CLEARY GOTTLIEB Alert Memo

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Bribery Act 2010: The UK Delays Implementation

The anti-bribery and corruption law of the United Kingdom has been largely unchanged since the late 19th century, and does not meet the requirements of the Organisation for Economic Co-operation and Development ("OECD") Bribery Convention. Against the backdrop of public criticism of the United Kingdom in the wake of the collapse of the bribery investigation into the Al Yamamah arms sales contract involving BAE Systems plc, the UK Government passed the Bribery Act 2010 (the "Act"), which was to come into force in April 2011.

The UK Government has now delayed, for a second time, the implementation of the new Act, following widespread concern that important guidance on anti-bribery procedures (the "Guidance") was not sufficiently clear. The Act had originally been scheduled to come into force in October 2010, but that target was also missed. No new implementation date has yet been announced.

The Act proposes a detailed and far-reaching new anti-bribery regime, the scope of which is still to some extent indeterminate. This Memorandum considers some of the concerns which have been raised in relation to the Act. A more detailed Alert Memorandum on the new regime will be published when the Guidance is finalized.

I. THE "ADEQUATE PROCEDURES" DEFENSE

One of the most far reaching provisions of the Act renders an organization guilty of an offence if any person "associated" with it commits bribery with a view to obtaining or retaining business, or an advantage in the conduct of business, for that organization. The associated person does not have to have been convicted of the principal offence of bribery: it is sufficient for the prosecution to establish that that the associated person could have been convicted of the principal offence. The concept of "associated persons" is exceptionally broad, and is defined as "someone who performs services for and on behalf of" the commercial organization.

The failure to prevent bribery offence is subject to a defense: that the organization had in place "adequate procedures" designed to prevent bribery. In September 2010, the Ministry of Justice published draft Guidance, for consultation, which provided guidance on the nature of those recommended procedures. The final version of the Guidance was expected to be published in January 2011. However, on the

day that the publication of the Guidance was scheduled, the Government announced that it was not yet in its final form, and that it required further time to conduct a "review of the regulatory impact of the Act".

II. "FACILITATION PAYMENTS"

Facilitation payments are small payments made to foreign officials to expedite or secure routine governmental actions, which they are already bound to carry out. The US Foreign Corrupt Practices Act 1977 (the "FCPA") presently provides a safe harbor for such payments, although companies rely upon it with caution. The OECD Convention also does not treat facilitation payments as a criminal offence, but nevertheless strongly discourages them, noting their "corrosive effect".

By contrast, the Act contains no such exemption for making or receiving facilitation payments. The draft Guidance also makes it clear that such payments are "likely" to be bribes under the Act. Notably, the draft Guidance goes on to highlight the discretion of a prosecutor not to take action in respect of less serious infractions of the Act and observes that "the exercise of prosecutorial discretion provides the degree of flexibility required to ensure the just and fair operation of the Act". Accordingly, the difference between the US and UK regimes, in practice, may not be significant.

It is unlikely that the UK Government will amend the law in order to provide a formal safe harbor for facilitation payments. Consequently, it would plainly be inappropriate for companies to operate procedures which tolerate small facilitation payments, on the expectation that they will not be prosecuted.

III. APPLICATION TO NON-UK COMPANIES

With respect to the substantive bribery offences, and the offence relating to the bribery of foreign officials, the territorial reach of the Act is limited. If any act or omission which forms part of the offence takes place in the UK, then an offence will potentially be committed. The category of persons liable for prosecution for these offences includes individuals, corporate entities, and, in some circumstances, the senior management of corporate entities. If no act or omission which forms part of these offences takes place in the UK, but a person's acts or omissions outside the UK would form part of such an offence if they took place in the UK, an offence may also be committed where a person also has a "close connection to the UK". A "close connection" could be established by a person within one of the following categories:

- Various categories of British citizens, subjects and protected persons.
- Individuals ordinarily resident in the UK.
- Entities incorporated under the law of any part of the UK, and Scottish

partnerships.

It is possible that some non-UK companies will be impacted by these provisions: either because they carry out a part of the offence in the UK, or because the offence is carried out by a person with a "close connection" to the UK.

Of far greater concern, however, is the possibility that a wide range of companies will be caught by the "failure of commercial organisations to prevent bribery" offence. That provision impacts any "relevant commercial organisation", which is defined as:

- A body that is incorporated under, and a partnership that is formed under, the law of any part of the UK and that carries on a business anywhere (whether in the UK or elsewhere); and

- Any other body corporate or partnership (wherever incorporated or established) that carries on a business, or part of a business, in any part of the UK.

Because there has been no definition of "carries on a business or part of a business", it cannot be discounted that foreign firms with no connection to the UK, other than a listing of securities (including, for example GDRs) on a UK exchange, may be exposed to prosecution under the Act. It is likely that the UK authorities would, in most cases, expect a company's home jurisdiction to take action against a company which had failed to prevent an associate offering a bribe. Nevertheless, unless future Guidance makes it clear that companies whose only relationship with the UK is a listing of securities are outside the scope of the Act, such companies would be advised to review their global anti-bribery programs, to ensure that they have in place "adequate procedures" which meet the requirements of the forthcoming regime.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under the 'Practices' section of our website at http://www.clearygottlieb.com.

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