The Quoted
Companies Alliance

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Bribery Act Implementation Team
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9 November 2010

Dear Sirs,

Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)

INTRODUCTION

The Quoted Companies Alliance (QCA) is a not-for-profit membership organisation working for small and mid-cap quoted companies. Their individual market capitalisations tend to be below £500m.

The QCA is a founder member of European**Issuers**, which represents over 9,000 quoted companies in fourteen European countries.

The QCA Legal Committee has examined your proposals and advised on this response. A list of committee members is at Appendix A.

RESPONSE

We welcome the opportunity to respond to this consultation. As an organisation that represents small and mid-cap quoted companies and those aspiring to join a UK public market, we are primarily concerned with how the proposals in the paper affect this constituency. The QCA recognises the detrimental effects of unchecked bribery on the integrity of institutions, both public and private, and particularly the anti-developmental effects of endemic corruption in developing nations and is therefore broadly supportive of the aims of the Bribery Act 2010 (the "Act"). However, we do consider that it imposes requirements on affected companies which risks putting them at a competitive disadvantage compared to their international peers. We expect in future, in common with the experience of the United States, that some allowances will have to be made just to enable businesses to function (the obvious example being the payment of so-called "facilitation payments").

The QCA recognises the near impossibility of HM Government being able to provide definitive "adequate procedures" which will be appropriate to all organisations in all circumstances. However, as a general remark, we consider that the lack of clarity, and ability for 20/20 hindsight to trump good faith attempts to ensure good practice, to be jurisprudentially questionable in a criminal context. Similarly, the prosecutorial discretion back stop, when deciding whether a particular breach of the Act which has been uncovered and whether prosecution is in the public interest, may lead to insecurity and uncertainty and disproportionate risks being taken in securing compliance.

As a general observation in relation to the guidance paper, we think it would be more helpful if the examples provided in Annex B stated what procedures would be considered "adequate" or provided

examples of satisfactory (or minimum) procedures rather than (or as well as) the series of questions based on the principles provided.

As a final general remark on the Act's potential impact on the SME sector, we are concerned that, unless clearer compliance parameters are developed to assist implementation of adequate procedures, there is a risk of companies "burying their heads in the sand" and ignoring the problem because it is not clear what is expected of them. For those companies that address the issue and seek help from professional advisors, we expect that, without the benefit of clear guidelines, advisers will err of the side of advising a very cautious approach.

Question 1: Are there principles other than those set out in the draft guidance that are relevant and important to the formulation of bribery prevention in commercial organisations? If so what are they and why do you think they are important?

A key question for many quoted SMEs without a regular UK business is whether they are intended to be caught by section 7(5)(a) of the Act in the definition of "relevant commercial organisation" which is expressed to mean "any other body corporate [incorporated outside of the UK] (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom."

As you will be aware, there is a significant body of companies listed on the UK markets who are not incorporated in the UK and do not maintain their trading businesses in the UK. However, they may raise money on the markets here (and retain advisors to do so), use UK banks for lending, have resident directors (non-executive or executive) and English law agreements (and potentially jurisdiction for the English courts or London arbitration proceedings).

What will be considered carrying on a business or part of a business in the UK for these purposes? How much activity is required? Posting a letter? Appointing an agent for service of process? Maintaining a bank account? Raising money? Or actually having a trading business located here?

We consider that the application of the Act will act as a disincentive to such companies seeking to list in London. It may be considered that an unwillingness to accept the Act's standards makes the potential applicant unsuitable for listing in the UK, but a clarificatory statement would be beneficial for those companies considering using the UK capital markets. Further, for those professionals involved in bringing companies to market (and in particular AIM Nominated Advisers and PLUS Corporate Advisers (the equivalent for the PLUS-quoted market), responsible for confirming a company's suitability for listing), this needs to be made clear so they can develop and refine their due diligence procedures accordingly and the LSE and PLUS can make the appropriate refinements to their listing requirements. We anticipate that compliance in the Act may become something of a sticking point with advisers to a float. Without clear guidance, it will be difficult for anyone to sign off on adequacy.

Question 2: Are there any procedures other than those set out in the draft guidance that are relevant and important to a wide range of commercial organisations? If so what are they and why do you think they are important?

Although we recognise the "zero tolerance" policy in the Act is consistent with the aims of the Act, we are concerned that companies falling within its remit should not be obliged to expose their employees and representatives to risks to their personal safety or liberty or their property to illegal damage, seizure or retention.

Could you please clarify what the intention of the legislation is in relation to what liability would arise under the Act in the following examples, even if adequate procedures are not in place (procedures alone cannot avoid situations arising):

a) at a border control in Africa, a UK employee of a UK company travelling between two mines owned by the company is stopped by armed border guards and, although not required under the relevant laws, told that he must pay $100 to cross the border or spend the night in the guardhouse.

b) at the port, the company is told that unless a special payment, not authorised by applicable laws, of $5,000 is made immediately, their goods which have just arrived in port will be detained indefinitely.

