

## WSGR ALERT

APRIL 2011

# THE UNITED KINGDOM'S LONG-AWAITED ANTI-BRIBERY LAW WILL COME INTO FORCE ON JULY 1, 2011

## *The Ministry of Justice and the Directors of the Serious Fraud Office and Office of Public Prosecutions Release Guidance Intended to Explain the Application of the Anti-Bribery Law*

Twelve years ago, the United Kingdom ratified the Organisation for Economic Co-operation and Development's (OECD's) Anti-Bribery Convention. Since that time, the UK has been widely criticized for its lax efforts at combating commercial bribery, including its failure to enact implementing legislation. In response, on April 8, 2010, the UK enacted a far-reaching anti-bribery statute, the Bribery Act 2010, which applies broadly to companies or partnerships incorporated in, or with business activities in, the UK, as well as to UK nationals and residents.

The Bribery Act originally was scheduled to become effective in October 2010 but, after a series of delays, on March 30, 2011, the Ministry of Justice issued its long-anticipated "Bribery Act 2010: Guidance" and announced that the act now will take effect on July 1, 2011. As provided by Section 9 of the act, the Bribery Act Guidance addresses "procedures which 'relevant commercial organisations' can put into place to prevent persons associated with them from bribing." At the same time, the UK's authorities responsible for enforcing the Bribery Act issued a separate document entitled "Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions," which outlines the factors UK prosecutors should consider in deciding whether to bring charges under the act. While neither the Bribery Act Guidance nor the Prosecution Guidance

amends or modifies the statute, together they provide some insight into how British prosecutors will interpret the act and apply their prosecutorial discretion in deciding what cases to pursue. Both guidance documents suggest that prosecutorial decisions will be impacted by a commercial entity's implementation of robust compliance programs, as well as self-reporting and cooperation by companies and individuals with government investigations.

Though similar in a number of respects to its U.S. counterpart, the U.S. Foreign Corrupt Practices Act (FCPA), the Bribery Act potentially casts a wider net in terms of the persons and entities that may be subject to the act and the conduct that may constitute a violation. The anti-bribery provisions of the FCPA make it unlawful for any issuer; domestic concern; or their officers, directors, employees, or agents; or any other person while in the United States to offer anything of value to officials of a foreign government, public international organization, or foreign political party for the purpose of: (1) improperly influencing the performance of their official duties; (2) inducing them to use their influence to affect a foreign government's or agency's decision; (3) obtaining or retaining business for anyone; or (4) directing business to anyone. The Bribery Act is broader in its scope than the FCPA, which is only directed at bribery of foreign officials. The Bribery Act makes it an offense to receive a bribe; criminalizes the

bribery of private individuals and companies; and provides strict liability for organizations that fail to prevent the payment of bribes by "associated persons," such as employees, agents, or contractors. (Of course, other U.S. laws could reach some of these forms of corruption as well and arguably in recent years the U.S. government has held corporations strictly liable for bribery committed by its employees and agents.)

Like the FCPA, the Bribery Act provides for extraterritorial jurisdiction, which applies to UK individuals or organizations regardless of where the conduct occurs. However, unlike the FCPA, the Bribery Act also applies broadly to non-UK individuals or organizations that carry on "a business, or part of a business, in any part of the United Kingdom." Significantly, no part of the offense need take place in the UK, as long as a person committing the offense has a "close connection" to the United Kingdom.

What should companies that carry on business in the UK do to prepare for the imminent enforcement of the act that has been termed "the FCPA on steroids?" Such companies should ensure that their corporate compliance programs cover the expansive scope of conduct covered by the act and, as discussed below, are informed by the principles the UK Ministry of Justice has espoused as fundamental to robust anti-bribery programs.

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## The Bribery Act Provides for Broad Jurisdiction, Prohibition of Expansive Forms of Corruption, and Stiff Penalties

### Overview

The Bribery Act creates four separate criminal offenses; the first two criminalize offering or paying, or requesting or receiving, a bribe in connection with public, commercial, or non-commercial functions or activities; the third prohibits offering or paying a bribe to a foreign public official; and the fourth criminalizes the failure of an organization to prevent bribery.

The penalties for violating the Bribery Act are severe. The maximum penalty for individuals is 10 years imprisonment and/or a fine. Corporations face unlimited fines. In addition, violation of the act may result in damaging collateral consequences for a company, such as director disqualification, ineligibility for public contracts, and asset confiscation.

