

## UK Bribery Act – Publication of Government Guidance

31 March 2011

## Guidance Issued

The UK Ministry of Justice has published its long-awaited official guidance (the Guidance) on anti-corruption compliance procedures, which organisations should implement in order to prevent persons associated with them from committing bribery under the UK Bribery Act 2010 (the Act). (<http://www.justice.gov.uk/guidance/bribery.htm>) The Act will come into force on 1 July 2011 – so businesses now have three months to prepare their policies and procedures in light of the Guidance.

In addition, the UK Serious Fraud Office and Director of Public Prosecutions have published Joint Prosecution Guidance in relation to the Act (Joint Guidance for Prosecutors). The Joint Guidance for Prosecutors may provide businesses with a sense of the type of conduct that is particularly likely to be prosecuted under the Act and thereby provide a clearer roadmap for the assessment of risk under the Act.

## The Act

The Act has been described as the toughest anti-corruption legislation in the world. It is expected to raise the bar above the standards in the US Foreign Corrupt Practices Act (FCPA) and will apply extra-territorially. The Act applies to all businesses with a UK presence (whether UK incorporated or just carrying on business in the UK), British citizens and any person who resides in the UK (regardless of whether the actions occurred in the UK or elsewhere) and any person whose actions occur in the UK. The Act applies to private sector as well as public sector bribery (unlike the FCPA, which focuses only on international public sector bribery). In addition to being wider in scope than the FCPA, the Act has stiffer penalties (*e.g.* unlimited fines for corporations and senior officers who connive in an act of bribery) and fewer defences.

The Act further contains an onerous new corporate offence of failing to prevent bribery by an “associated person” of the organisation. This could include employees, subsidiaries, agents, contractors, joint ventures and consortia. Once the act of bribery by the associated person has been found to have occurred, the burden of proof is on the organisation (not the prosecutor) to prove that it had “adequate procedures” to prevent the bribery. This is the only defence.

Businesses with a presence in the UK need to consider their exposure under the Act and take steps to put in place adequate anti-corruption procedures in light of the Guidance, ideally before the coming into force of the Act on 1 July 2011.

## Preparations for the Coming into Force of the Act

The Guidance is formulated around six guiding principles for bribery prevention to help organisations put “adequate procedures” in place. These are not prescriptive but are intended to be flexible and allow for the huge variety of circumstances in which commercial organisations of differing sizes find themselves.

### 1. PROPORTIONATE PROCEDURES

The Guidance explains that an organisation’s bribery prevention policies, and procedures which implement them, should be proportionate to the bribery risks it faces and to the nature, scale and complexity of its activities. An initial risk assessment is described as a necessary first step. The Guidance suggests that dealings with different categories of associated persons may require differing procedures, depending on the level of risk anticipated. For example, a heightened category of risk might be present in dealings with a third party agent negotiating with foreign officials than say compared to other associated persons (*e.g.* an employee). The Guidance further advises that application of procedures retrospectively to existing associated persons, although more difficult, should be carried out over time.

The Guidance suggests that policies should cover the organisation’s commitment to bribery prevention; its general approach to mitigation of specific bribery risks (such as dealings with agents, hospitality, facilitation payments and political and charitable contributions); and an overview of its strategy to implement its bribery prevention policies.

Procedures must be clear, practical, accessible, effectively implemented and enforced. The Guidance contains an indicative list of 14 topics that procedures might cover. These are set out in the appendix to this *White Paper*.

## 2. TOP-LEVEL COMMITMENT

A top-level statement should be issued demonstrating commitment to bribery prevention at the highest level in the organisation (the Guidance sets out suggested contents of such a formal statement). Involvement of top-level management in the determination of bribery prevention procedures is encouraged. In a large multi-national company, the board should be responsible for setting bribery prevention policies, tasking management to design, operate and monitor bribery prevention procedures and keeping such policies and procedures under regular review.

