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E-ALERT | Anti-Corruption

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THE BRIBERY ACT 2010 GUIDANCE: COUNTDOWN TO IMPLEMENTATION

The UK Ministry of Justice's publication last week of guidance on the UK Bribery Act 2010 ("Bribery Act") marked the start of a ninety day countdown to implementation of the Bribery Act, which will be brought into force on 1 July 2011.[1]

THE SCOPE OF THE BRIBERY ACT

The Bribery Act runs to just seventeen pages and contains only four substantive offences. The scope of two of those offences in particular prompted business leaders to voice concerns to Ministers and others. The section 6 (bribery of foreign public officials) and section 7 (failure of commercial organisations to prevent bribery) offences have been criticized as being too widely drawn, introducing novel and undefined concepts and giving undue discretion to officials at the Serious Fraud Office ("SFO").

The comments by the Minister of Justice, Ken Clarke QC MP, and the guidance itself aim to reassure companies that the Bribery Act will be enforced with common sense and pragmatism, as previously signaled by the SFO. The Minister ushered in the guidance by saying that "[t]he ultimate aim of [the Bribery Act] is to make life difficult for the minority of organisations responsible for corruption, not to burden the vast majority of decent and law-abiding businesses."[2]

SIX HIGH LEVEL PRINCIPLES

The guidance, as expected, focuses on six high level principles with which companies will need to familiarise themselves. The high level principles are supported by eleven case studies illustrating the application of the principles for businesses of all sizes. The guidance stipulates that the principles are not "prescriptive" but "flexible and outcomes focused," being designed to assist both small and large organisations create "robust and effective anti-bribery procedures" that are "proportionate to risk."

The principles are:

1. Proportionate Procedures

A company's procedures should be proportionate to the bribery risks it faces and to the nature, scale and complexity of its activities. The procedures should be clear, practical, accessible and effectively implemented and enforced.

2. Top-Level Commitment

The "top-level" management of a company must be committed to preventing bribery by persons associated with the company and must foster a culture within the company in which bribery is never acceptable.

3. Risk Assessment

There is an expectation that the company will assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by associated persons. The risk assessment is to be "informed" and "documented" and is to be conducted "periodically."

[1] Source: MoJ website. Document entitled "The Bribery Act 2010, Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)."
[2] Financial Times, "Clarke sees leeway in bribes law," published 29 March 2011.

4. Due Diligence

Companies should apply a proportionate and risk based approach to due diligence of those performing services on the company's behalf.

5. Communication

The aim is that the company's bribery prevention policies and procedures must be "embedded and understood throughout the organisation." This is to be achieved by internal and external communication, including training, that is proportionate to the risks a company faces.

6. Monitoring and Review

Policies and procedures should be reviewed periodically by internal or external experts, with improvements being made on an as-needed basis.

TANGIBLE ASSISTANCE?

The guidance sets out the UK Government's policy in relation to the section 7 corporate offence, stating that "[t]he objective of the [Bribery] Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf." The guidance recognises that "no bribery prevention regime will be capable of preventing bribery at all times."

Organisations such as the International Chamber of Commerce (UK) and the Confederation of British Industry have welcomed the guidance but others, including Transparency International (UK), have described certain aspects of the guidance as being "deplorable" and have complained that "[p]arts of it read more like a guide on how to evade the Act than how to develop company procedures that will uphold it."[3]

We discuss below the guidance as it relates to some of the Act's thorniest issues such as the UK's jurisdiction over non-UK registered companies, the extent of liability for the actions of third parties and the boundary between acceptable corporate hospitality and a prosecutable bribe, particularly when foreign officials are concerned.

A QUESTION OF JURISDICTION

The guidance makes it clear that "the courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases" and sets out the Government's "intention" in relation to the phrase "carries on a business, or part of a business, in the [UK]."

The guidance states that "the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught." It also states that the Government "would not expect" a mere listing on the London Stock Exchange or the presence of a subsidiary in the UK automatically to bring a company within the reach of UK courts.

Companies should be mindful though that, in the appropriate case, prosecutors are likely to take a broad approach to the powers conferred by the Bribery Act. The Director of the SFO has stated, for example, that he will be taking a "wide view of jurisdiction" and will not be impressed with "overly technical interpretations" of the Act crafted to evade the UK's jurisdiction.

THIRD PARTY LIABILITY – ASSOCIATED PERSONS

A company will be liable for the actions of associated persons -- those performing services for or on its behalf --- only if a bribe is paid by the associated person with the intention of obtaining or retaining business or a business advantage for the company. The guidance states that a bribe that is paid by an employee or agent of a subsidiary "will not automatically involve liability on the part of its parent

[3] Transparency International Press release on 31 March 2011 entitled "Government Guidance 'deplorable' and will weaken Bribery Act."

company * * * if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company * * *."