### Offenses under the Bribery Act

#### *Sections 1 & 2—Offering or Accepting a Bribe*

Section 1 of the Bribery Act prohibits “active bribery,” that is, offering, promising, or giving a financial or other advantage, directly or indirectly, to another person to bring about or reward the improper performance by that person or someone else of a relevant function or activity; or where the offeror knows that the acceptance of the advantage by the other person is itself the improper performance of a function or activity.

Section 2 of the act prohibits “passive bribery,” that is, requesting, agreeing to receive, or accepting a financial or other advantage where the requestor intends that a relevant function or activity should be performed improperly by the requestor or another person; or where the request, agreement, or receipt of a financial or other advantage itself constitutes the improper performance of a function by the requestor or is a reward for the improper performance of a

function by the requestor or another person; or where the improper performance of a function by the requestor or another person is in anticipation of, or results from, the receipt of a financial or other advantage.

Simply put, under Sections 1 and 2 of the Bribery Act, it is a criminal offense to offer, pay, request, or accept any financial or other advantage in connection with the improper performance of a relevant function or activity. A “relevant function or activity” is one that is expected to be performed in good faith, with impartiality, or is performed by one who is in a position of trust. It is defined to include public functions as well as functions connected with business or in the course of employment. In addition, it also includes functions performed on behalf of any “body of persons,” whether incorporated or otherwise. Thus, the act applies not only to bribes made in connection with formal or informal business arrangements, but also those connected with non-commercial activities, such as the operations of charitable organizations. The relevant function or activity need not have any connection to the UK, and may have been performed outside the UK.

#### *Section 6—Bribing a Foreign Public Official*

Section 6 prohibits directly or indirectly offering, promising, or giving a financial or other advantage to a foreign public official or, at the foreign official's request, to another person to influence the official in the performance of his or her official functions with the intent to obtain or retain business or an advantage in the conduct of business.

Like the FCPA, the term “foreign public official” is broadly defined in the act and includes elected and appointed officials holding legislative, administrative, or judicial positions of any kind in a country or territory outside the UK. It also includes any person who performs public functions in any branch of the national, local, or municipal government, or who is an official of a “public international organization.”

Unlike the offenses in Sections 1 and 2, the offense of bribing a foreign public official does not require proof of the improper performance of a relevant function or activity—it simply requires proof of the illicit offer or payment and the offeror's unlawful intent.

#### *Section 7—Failure of a Commercial Organization to Prevent Bribery*

In a provision unique to the Bribery Act, Section 7 criminalizes the failure by a relevant commercial organization to prevent bribery where a person “associated” with the organization bribes another person to obtain or retain business or an advantage in the conduct of business for the organization. If the associated person would be liable under Sections 1 or 6 (bribery of another person or bribery of a foreign public official), then the commercial organization may be liable under Section 7, so long as the bribe was made for the benefit of the organization.

It is an affirmative defense to a Section 7 violation that the organization had in place “adequate procedures” to prevent bribery. The Bribery Act Guidance issued by the Ministry of Justice is intended to address such procedures.

### Jurisdiction

Under Section 12 of the Bribery Act, UK courts will have jurisdiction over violations of Sections 1, 2, and 6 if these violations are committed within the UK. In addition, the UK courts will have jurisdiction over such offenses if committed outside the UK where all of the other elements are met and the violation was committed by a “person [who] has a close connection with the United Kingdom.” A person has a “close connection” with the UK if they are a British citizen or national, are ordinarily resident in the UK, or are a “body” incorporated under the law of any part of the UK, or a Scottish partnership.

With respect to Section 7, the UK courts will have jurisdiction over offenses wherever committed. Section 12 provides that “an

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offence is committed . . . irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere." This grant of extraterritorial jurisdiction is linked to the definition of "relevant commercial organization," the entity that may be prosecuted under Section 7 for failing to prevent bribery by an associated person. A "relevant commercial organization" is one that is incorporated or formed under the laws of the UK, or any other corporate entity or partnership, wherever incorporated or formed, that "carries on a business, or part of a business, in the UK."

## **The Bribery Act Guidance and Prosecution Guidance Shed Some Light on What Companies Must Do to Ensure Compliance with the Act**

### ***Overview***

On its face, the Bribery Act enacts the toughest anti-corruption regime in any jurisdiction. Companies doing business in the UK have been particularly concerned about the potential for criminal liability if they fail to prevent bribery by an "associated person." The Bribery Act Guidance is intended to clarify how companies can adopt adequate procedures to prevent bribery (and thereby meet the Section 7 affirmative defense). While useful, the guidance is just that. It neither modifies nor amends the statute.

