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**CORPORATE COMPLIANCE SYSTEMS:
ASSESSING THE MODEL FOR MÉXICO**

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Corporate Compliance Systems: ASSESSING THE MODEL FOR MÉXICO

1 Introduction

1.1 MEXICO: New Federal Anti-corruption Law for Government Procurement

1.2 Need to block corruption from public officials.

1.3 U.S., UK and other countries are implementing corporate compliance measures.

2 What Is Corporate Compliance.

2.1 U.S. Model – Organizational Sentencing Guidelines Section 8B2.1.

2.2 The United States sentencing commission organizational sentencing guidelines.

- Contractor Compliance Requirements.

2.3 UK Anti-bribery Act 2010.

- UK Minister of Justice Guidance on Bribery Act 2010

- The General Bribery Offences: sections 7, 8 and 9.

2.4 Corporate Compliance Systems: US and UK.

3 Assessment of Corporate Compliance as a means of checking corruption.

3.1 Would be difficult to use in some countries.

- Culture of corruption.**
- Senior leadership not committed to fighting corruption.**
- Prosecutions not an effective deterrent.**
 - Corruption in enforcement agencies itself a problem.**

3.2 Some corporations might adopt in self-interest.

4 Conclusion

5 Appendix

Corporate Compliance Systems:

ASSESSING THE MODEL FOR MÉXICO

Introduction:

Mexico through national legislation has an international legal obligation to implement treaties, by acceptance, ratification or accession, and is a signatory country of the following International anticorruption conventions:

- Organization of American States (OAS) signed in 1996 the Inter-American Convention against Corruption (ICAC), under the Organization of American States, and was the first international legal agreement to prevent, detect, sanction and eradicate corruption. Mexico ratified the agreement on June 2, 1997 and entered into force on July 1, 1997.
- Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD). It rests the obligation of governments and business to instrument and approve mechanisms to prevent, detect and sanction offenses pledged by natural or legal persons. Persons offering or promising pecuniary or other advantages directly or through mediators to a foreign public official in international business transactions in order that the official acts or desists from acting in relation to the enactment of official duties. Mexico ratified the agreement on May 27, 1999 and entered into force on July 26, 1999.

- United Nations Convention against Corruption (UNCAC) establishes methods and agreed standards for international cooperation and for local effort to combat corruption. Mexico ratified on June 24, 2004 and entered into force on December 14, 2005.¹

Trying to improve investment opportunities and international trades, Mexico has international connections due to its economy so Mexican business may be exposed to the probability of bribing foreign public officials. To promote itself as an ethical and safer place to do business, Mexico should develop anti-corruption and anti-bribery laws, with the help of different authorities from other countries that are willing to cooperate in transnational investigations. The countries authorities must have agreements with Federal Government contractors by setting up procedures and policies for ethical programs, internal control, and self-regulation to develop and promote a compliance culture.

Mexico has one of the highest risk corruption environment, for its poor regulations, an example of this is the Wal-Mart case, where the subsidiary Wal-Mart de Mexico, had arranged an enormous operation to win dominance by bribing to obtain permits and increase market share, since 2005, this was published in the New York Times on April 21, 2012². This article alleged that Wal-Mart Stores, Inc. one of the world's largest retailers implemented an ambitious growth strategy. A far-reaching practice by making payments to Mexican officials and bureaucrats, in order to accelerate the authorization to construct new stores, making illegal compensations through third parties, and reported a dual set of books and records. These payments were for city and mayor council members, urban planners, low level bureaucrats. More than 24 million questionable payments were made in order

¹ Stocker, F.T., 2012. Surveying Mexico's Anti-Corruption Landscape. MAPI

² <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silences.html?>

to reduce environmental impact fees, secure zoning approvals, in advance with the commitment of neighborhood leaders that were in connection with the construction developments. Relevant enforcement authorities in the United States and Comptroller officer in Mexico have launches investigations. This case has become the highest profile FCPA/bribery investigation reaching implications both in the US and Mexico, as in other global companies.³

1.1 MEXICO: New Federal Anti-corruption Law for Government Procurement

Because Mexico is taking a hard position against corruption, on June 11, 2012 published in the Mexican Official Gazette the new Anti-Corruption Law for Government Procurement and Public Auctions in Mexico named FEDERAL ANTI-CORRUPTION LAW FOR GOVERNMENT PROCUREMENT. It went into effect on June 12, 2012. This law brings Mexico to fulfilling the OECD obligations increasing sanction where most public corruption occurs.

