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Foreign Corrupt Practices Act (FCPA) Alert

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UK Bribery Act: What Non-UK Companies Need to Know

On July 1, 2011, the United Kingdom's long-anticipated Bribery Act will come into force. Companies subject to the Bribery Act – which will apply not only to UK-based companies, but every company that does business in the UK – may be held strictly and criminally liable for improper payments made on their behalf, anywhere in the world, even in the absence of any further connection between the payment and the UK. Such liability may attach without regard to whether the payment was known to or authorized by the company.

The Bribery Act is similar to, but in some respects significantly more aggressive than, the US Foreign Corrupt Practices Act ("FCPA"). The Bribery Act becomes effective on July 1 in order to permit affected companies time to take the steps necessary to assure their compliance.

This client alert addresses the five key questions that non-UK companies should be asking about the Bribery Act:

- Will the Bribery Act apply to my company?
- How is it different from the FCPA?
- How can my company avoid the Bribery Act's provisions for strict criminal liability?
- What limitations will the Bribery Act impose on corporate entertainment and promotional expenditures?
- What about facilitation payments?

As detailed below, virtually any company that conducts business operations in the UK must comply with the Bribery Act. Companies already accustomed to complying with the FCPA will need to re-examine their existing policies and procedures, as the Bribery Act is different in some important respects. Companies that lack anti-corruption compliance programs, or whose programs consist of little more than a policy statement, should avail themselves of the time remaining until the Bribery Act takes effect. By taking some relatively simple and cost-effective steps to implement adequate procedures to prevent bribery, companies can insulate themselves from the prospect of bearing criminal liability for the misdeeds of an employee or agent.

1. Will the Bribery Act apply to my company?

Though a company incorporated in the UK may be liable under the Bribery Act for improper payments made or authorized by its senior officials, there will be much broader jurisdiction over a company that *"fails to prevent"* bribes being offered or paid on its behalf. According to official Guidance published by the UK Ministry of Justice (http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf), a company risks strict criminal liability for failing to prevent such conduct if it *"carries on a business or part of a business"* in the UK, regardless of its place of incorporation or primary location. UK authorities have indicated their intention to prosecute such offenses even where the improper payment has no connection of any kind to the UK. By contrast, the FCPA only applies to conduct by US companies, citizens or permanent residents, or where at least some of the alleged misconduct takes place in the US.

Many non-UK companies engaged in international commerce are likely to fall within the Bribery Act's jurisdiction. The UK has strong business ties with most developed nations, particularly those in North America and the European Union. The UK is the sixth-largest trading partner of the United States, and many US companies have some form of operations in the UK.

The Guidance points out that "the mere fact" that a company's securities have been listed on the London Stock Exchange will not subject it to the Bribery Act's jurisdiction – a departure from the FCPA's jurisdiction over any company listed on a US exchange – although anything more than this single point of contact would seem likely to suffice. The Guidance also notes that simply having a UK subsidiary would not, "in itself," be sufficient to subject a parent company or its affiliates to the Bribery Act's jurisdiction, "since a subsidiary may act independently of its parent or other group companies." It remains uncertain what degree of independence would be required to persuade UK authorities that a subsidiary met this standard, but it should be anticipated that UK prosecutors will be aggressive in seeking to impose liability on a UK subsidiary's parent and its affiliates if connections to the UK subsidiary amount to anything beyond the ownership of equity.

2. How is the Bribery Act different from the FCPA?

The Bribery Act contains essentially all of the anti-bribery provisions of the FCPA, and adds another two significant prohibitions.

- Facilitation payments. While the FCPA permits facilitation payments – generally small payments to lower-level officials for "routine government actions" – the Bribery Act does not, and UK authorities have made plain their intention to prosecute those who make or permit such payments. This is considered in further detail below.
- Commercial bribery. Unlike the FCPA, which only prohibits improper payments to foreign government officials, the Bribery Act extends to bribery between private parties, commonly referred to as "commercial bribery."

