

To: Our Clients and Friends

March 31, 2011

## UK Bribery Act

### Adequate Procedures and Joint Prosecution Guidance Published

On March 30, 2011, the UK Ministry of Justice issued its long awaited Guidance on procedures for commercial organisations aimed at preventing bribery by “associated persons.” The UK Bribery Act 2010 provides a defence to the strict liability offence of failure by a commercial organisation to prevent bribery by associated persons if the organisation has in place “adequate procedures” to prevent such bribery. In England and Wales, proceedings for offences under the Act require the personal consent of the Director of Public Prosecutions (DPP) or the Director of the Serious Fraud Office (SFO). Accordingly, simultaneously with the publication of the Ministry of Justice Guidance, the Directors of DPP and the SFO issued joint guidance for prosecutors under the Act.

The Act is now expected to come into force on July 1, 2011, more than a year after it received Royal Assent.

As noted in Bryan Cave’s International Regulatory [Bulletin No. 476](#), there has been intense business lobbying expressing concerns about uncertainty as to what would constitute adequate procedures, particularly in areas such as corporate hospitality, joint ventures and third party services, as well as “facilitation” or “grease” payments. In addition, concerns have been raised as to what constitutes “doing business” in the UK for purposes of the Act’s jurisdictional reach with respect to non-UK organisations.

In the final analysis, whether a non-UK commercial organisation is found to be doing business in the UK for jurisdictional purposes, who is an associated person and whether procedures are “adequate” in a particular case will be matters for the courts. The Guidance notes that the onus will be on the organisation to prove, on the balance of probabilities, that it had adequate procedures in place. For now, the Guidance provides some insight into the present Government’s approach to these issues. It does not set hard and fast rules, and examples are for illustrative purposes only.

Following are some highlights from the Guidance:

#### **The Six Principles for Adequate Procedures**

- Proportionate Procedures – Procedures should be proportionate to the bribery risks faced by and the size and complexity of the organisation.
- Top Level Commitment
- Risk Assessment
- Due Diligence
- Communication
- Monitoring and Review

#### **Jurisdiction For Strict Liability Offence By Foreign Commercial Organisations Doing Business in the UK**

For companies and partnerships formed outside the UK, the Guidance indicates the Government contemplates a “common sense” approach to jurisdiction under the Act, with the courts as the final arbiter. Engagement in

commercial activities and a demonstrable business presence seem to be the test the Government expects to apply. The Guidance suggests that the mere fact that a company's securities have been listed on a UK stock exchange, without more, should not mean in and of itself that the company qualifies as "doing business" in the UK. This position has already drawn fire from certain investment funds and groups indicating this would put UK companies at a competitive disadvantage.

Similarly, according to the Guidance, a foreign company "having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies."

It should be noted that the head of the SFO has indicated he intends to take a wide view of the powers given to prosecute companies under the new Act. He has indicated that companies should not rely on very technical arguments that they are outside the scope of the Act and that the SFO would investigate what activities are being carried out in the UK.

### **Associated Persons**

An associated person is defined in the Act as a person anywhere who "performs services" anywhere for or on behalf of a commercial organisation subject to UK jurisdiction. This includes employees and agents and can include subsidiaries and others. The Guidance discusses the following examples:

- *Supply chain.* Where a commercial organisation only has control over the contract counterparty performing services for it, the Guidance suggests approaching bribery risks in the supply chain by employing risk-based due diligence and anti-bribery terms and conditions and other relevant procedures with the contract counterparty and requesting the counterparty to adopt a similar approach with the next party in the chain.
- *Joint ventures.* The Guidance suggests that the existence of a joint venture entity will not of itself mean that it is "associated" with any of its members. It provides the example that a bribe paid on behalf of a joint venture entity by one of the joint venture's employees or agents will not trigger liability for the joint venture members "simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture." Contractual joint ventures are analysed somewhat differently. An employee of a participant in a contractual joint venture who has paid a bribe to benefit his employer "is not to be regarded as a person 'associated' with all the other participants in the joint venture."

The Guidance goes on to note that only if an associated person providing a bribe intended to obtain or retain business or an advantage in the conduct of business for that organisation will an offence be committed. For example, the Guidance indicates that a bribe on behalf of a subsidiary by one of its employees or agents "will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries .... even though the parent company or subsidiaries may benefit indirectly from the bribe."

### **Hospitality, promotional, and other business expenditure**

Hospitality has been a big issue for business and the hospitality industry. In the Foreword to the Guidance, the Secretary of State for Justice says: "Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix."

Notwithstanding this statement, the Guidance makes clear that hospitality and travel and other expenditures must be reasonable and proportionate and for a bona fide purpose, and that the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure, the more likely the inference of a breach of the bribery provisions.

Under the general bribery provision of the Act, which applies to both public and private bribery, the Guidance indicates that the prosecution would have to show that hospitality was intended to induce improper performance, judged by what a reasonable person in the UK thought. "So, for example, an invitation to foreign

clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations ... is extremely unlikely to engage” the general bribery provision, according to the Guidance.

In contrast, the specific separate provision of the Act prohibiting bribery of a foreign official does not include an “improper performance” element like the general bribery prohibition – only a requirement that a financial or other advantage be intended to influence the official in his or her official role and thereby secure business or a business advantage. Again, the more lavish the advantage, the greater the inference that it is intended to influence the official to grant business or a business advantage in return. The Guidance suggests that standards or norms of a particular sector may be relevant in determining what would raise the inference of bribery.

In the final analysis, the Guidance provides that it is for individual organisations to establish and disseminate appropriate standards for such expenditures.

### **Facilitation Payments**

The Guidance notes that as under current law, facilitation payments are prohibited. However, it also recognises the problems that commercial organisations face in some parts of the world and some sectors, as well as the need for efforts by governments and international bodies to eradicate such payments. It points to the joint guidance for prosecutors under the Act published by the Directors of the DPP and the SFO, for the factors tending for and against prosecution in this area. These factors include whether there are large or repeated payments, whether such payments are accepted as a standard way of conducting business, whether the organisation has a clear and appropriate procedures to follow if facilitation payments are requested, and whether payments come to light as a result of a genuinely proactive approach involving self-reporting and remedial action.

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While the Guidance and the case studies appended to the Guidance (which do not form part of the Guidance) may be helpful in determining what may be acceptable in certain circumstances, it is no substitute for a systematic review of the risk factors an organisation faces and analysis of policies and procedures that are appropriate in the circumstances for an organisation to put in place to prevent bribery. The head of the SFO has made clear that enforcement of the Act is a high priority for prosecutors. And anti-corruption enforcement by other authorities which may have jurisdiction is also on the rise.

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