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Anticorruption Compliance & Foreign Corrupt Practices Act ALERT

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The Clock Has Started Ticking: Guidance to the UK Bribery Act 2010 Published Today

The UK Government has today confirmed that the Bribery Act 2010 (the Act) will come into force on 1 July 2011 and has published the much anticipated [final version of its Guidance](#) for commercial organisations about how they can reduce their exposure to bribery offences under the Act. A [Quick Start Guide](#) has also been published that sets out the key points.

For the purposes of the Act, a bribe is effectively the giving or receiving (or the offer or promise to do so) of a financial or other advantage with the intention of bringing about the "improper performance of a function or activity". The Act consolidates existing offences of offering or receiving a bribe, bribery of foreign public officials and introduces a new corporate offence of failure by a commercial organisation to prevent a bribe being paid or received on its behalf. It will be a defence for an organisation to show that it has "adequate procedures" in place to prevent such bribery. The long-awaited Guidance is important as it provides clarification in relation to what will constitute "adequate procedures".

The final version of the Guidance is formulated around six general principles:

- proportionate procedures;
- top-level commitment;

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- risk assessment;
- due diligence;
- communication; and
- monitoring and review.

These principles largely follow those contained in the draft Guidance, previously published. As emphasised by Lord Chancellor Kenneth Clarke in his announcement today, following these six general principles and combating bribery is very much about adopting a common sense approach to addressing the organisation's exposure to bribery.

The Government also appears to have heeded concerns raised in consultation on the draft Guidance and has attempted to minimise those concerns. The clear emphasis in the final Guidance is that a proportionate approach to the implementation of "adequate procedures" is very much all that is necessary. Small businesses and organisations operating in low risk areas will require only modest procedures to mitigate their risks under the Act. In contrast, large scale, multinational organisations operating in high risk areas will be under a more onerous obligation to ensure that their duty to implement adequate procedures is properly discharged.

Helpfully, the Government has also given further clarification in relation to the following areas:

- **Corporate Hospitality:** One of the main criticisms levelled at the draft Guidance was that it did not provide clear advice on what level of corporate hospitality could be provided without exposing the organisation to an investigation and potential prosecution. The final Guidance seeks to address these concerns and wants to reassure businesses that "bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations" is *not* prohibited by the Act. The Government does *not* intend for the Act to prohibit "reasonable and proportionate" hospitality and promotional expenditure incurred in "good faith" for these purposes and that prosecutors would take into account the standards or norms applying in a particular sector when considering whether bribery had taken place. The Guidance makes

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clear however that it is still for businesses to establish and disseminate appropriate standards for hospitality and promotional or other similar expenditure. The Quick Start Guide states that tickets to sporting events, taking clients to dinner, offering gifts to clients as a reflection of your good relations or paying for reasonable travel expenses in order to demonstrate your goods or services to clients will not amount to bribery as long as they are proportionate to your business. Lord Chancellor Kenneth Clarke has assured businesses that the Act does not stop them getting to know their clients by taking them to events like Wimbledon, Twickenham or the Grand Prix.

- **Facilitation Payments:** As widely anticipated, the final Guidance makes it clear that facilitation payments (small payments paid to facilitate routine Government actions) are still unlawful, but says that it recognises the problems that businesses face in some parts of the world and in certain sectors. The Quick Start Guide states that businesses can continue to pay for legally required administrative fees or fast-track services as these are not facilitation payments. The Guidance also recognises that the common law defence of duress is likely to be available where individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. Separate [prosecution guidance](#) has also been issued today, stating that prosecutions will normally be instigated *unless* there are public interest arguments to the contrary. Large or repeated payments, or payments that were planned for or were accepted as a standard way of conducting business are stated as factors tending in favour of a prosecution.
- **Commercial Organisations:** Only a "relevant commercial organisation" can commit the corporate offence under the Act. A "relevant commercial organisation" is defined as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which "carries on a business". The Courts will be the final arbiter as to whether an organisation "carries on a business" in the UK taking into account the particular facts in individual cases. As regards bodies incorporated, or partnerships formed, outside the UK, whether such bodies can properly be regarded as carrying

on a business in any part of the UK will be answered by applying a common sense approach. The Government anticipates this to mean that organisations that do not have a demonstrable business presence in the UK would not be caught. It would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, would qualify that company as carrying on a business or part of a business in the UK.

- **Associated Persons:** A company will only be guilty of failing to prevent bribery if a bribe was paid by a person associated with it. A person is associated with a business if that person performs services for or on its behalf, which is to be determined by reference to all the relevant circumstances and not just by reference to the nature of the relationship. The final Guidance seeks to address concerns that businesses could be liable for third parties over whom they have no control. It states that associated persons could include employees; agents; contractors; suppliers where they are performing services rather than simply acting as a seller; joint ventures where the bribe is paid for a member of the joint venture and with the intention of benefitting that member; and subsidiaries if the bribe was made to benefit the parent company. The Guidance makes it clear however that indirect benefit is not sufficient to constitute an offence.

The Guidance also provides 11 case studies to assist organisations to identify what procedures they should introduce to prevent acts of bribery within their organisations and for which they may be culpable.

Is the final Guidance helpful? We believe it is, and the risk-based approach will be welcomed by most organisations. However, it does not (and in all fairness, could not) provide all the answers. Businesses will still have to be pragmatic in their assessment of their risk and take a common sense approach to the adequate procedures that are required to minimise those risks.

The final Guidance places great emphasis on "proportionality", "common sense" and "public interest". As the cuts in public expenditure begin to bite, it is anticipated that "prosecutorial discretion" will be exercised sparingly to target the minority of organisations that are responsible for the most serious bribes or for allowing the continued practice of corruption to exist within their business. However, every organisation that is touched by this Act needs to

review its risk profile and decide upon the antibribery and corruption programme it requires in order to protect itself from enforcement action.

For further information regarding the Bribery Act 2010, please contact your principal Squire Sanders lawyer or one of the individuals listed in this Alert.



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