## 3. RISK ASSESSMENT

A risk assessment should be carried out to assess the nature and extent of the organisation's exposure to potential external and internal risks of bribery on its behalf by persons associated with it. This should be proportionate to the organisation's size and structure and to the nature, scale and location of its activities. The assessment should be periodic, informed and documented. The risk assessment that applies to an organisation's domestic operations might not apply when it enters a new market in another part of the world. Commonly encountered external risks are categorised into five groups: country, sectoral (such as, for example, the extractive and infrastructure sectors), transaction (*e.g.* public procurement), business opportunity and business partnership risk. Internal risks might include deficiencies in employee training, a bonus culture that rewards excessive risk taking, lack of clarity in the organisation's anti-corruption policies or procedures and lack of clear financial controls.

## 4. DUE DILIGENCE

Due diligence should be carried out on persons with whom the organisation does business (with a view to preventing persons associated with it from committing a violation under the Act on its behalf). The diligence should be proportionate and risk based *e.g.* a lower level of diligence might be expected to be conducted on an IT service provider than an intermediary assisting with business development in foreign markets. Particular care should be exercised where local custom dictates the use of local agents, where it may be difficult to end the relationship once established. Anti-corruption diligence will clearly be critical in the context of mergers and acquisitions and also, in procedures for recruitment of employees to high risk posts.

Due diligence should both form part of the risk assessment and operate as a means of mitigating risk going forward. Diligence procedures can be undertaken internally or by external consultants.

## 5. COMMUNICATION (INCLUDING TRAINING)

Policies and procedures should be embedded through internal and external communication, including training to enhance awareness and understanding. Tailored training may be appropriate for higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. There should be adequate protection for those reporting concerns.

## 6. MONITORING AND REVIEW

The organisation should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary. The risks the organisation faces may change with the nature and scale of its activities. This may require adaptation of procedures from time to time. Other stimuli for reviewing processes might include regime change in a country in which it operates, an incident of bribery or negative press reports. Auditing and financial controls that are sensitive to bribery should be put in place.

## Particular Issues Addressed in the Guidance

The Guidance also addresses a number of specific issues raised by the business community which caused uncertainty or general concern under the Act.

### ASSOCIATED PERSONS

On the face of the Act, an organisation can incur strict liability for the conduct of its associated persons even if it has no control or influence over the associated person. An associated person is any person who performs services for or on

behalf of the organisation. This has caused particular concern among the business community in the context of joint venture partners, long supply chains and projects involving several parties.

#### *Suppliers and projects involving multiple parties*

The Guidance states that where a supplier can properly be said to be performing services for an organisation rather than simply acting as a seller of goods, it may constitute an “associated person.” However, where there are several entities in a supply chain or there is a series of sub-contractors, who have no contractual relationship with the organisation, it is likely that those entities and sub-contractors will be regarded as performing services for their direct counterparties and not the organisation. The Guidance recommends that organisations employ anti-bribery procedures (such as risk-based diligence and anti-bribery terms and conditions) with their direct counterparties and request that such counterparties adopt a similar approach with the next party in the chain.

#### *Joint Ventures*

##### *Separate Legal Entity*

The Guidance states that a bribe paid by the joint venture vehicle may lead to liability for a member if the vehicle is performing services for the member and the bribe is paid with the *intention* of benefiting that member. However, joint venture partners should not incur liability for bribes paid by a joint venture vehicle simply by virtue of benefiting indirectly from the bribe through the investment in or simple corporate ownership of the vehicle.

##### *Contractual Joint Ventures*

In contrast, in a contractual joint venture, the Guidance regards the degree of control that a participant has over the arrangement as one of the relevant circumstances that would be taken into account in deciding whether the relevant person who paid the bribe in the context of the joint venture was performing services for that participant. So, for example, an employee of one participant might not be regarded as an “associated person” of all the other participants. Similarly, an agent engaged by one participant in the context of a joint venture is likely to be regarded as “associated” with that participant (in the absence of evidence that the agent is acting on behalf of the joint venture as a whole).

The Guidance states that, ultimately, the question of adequacy of bribery prevention procedures will depend on the level of control over the activities of the associated person and the degree of risk that requires mitigation. In addition, the Joint Guidance for Prosecutors indicates that whether a person is treated as “associated” with an organisation is determined by the nature of what is done (disregarding the bribe in question) rather than the capacity in which it is done.

