance and, in particular, to help you ensure that you are in full compliance with the Act in good time for the 1 July implementation date. Please do not hesitate to contact us.

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