



UK Bribery Act Guidelines Published Act to Enter Into Force in July 2011

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On March 30, 2011, the United Kingdom Ministry of Justice announced that the UK Bribery Act (the Act), enacted in April of 2010,¹ will enter into force on July 1, 2011. Along with this announcement, and per the Act's requirements, the Ministry of Justice has published guidelines for businesses to assist in understanding and complying with the Act. The 45-page document, titled "Guidance About Procedures Which Relevant Commercial Organisations Can Put Into Place to Prevent Persons Associated With Them From Bribing," (the Guidance) comes six months after the Ministry of Justice released a draft with request for public comments.² This final version of the Guidance offers some important insight into how the law will be implemented, and should be reviewed carefully by all commercial entities with business interests in the United Kingdom to ensure that appropriate internal procedures are in place.

Core Principle: Proportionality

The Guidance contains a foreword by Justice Secretary Kenneth Clarke that emphasizes workability, common sense, and a proportionate approach over "burdensome" procedures.³ In following with this principle, the Guidance explains that a commercial entity should have in place procedures that are proportional to the complexity of the entity's activities and the risk of corruption it faces. Thus, an entity's "necessary first step" is to conduct an assessment of risk, and then to implement procedures accordingly.

The Guidance acknowledges that in situations where there is no risk of bribery occurring, there is no need for procedures to prevent bribery. However, it suggests that any consideration of the adequacy of an entity's bribery-prevention procedures under the Act will focus on procedures related to the specific conduct in question. In other words, the Guidance appears to discourage the use of blanket policies and procedures designed to address an entity's average risk consistently across all areas of business, and favors an outlook that tailors bribery-prevention to the needs and circumstances of different business areas.

Perhaps most importantly, the Guidance repeatedly emphasizes that bribery-prevention procedures should be realistic and practical. To this end, the Guidance emphasizes that a commercial entity's bribery-prevention policies and procedures should be well-communicated and proper training of employees and agents needs to take place. Furthermore, a process should be implemented to monitor and review these procedures, and make modifications as necessary.

Hospitality and Facilitation Distinguished

Unlike its U.S. counterpart (the Foreign Corrupt Practices Act), the Act does not provide an exception for small payments for routine governmental actions, often referred to as



"facilitation payments." The Guidance reaffirms this intentional omission, but states that the eradication of facilitation payments in international business is a "long term objective," and as such, prosecution under the Act for facilitation payments will be left to the discretion of the prosecutorial agencies. Nevertheless, in tandem with the release of the Guidance, the UK Serious Fraud Office and the Director of Public Prosecutions have jointly published guidelines for prosecutors plainly asserting that facilitation payments are illegal under the Act.⁴

In contrast, the Guidance distinguishes from facilitation payments a "bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organization, better to present products and services, or establish cordial relations," and assures commercial entities that the Act is not intended to criminalize such expenditures so long as they are "reasonable and proportionate."

Associated Person

The Act holds a commercial entity liable for bribery committed by any person "associated" with the entity to the entity's advantage, and defines "associated" as a person who performs services for or on behalf of the entity. This definition appears to assign liability for the actions of a variety of individuals not traditionally considered employees or agents, such as contractors, suppliers, and joint ventures. The Guidance confirms this broad interpretation of "associated" persons, while emphasizing that a determination of liability will be case-specific and will consider "all the relevant circumstances."

Implementation

Now that the statutorily mandated the Guidance has been finalized and published, the British Government has announced that the Act will enter into full force on July 1, 2011. Although the published Guidance provides a great deal of clarity on many of the Act's provisions, whether an entity "carries on business" in the United Kingdom sufficient to subject itself to the Act remains a case-specific question left to the determination of the Courts. As such, it is crucial for commercial entities with any ties to the United Kingdom to create new or review existing internal anti-corruption policies and procedures in light of the Guidance to ensure compliance with the Act.

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Endnotes

- ¹ A prior LLB&L Client Alert dated April 29, 2010, provides an overview of the Bribery Act. Available by [clicking here](#).
- ² A prior LLB&L Client Alert dated September 29, 2010, describes the draft guidance in more detail. Available by [clicking here](#).
- ³ The full text of the Guidance is available by [clicking here](#).
- ⁴ Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, available by [clicking here](#).

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