



British Bankers' Association Releases Guidance on the UK Bribery Act 2010

Introduction

On 20 December 2011, the British Bankers' Association (the "BBA") released its guidance document (the "BBA Guidance")¹ for the banking sector on compliance with the UK Bribery Act 2010 (the "Act"). The BBA Guidance is aimed at assisting banks in establishing policies and procedures to combat bribery and corruption. Set out below are some of the key points arising out of the BBA Guidance. We also highlight some areas which it does not deal with as fully as may have been hoped.

Key Points in the BBA Guidance

The BBA Guidance contains the following key points concerning the Act:

1. **Guidance on principles 2 to 6 of the UK Ministry of Justice guidance document discussing procedures which organisations can put in place to prevent associated persons from bribing (the "MoJ Guidance")².** The BBA Guidance considers five of the six principles from the MoJ Guidance and provides some suggestions on the type of procedures and policies that banks could implement in relation to those principles. Although the suggestions in the BBA Guidance are unlikely to be new to legal and compliance officers, who should have already considered the effect of the Act and related policies and procedures, they will be useful in informing those who are updating or creating their policies and procedures. For example, in relation to principle 4 (due diligence) the BBA Guidance makes suggestions of the types of checks and controls that banks may want to have on associated persons before engaging them, and sets out examples of red flags to look out for when dealing with associated persons. These include where the associated person insists on operating anonymously; the associated person will not reveal its beneficial ownership; and inappropriate payment requests. The BBA Guidance also sets out examples of red flags in relation to principle 6 (monitoring and review). These include relocation of an agent to a high risk jurisdiction; requests for one-off payments; and use of non-standard invoices.
2. **Comparison with obligations imposed by the UK Financial Services Authority ("FSA").** The BBA Guidance makes the point that banks are also required by the FSA to address bribery risks. It recognises that the

¹ The BBA Guidance can be found at: <http://www.bba.org.uk/policy/article/bribery-act-2010-guidance-on-compliance/financial-crime/>

² Our update on the MoJ Guidance can be found at: <http://www.sidley.com/sidleyupdates/Detail.aspx?news=4780>

FSA can take action against an entity for failing to adequately address bribery and corruption risks. It also sets out some of the relevant FSA obligations:

*"The FSA's rules and Principles in SYSC 6.1.1R and PRIN 1, 2 and 3 apply to banks in relation to regulated activities carried on by a bank from an establishment in the UK. This includes corrupt transactions by anyone acting on the bank's behalf irrespective of where they are based. In relation to activities that might have a negative effect on confidence in the UK financial system, the fitness and propriety of the firm or its ability to meet financial resource requirements, SYSC 6.1.1R and PRIN 1, 2 and 3 apply in relation to activities wherever they are carried on."*³

3. **Guidance on gifts, corporate hospitality and promotional expenditure.** A key concern with the Act for the business community has been the possibility that a company could commit an offence as a result of the hospitality it provides in entertaining clients. Unfortunately, the BBA Guidance does not set out a detailed description of behaviour that it considers is likely to breach the Act. However, it does state that:

*"A bank is therefore unlikely to face prosecution for providing reasonable and proportionate levels of hospitality as part of competing fairly in the international arena."*⁴

The BBA Guidance suggests that the best way in which banks may protect themselves against infringing the Act as a result of their marketing activities, is to *"have in place clear written policies detailing the principles for giving and or receiving gifts, entertainment and hospitality."*⁵ It also suggests that any such policy requires a *"degree of common sense and flexibility."*⁶

4. **Guidance on incident management and reporting.** The BBA Guidance notes that, although not required by the Act, for reasons including FSA expectations, it would be a *"sensible precaution"* to have a policy on how to respond to bribery incidents. However, the BBA Guidance suggests that any policy should consider the need for external support, particularly *"given the risks to the organisation involved in the investigation process, it may be worthwhile taking legal advice at an early stage of the investigation by instructing external lawyers."*⁷
5. **Detailed summary of the relevant provisions of the Act and the six principles set out in the MoJ Guidance.** The BBA Guidance contains a good summary of the relevant provisions of the Act and the six principles set out in the MoJ Guidance. It also deals with some of the key concerns arising out of the Act such as the potential liability of parent companies, the risk of debarment following a conviction under the Act and the prohibition on facilitation payments.

What is missing?

Although the BBA Guidance provides some useful pointers, it arguably could have been more helpful in the following respects:

1. **More detailed guidance on corporate hospitality.** The BBA is well-placed to comment on "normal" corporate hospitality in the banking industry and the BBA Guidance would perhaps have been more useful had it set out examples of reasonable and unreasonable corporate hospitality. In addition, the BBA Guidance could perhaps have included some guidance on how banks should approach corporate hospitality in the context of the London Olympics, as many banks will be considering this issue over the coming months.

³ BBA Guidance, para 2.2.3

⁴ BBA Guidance, para 5.2.3

⁵ BBA Guidance, para 5.3.1

⁶ BBA Guidance, para 5.3.3

⁷ BBA Guidance, para 6.1.5

2. **More focus on case studies or examples specifically related to the banking industry.** Much of the BBA Guidance is very broadly drafted and many of the suggestions on policies and procedures that banks could implement are general suggestions not specifically related to the banking industry.

Conclusion

There has yet to be a publicised prosecution of a corporation under the Act. In a tough economic climate and with events such as the London Olympics coming up which will involve a significant amount of corporate hospitality, the release of the BBA Guidance is an additional reminder for those organisations that have yet to draft or update their anti-bribery policies and procedures that this should be done as soon as possible.

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