The Bribery Act Guidance is divided into three parts. The first part outlines Sections 1, 6, and 7 of the act, and discusses certain perspectives regarding its enforcement. The second section sets forth six principles that companies should consider in developing procedures to prevent bribery. The Bribery Act Guidance makes clear that the six principles are not prescriptive in nature, that appropriate policies and procedures will vary from company to company, and recommends a risk-based approach to implementing compliance programs. Finally, the third section (Appendix A) provides a series of case studies that are intended to illustrate the procedures companies may adopt in order to

prevent "associated persons" from committing bribery.

In the separate Prosecution Guidance, also issued on March 30, 2011, the Director of the Serious Fraud Office and the Director of Public Prosecutions outline certain factors that prosecutors should consider in deciding whether to bring charges under the Bribery Act. In England and Wales, the director of either agency must personally approve every prosecution brought under the act. The directors and prosecutors will engage in a two-part test to determine if a case should be charged: "whether there is sufficient evidence to provide a realistic prospect of conviction, and if so, whether a prosecution is in the public interest."

### ***Key Issues Addressed by the Guidance Documents***

#### *Hospitality and Facilitation Payments*

Two areas of perennial concern for businesses in connection with anti-corruption statutes are hospitality (often referred to as travel and entertainment) and facilitation payments. Facilitation payments, sometimes called "grease payments," are small payments to a public official to facilitate routine government action.

Notably, while facilitation payments are an exception to the FCPA's prohibitions (albeit one that should not be relied on without careful consideration) and the FCPA includes an affirmative defense for bona fide expenses (such as travel and entertainment) associated with either the promotion, demonstration, or explanation of the company's products or services or the execution or performance of a contract with the foreign government, the Bribery Act recognizes no such exceptions. Accordingly, if the other elements of the Bribery Act are met, hospitality and facilitation payments are prohibited and may be prosecuted under Sections 1 or 6, depending on the facts and circumstances.

So, does this mean that companies that have adopted compliance programs framed around

the FCPA now must change their policies and procedures around facilitation payments and hospitality to accommodate the Bribery Act? Not necessarily. The Bribery Act Guidance states that the UK does not intend to prohibit legitimate and proportionate hospitality or other similar business expenditures intended to promote a commercial enterprise and its products or services. The Bribery Act Guidance makes clear, however, that excessive, disproportionate, or unnecessary hospitality, promotional, or other similar business expenditures may violate the law. In considering whether the hospitality expense amounts to a prohibited bribe, the Serious Fraud Office will look to the circumstances surrounding the expense. The more lavish the hospitality, the more likely it was intended to encourage an improper action. In addition, where the hospitality bears no clear connection to the company's legitimate business or is concealed, the more likely the expense will be considered a violation of the act.

To constitute an unlawful bribe to a foreign public official under Section 6 of the act, "there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage." Interestingly, the Bribery Act Guidance notes that some travel expenses may not be considered "a financial or other advantage" to the official because his or her government otherwise would have borne that cost. It is likely, however, that lavish expenditures would not be paid for by the foreign government, and therefore would violate the act. The Bribery Act Guidance also suggests that reasonable hospitality to the spouse or partner of a foreign public official may not violate the act. Again, the facts and circumstances will be key to determining whether the expense violates the act. Thus, while paying for travel and entertainment for a foreign official and her spouse in connection with a product demonstration at a plant in Paris may be considered a reasonable business expense, paying for a foreign official and her spouse to travel to and attend a dinner in Paris when there is no other

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legitimate business-related connection to Paris may not.

The Bribery Act Guidance makes evident that facilitation payments are prohibited without exception. Despite this, the Bribery Act Guidance suggests that prosecutors will be permitted to use their discretion in deciding whether to prosecute small facilitation payments. The Bribery Act Guidance states that the more serious the offense and the greater the public interest, the more likely it is that the offense will be prosecuted. Finally, the Bribery Act Guidance recognizes that where individuals are forced to make a facilitation payment in order to prevent "loss of life, limb or liberty," the common law defense of duress likely will apply. For its part, the Prosecution Guidance hints at factors that will impact prosecutorial discretion. Factors that counsel in favor of prosecuting facilitation payments include: large or repeated payments that are likely to result in a significant sentence; facilitation payments that are part of a standard means of conducting business suggesting premeditation; payments and conduct that evince the active corruption of a foreign official; or where an individual fails to follow appropriate company compliance guidelines on how to handle requests for facilitation payments. Factors that counsel against prosecution include: a single small payment that is likely to carry an insignificant sentence; payments that were revealed as a result of genuine proactive measures involving self-reporting and remedial action; where a company has clear, appropriate guidelines on how individuals should respond to requests for facilitation payments; or where payment was made by one in a vulnerable position.