The guidance also seeks to provide comfort to companies in relation to potential liability for the actions of its "suppliers." It makes clear that, in the Government's view, when the supplier is "simply acting as the seller of goods" it is unlikely to qualify as an "associated person."

When considering the potential liability of a company by virtue of its involvement in a joint venture, the guidance makes a distinction between a joint venture that is a "separate legal entity" and one that is "conducted through a contractual arrangement." In relation to the former, the guidance stipulates that the existence of the joint venture "will not of itself mean that it is 'associated' with any of its members" and that "a bribe paid on behalf of the joint venture entity * * * will therefore not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture."

In relation to the case of a "contractual" joint venture, the guidance introduces the concept of "level of control"– a concept that does not appear in the Bribery Act -- as one of the "relevant circumstances" that would be taken into account when seeking to determine whether a person who paid a bribe on behalf of the joint venture business can be said to be performing services on behalf of the participants in the joint venture.

The guidance states that "[t]he question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation."

FOREIGN PUBLIC OFFICIALS

The guidance states that bribing a foreign public official could be prosecuted under section 1 of the Bribery Act but that evidential difficulties in proving that a bribe was paid to a foreign public official with the intention to induce him or her to perform his or her role "improperly" -- something the guidance calls "a mischief" -- means that prosecutors often would seek to rely on the section 6 offence, which requires no such proof. The guidance goes on to state that "it is not the Government's intention to criminalise behaviour where no such mischief occurs * * *."

In other words, it appears that the guidance may be advocating that the concept of "improper performance" be read into section 6. That would in effect introduce a higher threshold for prosecution than the Bribery Act explicitly envisages. While this may be a welcome statement for those who routinely interact with foreign government officials, companies will be mindful that prosecutors are unlikely to apply anything but the letter of the law when faced with a case that they consider to be in the public interest to prosecute.

CORPORATE HOSPITALITY AND OTHER BUSINESS EXPENDITURES

In addressing the topic of corporate hospitality and other business expenditures, the guidance adopts a permissive tone.

The guidance codifies the comments the Minister of Justice had made in the run up to publication of the guidance, stating that "[b]ona 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 recognised as an established and important part of doing business * * *." The guidance goes on to state that "it is not the intention of the [Bribery] Act to criminalise such behaviour * * *." The foreword to the guidance invites companies to "[r]est assured" as "no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix."

The guidance endorses "reasonable" and "proportionate" hospitality and business expenditures. In determining what is reasonable and proportionate, the guidance proposes taking into account "all of the surrounding circumstances," which include matters such as "the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the

particular foreign public official has over awarding business." It states that "the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditures provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return."

Much of this already is part of the compliance mantra but the guidance also appears to sanction certain interactions with foreign public officials that would today be closely and critically scrutinised by those responsible for compliance. As an example, the guidance envisages that the provision of flights, airport to hotel transfers, hotel accommodation, "fine dining" and tickets to an event for a foreign public official as well as his or her spouse are "unlikely to raise the necessary inference" to engage section 6 so long as there is a business rationale for the trip.

FACILITATION PAYMENTS

While the Government has recognised the problems faced by commercial organisations in some parts of the world and in certain sectors, the guidance reiterates that there is no exemption for facilitation payments. It sets out the OECD position that such payments are corrosive and that exemptions create artificial distinctions that are "difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused."

When a company or individual has no alternative but to make a facilitation payment to "protect against loss of life, limb or liberty," the guidance states that "the common law defence of duress is very likely to be available." It stresses that it is a matter for prosecutorial discretion whether to prosecute an offence and defers to the Joint Prosecution Guidance when it comes to the "prosecution of facilitation payments."[4]

CONCLUSIONS

Companies that already have reviewed and updated their anti-bribery procedures will need to study the new guidance to see what, if any, further amendments may be required. Those who have yet to complete the process of updating their procedures to ensure compliance no doubt will draw a modicum of comfort from the fact that they have some ninety days in which to digest and absorb the guidance and implement the required policies and procedures.

Companies will be pleased, of course, to have more guidance than they previously had on aspects of the Bribery Act. They will look in that connection to draw as much comfort as they can from the rather "permissive" tone of the Ministry of Justice guidance. At the same time, however, companies with a global footprint cannot afford to look at their UK exposure in isolation. It will be of little comfort if a company is able to avoid prosecution in the UK but face prosecution in the US, for example, for what the US prosecutors may regard as corporate hospitality that stepped over the line into prohibited bribery under the US Foreign Corrupt Practices Act.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our anti-corruption practice group:

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[4] The Ministry of Justice guidance was supplemented by the Joint Prosecution Guidance published on 31 March 2011. It is entitled "Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions"