

CLIENT ALERT

The Ministry of Justice Issues Long-Awaited Guidance on the UK Bribery Act

On March 30, 2011, the United Kingdom (“UK”) Ministry of Justice (“MOJ”) issued its long-awaited guidance on the UK Bribery Act (the “Guidance”). The implementation of the UK Bribery Act (the “Act”) has been delayed twice, but will now take place on July 1, 2011. Thus, the time has come for companies to assess their anti-corruption compliance programs and make adjustments to ensure that they address the nuances of the Act.

Effective Bribery Prevention Procedures

Section 7 of the Act creates strict liability for commercial organizations that fail to prevent bribery. Significantly, a company has a statutory defense to section 7 liability if it had “adequate procedures” in place to prevent persons associated with the company from engaging in bribery.

The Guidance identifies six principles that should guide organizations when formulating “adequate procedures.”

1. Proportionality: The procedures should be clear, practical, accessible, effectively implemented, enforced, and proportionate to the bribery risks the company faces and to the nature, scale and complexity of the company’s operations.
2. Top-Level Commitment: Top-level management should be committed to preventing bribery by associated persons and be involved in establishing anti-bribery policies and procedures and in any other key decision-making related to bribery risk.
3. Risk Assessment: Companies should periodically assess and document the nature and extent of their exposure to potential risks of bribery on their behalf by associated persons.
4. Due Diligence: Companies should implement due diligence procedures based on a proportionate and risk-based approach to screen persons who perform or will perform services on their behalf.
5. Communication and Training: Companies should ensure understanding of their anti-bribery policies through internal and external communication, including training, that is proportionate to the bribery risks they face.
6. Monitoring and Review: Companies should monitor and review their procedures in response to changing bribery risks and adapt the procedures where necessary.



Hospitality, Promotional and Other Business Expenditures

The Guidance takes a step back from the initial strict interpretation of the provisions of the Act related to hospitality, promotional and other business expenditures. According to the Guidance, the Act is not intended to criminalize “[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.”

Facilitation Payments

The Guidance confirms the Act’s ban on facilitation payments, reiterating that “small bribes paid to facilitate routine Government action” can trigger liability under section 6 or 7 of the Act. At the same time, however, the Guidance recognizes that companies face issues relating to facilitation payments in certain parts of the world and in certain sectors. In light of those issues, the Guidance describes the eradication of facilitation payments as a long-term objective requiring economic and social progress and sustained commitment to the rule of law in countries where the problem is most prevalent.

Jurisdictional Reach of Section 7 of the Act

The Guidance also attempts to provide some clarification of the jurisdictional reach of section 7 of the Act. A company can be liable under section 7 if it “carries on a business or part of a business in the UK.” Although it will be up to the courts to interpret this phrase, the MOJ expects courts to take a common sense approach and anticipates that companies without a “demonstrable business presence” in the UK will not be subject to section 7 liability. Thus, according to the Guidance, the mere fact that a company’s securities are admitted to the UK Listing Authority’s Official List would not itself open the company up to section 7 liability. Having a subsidiary in the UK likewise would not, in and of itself, subject a parent company to liability under section 7.

Sheppard Mullin’s Expertise

We design and implement anti-corruption compliance programs for small, mid-size and large companies, both public and private. Our clients need to be aware that although their U.S. Foreign Corrupt Practices (“FCPA”) compliance programs may establish a strong foundation for an organization subject to the UK Bribery Act, there are significant differences between the two statutes that their compliance regimes need to address.

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