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United Kingdom's Ministry of Justice Accepting Public Commentary Regarding Recently Published Proposed Guidance under the UK Bribery Act 2010

The recently enacted UK Bribery Act 2010 ("Bribery Act"), which will become fully effective and enforceable in Spring 2011, constitutes a sweeping revision and expansion of the United Kingdom's anti-corruption legislation. It creates broad prohibitions on both public sector and commercial bribery for essentially any company or person with a connection to the United Kingdom.

The jurisdictional reach of the Bribery Act is potentially profound and generates the need for any company with operations in the UK to closely evaluate its anti-corruption compliance policies and procedures. In particular, under Section 7, the Bribery Act imposes strict liability on any company with a connection to the UK -- including those operating even a "part of a business" in the UK -- whose employee or agent commits a violation of the Bribery Act and where the company lacks "adequate procedures" to prevent bribery. Furthermore, the Bribery Act provides that a company's senior officials face personal liability if they consent to conduct that violates the Bribery Act. In short, the Bribery Act -- which provides for limitless fines for companies and 10 year prison sentences per violation for individuals -- demands immediate attention from the business world generally, but especially from any company with connections to the United Kingdom.

This past month, the United Kingdom's Ministry of Justice ("MoJ") proposed guidance regarding certain requirements under Bribery Act. Significantly, the MoJ has opened a public comment or "consultation" period in relation to this proposed guidance. The MoJ's proposed guidance is set forth in a "Consultation Paper" published on September 14, 2010. In addition to this guidance (discussed in more detail below), the Consultation Paper sets forth "illustrative scenarios" purportedly designed to help companies understand the proposed guidelines. The Consultation Paper also provides information about the consultation process and methods for submitting comment to the MoJ. These materials are available at the MoJ website at <http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf>.

We recommend that our clients with global operations, and particularly those with connections to the United Kingdom, review the Consultation Paper and consider submitting commentary to the MoJ. ***The MoJ will only be accepting public comment until November 8, 2010.***

MoJ Proposes Six Principles for "Adequate Procedures" to Prevent Bribery

In Annex A of the Consultation Paper, the MoJ has proposed six principles to assist commercial organizations with the prevention of bribery and the establishment of "adequate procedures" as required by the Bribery Act under Section 7. The MoJ has stated that these principles are "outcome-focused and flexible" and will "allow each commercial organisation to tailor its policies and procedures so that they are proportionate to the nature, scale and complexity of its activities." The MoJ believes that application of

these principles to a company's anti-corruption program will result in "robust and effective anti-bribery systems and controls."

The six principles as defined by the MoJ are as follows:

- **Principle 1 - Risk Assessment:** The commercial organisation regularly and comprehensively assesses the nature and extent of the risks relating to bribery to which it is exposed.
- **Principle 2 - Top Level Commitment:** The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery. They establish a culture within the organisation in which bribery is never acceptable. They take steps to ensure that the organisation's policy to operate without bribery is clearly communicated to all levels of management, the workforce and any relevant external actors.
- **Principle 3 - Due Diligence:** The commercial organisation has due diligence policies and procedures which cover all parties to a business relationship, including the organisation's supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the commercial organisation does business.
- **Principle 4 - Clear, Practical and Accessible Policies and Procedures:** The commercial organisation's policies and procedures to prevent bribery being committed on its behalf are clear, practical, accessible and enforceable. Policies and procedures take account of the roles of the whole workforce from the owners or board of directors to all employees, and all people and entities over which the commercial organisation has control.
- **Principle 5 - Effective Implementation:** The commercial organization effectively implements its anti-bribery policies and procedures and ensures they are embedded throughout the organisation. The process ensures that the development of policies and procedures reflects the practical business issues that an organisation's management and workforce face when seeking to conduct business without bribery.
- **Principle 6 - Monitoring and Review:** The commercial organization institutes monitoring and review mechanisms to ensure compliance with relevant policies and procedures and identifies any issues as they arise. The organisation implements improvements where appropriate.

The Consultation Paper provides further details about these six principles and how they may apply. Annex A also provides other more general guidance about the Bribery Act in the section entitled "Further Information About the Act." This information includes an overview of prohibited activity under the Bribery Act, and guidance about its extra-territorial application, permissible hospitality and promotional expenditures, and the prohibition on "facilitation payments." This information is also open for public comment. The MoJ has also invited commentary with respect to the "illustrative scenarios" set forth in Annex B of the Consultation Paper.

Submitting Commentary to the MoJ

The MoJ has prepared five questions to help individuals and companies supply commentary on the draft guidance. These questions, which can be found at Paragraph 16 of this Consultation Paper, are as follows:

- **Question 1:** Are there principles other than those set out in the draft guidance that are relevant and important to the formulation of bribery prevention in commercial organisations? If so what are they and why do you think they are important?
- **Question 2:** Are there any procedures other than those set out in the draft guidance that are relevant and important to a wide range of commercial organisations? If so what are they and why do you think they are important?
- **Question 3:** Are there any ways in which the format of the draft guidance could be improved in order to be of more assistance to commercial organisations in determining how to apply the guidance to their particular circumstances?
- **Question 4:** Are there any principles or procedures that are particularly relevant and important to small and medium sized enterprises that are not covered by the draft guidance and which should be? If so what are they and why do you think they are they important?
- **Question 5:** In what ways, if any, could the principles in the draft guidance be improved in order to provide more assistance to small and medium sized enterprises in preventing bribery on their behalf?

Again, the consultation period will expire on November 8, 2010. The MoJ is accepting commentary in the following ways:

- By email to: Bribery.Act@justice.gsi.gov.uk;
- By mail to:
The Bribery Act Implementation Team
Ministry of Justice
7.42, 102 Petty France
London SW1H 9AJ
and
- Via online questionnaire at <http://survey.euro.confirmit.com/wix5/p476673099.aspx>.

We encourage clients to review the draft guidance proposed in the Consultation Paper and to submit commentary. Feedback supplied to the MoJ will likely affect the substance of the guidance regarding “adequate procedures” and other aspects of the Bribery Act. Given the significant impact the Bribery Act will ultimately have on the anti-corruption policies and procedures of companies operating in the United Kingdom, and considering the potential penalties a company faces for violations of the Bribery Act, it is important that concerns are voiced to the MoJ before the guidance is finalized. To that end, Chadbourne is available to assist clients with evaluating the guidance, determining application of the Bribery Act to clients’ business operations, and submitting appropriate commentary to the MoJ.

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Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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