

# Global Regulatory Enforcement Alert

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## The Bribery Act 2010 – Adequate Procedures Guidance

After some delay, the Ministry of Justice has today, 30 March 2011, published its guidance (<http://www.justice.gov.uk/guidance/bribery.htm>) to the Bribery Act 2010 ("the Act") which will enter into force on 1 July 2011. The guidance sets out what procedures a commercial organisation should adopt to prevent persons associated with it from bribing.

The guidance will no doubt get a mixed reception. Many commercial organisations are likely to regard it as still unclear about how they can avoid liability. In any event, it is not prescriptive and, as indicated in the Consultation Document previously issued by the Ministry of Justice in September 2010, it is designed to complement, not replace, other forms of published guidance.

Whilst organisations may welcome the commentary provided in the guidance about the scope of the Act, the legal force of this commentary is questionable. The guidance does not create its own obligations or impose any limitations on obligations created by the Act. As the guidance makes clear, the courts are the final arbiters of what the Act means.

### What part of the Act does the guidance relate to?

Please see our previous Alert (<http://reedsmithupdate.com/ve/ZZQji649278Wjbm69j>) for general background about the Act.

As indicated, the Act sets out four offences:

- Offering, promising or giving a bribe
- Requesting, agreeing to receive, or accepting a bribe
- Bribing a foreign public official
- Failure of a commercial organisation to prevent bribery ("the Corporate Offence")

A commercial organisation will be guilty of the Corporate Offence where it fails to prevent an "associated" person from bribing another person with the intention of obtaining business, or an advantage in the conduct of business, for that commercial organisation. The organisation will have a defence to the Corporate Offence if it can show that it had in place "adequate procedures" designed to prevent bribery.

The Act required the Government to publish guidance about procedures that commercial organisations could put in place to prevent persons associated with them from bribing. This is the guidance which has now been published after a period of consultation.

### What procedures does the guidance refer to?

The guidance sets out six principles which should inform the thinking of commercial organisations wishing to prevent bribery being committed on their behalf. These principles are not prescriptive but are said to be flexible and outcome-focused, and should be interpreted proportionately to the level of bribery risk faced by the commercial organisation. Each principle includes commentary, and there are case studies dealing with the application of each principle (although these do not form part of the guidance provided under the Act).

Lord Chancellor and Secretary of State for Justice Kenneth Clarke said in his statement on the publication of the guidance that, "*The guidance does not and cannot change the substance of the Act. But by improving clarity about its intentions, it should arm organisations of all sizes against the fears that millions of pounds must be spent on procedures, that in my opinion, no honest business will require.*"

The principles are:

- **Principle 1 - Proportionate Procedures:** procedures should be proportionate to the bribery risks faced, and to the nature, scale and complexity of the commercial organisation's activities. They should be clear, practical, accessible, effectively implemented and enforced. The Secretary of State stated, "*The guidance also explains that the procedures that need to be put in place to rely on the statutory defence only have to be proportionate to the size and*

*nature of the business. Modest risks require modest procedures to mitigate them.”*

- **Principle 2 - Top Level Commitment:** top level management should be committed to preventing bribery and foster a culture in which bribery is unacceptable. That commitment should include communication of the organisation’s anti-bribery stance and involvement in developing anti-bribery procedures.
- **Principle 3 - Risk Assessment:** there needs to be an assessment of the nature of the extent of exposure to potential external and internal risks of bribery which is periodic, informed and documented. Commonly encountered external risks are categorised into five groups: country risk, sectoral risk, transaction risk, business opportunity risk, and business partnership risk.
- **Principle 4 - Due Diligence:** proportionate and risk-based due diligence should be carried out on persons providing services to the organisation.
- **Principle 5 - Communication (including training):** through internal and external communication and training, anti-bribery policies should become embedded within the organisation proportionate to the risks it faces.
- **Principle 6 - Monitoring and Review:** procedures to prevent bribery should be monitored and reviewed, and improvements made as necessary.

### Comments on the interpretation of the Act

In addition to these six principles, the guidance sets out Government policy on aspects of the Act. The status of this commentary is unclear. The Act only refers to guidance about adequate procedures and not to this kind of commentary. As stated above, the guidance makes clear throughout that the courts will be the final arbiters as to the meaning of the Act.

The commentary covers the following:

- **Hospitality:** the guidance includes commentary on the test to be applied to hospitality and provides specific examples. For example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation’s field is said to be extremely unlikely to amount to an offence of offering, promising or giving a bribe.

For the purposes of an offence of bribing a foreign public official, in the absence of any further evidence, it is said that it is unlikely that incidental provision of a routine courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry (e.g., the provision of airport transfer services or dining and tickets to an event).

- **“Carries on a business”:** for the purposes of the definition of “relevant commercial organisation” for the Corporate Offence, the Government anticipates that organisations that do not have a demonstrable business presence in the UK would not be regarded as “carrying on a business” in the UK.

The Government would not expect that the mere fact that an organisation’s securities have been admitted to the UK Listing Authority’s Official List and therefore admitted to trading on the London Stock Exchange would, in itself, be sufficient to qualify that organisation as carrying on a business or part of a business in the UK.

Similarly, having a UK subsidiary will not, in itself, mean that a parent organisation is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

- **Associated person:** where a project is to be performed by a prime contractor with a series of sub-contractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain.

The extent to which members of a joint venture may be liable for the Corporate Offence is likely to depend on the form of the joint venture. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. A different situation applies where the joint venture is conducted through a contractual arrangement, in which case the degree of control that a participant has over the arrangement will be relevant.

The Corporate Offence will only be committed if the associated person intended to obtain or retain business or an advantage in the conduct of the business of the commercial organisation. The Government intends that, without proof of the required intention, a commercial organisation will not be liable simply because it obtained an indirect benefit through simple corporate

ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent.

- **Facilitation payments:** issues relating to the prosecution of facilitation payments are set out in the Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions ([http://www.cps.gov.uk/legal/a\\_to\\_c/bribery\\_act\\_2010/index.html](http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/index.html)).

The Justice Secretary also stated that, "A very important issue is the question of prosecutions. Cases will be brought where they are in the public interest, which will require the personal agreement of the Director of Public Prosecutions or the Director of the Serious Fraud Office. I do not expect a large number of prosecutions and certainly not for trivial cases."

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