While as a matter of prosecutorial discretion we would not expect that a person who pays an amount of money to an official in a developing nation on pain of spending time in unlawful detention or threatened damage to assets, or their employer, would be prosecuted, we would welcome commentary from the Ministry on such matters so that companies can build in health and safety and other suitable caveats to their anti-bribery policies and procedures. In effect, a clarification that the Act is not intended in itself to criminalise those who are the victims of extortion and similar threats.

Failure to allow such exceptions in extreme circumstances could lead to increased insurance issues, unwillingness to export or deal overseas with more challenging jurisdictions, an unwillingness on the part of employees to travel and a commensurate detrimental effect on businesses being developed abroad and the ability of the UK anti-bribery culture to be exported, embedded and monitored at local level.

Question 3: Are there any ways in which the format of the draft guidance could be improved in order to be of more assistance to commercial organisations in determining how to apply the guidance to their particular circumstances?

AND

Question 5: In what ways, if any, could the principles in the draft guidance be improved in order to provide more assistance to small and medium sized enterprises in preventing bribery on their behalf?

The principles as set out do not draw any distinction between larger and smaller and medium sized companies. Similarly, “adequate procedures” appears to be an absolute measure of effectiveness without reference to the size or resources available to the affected company. However, the guidance (in respect of principles 5 and 6) provides examples of how larger organisations might address compliance. This suggests that an element of proportionality is recognised but it is not addressed in the principles themselves. This could lead to some confusion in what is expected. Also there is no guidance on what the Ministry would consider to be a smaller or larger company for these purposes.

Given the pressure of resources available to SMEs and the disproportionate burden of compliance that can affect this sector, we would support some recognition of a general principle that adequate procedures take account of the resources available to such companies and that this will be a factor in considering their adequacy.

Yours faithfully,

Tim Ward
Chief Executive

APPENDIX A

QCA LEGAL COMMITTEE

Tom Shaw (Chairman)	-	Speechly Bircham LLP
Jai Bal	-	Farrer & Co LLP
Chris Barrett	-	Bird & Bird LLP
Richard Beavan	-	Boodle Hatfield
Matt Bonass	-	Denton Wilde Sapte LLP
Ross Bryson	-	Mishcon de Reya
Andrew Chadwick	-	Rooks Rider Solicitors
Jonathan Deverill	-	Stikeman Elliott LLP
Jeanette Gregson	-	Davenport Lyons
Carol Kilgore	-	Curtis, Mallet-Prevost, Colt & Mosle LLP
Philip Lamb	-	Lewis Silkin LLP
Alex Melrose	-	Rosenblatt Solicitors
Laura Nuttall*	-	McGrigors LLP
Chris Owen	-	Manches LLP
June Paddock	-	Fasken Martineau LLP
Donald Stewart	-	Faegre & Benson LLP
Gary Thorpe	-	Clyde & Co LLP
Tim Ward	-	The Quoted Companies Alliance
Kate Jalbert	-	The Quoted Companies Alliance

*Main Author

APPENDIX B

THE QUOTED COMPANIES ALLIANCE (QCA)

A not-for-profit organisation funded by its membership, the QCA represents the interests of small and mid-cap quoted companies, their advisors and investors. It was founded in 1992, originally known as CISCO.

The QCA is governed by an elected Executive Committee, and undertakes its work through a number of highly focussed, multi-disciplinary committees and working groups of members who concentrate on specific areas of concern, in particular:

- taxation
- legislation affecting small and mid-cap quoted companies
- corporate governance
- employee share schemes
- trading, settlement and custody of shares
- structure and regulation of stock markets for small and mid-cap quoted companies; Financial Services Authority (FSA) consultations
- political liaison – briefing and influencing Westminster and Whitehall, the City and Brussels
- accounting standards proposals from various standard-setters

The QCA is a founder member of European**Issuers**, which represents quoted companies in fourteen European countries.

QCA's Aims and Objectives

The QCA works for small and mid-cap quoted companies in the United Kingdom and Europe to promote and maintain vibrant, healthy and liquid capital markets. Its principal objectives are:

Lobbying the Government, Brussels and other regulators to reduce the costing and time consuming burden of regulation, which falls disproportionately on smaller quoted companies

Promoting the smaller quoted company sector and taking steps to increase investor interest and improve shareholder liquidity for companies in it.

Educating companies in the sector about best practice in areas such as corporate governance and investor relations.

Providing a forum for small and mid-cap quoted company directors to network and discuss solutions to topical issues with their peer group, sector professionals and influential City figures.

Small and mid-cap quoted companies' contribute considerably to the UK economy:

- There are approximately 2,000 small and mid-cap quoted companies
- They represent around 85% of all quoted companies in the UK
- They employ approximately 1 million people, representing around 4% of total private sector employment
- Every 5% growth in the small and mid-cap quoted company sector could reduce UK unemployment by a further 50,000
- They generate:
    - corporation tax payable of £560 million per annum
    - income tax paid of £3 billion per annum
    - social security paid (employers' NIC) of £3 billion per annum
    - employees' national insurance contribution paid of £2 billion per annum

The tax figures <u>exclude</u> business rates, VAT and other indirect taxes.

For more information contact:

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