This Law complements the legal Anti-Corruption frame which includes the next Mexican Laws:

- Federal Criminal Code.
- Federal Law of Administrative Accountability of Public Officials.
- Law on Government Acquisitions, Leases and Services.
- Law on Government Construction and Public Work and Related Services.

A key purpose of this Law is that upon a Mexican or foreign individual or company in a Federal Public Contract will be responsible and sanctioned for

³<http://www.omniture.com>"title="WebAnalytics"><img src=";law.com

violations committed, as an international commercial business upon their involvement

Subject to this law are Mexicans or foreign entities or individuals that:

- In any federal public contracting procedures participate in their capacity as invitees, interested parties, suppliers, participants in public auction procedures, contractors, permit holders, persons awarded contracts or similar cases.
- In their capacity participate in public contracting processes as shareholders, associates, representative, partners, power grantors or attorneys-in-fact, brokers, legal representatives, agents, advisors, subcontractors, employees, or in any other capacity.
- Directly or indirectly participate in the terms of this Law in international commercial transactions.
- When Public Officials directly or indirectly participate in federal public contracting procedures.

Some conduct that arise which may be sanctioned in “International commercial transactions” that involve a foreign public official or any public organization of a foreign state, in which directly or indirectly are involved Mexican individuals or entities:

- a) Procedures and acts associated to contracting, implementing and enactment of contracts about leases, acquisitions, public work and services, services of any nature.
- b) Actions and procedures allowing extension of concessions and permits.
- c) Other agreement or procedure related with the above transactions.⁴

⁴ Greenberg Traurig.LLP.2012, Attorneys at Law, New Anti-corruption Law for Government Procurement and Public Auctions in Mexico

The new law targets corruption but does not mandate corporate compliance systems. It applies only to government at a federal level, and does not apply to state or local procurement. It will make Mexico attractive for foreign business, and lodges enforcement authority in an administrative level, puts more resources in the fight against corruption, with international reach that imposes real penalties on companies and other entities⁵.

1.2 Need to block corruption from public officials

An operative compliance program can decrease many of the company's greatest risks, diminish the severity of claims and penalties when violations of law occur regardless of the program and improve the company enactment and effectiveness.

The budget is the way the government allocates and controls the expenditure of public resources in a responsible, efficient and effective way as: managing the economic activities, providing various services and purchasing goods.

Public sector institutions in order to protect public resources and enhance public sector performance should strengthen ethics, integrity, transparency accountability and professionalism.

Because citizens pay taxes, and a high percent of the budget is taxation, they expect that the public servants will manage the public resources in a properly

⁵ Available at: <http://metrocorp.counsel.com/articulo/20616/mexicoanti-corruption-law-has-international-reach.2012>.

way and with fairness to maximize the profit of the budget showing that the ethical principals in the handling of public resources are fulfilled.

Corruption has the greatest impact on the most vulnerable part of a country's population: the poor. It has become the most salient manifestation in organized crime, because we are living in a globalized world, that is why developed or developing countries are victims of this great problem. There are many challenges to combat corruption in a national and international level. Nations have deal with a legal framework, but the issue of corruption as a transnational crime does not have uniformity, because corruption differs from one country to another.⁶

1.3 U.S., UK AND OTHER COUNTRIES ARE IMPLEMENTING CORPORATE COMPLIANCE MEASURES.

Defense is the best offense against corruption. To elude or reduce exposure of penalties, organizations should be prepared to show they have a strong compliance program. If the organization has an appropriate compliance measure to detect and prevent issues of noncompliance and corruption, with preventive measures in place they will avoid corruption issues, and at the same time having detective measures to monitor instances of corruption. An efficient and quick answer will be the maximum goal against corruption. Around the world there are different anti-corruption laws, which are based on common requirements of any good compliance program. The US and the UK guidance align with the support of

⁶ Available at: <http://works.bepress.com/cgi/viewcontent.cgi?article=1059&context=marcotavanti>

OECD Good Practice on Internal Controls, Ethics and Compliance creating an integrated view of what an organization requires⁷.

