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UK Bribery Act to come into force on 1 July 2011

Ministry of Justice releases guidance on the application of the UK Bribery Act

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On 30 March 2011 the Ministry of Justice released its long awaited guidance (the **Guidance**) setting out what may constitute an “adequate procedures” defence to an allegation that a commercial organisation failed to prevent bribery under section 7 of the UK Bribery Act 2010 (the **Act**). The publication of the Guidance, which was required under the provisions of the Act, paves the way for the entry into force of the Act on 1 July 2011.

In the foreword to the Guidance, the Secretary of State for Justice Mr. Kenneth Clarke recognises the impact of the Act on the business community and, while reiterating the UK’s commitment to tackling corruption, states that the Act is “directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms.”

The Guidance is a lengthy document, and as such, this alert will focus on some of the key issues. The full text of the Guidance can be found at <http://www.justice.gov.uk/guidance/bribery.htm>. This alert sets out the six guiding principles as to what may constitute “adequate procedures” and considers (i) the extra-territorial implications of the Act, (ii) hospitality and client entertainment under the Act, (iii) the prohibition of facilitation payments and (iv) the approach to prosecutions under the Act.

SIX GUIDING PRINCIPLES

The core principle of the Guidance is “proportionality” and it is recognised that different organisations face very different bribery risks. The Guidance is not prescriptive in nature and instead focuses on six core principles which should be considered when relevant commercial organisations are compiling and implementing anti-bribery policies and procedures. The six guiding principles are:

Principle 1 – Proportionate procedures

Principle 2 – Top-level commitment

Principle 3 – Risk Assessment

Principle 4 – Due diligence

Principle 5 – Communication (including training)

Principle 6 – Monitoring and review

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Further, the Guidance provides a number of case studies which focus on the application of the six principles in various factual scenarios. Details of the six principles and the case studies can be found at pages 20 – 43 of the Guidance.

EXTRA-TERRITORIALITY

The Act is intended to have extra-territorial reach. The UK courts will have jurisdiction over offences under the Act committed both in the UK and in other jurisdictions where the person (legal or natural) committing those acts has a close connection with the UK either by virtue of their domicile, incorporation or citizenship as applicable. Although the Act will obviously apply to commercial organisations incorporated or formed in the UK, it will also apply to organisations which carry on a business or part of a business in the UK. The UK courts will have jurisdiction regardless of whether the person committing those acts is a UK national or resident, or where the relevant acts take place.

In the case of organisations incorporated or based outside the UK, whether or not those organisations can be regarded as carrying out a business or part of a business in the UK will be determined on a case-by-case basis, and the UK courts will be the final arbiter in the event of a dispute. The Guidance states that a “common sense approach” will be applied in determining whether a company falls within the scope of the Act. By way of example, the Guidance states that the UK government would not expect a company whose securities have been admitted to trading on the LSE to be carrying out a business in the UK by virtue of that listing alone. All commercial organisations which reasonably believe that they may be carrying out a business or part of a business in the UK may wish to consider the implications of the Act for their business and take appropriate action.

HOSPITALITY

In the foreword to the Guidance, Secretary Clarke states that “no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix” and no doubt this is reassuring to many organisations and many clients who enjoy such events. Commercial organisations’ approach to hospitality should be guided by the core principle of proportionality.

The Guidance recognises the role that bona fide hospitality and client entertainment play in commercial enterprise and states that “it is not the intention of the Act to criminalise such behaviour”. Hospitality should be reasonable and proportionate and should not be offered or entered into with the intent to influence the recipient in a manner which would fall foul of sections 1, 2 or 6 of the Act. Without an intention to influence, an offence cannot be committed under the Act and organisations should bear this in mind when considering their approach to hospitality and other such business expenditures. There is a case study on hospitality which can be found at page 36 of the Guidance.

FACILITATION PAYMENTS

Although the Guidance states that the UK government recognises “the problems that commercial organisations face in certain parts of the world and in certain sectors”, unlike the position under the FCPA, facilitation payments are not permitted under the Act. It is important to note that this does not constitute a departure from the position under the current legislation in force in the UK.

The payment of a small bribe to facilitate routine action, or a facilitation payment, could trigger sections 1 or 6 of the Act and as such result in the commission of an offence under section 7 of the Act by the commercial organisation associated with the person engaging in the payment of a facilitation payment. There is no “safe harbour” or minimum threshold for prosecution under the Act and organisations which could be said to carry on a business or part of a business in the UK

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must be aware of this provision of the Act. There is a case study on facilitation payments which can be found at page 33 of the Guidance.

APPROACH TO PROSECUTION

The Guidance states that “whether to prosecute an offence under the Act is a matter for the prosecuting authorities” and that in deciding whether to prosecute an offence, the authorities will consider (i) whether there is sufficient evidence and (ii) if so, whether such a prosecution would be in the public interest. The Guidance states that where hospitality expenditures or facilitation payments appear to trigger the Act, the authorities will “consider very carefully what is in the public interest before deciding whether to prosecute”. Issues relating to prosecutions for facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office (SFO) and the Director of Public Prosecutions. In addition, the SFO operates a policy of co-operation with commercial organisations that self-report incidents of bribery.

It is important to note that the Guidance does not constitute a “checklist” and that the policies and procedures adopted by each commercial organisation will be assessed on a case-by-case basis. As the Act comes into force on 1 July 2011, commercial organisations affected by the Act should now be conducting risk assessments to ensure that they are prepared for its implementation.

For more information on preparing your organisation for the implementation of the Bribery Act and on Morrison & Foerster’s anti-corruption practice please contact:

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