Because the Bribery Act prohibits facilitation payments while the FCPA provides an exception for such payments, companies doing business in the UK and the U.S. must develop clear guidelines for their employees, agents, contractors, and others that outline whether and under what circumstances facilitation payments will be permitted, if at

all, and what documentation will be required in the event such payments are made. Despite the Bribery Act's blanket prohibition on facilitation payments, the guidance documents suggest that compliance programs that permit facilitation payments only in compliance with local law, in clear emergency situations where payment is required to secure the safety of individuals or property, and that provide clear guidelines on how employees must handle requests for facilitation payments in such circumstances should pass muster under the act.

### Gifts

Neither the Bribery Act nor the Bribery Act Guidance specifically addresses the issue of gifts to public officials or private persons. The act provides that the offer, promise, or gift of *any* financial or other advantage when made to induce the improper performance of a relevant function or activity, or in the case of a foreign public official, to influence the official in his or her official capacity and to obtain or retain business or a business advantage, violates Sections 1 and 6, respectively, and potentially Section 7. There is no *de minimis* exception for gifts (or hospitality). However, to constitute an unlawful bribe, a gift must be made with the necessary illicit intent. Moreover, in determining whether a gift was intended as a bribe, the UK authorities likely will look to the circumstances of the gift under the "common sense approach" referred to in the guidance documents.

Although it specifically discusses hospitality rather than gifts, Case Study 4 of the Bribery Act Guidance suggests procedures and policies that could extend to gifts. The case study addresses a hypothetical scenario in which an engineering firm provides regular hospitality for governmental and private business partners. The Bribery Act Guidance indicates that where the organization provides hospitality, travel, and lodging for foreign officials, the organization should consider: conducting a bribery risk assessment; publishing a policy statement

"committing [the organization] to transparent, proportionate, reasonable and bona fide hospitality and promotional expenses"; issuing internal guidelines for company personnel; regularly monitoring, reviewing, and evaluating internal procedures and compliance; and appropriately training and supervising staff. The internal guidelines should make certain that the procedures related to hospitality and gifts are designed to ensure transparency and compliance with relevant laws; that the purpose of the expenditure is to generate good will and promote the company and its products and services; that the recipient is made aware that he or she is under no *quid pro quo* obligation to the company; that criteria are set for determining what expenditures are appropriate under varying circumstances; that necessary approvals by any relevant public entities and, under appropriate circumstances, by senior-level company personnel are obtained; and that expenditures are accurately documented.

The takeaway from the case study is that hospitality or promotional expenses—and, by extension, gifts—should not run afoul of the act where the expenditure is proportionate, reasonable, and for bona fide promotional or other legitimate business purposes; the expenditure is transparent internally and externally and all necessary approvals have been given; and it is made clear to the recipient that neither does the organization expect, nor is the recipient under any obligation to provide, business or any business advantage to the organization.

### Liability under Section 7—Failure of Relevant Commercial Organizations to Prevent Bribery

As noted above, Section 7's imposition of liability on a company for failure to prevent bribery has perhaps caused the most trepidation within the business community. It is a complete defense to a charge under Section 7 if an organization can show that, despite bribery by an "associated person," the organization had adequate procedures in place to prevent persons associated with it

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from engaging in bribery. As both the Bribery Act Guidance and the Prosecution Guidance note, whether the procedures were adequate is a question to be determined by the courts.

The Prosecution Guidance directs prosecutors to consider the strength of the defense's case and the evidence that would support the defense in order to determine the likelihood of a conviction. Prosecutors are further directed to consider all the facts and circumstances and to be aware that a single incident of bribery does not necessarily mean that the procedures were inadequate.

### Associated Persons

An "associated person" is defined as an individual, or an incorporated or unincorporated body that "performs services" for or on behalf of the organization. An associated person may be an employee, agent, or contractor. The Bribery Act Guidance provides that whether a particular person or entity was performing services on behalf of the organization is to be considered in light of all of the facts and circumstances. While an employee acting in the scope of his or her employment will almost invariably be considered an associated person, the question becomes much more difficult to answer when applied to agents or contractors. The Bribery Act Guidance notes that where contractors or suppliers perform services on behalf of a company, they will likely be associated persons. The Bribery Act Guidance also notes that where the company does not exercise control over remote entities in the supply chain, such entities are likely not performing services on behalf of the company, but the guidance seemingly leaves open the possibility that such remote entities could still be deemed associated persons, suggesting instead that organizations should implement anti-bribery procedures such as requiring certifications and sub-certifications along their supply chain and conducting risk-based due diligence. In practice, this may prove to be very difficult. Even where a company includes contractual provisions with its business partners requiring that the business partners obtain certifications from

their suppliers, in practice the company will face difficulty enforcing such provisions, let alone be able to conduct due diligence on remote suppliers or enforce audit rights or other mechanisms to police their actions.