#### FACILITATION PAYMENTS

As was the case under existing English law, the Act contains no specific defences for the making of facilitation payments (unlike the FCPA, which has a narrowly construed exception for facilitating payments). The Guidance recognises that this is a problem facing organisations in some parts of the world and suggests addressing the problem through bribery prevention procedures (such as seeking local advice, training local staff about resisting demands, asking to speak to superiors and requesting receipts). In this regard, it should be borne in mind that facilitation payments are *prima facie* illegal under the Act, but it will be a matter for the prosecutors to decide, in their discretion, whether a prosecution in a particular case is in the public interest. The Guidance also recognises that where individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty, the common law defence of duress may be available.

#### HOSPITALITY

The giving or receipt of hospitality is within the ambit of the Act and there is no specific defence for *bona fide* hospitality payments (unlike the FCPA). The Guidance states that reasonable and proportionate *bona fide* hospitality and promotional or other similar business expenditure intended for the purpose of improving the image of a commercial organisation, presenting products and services or establishing cordial relations are not intended to be criminalised by the Act. On the other hand, it acknowledges that hospitality and other promotional expenditure can, in fact, be used as bribes. It stresses that the prosecution must establish a *connection* between the financial or other advantage offered and the intention to influence the relevant official. Evidence of the connection could be derived from a variety of

surrounding circumstances such as the type and level of advantage offered, the manner and form in which the advantage is provided and the level of influence the particular official has over awarding the business. The standards and norms applying in a particular sector may also be relevant, but if the norms are extravagant, then providing hospitality or promotional expenditure in accordance with those norms will not be a defence.

In general, the more lavish the hospitality or the higher the expenditure, the greater the inference that it was intended to influence the official to grant a business advantage.

By way of example, ordinary travel and lodgings reimbursed to a foreign public official in order to visit an installation run by the organisation is described as unlikely to attract liability. In contrast, a five-star holiday unrelated to a demonstration of the organisation's services or flights and accommodation to an unnecessary or unrelated destination could raise an inference of bribery.

In addition, the Joint Guidance for Prosecutors mentions that a factor weighing in favour of prosecution in this context includes where the hospitality or expenditure was not clearly connected with a legitimate business activity or was concealed.

#### OFFSET PAYMENTS

The Guidance acknowledges that governments sometimes require organisations tendering for public contracts to provide some form of separate investment in the local community, which could fall within the ambit of the Act. The Guidance explains that where local written law permits or requires the relevant official to be influenced by such arrangement, then it will fall outside the scope of the offence. So if local planning law permits community investment or requires public officials to minimise the cost of public procurement administration through cost sharing with contractors, then an organisation's offer of free training is unlikely to attract liability. However, where local law is silent, prosecutors will consider the public interest in deciding whether to prosecute.

#### "CARRYING ON BUSINESS" IN THE UK

The new strict liability corporate offence of failing to prevent bribery by an associated person applies to a body or partnership incorporated or formed in the UK (irrespective of where it carries on a business) and to a body or partnership which carries on a business or part of a business in the UK (irrespective of the place of its incorporation or formation). The Guidance makes it clear that the courts will be the final arbiter as to what constitutes "carrying on business" for the purposes of the Act. However, the Guidance states that it expects that the question will be answered applying a "common-sense" approach and that the Government would not expect the mere fact of admission to the UK Listing Authority's Official List and admission to trading on the London Stock Exchange, in itself, to constitute carrying on business in the UK.

### Joint Guidance for Prosecutors

This sets out certain public interest considerations which may weigh in favour or against the prosecution of bribery, in the context of the four different offences under the Act.

#### BRIBING ANOTHER PERSON, BEING BRIBED OR FAILURE BY AN ORGANISATION TO PREVENT BRIBERY

Factors tending in favour of prosecution include: whether the particular conduct is likely to attract a significant sentence; whether it was pre-meditated; whether the offence was committed to facilitate a more serious offence; and whether those involved were in positions of authority or trust. Factors weighing against prosecution include: whether the court is likely to impose a mere nominal penalty; whether the harm was minor and resulted from a single or isolated incident; and whether there was a genuinely proactive approach involving self-reporting and remedial action.