2 What Is Corporate Compliance

One of the world's greatest challenges is corruption. There are many well-known forms of political and corporate corruption as bribery, extortion, cronyism, nepotism, patronage, graft and embezzlement. It impacts the private and public sectors in a considerable and costly way, because it impacts economic growth, distorts competition and represents serious legal and reputational risks. Worldwide the severity of law to fight corruption has increased substantially, promising visible results in all regions. Governments also are increasing proactive enforcement to anti-corruption laws, with international effects. Leader's priority is fighting corruption and bribery.⁸

Different anticorruption mechanisms promote, facilitate and regulate cooperation among State Parties by developing and harmonizing the policies related to prevention, detection, punishing and the eradication of corruption in public and private sectors, criminalizing bribery both domestic and foreign, money laundering and trading in influence, embezzlement, misappropriation or diversion of property by a public official.

To create a code for a Corporate Compliance Program, governments and the private sector must have representatives in order to form a committee. The principal assignment is to analyze international experiences in the topic before they begin planning by enlisting the text of the code. Committee members need to frame their endorsements consistent with the social reality and economic growth of

⁷ Available at: <http://corp-integrity.com/integrity-ethics/meeting-anti-corruption-obligations.2011>

⁸ Rasmuseen, M. 2011, Meeting Anti-Corruption Obligations, Corporate Integrity, LLC.

their country. Every country has different corporation structures - some capital corporations are held by control shareholders who give them a preeminent character in the company's management.⁹

Business people have the challenge that laws must be enforced, because in a long term bribery and corruption are not productive for sustainable development.

2.1 U.S. Model – Organizational Sentencing Guidelines Section 8B2.1

After more than 400 US companies admitted making illegal payments to foreign government officials, in 1977 the US Congress enacted the Foreign Corrupt Practices Act (FPCA) to restore public confidence in the integrity of American Business systems, and to bring to an end the bribery of foreign officials. The FPCA in general forbids payments to foreign officials by gaining or retaining American firms do business. These firms have been subject of civil and criminal enforcement actions, and in consequence having to pay great fines and having deferral and exclusion from federal gaining contracts and bringing their officers and employees to jail. To prevent these consequences firms have developed detailed compliance programs to avoid and notice improper payments¹⁰.

⁹ Available in: <http://www.ecgi.org/codes/.../mexico-code-en.pdf>. 2002.

¹⁰ Available in: <http://infouse.state.gov/government/forpolicy/doct/ijde1206.pdf> 2006

2.2 THE UNITES STATES SENTENCING COMMISSION ORGANIZATIONAL SENTENCING GUIDELINES:

- *1.-UNDERSTAND THE RISK:* to manage corruption the organization needs to have a risk-based approach, including periodic assessment of the exposure for corruption and unethical conduct, it should be dynamic and should cover exposure in specific markets, geographies and business partners.

- *2.-APPROCH COMPLIANCE IN PROPORTION TO RISK:* On the proportion of the risk the organization should implement compliance procedures and controls. If there are higher risks of corruption, the procedures and controls must have a stronger compliance.

- *3.-TONE AT THE TOP:* The board of directors and executives must fully support the compliance program and must be well informed about the strategies for and effectiveness of anti–corruption and compliance initiatives and will not tolerate corruption in any form.

- *4.-KNOW WHO YOU DO BUSINESS WITH:* The organization must make sure of contracting with ethical entities, but if there is a high degree of corruption risk in a relationship additional detective and preventive controls must be established in response.

- *5.-KEEP INFORMATION CURRENT:* There must be regular basis to become aware if there is an increase of risk conditions, so diligence and risk assessment efforts need to be kept current.

- *6.-COMPLIANCE OVERSIGHT:* People with authority should report to independent monitoring bodies, as audit committees of the board issues of corruption, and are responsible for the oversight of anti-corruption compliance activities and processes.