The Bribery Act Guidance offers some deference to joint ventures, noting that in the case of joint ventures operating through a separate legal entity, the "existence of a joint venture entity will not of itself mean that it is 'associated' with any of its members." But members of a joint venture face liability for bribes paid by the joint venture that are intended to benefit that member. On the other hand, if a member only indirectly benefits from the bribe simply by virtue of its investment in the joint venture, liability should not extend to that member. With regard to joint ventures created by contractual relationships, the degree of control is a key consideration in determining whether a person who pays a bribe is performing services on behalf of a participant in the joint venture. All participants in a joint venture should not face liability where an employee or agent pays a bribe intended only to benefit a particular participant in a joint venture. Conversely, if the circumstances suggest the employee is acting for the benefit of the joint venture as a whole, liability could extend to all participants.

Further, the Bribery Act Guidance provides that an organization may not be liable even if an agent, subsidiary, or person acting for a member of the joint venture was performing services for the organization, if the bribe was not paid to benefit that organization. The Bribery Act Guidance states that the "fact that an organization benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence." Likewise, a bribe offered or paid on behalf of a subsidiary will not automatically result in liability for the parent, unless the bribe was offered or paid to benefit the parent. Accordingly, the Bribery Act Guidance provides that corporate ownership or investment does not impose liability upon the parent, even if it indirectly benefits from the bribe.

The Bribery Act Guidance does not specifically address whether, upon gaining knowledge of the bribe, the parent may continue to indirectly benefit from the bribe without facing liability. Similarly, neither the Bribery Act Guidance nor the Prosecution Guidance address whether liability will extend to acquirers who indirectly benefit from bribes paid by a target prior to the acquisition, particularly if such bribes are discovered during pre-acquisition due diligence and the benefit will continue after the closing. But surely an acquirer will be on the hook if the bribes continue post-closing, are accomplished by an associated person, and the facts show the bribes are intended to benefit the post-acquisition entity.

### Implementing Adequate Procedures to Prevent Bribery: The Six Principles

The Bribery Act Guidance outlines six principles that should inform the procedures and policies implemented by commercial organizations to prevent bribery by associated persons. Each of the principles is followed by commentary and a discussion of the procedures that the organization may implement, based on its analysis of its own bribery risks. Case studies are then provided to illustrate how the principles may be implemented in particular circumstances.

The six principles are: (1) **proportionality**—the actions the organization takes should be proportionate to the risk it faces based on the size of its business and exposure to markets in which bribery is prevalent; (2) **top-level commitment**—that those at the top of an organization are in the best position to instill an understanding within the organization that bribery is unacceptable; (3) **risk assessment**—assessing the risk of bribery the organization faces based on the people with whom the organization interacts and the markets in which the organization operates; (4) **due diligence**—knowing the character and work history of those with whom the organization deals but asking questions and conducting background checks; (5) **communication**—communicating the organization's anti-bribery policies and

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procedures to staff and to others who will perform services for the organization; and (6) **monitoring and review**—engaging in ongoing assessment of the organization's anti-bribery risks and procedures and updating as necessary.

That these principles are not prescriptive and are intended to promote flexible, outcome-focused compliance initiatives is repeated throughout the Bribery Act Guidance. Consequently, those looking for clear answers on how to address the practical, knotty issues and questions that companies routinely face—i.e., How much due diligence is enough? Which agents should be trained on anti-corruption laws? What gift thresholds should be set? What nature of controls and reporting systems must be implemented to ensure that hospitality does not run afoul of the act?—will not find them here. Instead, the Bribery Act Guidance broadly proclaims that anti-bribery programs and procedures should be proportionate to the bribery risks the organization faces as well as the nature, scale, complexity, and locations of the commercial organization's activities. While the Bribery Act Guidance certainly provides some clarity as to the intended scope and application of the act, the actual enforcement initiatives and priorities that will be advanced by the Serious Fraud Office as well as the courts' interpretation of this expansive anti-corruption law remain yet to be seen.

## Additional Information

Links to the full text of the Bribery Act Guidance, the Prosecution Guidance, and the Ministry of Justice's "Quick Start Guide" on how to prepare for implementation of the act are below:

<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>

<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-quick-start-guide.pdf>

<http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>

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