

UK Bribery Act—New Guidance, Plus Input from the Director of the Serious Fraud Office on Preparing for Compliance as of July 1

by Rafi Azim-Khan and Steven Farmer

The impact of the new Bribery Act 2011 (the “Act”) will extend far beyond UK shores. In his capacity as Chair of the British American Business Law Forum, London-based Pillsbury partner Rafi Azim-Khan recently chaired a briefing with the Director of the UK Serious Fraud Office (“SFO”), Richard Alderman, who provided valuable insight into the enforcer’s priorities. Along with the Ministry of Justice’s guidance on the Act released today, we look briefly at the key points that companies should note and take action on before July 1, 2011.

Today, the Ministry of Justice (“MOJ”) issued revised guidance on the Act in an attempt to dispel business concerns. The guidance confirms some of the key messages SFO Director Richard Alderman had delivered to industry recently. Businesses, whether in the UK, US or elsewhere should take note and where necessary action reviews and corrective measures before July 1, 2011.

In his recent discussion of the Act, the SFO Director commented that:

- “Adequate procedures” are key: If companies are operating in accordance with best practices as to corporate governance they should have a lot less to fear. This means reviewing—on a regular basis—business practices, particularly those in relation to sales, marketing, incentives and contracting.
- A common-sense approach towards entertainment, gifts and hospitality should be taken by companies and the guidance gives some clear steer on this. The SFO will take an equally “sensible” approach.
- Whilst facilitation payments will continue to be outlawed, factors tending against prosecution include situations where the payment(s) came to light as a result of a proactive approach involving self-reporting and remedial action.

The Revised MOJ Guidance—Does It Give Much Comfort?

From an initial peek, the guidance is aligned in many respects with the SFO's recent messages, making it clear that only where entertainment, gifts or hospitality are extraordinary or lavish, or have the ability to influence or reward improper performance by the recipient, will the payment be prosecuted under the Act. Is this good news for business then? Maybe, in the sense that certain tickets to a sporting event are unlikely to be prosecuted. However, where the gift or hospitality is deliberately concealed, not genuinely connected with legitimate business, etc., then it is clear that the Act will bite.

The guidance goes on to explain that key issues that might affect the decision to prosecute in the context of facilitation payments will include large/repeated payments, pre-mediated/planned payments, and those in breach of company policies on facilitation payments. A further point stressed by the guidance is that companies will need to have a demonstrable business presence in the UK for the Act to apply. However, in the absence of case law testing the boundaries of this, grey areas still remain.

So What Should I Do Now?

Further guidance will follow from us as the SFO's exact position becomes clear, however, for the time being, it is clear from Mr Alderman's comments and the MOJ guidance that companies with a demonstrable business presence in the UK (whatever that turns out to be) should:

- Urgently review internal governance procedures, conducting risk assessments and implementing policies and procedures where these are missing (despite the guidance suggesting oral policies may in some circumstances meet the requirements of the new law).
- Train staff and get reporting structures in place.
- Consider all sales, hospitality and marketing strategies generally—revisiting all types of activities and payments planned in light of the guidance.
- Seek advice and conduct such reviews of the above with independent external advisor assistance, which will give weight to “due diligence” defence arguments if a problem should later arise.

Whilst the guidance on the one hand suggests the Act is largely about common sense and not burdensome procedures, a number of key questions still remain unanswered and crucially untested by the courts which, of course, have the power to completely disregard the guidance and all pre-guidance commentary. This, along with the suggested use of the Proceeds Of Crime Act to ratchet up the risks for violators of the Act, means that companies would be ill-advised not to proceed with caution and take action now to ensure an adequate regime of procedures are in place come July 1.

If you have questions, contact the Pillsbury attorney with whom you regularly work, or the authors below. You will also find more articles on the UK Bribery Act at www.pillsburylaw.com.

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