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UK Bribery Act To Come Into Force On July 1, 2011; Final Guidance Issued

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On March 30, 2011, the UK government announced that the new UK Bribery Act (the Act) will come into force on July 1, 2011. At the same time, final joint prosecution guidance¹ has been issued by the Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP) on the approach toward

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enforcement, and the UK Ministry of Justice has issued final guidance² on adequate procedures that commercial organizations can put in place to comply with the Act and avoid the risk of criminal prosecution for failing to prevent bribery.

This guidance is generally good news for business, since it helps clarify the extent to which non-UK entities may be subject to the new regime, as well as the conditions under which third-party activities may expose a company to potential liability under the UK law. For example, while facilitation payments may, in principle, be treated as an offense under the Act, prosecutors may not take an unduly aggressive approach to minor violations. As to compliance procedures, the new guidance provides a basis for companies to take a risk-based approach in the development and administration of cor-



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responding safeguards and internal controls.

With the timing for implementation of the Act now set, it is important for affected companies to ensure that their compliance safeguards conform with the new guidance by July 1, 2011, the date the law takes effect.

Overview Of The Act

The UK enacted the new Act on April 8, 2010. It introduced new offenses, increased the application of offenses to non-UK companies and imposed stricter penalties. In a number of areas, the Act is stricter than the U.S. Foreign Corrupt Practices Act (FCPA).

The new provision that has attracted most attention – and that does not apply under the FCPA – is the corporate crime of failing to prevent bribery. If a company is incorporated in the UK or carries on a

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business or part of a business in the UK, it will be subject to the new regime. As a result, a bribe by any party associated with such a company anywhere in the world may be considered an offense, unless the company can show it had in place adequate procedures designed to prevent bribery.

Therefore, it is important that companies carefully evaluate whether they may be subject to the UK corporate offense provision and ensure their policies and procedures comply with the Act. Where policies and procedures are already FCPA-compliant, this may require only limited changes to an existing framework.

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Impact Of The Final Guidance

Compared with the draft issued in September 2010, the Ministry of Justice guidance and the SFO/DPP prosecution guidance provide greater clarity and, in certain respects, may soften the practical impact of the Act. The new guidance appears to respond to concerns raised by the business community. However, there are no safe harbours, and the guidance does not have the force of law. The headline points are:

Non-UK entities:

The fact that a company is listed on the London Stock Exchange or has a UK subsidiary does not necessarily mean it carries on a business in the UK; a common sense approach is to be adopted based on “demonstrable business presence.”

Activities of third parties:

In order to be “associated” with a company, a party must perform services for or on behalf of the company – which will be decided according to the relevant circumstances, including the degree of control the company has over that party’s activities. An offense is committed only if the associated person intended by their

bribe to obtain or retain business or a business advantage for the company.

Facilitation payments:

Small payments to facilitate routine government actions are, in principle, bribes, and (unlike the FCPA) no exception is provided or recognized. However, the guidance acknowledges that the eradication of such payments is a long-term objective, and consideration of other factors, such as whether or not a payment is one-off, small and/or made by a party in a vulnerable position, may tend against prosecution. Further, the guidance recognizes that a defense may be grounded on an assertion that a payment was made under duress.

Corporate hospitality:

There is also no express exception recognized for hospitality or other promotional expenditure. Criminal prosecution may occur if an expenditure was intended to unduly impact an award of business (e.g., if an expenditure is determined to be lavish, concealed or not clearly connected to a legitimate business purpose). However, “it is not the intention of the Act to criminalise” such an expenditure where it is bona fide, reasonable and proportionate as part of legitimate efforts to pursue valid business opportunities.

Prosecutorial discretion:

Where a facilitation payment or hospitality or other promotional expenditure does amount to an offense, then “prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute.”

Guidance On Adequate Procedures

The Ministry of Justice guidance sets out six principles intended to inform the design of procedures to prevent bribery. These differ from those contained in the September 2010 draft. The guidance emphasizes that these principles are not prescriptive and that companies should take a risk-based approach. A strong theme is that individual companies should take steps to understand and respond to the particular risks they face, which, in turn, may have practical consequences for the way in which they approach transactional and relationship due diligence.

The six principles are as follows:

Proportionate procedures:

“A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.”³

Top-level commitment:

“The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.”

Risk assessment:

“The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.”

Due diligence:

“The commercial organisation applies due diligence procedures, taking a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.”

Communication (including training):

“The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.”

Monitoring and review:

“The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.”

¹ The SFO/DPP final prosecution guidance can be found at <http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf>.

² UK Ministry of Justice’s final guidance on adequate procedures can be found at <http://www.justice.gov.uk/guidance/bribery.htm>.

³ This and the following points excerpted from The Bribery Act 2010 – Guidance (Ministry of Justice) at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>.