- *7.-ESTABLISH POLICIES AND PROCEDURES:* Compliance processes and requirements must be clearly adhered and documented in the policies and procedures that address corruption, the code of conduct is a governing policy that filters down to other policies as anti-corruption, gifts, entertainment, customer travel, hospitality, extortion, solicitation, facilitation payments and political contributions.
- *8.-EFFECTIVE TRAINING AND COMMUNICATION:* Training programs to educate business partners and employees at risk of exposure to corruption, fraud and bribery must be implemented. In addition to written policies, people need to know what to expect of them, affirm they do understand and behave according to the established procedures and policies.
- *9.-IMPLEMENT COMMUNICATION AND REPORTING PROCESSES:* In order for the employees to get answers on policies and procedures there must be channels of communication, like a help line to ask questions on activities and requests and a hotline to report misconduct.
- *10.-ASSESSMENT AND MONITORING:* There must also be monitoring and assessment compliance activities to ensure procedures, controls and policies are in place and working out to prevent bribery and corruption.
- *11.-INVESTIGATIONS:* To effectively and quickly resolve issues due to identifying potential incidents of corruption, there must be investigation processes as surveys, hotlines, interviews and management reports.

- 12.-INTERNAL ACCOUTING CONTROLS: Disposition of assets, accounts that accurately and fairly reflect transactions, records and books must be kept in cases that the organization could be implicated in corruption issues.
- 13.-MANAGE BUSINESS CHANGE: In case of deficiencies, there must be changes to monitoring if there is a greater risk of corruption, as a result of observation and investigations, requiring the business to make changes by compliance personnel to proactively prevent corruption¹¹.

The systems include:

- Standards and procedures to guide ethical conduct in the corporation.
- System to ensure that corporate leadership remains apprised of emerging problems.
- A process to exclude “risky” personnel, as those with criminal records.
- Training.
- Monitoring, evaluating and reporting mechanism.
- Incentives and discipline to ensure compliance.

¹¹ Rasmuseen,M. 2011, Meeting Anti-Corruption Obligations, Corporate Integrity, LLC

Contractor Compliance Requirements.

The private sector shares responsibility for the challenges of eliminating corruption worldwide. From a global perspective, corruption is an obstruction to poverty reduction and sustainable development. Contractors must also assume their responsibility establishing corporate compliance systems. The Federal Acquisition Regulation (FAR) gives the requirement that will enhance integrity in the procurement system. This system must be able to adjust new types of risks and ensure knowledgeable corporate leadership. In result a determined effort to create self-policing will be exposed with the sentencing guidelines of the compliance systems¹².

2.3 UK Anti-Bribery Act 2010

UK Ministry of Justice Guidance on Bribery Act

The Parliament of the United Kingdom passed the Bribery Act 2010, which covers the criminal law related to bribery. Initially it would enter in force in April 2010, but it was until July 2011. It repeals all common law provisions related to bribery, replacing them with crimes of bribery of foreign public officials, failure on commercial organization to prevent bribery by its behalf and being bribed.

There is a 10 year imprisonment penalty for committing bribery under Act 2010, as well as an unlimited fine, the potential confiscation of property, and disqualification of directors.

This Act also has a near-universal jurisdiction, that regardless where the crime has occurred, the United Kingdom has links allowing the prosecution of a company or an individual. It is described as “the toughest anticorruption legislation

¹² Yukins,C.R.2007, Feature Comment: Enhancing Integrity Aligning proposed Contractor Compliance requirements with broader advances in Corporate Compliance, The George Washington University Law School Public Law and Legal Theory working paper No. 264,Legal studies research paper No. 264.

in the world". This makes the Act's provisions criminalize behavior acceptable in the global market, putting in disadvantage the competition of British business.

The General Bribery Offences: Section 7, 8 and 9.

Section 7 describes the innovative and broad offence of the failure of commercial organization to prevent bribery on the behalf, and applies to all commercial business in the United Kingdom.

