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Bribery Act 2010 Update: Guidance for Commercial Organizations

The Ministry of Justice has published the long awaited finalized guidance on “adequate procedures” under the Bribery Act 2010. The Act will come into force on 1 July 2011.

The Bribery Act 2010 creates a new offence under section 7 which can be committed by commercial organizations which fail to prevent persons associated with them from “bribing” another person on their behalf. An organization that can prove it has adequate procedures in place to prevent persons associated with it from bribing will have a defence to the section 7 offence. The new guidance published under section 9 of the Act, will help commercial organizations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery.

The Guidance emphasizes that, while the Act contains “tough rules”, these will be enforced with “common sense”, according to a core principle of proportionality. The Guidance does not provide hard and fast criteria; the overriding criteria appears to be, as Secretary of State of Justice, Kenneth Clarke, put it, “*Bribery is one of those things we all know when we see it*”. In other words, the plain language of the statute is extremely wide-reaching. This apparently relies on prosecutorial discretion to pick and choose cases. Companies may feel that this unpredictability is somewhat unsatisfactory.

The Guidance sets out useful illustrations, as opposed to prescriptive criteria. For example, “reasonable and proportionate” corporate hospitality is not a bribe unless spending was intended to induce a person to perform improperly any relevant function (e.g. awarding contracts). As Kenneth Clarke, the Minister of Justice stated, “*under this law, no one is going to try to stop businesses taking clients to Wimbledon or the Grand Prix*”.

The Act has a very wide jurisdiction. Sections 1, 2 and 6 catch offences committed anywhere in the world by any person with a “close connection” to the UK. By contrast, section 7 does not need a UK close connection and catches failure by a company to prevent bribery anywhere in the world by a company which is either: i) formed/incorporated in the UK; or ii) if formed/incorporated elsewhere, carries on business, or part of a business, in the UK. The Guidance clarifies that having a listing on the London Stock Exchange or a UK subsidiary is not, without more, enough for a foreign company to fall within the jurisdiction of the UK courts under section 7.

The Guidance has generally been welcomed by practitioners in this field as providing the clearest clarification to date of the legislation. However, the guidance itself is not legally binding, and many questions such as the jurisdiction of the Act will ultimately turn on the judge’s interpretation.