

Alerts and Updates

UK BRIBERY ACT, EFFECTIVE 1 JULY 2011, TO IMPACT BUSINESSES LARGE AND SMALL

April 7, 2011

The UK's Lord Chancellor and Secretary of State for Justice Kenneth Clarke **announced** on 30 March 2011 that the new **UK Bribery Act** will take effect on 1 July 2011. The Ministry of Justice (MoJ) also issued its final guidance on how a company should comply with the new legislation. At the same time, joint prosecutorial guidance was issued indicating who should feel the full weight of the legislation. The documents are lengthy. The MoJ's **guidance** stretches to 45 pages, with the **prosecutors' guidance** a further 12 pages. While much of the concentration has been on the MoJ guidelines, it is likely that the prosecutors' guidelines may have the most lasting significance.

The MoJ published draft guidance last year that was open to consultation until 8 November 2010. Duane Morris and a number of other interested organizations made representations to the MoJ as part of that consultation process, and the final guidance was due to be published in January. It was delayed while the government responded to criticisms of the draft guidance, but in light of at least one freedom-of-information request and disapproval from campaign groups, the go-live date has now been set.

In general, the new guidance tempers some of the directives given in the earlier draft. It also offers a little more comfort than before to those engaged in international business.

Mr. Clarke's announcement indicates that the representations made have influenced the guidance. He said when launching the guidance, ". . . the guidance I am . . . publishing today underlines—after helpful consultation with businesses, and NGOs—. . . that combating bribery is about common sense, not bureaucracy." However, Mr. Clarke also emphasized that the guidance is not intended to dilute the legislation, which includes penalties of up to 10 years in jail.

What Does the New MoJ Guidance Say?

Whilst technically the guidance speaks only to the new offence of failure to prevent bribery, the guidance goes through most of the main provisions of the Act, expanding on its principles, and also contains examples at the end of the document following the same format as the draft guidance. Some of its language is legalistic, and in places, the guidance does not appear as clear as it could have been. The six principles of compliance that were in the draft guidance are retained, but have been altered slightly. Those six principles and the short explanatory notes given by the MoJ are as follows:

1. **Proportionate procedures.** "A commercial organization's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization's activities. They are also clear, practical, accessible, effectively implemented and enforced."
2. **Top-level commitment.** "The Top-Level management of a commercial organization (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by a person associated with it. They foster a culture within the organization in which bribery is never acceptable."

3. **Risk assessment.** "The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented."
4. **Due diligence.** "The commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks."
5. **Communication (including training).** "The commercial organization seeks 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."
6. **Monitoring and review.** "The commercial organization monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary."

The three main areas of key interest to multinational businesses are all covered.

Hospitality

It is clear, in contrast to equivalent legislation in other countries, that hospitality is clearly within the scope of the Act. The MoJ's draft guidance had made it clear that hospitality is fully within the ambit of the new law, saying "Hospitality and promotional expenditure can be employed improperly and illegally as a bribe." It seems to be the view of the UK government and the prosecutors that hospitality is often just the first act in a bribery play. For example, one of the prosecutors said during the guidance process that hospitality is "used . . . to groom employees . . . into a position of obligation and thereby prepare the way for major bribery." Against this background, it was natural that hospitality was one of the main areas of concern in submissions to the MoJ consultation.

Earlier guidance from the MoJ did not shed sufficient light on the level of hospitality that would be permitted and how that value would be determined. Mr. Clarke commented on this specifically in his 30 March 2011 announcement, stating, "The guidance makes clear that no one is going to try to stop businesses getting to know their clients by taking them to events like Wimbledon, Twickenham or the Grand Prix. Reasonable hospitality to meet, network and improve relationships with customers is a normal part of business."

The MoJ's guidance also says that the sector of business could be taken into account. What is viewed as normal entertaining in some industries would likely appear lavish in others. The MoJ's guidance says: "The standards or norms applying in a particular sector may also be relevant. . . . However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant."

The guidance also explains that travel and hospitality connected with the service offered is unlikely to be prosecuted—for example, a trip to see a hospital to show the efficiency of its management and standards of care is likely to be acceptable to a potential buyer of those services.

Facilitation Payments

Facilitation (or facilitating) payments—small payments to government officials to expedite an official act—are in some circumstances permitted under the US Foreign Corrupt Practices Act (FCPA), which is the equivalent American legislation.

The MoJ guidance has a slightly changed tone on facilitation payments from the earlier draft. Whilst emphasizing that they are not permitted, in contrast to the FCPA, the guidance states that the eradication of facilitation payments is a long-term objective. This echoes the comments of Vivian Robinson, QC, the general counsel of the Serious Fraud Office (SFO) when he spoke on a panel the author organized in London on 18 March 2011. Mr. Robinson said then that no one would expect facilitation payments to stop overnight. The MoJ's guidance also appears to build on Mr. Robinson's comments at the London meeting that duress would be a factor taken into account when considering prosecutions for making facilitation payments. The MoJ guidance says: "It is recognised that there are circumstances in which 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 is very likely to be available in such circumstances."

Associated Persons

Another area of special difficulty for multinational corporations has been the fact that a corporation can be liable under Section 7 of the Act if a person "associated" with it bribes another person intending to obtain or retain business or a business advantage for the organization. The definition of who is an associated person is deliberately wide. The investigatory firm [Control Risks](#) has called associated persons "the single most important risk companies need to manage" and has said that the major corruption cases in recent years have involved bribes paid by third parties such as commercial agents.