#### BRIBING A FOREIGN OFFICIAL

Factors tending in favour of prosecution include: whether they were large or repeated payments; whether facilitation payments are planned or accepted as part of a standard way of doing business, indicating pre-meditation; and failure to follow correctly the organisation's own policies on facilitation payments. Factors weighing against prosecution include: whether it was a single payment likely to lead to a mere nominal penalty by the court; whether there was a genuinely

proactive approach involving self-reporting and remedial action; whether the organisation's own policies were correctly followed; and whether the payer was in a vulnerable position.

## Conclusion

The Guidance provides clarification on a number of areas of concern expressed by business leaders in relation to the scope of the Act and how it will be enforced in practice and also advocates a risk-based and proportionate response to the preparation of anti-corruption policies and procedures.

Ultimately, the question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular case can only be determined by the courts on the basis of the facts and circumstances of a particular case. A departure from the procedures suggested in the Guidance will not, by itself, give rise to a presumption that an organisation does not have adequate procedures. However, it should be borne in mind that the burden of proof will fall on the organisation which is prosecuted to prove that it did have adequate anti-corruption procedures. The Guidance sets out a basic framework for each organisation to adapt to its own risk profile. Businesses affected by the Act should now review their anti-corruption procedures in light of the Guidance in readiness for the coming into force of the Act on 1 July 2011.

## THE MCDERMOTT DIFFERENCE

McDermott Will & Emery's Foreign Corrupt Practices Act (FCPA) and International Anti-corruption Group has substantial experience assisting clients with internal investigations; government enforcement actions and regulatory inquiries; and FCPA compliance counselling and transactional due diligence. McDermott FCPA and International Anti-Corruption lawyers have experience across many industries in each of the international "hot spots" for government investigations and prosecutions, including South America, the Caribbean, Europe, the Middle East, and Asia where MWE China Law Offices is the only firm exclusively affiliated with a U.S. law firm that can legally practice Chinese law, including interviewing witnesses and representing clients before Chinese regulatory agencies and courts.

For more information, please contact your regular McDermott lawyer, or:

**Brigid Breslin:** +44 20 7577 3487 [bbreslin@mwe.com](mailto:bbreslin@mwe.com)

**Obiamaka P. Madubuko:** +1 212 547 5308 [omadubuko@mwe.com](mailto:omadubuko@mwe.com)

For more information about McDermott Will & Emery visit [www.mwe.com](http://www.mwe.com)

## Appendix

### INDICATIVE LIST OF TOPICS WHICH THE GUIDANCE SUGGESTS THAT ANTI-CORRUPTION PROCEDURES MIGHT EMBRACE

- The involvement of the organisation's top-level management
- Risk assessment procedures
- Due diligence of existing or prospective associated persons
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration
- Governance of business relationships with all other associated persons including pre and post contractual agreements
- Financial and commercial controls such as adequate book-keeping, auditing and approval of expenditure
- Transparency of transactions and disclosure of information
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules
- The reporting of bribery including 'speak up' or whistle blowing' procedures
- The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation
- The communication of the organisation's policies and procedures, and training in their application
- The monitoring, review and evaluation of bribery prevention procedures

The material in this publication may not be reproduced, in whole or part without acknowledgement of its source and copyright. This *White Paper* is intended to provide information of general interest in a summary manner and should not be construed as individual legal advice. Readers should consult with their McDermott Will & Emery lawyer or other professional counsel before acting on the information contained in this publication.

© 2011 McDermott Will & Emery. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery/Stanbrook LLP, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, MWE Steuerberatungsgesellschaft mbH, McDermott Will & Emery Studio Legale Associato and McDermott Will & Emery UK LLP. McDermott Will & Emery has a strategic alliance with MWE China Law Offices, a separate law firm. These entities coordinate their activities through service agreements. This communication may be considered attorney advertising. Previous results are not a guarantee of future outcome.