This new offence motivated a reaction in the business community, meaning that a commercial organization will be responsible if:

- a) A person related to the organization bribes another person will be liable to prosecution, intending to retain or obtain business, or a benefit in the conduct of business for the organization, (commits general offence of bribing under section 1 or bribing a FPO under section 6)
- b) There are no appropriate procedures in place intended to prevent bribery.

Section 8 states a commercial organization can be guilty of offence if the bribery is carried out by an agent, a subsidiary, an employee or a third party.

A commercial organization has a wide definition, no matter where companies and partnerships do business, or where they are incorporated. Associated person is defined to include people who accomplish services for or on behalf of the company regardless of their capacity.

Section 9 states the Secretary of State is required to publish guidance procedures which commercial organizations can put in place to prevent persons associated with them from bribing.

The guidance is not projected to be prescriptive or standing location or execute any direct responsibility on businesses, instead seeks to reflect worthy practice and offer general relevant guidelines to be adapted by businesses as appropriate.

The key principles that may be considered in certain circumstances are: proportionate procedures, top level commitment, risk assessment, due diligence, communication, monitoring and review (a).

2.4 Corporate Compliance System: US and UK

All around the world there are different anti-corruption laws, which are based on common requirements of any good compliance program. The US guideline compliment coordinated with the UK guidance aligns with the supports OECD Good Practice on Internal Controls, Ethics and Compliance creating an integrated view of what an organization requires.

3 Assessment of Corporate Compliance as a Means of Checking Corruption

Corruption is defined by Transparency International as *“the abuse of entrusted power for private gain”*, this recognizes the breadth of the concept, but does not enumerate or delimit it. The UN considered the opportunity for the global anti-corruption treaty a legal definition of corruption, concluding that any attempt at a comprehensive definition would fail to address relevant forms of corrupt behavior¹³.

¹³ Available in: <http://www.transparency.org/cpi2011/in.detail>
(a) See appendix

3.1 Would be difficult to use in some countries

To involve international relationship and attract investment, governments must have anti-corruption and anti-bribery concerns. Countries with strong anti-bribery and anti-corruption laws will be able to enter in international negotiations easily before those with impunity and high levels of corruption. Because Investors will not feel fortified to be where there are weak institutions, governments have to deal with political corruption that affects contracts and investment that makes operations too risky and fix poor anti-corruption regulations. It is a challenge for most countries that their government implements the legal framework and institutional changes to acquire a practical improvement to ethics and transparency. Organizations should have different mechanisms to determine if law and provisions are being applied well, and review them at least once a year.

Culture of corruption

Every country worldwide must bring multilateral agreements against corruption by promoting, harmonizing and developing different mechanisms as policies related to prevention, detection, punishing and eradicating corruption in public and private sectors, criminalizing bribery both domestic and foreign, money laundering and trading influence, embezzlement, misappropriation or diversion of property by a public official. Searching high standards at both local and national levels, public and private sectors must share principles to bring will and capabilities of people and governments fighting corruption and renovate country's culture¹⁴

¹⁴ Available in: <http://inflouse.state.gov/government/forpolicy/docts/ijde1206.pdf>

Senior leadership not committed to fighting corruption.

Countries must have their compliance programs, showing the risks that may face along with business organizations. They should address their controls and procurements that have been proven, and can help the organization improve its own. Senior Management must ensure the values and emphasize actions of rectitude and veracity to exclude bidding from future business if they have a bad reputation. Employees must have a high level of training and business organization must ensure all of them attend these training sessions.

High level management must be committed to preventing corruption, by not hiring any person, without exception, that has been in trouble before, and hire qualified employees with ethical principles and good reputations for honesty and reliability in dealing business¹⁵.

A global transparent economy will be created when organizations share common policies and measures in collaboration with governments.

Prosecutions not an effective deterrent

Enormous anti-corruption programs have failed, because there is absence of information and political will. In some economies dealing daily with corruption seems better than combating it, because it is seen as only a wrong behavior. The problem is that only few individuals benefit, but has a high cost to society, governments and private sector. Corruption misallocates resources that would be

¹⁵ Available in: <http://works.bepress.com/cgi/viewcontent.cgi?article=1059&context=marcotavanti>

used in other services, has negative effects in domestic and foreign investment, reduces efficiency and competition, lowers growth levels, productivity and innovation, exacerbates poverty and inequality, political instability and high crime rates.

