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# Insight: White Collar

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# Bribery Act guidance: A common sense, risk-based approach

Further to our last client alert on the Bribery Act (click here to view), the government has published its long-awaited "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing" and has confirmed that the Act will now come into force on 1 July this year.

The government guidance (which has been materially revised from the draft published late last year and which has a wider scope than is suggested by its title), and the Joint Prosecution Guidance from the Serious Fraud Office (SFO) and the Director of Public Prosecutions were both published yesterday. They make clear that companies should adopt a risk-based and proportionate approach and address certain aspects of the Act that were identified by the business community as being of concern, namely:

- whether a non UK-based company will fall within the scope of the corporate offence merely by reason of a listing on the London Stock Exchange; and
- the boundaries of the corporate offence in respect of acts by suppliers, joint venture partners, subsidiaries and other third parties.

The guidance also addresses other areas of the Act, namely:

- the Act's application to typical corporate hospitality expenditure; and
- facilitation payments.

After both sets of guidance, unanswered questions concerning the scope and application of the Act remain to be addressed through the exercise of prosecutorial discretion and judicial decision, resulting in continuing uncertainty for businesses. We anticipate that the SFO will be looking to bring test cases soon after the Act comes into force on 1 July 2011. Accordingly, companies should use the next three months to review their procedures and culture in line with the six principles set forth in the guidance and discussed below.



## Our White Collar Group

An important trend in regulatory enforcement is the rapidly increasing cooperation among national and multi-national authorities. Regulators often pursue investigations simultaneously across multiple jurisdictions requiring companies to marshal national and transnational responses.

Our white collar group advises companies, financial institutions, and senior business and political figures on both domestic and international civil and criminal investigations and enforcement proceedings.

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## The corporate offence

The Act provides that a company will be guilty of failing to prevent bribery where a person associated with it bribes another person, intending to obtain or retain business or a business advantage for the company. A defence to this strict liability offence will only exist where the company in question has in place adequate systems and procedures to prevent bribery. The burden is on the company to prove that it had "adequate procedures" in place. The government guidance was published in order to provide greater detail on this offence and what exactly it means for a company to put in place such adequate systems and procedures. These are discussed below.

## Application to non UK businesses

The corporate offence applies to both UK and non UK-based businesses. Accordingly, if a foreign company carries on business or part of a business in the UK, that company could be criminally liable if it fails to prevent acts of bribery by its associated persons anywhere in the world. The government guidance only provides that, whether a company is carrying on a business in the UK, will be decided by applying a "common sense" approach. The government anticipates that applying this approach will mean that organisations that do not have a "demonstrable business presence" (undefined) in the UK will not be subject to the Act. The guidance also makes clear that it would not expect the mere fact that a company's securities have been listed in the UK and admitted to trading on the London Stock Exchange, in itself, to mean that company is deemed to be carrying on business in the UK. Equally, having a UK subsidiary will not, in itself, mean that a non UK parent company is carrying on a business in the UK. This clarification is not intended to be a "carve-out" from the Act. Ultimately, the courts will determine whether an organisation carries on business in the UK or not.

Whilst this guidance is of some use and may provide some comfort to non UK-based businesses it is vague and does not sit comfortably with the Serious Fraud Office's recent comments that it intends to take a broad view of what constitutes "carrying on a business" and that companies should not rely on technical arguments that they are outside the scope of the Act.

## Associated persons

The government guidance makes it clear that the concept of a person who performs services for or on behalf of a company is intended to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the company's behalf. In particular, the guidance focuses on when liability will extend to companies for the acts of its contractors, joint venture entities and subsidiaries:

### Suppliers and contractors

An entity which simply supplies goods, as opposed to services, is unlikely to fall within the definition of an "associated person". In relation to supply chains or a project involving a number of subcontractors, the guidance recognises that a company is, generally speaking, only able to exercise control over, and therefore should only be liable for, its immediate contractual counterparty.

### Joint ventures

A separate *joint venture entity* will not automatically be "associated" with its members. To that end, a bribe paid on behalf of the joint venture entity by one of its employees will not trigger liability for its members simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture. An employee or agent of a participant in a *joint venture agreement* will be presumed to be "associated" only with that participant (in the absence of evidence that they are acting on behalf of the contractual joint venture as a whole).

### Subsidiaries

Liability will not accrue through simple corporate ownership or investment or through the payment of dividends or provision of loans by a subsidiary to its parent. A parent company will only be liable in respect of a bribe by a subsidiary if the intention of the person making the bribe was to obtain an advantage for the parent company.

## Adequate procedures defence: guidance and practical response

### What the guidance does

The guidance sets out six principles for bribery prevention, together with a number of illustrative scenarios, in an aim to make statements of general applicability. It advocates a common sense and risk-based approach.