The MoJ guidance makes it clear that an associated person can be an individual, or an incorporated or unincorporated body. The capacity in which a person performs services for and on behalf of the organization does not matter, so employees, agents and subsidiaries will be included. At the 18 March 2011 London event, Mr. Robinson also felt that the definition was wide enough to include an obligation on franchisors to ensure that their franchisees comply. The MoJ guidance would seem to confirm that: "this broad scope means that contractors could be 'associated' persons to the extent that they are performing services for or on behalf of a commercial organization. Also, where a supplier 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."

The MoJ guidance does however seem to give more comfort than was previously thought: saying that—where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of subcontractors—an organization is unlikely to be prosecuted for failure to exercise control over those further down the chain than its own contractual reach. This means that a prime contractor will be liable for the acts of his subcontractors but not his subcontractors' subcontractors. The contractor would still need to explain its anti-bribery policy to those it contracts with and also ask them to pass compliance obligations down the chain.

What Are the Prosecutors Thinking?

It is important to note that unlike the Department of Justice in the United States, the MoJ does not have the ability to prosecute offenses under the new Bribery Act. The majority of the prosecutions will be brought by the Serious Fraud Office, which has been heavily involved to this point in explaining to businesses how their new powers are likely to be exercised. At the London event, Mr. Robinson confirmed that the SFO would look to examine each case on its facts. The prosecutors'

guidelines reinforce this, saying that "The Act is not intended to penalize ethically run companies that encounter an isolated incident of bribery." Prosecutors will employ a two-step test:

1. Is there sufficient evidence to provide a realistic prospect of conviction?
2. If so, is prosecution in the public interest?

For the SFO, the two main factors that are likely to influence whether or not a prosecution is in the public interest are whether the company has adequate procedures in place and whether it self-reported the issue to the SFO.

The following factors also indicate that a prosecution under the Act will be more likely:

1. A conviction would bring a significant sentence.
2. Offenses are premeditated.
3. Offenses are committed in order to lead to more-serious offending.
4. Those involved are in positions of authority or trust and take advantage of that position.

Facilitation Payments

The prosecutors' guidelines also outline how their discretion should be issued when considering prosecutions for making facilitation payments. Factors likely to lead to prosecution include:

1. Large or repeated payments.
2. Facilitation payments that are planned for or accepted as part of a standard way of conducting business.
3. Payments that indicate an element of active corruption of the official in the way the offense was committed.
4. Whether a commercial organization has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these procedures have not been correctly followed.

It is this final factor which is likely to cause the most concern to companies that have made the effort to implement clear policies that have failed. However, the guidelines clarify that a single, small payment is likely to result in only a nominal penalty. In addition, the SFO will also take into account self-reporting, the clarity of any policy in place and whether the payer was in a vulnerable position when a payment was sought.

Hospitality

The prosecutorial guidance also reinforces the MoJ guidance on hospitality. The guidelines state that the cost of the hospitality is only one factor, but little additional guidance is provided.

What Steps Should Businesses Consider Taking Now?

It is apparent that businesses should consider undertaking a thorough program of compliance with the new legislation, given the possibility of sanctions that include up to 10 years in prison. For most organizations, the period up to 1 July 2011 could be used efficiently to begin implementing at least the following five steps:

1. The review of any existing ethics code, FCPA code or the like, to check its compliance with the UK legislation.
2. Communicating to employees what is expected of them. This would extend beyond people employed by a UK company or a UK subsidiary. It would also include those negotiating contracts in the UK and UK nationals employed by the organization wherever they work.
3. Companies should consider embedding compliance programs in subsidiaries, whether wholly owned or not. For most organizations, this would likely involve a structured program of board meetings of subsidiary entities, with the new Bribery Act as an agenda item. They may also want to send a briefing note to all of the directors of the relevant subsidiaries beforehand, explaining their responsibilities and instructing them to develop an action plan to deal with the new law.
4. A specific training session for affected employees. This might coincide with training the organization has already completed; for example, under the FCPA, showing again any online materials that are not inconsistent with the new UK legislation. Over time, corporations can build on this initial training, incorporating the MoJ's guidance.
5. A review of "associated persons." The Bribery Act imposes obligations on a company to do due diligence on those with whom it does business. This would include consultants, agents, suppliers and others—for example, a franchisor may want to check compliance at its franchisees.

Businesses now have a clear date to aim for with their compliance efforts. The deadlines are short, but given that the Act will be over a year old by the time it has come into force, most businesses will have done the groundwork already. The mood music from the prosecutors is that organizations have no excuse for not starting on their compliance efforts, although they may get some leniency if their efforts are not complete by the time an incident takes place.

Mr. Clarke's announcement, and the publication of the Prosecutorial Guidelines, firmly puts an end to rumors that the Act would be changed. There was never any substance in these rumors. At best, they were wishful thinking or ill-informed speculation from those who had not followed the long and winding passage of the legislation. The Act is a clear call to action for businesses large and small. They ignore it at their peril.

For Further Information

If you have any questions about the UK Bribery Act or would like more information about this *Alert*, please contact the author [Jonathan P. Armstrong](#), [Jeffrey V. Rodwell](#) or [Jonathan Cohen](#) in our London office; [George D. Niespolo](#) in our San Francisco office; [Marvin G. Pickholz](#) or [Mauro M. Wolfe](#) in our New York office; [Richard A. Silfen](#) in our Philadelphia office; [Joseph J. Aronica](#) in our Washington, D.C. office; any member of the [White-Collar Criminal Law Practice Group](#); any member of the [Corporate Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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