Moral judgment and common sense are not sufficient to effectively win the battle against corruption. Because every organization is different, there is no program that will guarantee an organization that is safe from FCPA risk. Control and procedures must produce results to help develop its own compliance program, it should develop tools and information to make it successful, finding the way to implement national and international legislation and reduce corruption. There must be zero tolerance.

Corruption in enforcement agency itself a problem

Corruption fails because there is absence of political determination and not understanding the compliance programs, agencies must have well trained professionals implementing strategic plans in prevention, detection and finding the consequences of corruption.

There should be an administrative action such as suspension or contract termination, in the extreme cases the consequence may be a term in prison.

3.2 Some corporations might adopt in self-interest

A company's management must ensure its compliant is going along with the ethical code and anti-corruption laws that have being adopted and implemented in great lengths. The management must be the first to know the potential or actual problems to ensure that the internal communication plans, appropriate systems and reporting mechanisms are in place. If these reporting procedures do not exist, the malpractices surely will continue.

Compliance gives a competitive advantage to organizations that in the past didn't have to provide results. Now they are asked to do so, even with few resources. In the compliance reportage within the budget, organizations are having a hard time. Organizations' honest interest is viewing for safeguard investors and extenuating risks as fraud and bribery, so they are implanting compliance into business process that gives them the opportunity to innovate and grow. Compliance executives must look for tools that help them have the adequate controls and information for efficient results. Compliance helps organizations to spend much more time improving and not just operating business¹⁶.

Because international reputation is a factor to take in consideration, countries have different requirements according to their economic condition. It is reflected in terms of aid as an incentive authorizing and enforcing anticorruption measures that bring main progress and benefits from international cooperation. Having anti-corruption regulations will reduce impunity levels, an active participation by the society in anti-corruption matters and social auditing will develop progress in this challenge¹⁷.

¹⁶ Wilhelms,D.2010, Using GRC to drive Innovation an Competitive Advantage

¹⁷ Central American anti-corruption efforts.

4 CONCLUSION:

By working together, public and private partnerships can meet security challenges that bring prosperity to economies and health safety to the people. With the commitment of leaders to make great efforts for transparency and anti-corruption will improve societies in expanding markets across the economies. Countries must make anti-corruption a top priority, recognizing the role in attracting foreign and internal investment and promoting economic growth.

Corruption stifles international and entrepreneurship investment as businesses are less interested to invest in markets where corruption is used to abuse positions for self-enrichment. Having information and education campaigns by making a substantial legal reform in the organization will stop corruption. Once corruption is stopped there will not be the incentive to corrupt, which will reduce impunity.

Countries should ratify International agreements corresponding to internal regulations against corruption, in order to have strong institutions with anti-corruption and anti-bribery laws.

5) APPENDIX

NOTE *Section 7, 8 and 9 are part of the Bribery Act 2010 Chapter 23 as:

Section 7: Failure of Commercial Organisations to prevent bribery.

(1) A relevant commercial organization (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending-

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A---

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section-----

“partnership” means---

(a) a partnership within the Partnership Act 1890, or

(b) a limited partnership registered under the Limited Partnerships Act 1907,

or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,

“relevant commercial organisation” means---

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business.

Section 8: Meaning of associated person

(1) For the purposes of section 7, a person (“A”) is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2) The capacity in which A performs services for or on behalf of C does not matter.

- (3) Accordingly A may (for example) be C's employee, agent or subsidiary.*
- (4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and no merely by reference to the nature of the relationship between A and C.*
- (5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.*

Section 9: Guidance about commercial organisations preventing bribery

- (1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentions in section 7 (1).*
- (2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.*
- (3) The Secretary of State must consult the Scottish Ministers before publishing anything under this section.*
- (4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.*
- (5) Expressions used in this section have the same meaning as in section 7¹⁸.*

¹⁸ Bribery Act 2010 (c23) Document Generated 2012-05-30