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A Closer Look at the 2010 UK Bribery Act

Mike Emmick is a white-collar defense specialist at the Los Angeles office of Sheppard Mullin Richter & Hampton LLP. He was an assistant U.S. attorney for 25 years, and chief of the Public Corruption & Government Fraud Section for eight years. He is an adjunct professor at Loyola Law School. He can be reached at (213) 617-5554 or memmick@SheppardMullin.com.



LAST IN A TWO-PART SERIES: Part one appeared on Friday.

The Ministry of Justice's recently-issued guidance on the UK Bribery Act has received mixed reviews. Some companies were disappointed in the guidance's vagueness about what measures would help establish the new defense of having "adequate procedures" in place to prevent bribes. Other companies were pleased at the guidance, especially its clarifications regarding the scope and substance of the Act.

Bethany Hengsbach is a partner in Sheppard Mullin Richter & Hampton LLP's Los Angeles office. She has designed and implemented FCPA and global anti-corruption compliance programs for numerous clients in the U.S. and abroad. She can be reached at (213) 617-4125 or bhengsbach@SheppardMullin.com.



In particular, the guidance clarified two aspects of the Act's coverage. First, the mere fact that a company is admitted for trading on the London Stock Exchange is not, in itself,

sufficient to conclude that the company is covered by the Act. Second, the mere fact that a corporation has a U.K. subsidiary will not, in itself, be sufficient to conclude that a parent company is covered by the Act.

The guidance also clarified the dicey subject of "hospitality and promotional expenditures." The Ministry sensibly announced that such expenditures will not be prosecuted so long as they are "reasonable and proportionate."

As for the "adequate procedures" defense, the guidance is indeed vague, but it does no good for companies to sit around and wish the guidance had been more helpful. The Act will be enforced on July 1, 2011, and companies need to protect themselves from criminal liability through some program of anti-bribery compliance measures.

Although Parliament had asked the Ministry of Justice to provide guidance as to how companies can prevent bribery, it went a step further and added clarifications regarding the scope and substance of the Act itself.

There are several specific ways a company can increase its chances of satisfying the "adequate procedures" defense. First, document everything. Regardless of the details of the company's anti-bribery program, every measure, every meeting, discussion, and decision should be documented in full. These documents may later be needed in order to dissuade a prosecutor from bringing charges, or to persuade a court that an "adequate procedures" defense was established.

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It is often quite difficult to reconstruct compliance efforts that were taken or considered years before. It is much more persuasive to point to hard documentary evidence of such efforts when they actually occurred. Documentation is also a sign that a company is taking its anti-bribery obligations seriously. From a cost/benefit point of view, the documentation of anti-bribery measures will take little additional time, and may make a world of difference later.

Second, shoot at the target. The guidance may not be perfect or even particularly helpful as to specific anti-bribery measures, but it should not be ignored either. The U.K. Serious Fraud Office will almost certainly use the guidance when evaluating a proffered "adequate procedures" defense. As a result, when companies are preparing their anti-bribery programs, they are in effect drafting the substance of their letters or "white papers" seeking non-prosecution under that defense. It would be foolish not to consider whatever format the guidance has offered. Call it a checklist; touch all the bases.

Third, don't be lulled. Although the guidance makes several reassuring references to the prosecutor's obligation to exercise discretion and to consider the public interest, it would be a mistake for a company to base its anti-bribery program on those calming palliatives. Terms like "discretion" and "public interest" may prove useful once a company has been caught and is seeking lenience, but those concepts are too shifting, subjective, and political to form the basis for compliance efforts going forward. One prime example of this is the area of "facilitation payments." The guidance states that prosecutors will "consider very carefully" whether prosecuting such a violation is really in the public interest, even if the bribe payments are provable and illegal "on their face."

But make no mistake about it: The guidance also confirms that "facilitation payments" are squarely prohibited by the Act, and it would be foolhardy for a company not to at least consider prohibiting all such payments outright. Fourth, take it seriously. Companies are not likely to receive significant credit if their compliance programs are merely formalistic. Indeed, that is part of the reason the Ministry of Justice refused to provide a definitive list of required anti-bribery measures. The larger goal is to motivate companies to modify their company cultures in meaningful ways. As a result, perfunctory compliance is not likely to satisfy the "adequate procedures" defense, and may even redound to the company's detriment by looking feigned or insincere.

For instance, the guidance suggests that companies consider setting up anti-bribery hotlines to identify bribery risks. Companies should understand that such measures require follow-up to be effective and to be credited fully. It will not be enough to set up a hotline and dutifully record the referrals. All incidences of possible misconduct received on the hotline must be investigated appropriately. Similarly, the guidance suggests several ways to conduct assessments of the bribery risk presented by certain industries and foreign countries. Despite these suggestions, the government will not be impressed if a company has simply conducted the recommended inquiries and then plowed forward regardless of the risks identified.

The point is not just to acquire information but to use the information in a way that meaningfully addresses the bribery risk. Otherwise, the government may conclude that a company is just "going through the motions" in order to readily manufacture a defense it does not really deserve. The Guidance may not be perfect, but it is useful. More importantly, it represents the current reality for companies doing any business in the U.K. The ball is now the companies' court to respond and adhere to the Act appropriately.

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