3. How can my company avoid the Bribery Act's provisions for strict criminal liability?

The Act provides a complete defense to "failure to prevent" charges where a company can establish that it had in place *"adequate procedures"* to prevent persons associated with it from paying bribes. UK authorities recognize, and the Guidance makes clear, that "no bribery prevention regime will be capable of preventing bribery at all times," and the intention is not to impose harsh sanctions on "well run commercial organizations that experience an isolated incident of bribery on their behalf." In this regard, the UK authorities responsible for enforcing the Bribery Act have issued "Prosecution Guidance" stating that "a single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. For example, the actions of an agent or employee may be willfully contrary to very robust corporate contractual requirements, instructions or guidance." (http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/index.html)

The purpose of the "adequate procedures" defense is to encourage companies to put procedures in place to prevent violations of the Bribery Act, and the Guidance sets out six principles by which such adequacy will be evaluated. The Guidance

elaborates these principles at some length, along with eleven case studies applying the principles to specific fact scenarios. The principles are in line with current best practices already being followed by many companies seeking to assure their compliance with the FCPA.

Key points of the six principles are as follows:

- Principle 1: proportionate procedures.
  - Procedures to prevent bribery should be "proportionate to the bribery risks" that the company faces, and to the "nature, scale and complexity" of the company's activities.
  - Procedures must be clear, practical, accessible, effectively implemented, and enforced.
- Principle 2: top-level commitment.
  - Companies must reflect a "top-level commitment" to preventing bribery. Among other things, this will generally include a commitment to doing business honestly and transparently; "a commitment to zero tolerance towards bribery"; and an "articulation of the business benefits of rejecting bribery."
- Principle 3: risk assessment.
  - Procedures must be informed by an assessment of the "nature and extent" of the company's exposure to potential bribery risks, and risk assessments should be re-evaluated, both periodically and as the company's business evolves.
  - Distinct types of risks may be posed by the country or sector in which the company operates; by certain types of transactions or business opportunities; and by certain kinds of business relationships, such as those with intermediaries in dealing with foreign public officials.
  - Beyond this, certain factors may exacerbate a company's risks in this regard, such as a "bonus culture that rewards excessive risk taking," or a lack of clear policies, procedures, controls or a clear commitment to preventing bribery.
- Principle 4: due diligence.
  - Due diligence is both a "form of bribery risk assessment" and "a means of mitigating" risk. Due diligence may help to identify areas of generalized risk, and due diligence reviews of specific third parties can help to significantly mitigate those risks.
  - Due diligence procedures should be proportionate to the identified risks. The Guidance notes the need for considerable care, for example, when entering into certain business relationships, such as where local law or practice calls for the use of a local agent, where it may be particularly difficult to modify or end such a relationship once it is entered into.
- Principle 5: communication (including training).
  - In addition to conveying a proper "tone from the top," a company should communicate both to internal and external audiences its commitment to preventing bribery by persons associated with it. Training, which should be proportionate to the risks faced by the company, should cover the implementation of the company's policies and procedures, the consequences of failing to follow those requirements, how to respond to bribe requests, and how to report potential violations.
- Principle 6: monitoring and review.
  - Companies need to establish ways of monitoring and evaluating the effectiveness of their bribery prevention procedures, and to modify them as necessary, in response to changes in their operations, changes in the law, or particular incidents experienced by the company or reported in the press.

4. What limitations will the Bribery Act impose on corporate entertainment and promotional expenditures?

The plain language of the Bribery Act could be read to broadly prohibit the kinds of entertainment and promotional expenditures that are routinely made by most companies. UK authorities, however, have

been keen to provide assurances that they will *not* bring prosecutions in connection with such routine activities.

In this regard, the UK authorities responsible for enforcing the Bribery Act have issued "Prosecution Guidance" stating that "Hospitality or promotional expenditure which is reasonable, proportionate and made in good faith is an established and important part of doing business. The Act does not seek to penalize such activity." This is essentially the same standard that is ordinarily applied under the FCPA, and it suggests that there is no need to alter existing FCPA-based policies on such expenditures.

Consistent with FCPA standards, the Prosecution Guidance explains that "the more lavish the hospitality or expenditure … the greater the inference that it is intended to encourage or reward performance or influence an official" in violation of the Bribery Act. Lavishness is "just one factor that may be taken into account in determining whether an offence has been committed," and prosecutors will evaluate each situation according to all the circumstances.

5. What about facilitation payments?

While many companies have determined in recent years to prohibit facilitation payments altogether, other companies have felt it necessary to continue to make such payments, on a limited basis, subject to controls designed to assure that such payments do not violate the FCPA's anti-bribery provisions and that such payments are accurately recorded in the company's books and records. The fact that such payments may violate local law where they are made raises particular challenges.