### What it does not do

The guidance is not overly prescriptive, indeed it uses vague concepts such as common sense and proportionality, and it does not impose direct obligations on businesses. Companies are therefore left to determine how to implement their own policies and procedures reflecting the six principles.

### Action required

Companies, either incorporated in the UK or carrying on business or part of a business in the UK, should take immediate steps to ensure that their anti-bribery procedures and policies adequately reflect the principles outlined in the guidance. These steps ought to include those outlined below.

| The guidance: The principles for bribery prevention | A practical response: What steps should companies take? |
|---|---|
| **Principle 1: Proportionate procedures**<br>Companies should ensure that their policies and procedures are proportionate to the risks faced by them and the nature, scale and complexity of their activities.<br>This principle underpins the remaining five principles, which are examples of how to implement "proportionate" procedures. | ■ Conduct a thorough risk assessment with external advisors.<br>■ Assess and review current policies to ensure they encompass liabilities and responsibilities under the Act (FCPA compliance is no longer enough) and the risks faced by the business. |
| **Principle 2: Top level commitment**<br>Companies should ensure that their top level of management are fully committed to preventing bribery by persons associated with them. | ■ Appoint a senior executive, who can directly report to the Board, to oversee the compliance programme.<br>■ The senior executive should communicate the company's anti-bribery stance and foster an anti-bribery culture.<br>■ "Bottom" up commitment is equally important. |
| **Principle 3: Risk assessment**<br>Companies should ensure that they fully assess both the nature and extent of their risks relating to bribery. | ■ Assess internal "hot spots" such as corporate hospitality; facilitation payments; political or charitable donations; lack of clear financial controls; and deficiencies in staff training.<br>■ Assess external "hot spots" in the industries and jurisdictions in which the business operates. By way of example, political unrest, relationships with public officials or state owned entities and joint venture partners. |
| **Principle 4: Due diligence**<br>Companies should have effective due diligence policies and procedures in respect of their associated persons. | ■ Review all relationships with third parties in order to determine which parties could be regarded as "associated persons" under the Act.<br>■ Review existing contracts and, where possible, introduce audit rights to ensure "associated persons" compliance with the Act.<br>■ Carefully assess potential partners' liability in future relationships including mergers and acquisitions and incorporate appropriate contractual safeguards. The extent of the assessment will depend upon the identity and location of the contracting party. |
| **Principle 5: Communication (including training)**<br>Companies should ensure that their bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication. | ■ Ensure that the relevant policies are provided to all personnel and, if appropriate, to "associated persons" at specific training sessions and that they are readily accessible on intranet sites.<br>■ Establish mandatory training to educate and inform employees (and, if appropriate, "associated persons") of the scope and application of the Act. |
| **Principle 6: Monitoring and review**<br>Companies should ensure that the policies and procedures are effectively monitored and improved where necessary. | ■ Ensure regular monitoring of the compliance programme by internal audit committees, finance teams, and external advisors.<br>■ Ensure that the finance, HR, and compliance teams are able to report any concerns and irregularities to senior management. |

## Facilitation payments

Both sets of guidance make clear that facilitation payments are illegal in the current anti-bribery regime and will remain so under the Act. However, recognising the prevalence of such payments, the Joint Prosecution Guidance sets out a number of public interest factors which will tend against prosecution. These include: where the company has clear procedures in place that ought to be followed, and were followed when facilitation payments were requested; and where the payment came to light as a result of a "genuinely proactive approach involving self-reporting and remedial action". Further, the government guidance refers to the eradication of facilitation payments as a "long term objective".

## Corporate hospitality

Both sets of guidance also address concerns raised by the business community as regards to hospitality. They adopt a common sense approach and explicitly recognise 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 an established and important part of doing business. More specifically, in relation to the offence of bribing a Foreign Public Official, they recognise that expenditure in the form of travel and accommodation costs may not amount to "a financial or other advantage" to the relevant official as it is a cost that would otherwise be borne by the relevant foreign government rather than the official.

Such a clear recognition of the legitimacy of corporate hospitality is welcomed, especially in light of the recent confused and misleading press commentary concerning the Act's impact on this area.

## Where do companies stand now?

The guidance clarifies, to a certain degree, some of the key areas of the Act, but relies on wide concepts to do so. The key message for companies is to adopt a common sense, risk- based and proportionate approach when considering their responsibilities under the Act. Nevertheless, the reliance on such concepts and the fact that many of the key aspects of the Act are left to prosecutorial or judicial discretion means that we will have to wait and see over the coming years before we can be certain of the true scope of the Act. The SFO is already making clear that, notwithstanding statements made in government guidance, it will adopt a broad and inclusive approach and will not accept "technical arguments" raised by those trying to find loop holes in the Act. Accordingly, both UK and non UK-based companies should act now and ensure that they have appropriate procedures in place.

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