Alerts and Updates

UK BRIBERY ACT TO TAKE EFFECT ON 1 JULY 2011

March 30, 2011

The UK's Lord Chancellor and Secretary of State for Justice Kenneth Clarke announced on 30 March 2011 that the new UK Bribery Act will take effect on 1 July 2011. The Ministry of Justice (MoJ) also issued draft guidance on how a company should comply with the new legislation. At the same time, the Attorney-General issued guidance for prosecutors on who should feel the full weight of the legislation. The documents are lengthy. The MoJ's guidance stretches to 45 pages, with the prosecutors' guidance a further 12 pages. While much of the concentration has been on the MoJ guidelines, it is likely that the prosecutors' guidelines may have the most lasting significance.

As detailed in the 7 October 2010 *Alert*, "UK Clarifies Wide-Ranging Bribery Laws and the Impact on Non-UK Companies," the MoJ published draft guidance last year that was open to consultation until 8 November 2010. Duane Morris and a number of other interested organizations made representations to the MoJ as part of that consultation process, and the final guidance was due to be published in January. It was delayed while the government responded to criticisms of the draft guidance, but in light of at least one freedom-of-information request and disapproval from campaign groups, the go-live date has now been set.

Ken Clarke's announcement indicates that the representations made have influenced the guidance. He said this morning, ". . . the guidance I am. . . publishing today underlines—after helpful consultation with businesses, and NGOs—. . . that combating bribery is about common sense, not bureaucracy." Clarke also emphasized that the guidance is not intended to dilute the legislation, which includes penalties of up to 10 years in jail.

What Does the New MoJ Guidance Say?

The guidance goes through the Act, expanding on its principles, and also contains examples at the end of the document following the same format of the draft guidance. Some of its language is legalistic, and in places, the guidance does not appear as clear as it could have been. The six principles of compliance that were in the draft guidance are retained, but have been altered slightly. Those six principles are:

1. Proportionate procedures

2. Top-level commitment
3. Risk assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

The two main areas of key interest to multinational businesses are both covered.

Hospitality

One of the main areas of concern in submissions to the MoJ consultation was in hospitality. Earlier guidance from the MoJ did not shed sufficient light on the level of hospitality that would be permitted and how that value would be determined. Clarke commented on this specifically in his announcement this morning, stating, "The guidance makes clear that no one is going to try to stop businesses getting to know their clients by taking them to events like Wimbledon, Twickenham or the Grand Prix. Reasonable hospitality to meet, network and improve relationships with customers is a normal part of business." The MoJ's guidance also says that the sector of business could be taken into account. What is viewed as normal entertaining in some industries would likely appear lavish in others. The MoJ's guidance says: "The standards or norms applying in a particular sector may also be relevant. . . . However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant." The guidance also explains that travel and hospitality connected with the service offered is unlikely to be prosecuted—for example, a trip to see a hospital to show the efficiency of its management and standards of care is likely to be acceptable to a potential buyer of those services.

Facilitation Payments

The MoJ guidance has a slightly changed tone on facilitation payments from the earlier draft. Whilst emphasizing that they are not permitted, in contrast to the equivalent U.S. legislation, the guidance states that the eradication of facilitation payments is a long-term objective. This echoes the comments of Vivian Robinson QC, the general counsel

of the Serious Fraud Office (SFO) when he spoke on a panel organized by Duane Morris' Jonathan Armstrong in London on 18 March. Mr. Robinson said then that no one would expect facilitation payments to stop overnight. The MoJ's guidance appears to build on Mr. Robinson's comments at the London meeting that duress would be a factor take into account when considering prosecutions for making facilitation payments. The MoJ guidance says: "It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances."

What Are the Prosecutors Thinking?

It is important to note that unlike the Department of Justice in the United States, the MoJ does not have the ability to prosecute offenses under the new Bribery Act. The majority of the prosecutions will be brought by the Serious Fraud Office, which has been heavily involved to this point in explaining to businesses how their new powers are likely to be exercised. At the London event, Mr. Robinson confirmed that the SFO would look to examine each case on its facts. The prosecutors' guidelines reinforce this, saying that "The Act is not intended to penalize ethically run companies that encounter an isolated incident of bribery." Prosecutors will employ a two step test:

1. Is there sufficient evidence to provide a realistic prospect of conviction?

2. If so, is prosecution in the public interest?

For the SFO, the two main factors that are likely to influence whether or not a prosecution is in the public interest are whether the company has adequate procedures in place and whether it self-reported the issue to the SFO.

The following factors also indicate that a prosecution under the Act will be more likely:

1. A conviction would bring a significant sentence.

2. Offenses are premeditated.

3. Offenses are committed in order to lead to more-serious offending.

4. Those involved are in positions of authority or trust and take advantage of that position.

Facilitation Payments

The prosecutors' guidelines also outline how their discretion should be issued when considering prosecutions for making facilitation payments. Factors likely to lead to prosecution include:

1. Large or repeated payments
2. Facilitation payments that are planned for or accepted as part of a standard way of conducting business
3. Payments that indicate an element of active corruption of the official in the way the offense was committed
4. Where a commercial organization has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these procedures have not been correctly followed.

It is this final factor which is likely to cause the most concern to companies that have made the effort to implement clear policies that have failed. However, the guidelines clarify that a single small payment is likely to result in only a nominal penalty. In addition, the SFO will also take into account self-reporting, the clarity of any policy in place and whether the payer was in a vulnerable position when a payment was required.

Hospitality

The prosecutorial guidance also reinforces the MoJ guidance on hospitality. The guidelines state that the cost of the hospitality is only one factor, but not much additional guidance is provided.

What Steps Should Businesses Consider Taking Now?

It is apparent that businesses should consider undertaking a thorough program of compliance with the new legislation, given the possibility of sanctions that include up to 10 years in prison. For most organizations, the three-month period can be used efficiently to begin implementing at least the following five steps:

1. The review of any existing Ethics code, Foreign Corrupt Practices Act (FCPA) code or the like, to check its compliance with the UK legislation.
2. Communicating to employees what is expected of them. This would extend beyond people employed by a UK company or a UK subsidiary. It would also include those negotiating contracts in the UK and UK

nationals employed by the organization wherever they work.

3. Companies should consider embedding compliance programs in subsidiaries, whether wholly owned or not. For most organizations, this would likely involve a structured program of board meetings of subsidiary entities, with the new Bribery Act as an agenda item. They may also want to send a briefing note to all of the directors of the relevant subsidiaries beforehand, explaining their responsibilities and instructing them to develop an action plan to deal with the new law.

4. A specific training session for affected employees. This might coincide with training the organization has already completed; for example, under the FCPA, showing again any online materials that are not inconsistent with the new UK legislation. Over time, corporations can build on this initial training, incorporating the MoJ's guidance.

5. A review of "associated persons." The Bribery Act opposes obligations on a company to do due diligence on those with which it does business. This would include consultants, agents and suppliers and others—for example, a franchisor may want to check compliance at its franchisees.

For Further Information

If you have any questions about the UK Bribery Act or would like more information about this *Alert*, please contact Jonathan P. Armstrong, Jeffrey V. Rodwell or Jonathan Cohen in our London office; George D. Niespolo in our San Francisco office; Marvin G. Pickholz or Mauro M. Wolfe in our New York office; Richard A. Silfen in our Philadelphia office; Joseph J. Aronica in our Washington, D.C. office; any member of the White-Collar Criminal Law Practice Group; any member of the Corporate Practice Group or the attorney in the firm with whom you are regularly in contact.