Facilitation payments are flatly prohibited by the Bribery Act. As the Prosecution Guidance notes, "there is no exemption in respect of facilitation payments. They were illegal under the previous legislation and the common law and remain so under the Act." The difference, of course, is that the Bribery Act broadly subjects non-UK companies to these restrictions *for the first time*. The UK authorities remain anxious to give the impression that they will prosecute companies that make or fail to prevent facilitation payments, notwithstanding a few statements that appear to recognize the difficulties of doing business under certain circumstances without making such payments.

The Prosecution Guidance states that while a "single small payment" may weigh against bringing charges or result in "only a nominal penalty," significant consequences will result where there have been "large or repeated payments," and it notes that "facilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated." The UK authorities advise that companies train their personnel about how to resist demands for such payments by, for example:

- Questioning the legitimacy of the demand;
- Requesting receipts and recording the identity of the official making the demand;
- Requesting the opportunity to speak with the requesting official's superior officer;
- Informing the requester that compliance with the demand may subject company personnel to prosecution under UK law; and
- Advising those requesting payment that it will be necessary to inform the UK embassy in that country of the demand.

These tactics parallel those recently outlined in *Resisting Extortion and Solicitation in International Transactions* (RESIST), a project led by the International Chamber of Commerce, Transparency International, the United Nations and the World Economic Forum. RESIST is intended to provide practical suggestions for companies as to how to respond to bribe solicitations, although some have described these tactics as ineffective and particularly unlikely to be of use in many situations where facilitation payments are demanded by low-level officials operating at points where governmental authority is weak or non-existent.

The Guidance recognizes that there may be situations where there is "no alternative but to make payments against loss of life, limb or liberty," and that a defense of "duress" would likely apply where such payments are made. Moreover, such payments may properly be characterized as petty extortion, as

opposed to a request for a facilitation payment, because they tend to have nothing at all to do with business or commercial activities; instead, they oftentimes are merely a reflection of abuse of power. But the Guidance indicates no flexibility with regard to such payments where commercial damage will result from a refusal to accede to a bribery demand, leaving companies with the unattractive alternatives of abandoning their business activity or violating the Bribery Act. Of course, this is a consequence of the Bribery Act itself, which makes no exceptions for these circumstances.

Notably, UK authorities have indicated their intention to prosecute bribery, including facilitation payments, where UK companies are disadvantaged by such payments. In remarks made at a conference in February 2011, Chris Walker, the head of policy for the Serious Fraud Office ("SFO"), posited a situation where two companies – one US company and one UK company – build factories in a remote area of a developing country, and local officials demand facilitation payments to activate telephone service. In Mr. Walker's example, the US company avails itself of the FCPA's exception for facilitation payments and pays a bribe to obtain telephone service, while the UK company, in accordance with the Bribery Act, refuses to do so, and its factory remains shut. Mr. Walker said that the SFO would carefully consider whether to prosecute the US company in this situation, because the UK company had been disadvantaged. Mr. Walker explained that "It is our intention to go after those individuals and corporations that have absolutely no intention whatsoever of living up to an anti-corruption culture, and want to use corruption to undercut good, clean companies."

Consequently, non-UK companies subject to the Bribery Act face considerable risks if they continue to make facilitation payments. Indeed, there seems a very real risk that UK prosecutors might not consider a company to have "adequate procedures" unless it firmly prohibits such payments, given Guidance on "Principle 2: top-level commitment," stating that this is likely to require a public commitment to "zero tolerance" towards bribery and an "articulation of the business benefits of rejecting bribery." SFO authorities have reportedly made public statements to the effect that companies with policies that allow facilitation payments to be made under certain circumstances will not be seen as "adequate" for purposes of the Bribery Act, since the Act demands a "zero tolerance" approach.

Conclusions

While it will ultimately be for the UK courts to decide the extent of the Bribery Act's jurisdiction over non-UK companies, UK prosecutors will take the view that virtually any company that conducts business operations in the UK must comply with the Bribery Act. Companies that already have programs to assure their compliance with the FCPA should re-examine those programs to consider whether they are "adequate" for purposes of the Bribery Act. Given the fact that there are some differences between the Bribery Act and the FCPA, some adjustments are likely to be necessary.

Companies that lack anti-corruption compliance programs, or whose programs consist of little more than a policy statement, should avail themselves of the 90-day period before the Bribery Act takes effect. Taking steps to implement adequate procedures to prevent bribery is a relatively simple and cost-effective way to avoid criminal liability for the misdeeds of an employee or agent, as well as the resulting legal costs and reputational harm.