



# GLOBAL riskupdate

The quarterly independent risk review for banks and financial institutions worldwide

APRIL 2011



## THE BRIBERY ACT 2010

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# THE BRIBERY ACT 2010

*John Horan, Director of CAML Global Limited, has contributed this article to address the principles of the long awaited UK Bribery Act and questions how British firms, worldwide, will adapt their business practices to conform to the mysteries of Sec 7 and the need for a risk-based approach.*

**Finally it has arrived! The much trumpeted Bribery Act 2010 will come into force on 1st of July 2011. After much angst and scaremongering it is with us. Additionally much of the rumours and bluntly falsehoods about it stifling business have also been laid to rest by the guidance issued by the UK Ministry of Justice.**

In his foreword to the guidance the British Secretary of State for Justice Kenneth Clarke says the legislation and its guidance is "...largely common sense...proportionality". He goes on to say "no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix". These are all things that Risk Reward's Financial Crime Team have been reminding clients of since the Act was first drafted. It is also nice to know that as a by product of entertaining clients you are actually practicing KYC (Know Your Customer) and thereby complying with the Money Laundering Regulations. Two birds with one stone!

The guidance is based on six guiding principles and emphasises it is not prescriptive nor designed to be one size fits all. Now I know that many of our clients prefer a prescriptive approach it takes the pain out of decision making. However I firmly agree with the non prescriptive approach as it allows your firm to tailor your policies and procedures to fit your business model and thereby minimise costs to you as a business. In this economic climate that has to be worth a little headache and pain.

## The six principles are

1. **Proportionate procedures**
2. **Top level commitment**
3. **Risk Assessment**
4. **Due diligence**
5. **Communication (including training)**
6. **Monitoring and review**

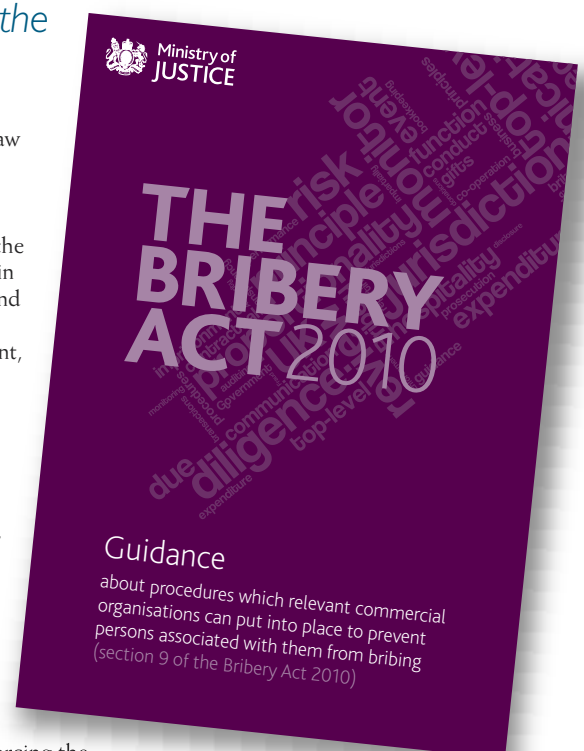
Not surprisingly with a non prescriptive approach in common with the Anti Money laundering legislation there is a need for a risk based approach. Consequently there is an ongoing need to monitor your procedures and business relationships as nothing is static.

The area which is causing considerable concern to most firms is the Section 7 offence of "Failure of commercial organisations to prevent bribery". It is this offence that the

regulators and the law enforcement community will undoubtedly focus their attentions on the basis that an easy win is a good win, a sound principle in any business environment, if not particularly helpful. Aon of course fell foul of this type of enforcement when the FSA levied a seven figure fine for failure to have proper procedures in place. Interestingly the guidance ensures that there can be "no two bites of the apple when enforcing the Bribery Act".

A significant worry was that having failed to secure a conviction on an offence under Sections 1-6 the prosecuting authority would revert to an offence under Section 7. This has been specifically vetoed in the guidance. Sounds good? Do not be so sure. If a possible prosecution under Section 1-6 seems to be less than a sure thing, the prosecutor may go for the potentially easier to prove Section 7, abandoning prosecution of an actual offender knowing that a failure in Section 1-6 negates any possibility of a Section 7 prosecution. The Section 7 offence as the first offence prosecuted does not require as a prerequisite conviction under Sections 1-6. It is a standalone offence. My advice is be careful. **Get your procedures right NOW.**

Another issue that concerns firms is the extra territorial nature of the legislation, there is a feeling that this is something completely new. In many ways of course it is. Strictly speaking the concept has been with us for some time. Travelling abroad for sex tourism is already an extra territorial offence under the UK Criminal Justice and Immigration Act 2008. As long ago as 1843 liberal politicians and others sought to extend the concept of extra territoriality abroad to areas where slavery on British owned property continued, the



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so called Brougham's Act. It met with limited success I have to say. Business interests and by extension the protection of profits was king then, the Cuban and Brazilian slave mining continued under a different guise.

In dealing with extra territoriality it has more than one dimension. United Kingdom courts have jurisdiction over Sections 1, 2, and 6 offences committed in the UK and offences committed outside the UK where the person committing them is a UK national or ordinarily resident in the UK. A very broad approach indeed. Naturally this extends to a corporate entity in the UK and a Scottish partnership. Seems simple enough?

**What is missing?** Yes you have guessed it good old Section 7. Again in dealing with extra territoriality we see how dangerous this section is. Unlike the other sections no close connection with the UK is necessary to commit this offence.

Provided conduct which amount to a bribery offence is committed by a person or entity outside the UK and the organisation committing the Section 7 offence is incorporated or formed in the UK, and here is the interesting bit or the organisation carries on a business or part of a business wherever incorporated an offence is committed. However yet again the guidance adopts the sound principle of calling for a common sense approach.

Another area causing considerable concern to businesses with an overseas dimension was the failure of government to exclude facilitation payments from the offences of bribery unlike the United States FCPA which does cover it. Here too the guidance goes some way to take the sting out of the legislation recognising cultural differences and the need on some occasions to make "facilitation

payments" to protect against loss of life etc. The defence of duress should come into play here and may prevent conviction if not necessarily prosecution. In all scenarios where bribery offences are alleged to have been committed prosecutorial discretion lies at the heart of the decision making process. The guidance also emphasises that part of that decision making process will be is the prosecution in the public interest. So if the bribe secures significant work or contracts for what is essentially UK plc does that make a difference? Just a thought.

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