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June 6, 2013

UK Bribery Act: Red Light, Green Light or Mixed-Signals?

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The UK Government has announced a review of the Bribery Act 2010 and its intent to reduce the cost of compliance for small and medium-sized businesses. The main focus will apparently be on facilitation payments. These are small payments given to officials to permit or speed up a service, and that are illegal under the UK Bribery Act but narrowly permissible under the U.S. Foreign Corrupt Practices Act (FCPA). The current legislation has been challenged by businesses that operate in jurisdictions where such payments are a common and arguably necessary occurrence and also by those companies that are subject to both the Bribery Act and the FCPA. At the same time, the facilitation payments exception under the FCPA itself appears to be under review and perhaps on the way out.

While many laud the UK Government's expressed intention to reduce red tape for small and medium-sized businesses generally, these proposals are in contrast to repeated promises to clamp down on bribery, as well as contrary to the Serious Fraud Office (SFO) guidance statements that facilitation payments are regarded as bribes. It will be interesting to see whether any meaningful proposals actually come out of the review.

The so-called facilitation payment exception in the FCPA is presently being questioned and may well be on the way out. For example, one U.S. Securities and Exchange Commission (SEC) official (writing in his personal capacity) argued that "while the FCPA contains several core provisions that will always withstand the test of time, the facilitation payments exception is out of date in this modern-day era of commerce and sensibility." Indeed, he predicted that the facilitating payments exception "will eventually be eliminated" formally in response to "international pressure." Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 921-922 (2011). Many attorneys in the U.S. have also wondered whether U.S. prosecuting authorities have already effectively read the exception out of the

statute. Thomas Fox, *The End is Nigh for Facilitation Payments—Get Ahead of the Breeze*, LEXISNEXIS (Jan. 9, 2012) ("You don't need a weatherman to know which way the wind blows and the direction of that breeze you feel at your back about now is clearly running against allowing the facilitation payments to continue."); see also Cheryl A. Krause & Elisa T. Wiygul, *FCPA Compliance: The Vanishing "Facilitating Payments" Exception*?, 2 FIN. FRAUD L. REP. 673, 730 (2010).

Nevertheless, the recent joint guidance issued by the SEC and the U.S. Department of Justice recognizes that facilitation payments are still an exception under the FCPA. See *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Agency Publisher: Justice Dept.; and Securities and Exchange Commission, Ch. 2 at pp. 25-26, GPO Stock Number: 027-000-01424-1, ISBN: 9780160915390. This disparity in treatment may turn to some extent upon the distinct differences between the Bribery Act and the FCPA on the issue of corrupt intent. Under the FCPA, the prosecutors have to prove this as an element of any crime charged, while in the UK, the Bribery Act's corporate offence is one of strict liability.

Nevertheless, if the UK and U.S. authorities were to somehow agree on a common approach regarding this issue, that would certainly be a welcome outcome.

Perhaps a greater or more immediate benefit to businesses of all sizes, as well as to the SFO operating under a limited budget, may be that Deferred Prosecution Agreements ("DPAs") are now a possibility in the UK following Royal Assent to the Crime & Courts Act ("the ACT") on 25 April 2013. The provisions for DPAs can be found in Schedule 17 of the ACT and can be used to address a number of corporate offences, including fraud, bribery and corruption, tax evasion and money laundering. Before DPAs are fully available, the Director of Public Prosecutions and the Director of the SFO are required to issue a joint Code for prosecutors on the general principles to be applied in determining whether a DPA is appropriate in a given case.

Until these uncertainties are all sorted out, it is surely prudent to consider the traffic signal as yellow and facilitation payments as inadvisable.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author.

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