

Client Alert

UK Bribery Act - Guidance Issued

April 4, 2011

On 30 March 2011, the Ministry of Justice released the long awaited guidance about procedures that relevant commercial organisations can put in place to prevent associated persons from engaging in bribery. It announced that the UK Bribery Act, which received Royal Assent in April 2010, would enter into force on 1 July 2011. On the same day, the Serious Fraud Office and the Director of Public Prosecution published joint prosecutorial guidance. Neither document provides much practical guidance or comfort to UK companies – or to those foreign companies whose activities may be subject to the Act – in trying to establish the “adequate procedures” necessary to avoid violation of the new commercial organisation offence of failing to prevent bribery.

Steadfastly avoiding prescriptive instruction, the guidance provides little concrete advice either in relation to specific troubling areas or generally on devising an adequate compliance program:

- **Business Entertainment & Hospitality.** Although noting that it is "clear that hospitality and promotional or other similar business expenditures can be employed as bribes," the guidance has sought to assure industry (and perhaps government officials) that "reasonable and proportionate" hospitality and promotional activities – that fall within the recognised norms for that particular industry, will be considered acceptable. Perhaps most important is to avoid an inference of an improper motive in providing business entertainment to public officials, is to follow the suggestion of complete transparency and, where possible, clearance from the relevant public body.
- **Facilitation Payments.** The prosecutorial guidance emphasises that facilitation or grease payments are illegal bribes even when paid to obtain action to which the company is clearly entitled and asserts such payments were already illegal under existing law. Unfortunately, the guidance provides no practical guidance for companies faced with demands for such payments, naively suggesting that better education or consultation with the UK embassy may address the problem. Most perplexing is the suggestion in the prosecutorial guidelines that identifies as a factor against prosecution where the commercial organisation has a "clear and appropriate policy" setting out procedures for addressing requests for facilitation payments and those have been correctly followed. One is left to wonder what such a policy would say or how a facilitation payment could have been paid if the policy had been correctly followed.
- **Adequate Procedures.** Despite the statutory mandate to provide commercial organisations with clear guidance on what would constitute "adequate procedures" and the criticism of the initial draft guidance, the final guidance retained its "principles based" approach with little explanation, even in the eleven case studies, of how commercial organisations should determine which procedures are appropriate for their situations. Nonetheless, for companies already subject to the U.S. Foreign Corrupt Practices Act, these compliance principles will be familiar: (1) Procedures proportionate to the risks; (2) Top level commitment to prevention; (3) Risk Assessment of the organisation's business activities; (4) Due

Diligence of "associated persons;" (5) Communication & training; and (6) Monitoring & review.

Commercial organisations will need to look closely at their global business activities to prepare sensible and proportionate policies and procedures keeping in mind the unsettling warning in the introduction to the guidance that "the question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case." In other words, your procedures will be judged with 20/20 hindsight after a problem has been identified.

- **Associated Persons.** The new offence of failing to prevent bribery extends to actions of "associated persons," defined in the Act as persons performing services for the commercial organisation. Employees and agents hired to provide specific services are easy examples. The guidance addresses, but does not resolve, when a commercial organisation may be liable for the acts of others with whom it does business. It suggests that liability will generally be limited to those entities with whom the commercial organisation has a direct contractual relationship, although it would not be hard to identify circumstances where others in the supply chain are in reality acting for the prime contractor. The guidance also suggests that where a joint venture (JV) is a separate legal entity, a commercial organisation may be more akin to a passive shareholder such that the services are being performed for the JV and not JV member: "A bribe paid on behalf of the [JV] by one of its employees or agents will therefore not trigger liability for members of the [JV] simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the [JV]." Similarly, the guidance states that ownership alone of a subsidiary is not enough to create liability for the parent company. There must be some evidence – as there certainly could be – that the JV or the subsidiary is seeking a business advantage for the parent.
- **Jurisdiction.** The guidance offers little to assist foreign companies in determining whether the new offence of failing to prevent bribery would apply to it or its affiliates outside of the UK. Under the Act, a commercial organisation (wherever incorporated) is subject to this prohibition if it "carries on a business, or part of a business, in any part of the UK." The guidance makes clear that certain acts are not considered as 'carrying out business' in the UK – such as listing shares on the London Stock Exchange – but it does not provide a positive test for what would qualify. For example, the guidance states that merely having a subsidiary in the UK "will not, in itself, mean a parent company is carrying on a business in the UK," but then suggests this conclusion may depend on how independently the subsidiary acts.

In short, the Justice Secretary's protestations notwithstanding, UK and foreign companies doing business in the UK must re-evaluate their anti-corruption compliance procedures in light of the Act with little assistance from these guidelines. Your organisation does not want to be the one testing the adequacy of its procedures before the courts.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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