Litigation Law Alert: Anti-Corruption Update: What Are You Doing to Prepare for July 1, 2011?

5/11/2011

After several delays, the U.K. Bribery Act of 2010 is finally set to go into effect on July 1, 2011—about three months behind schedule. (See here for our previous update describing the Act.) Despite recent final guidance from the Ministry of Justice ("MoJ Guidance"), many questions remain regarding how the Act will be enforced—or even who will be doing the enforcing.

The biggest concern for U.S. companies doing any business in the U.K. remains Section 7 of the Act. That provision subjects a company that "carries on a . . . part of a business" in the U.K. to criminal liability for any bribe paid anywhere in the world by a person "associated with" the company. The bribe itself can be wholly unconnected to any U.K. activity.

The MoJ Guidance provides almost no guidance on what constitutes carrying on a "part of a business" in the U.K. Indeed, it acknowledges that "the final arbiter . . . will be the courts." The MoJ Guidance suggests that the government will apply "common sense" to determine whether a company has "a demonstrable business presence" in the U.K. It further suggests that "the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself," may not qualify as "carrying on a business or part of a business in the UK." This is a somewhat surprising interpretation. In the United States, for example, the Foreign Corrupt Practices Act ("FCPA") prohibits bribery of foreign officials and applies to any foreign company registered on any U.S. securities exchange. If actively selling securities on the London Stock Exchange does not qualify as "carrying on a business or part of a business in the UK," it remains unclear what will qualify for non-U.K. companies.

The MoJ Guidance does attempt to provide more guidance on who qualifies as a person "associated with" the company. Section 8 of the Act defines an "associated person" to mean any company employee, agent, or subsidiary, or any "person who performs services for or on behalf of" the company. The company is liable for the acts of the "associated person" "only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation." The MoJ Guidance further provides that the "fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence." Moreover, "the level of control over the activities of the associated person" can be a relevant factor in determining whether to prosecute. However, the MoJ Guidance does not give any indication how the government will weigh those factors, or what level of control or indirect benefit will suffice. Thus, as with the scope of "carrying on a part of a business," the final scope of who is an "associated person" remains unclear.

Other important areas to note about the MoJ Guidance:

> ***Will the MoJ Require Heightened Intent for Bribery of Foreign Officials?*** Section 6 of the Bribery Act—outlawing bribery of foreign officials—does not require proof that the defendant *improperly* influenced, or intended to *improperly* influence, the foreign official. That is, there is no corrupt-intent requirement, or a requirement that the defendant sought to influence the foreign official to act in bad faith, or in violation of a position of trust. Rather, it is sufficient that the defendant simply had the general intent to "influenc[e] the official in the performance of his or her official functions." Nevertheless, the MoJ apparently intends to read such a requirement into the statute, assuring the business community that "it is not the Government's intention to criminalise behaviour where no such mischief occurs."
>
> ***Reasonable Hospitality and Promotional Expenditures Not to Be Prosecuted.*** Unlike the FCPA, the Bribery Act does not contain an express, statutory exemption for hospitality and promotional expenditures. This led to speculation in the business community that such expenditures—often a vital and necessary part of doing business and effectively competing in the marketplace—would be prosecuted. The MoJ Guidance clarifies that "it is not the intention of the Act to criminalise . . . reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes." The MoJ Guidance indicates that the "incidental provision of a routine business courtesy," such as "the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event," will not likely be prosecuted. In his Foreword to the MoJ Guidance, Secretary of State for Justice Kenneth Clarke wrote: "Rest assured—no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix." But "the more lavish the hospitality or the higher the expenditure in

generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return." As with the FCPA, the limits of what is considered "reasonable and proportionate" hospitality expenditures will be decided by the courts as the government exercises its discretion to file charges. While companies should be encouraged that the U.K. authorities do not, apparently, intend to prosecute such expenditures, they should also be cautious and not seek to be the test case for the government's authority or discretion.

Adding to the uncertainty, the Serious Fraud Office ("SFO")—the office charged with enforcing the Bribery Act—has seen significant turnover in recent months. Most recently, its general counsel, Vivian Robinson, QC, announced his departure to join McGuireWoods LLP. Mr. Robinson had been a vocal promoter of the Bribery Act in the U.K. and abroad since it was passed in April 2009. His resignation comes on the heels of Robert Amaee's, the former Head of Anti-Corruption and Proceeds of Crime Unit at the SFO, who left the SFO to join Covington & Burling's London office in January 2011. Adding to the turnover, the current head of the SFO, Richard Alderman—another vocal promoter of the Bribery Act—has indicated he plans to retire in 2012. This slate of departures will leave very little of the core anti-bribery leadership team at the SFO, just as it begins testing the waters—and the limits of its authority—with Bribery Act investigations and prosecutions.

Stoel Rives LLP is ready to assist companies that do any part of their business in the U.K., or are contemplating expanding in some fashion into the U.K., in preparing for the new regime under the U.K. Bribery Act. Our experienced White Collar Criminal Law and FCPA practitioners can provide counseling on the adequacy of existing anti-corruption procedures and can provide concrete recommendations for instituting new procedures as appropriate.

For additional information on this or any related topic, please contact:

Per A. Ramfjord at (503) 294-9257 or paramfjord@stoel.com
Jamie S. Kilberg at (503) 294-9274 or jskilberg@stoel.com
Jason E. Prince at (208) 387-4288 or jeprince@stoel.com