Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

UK Lays Out Limits To Overseas Reach Of Bribery Act

By **Hilary Russ**

Law360, New York (March 30, 2011) -- Companies in the U.S. and elsewhere will get some relief from prosecution under the new anti-bribery law set to go into effect this year in the U.K., according to long-awaited government guidance released Wednesday that clarifies the measure.

Just because a company is traded on the London Stock Exchange or has a subsidiary in the U.K. does not in itself mean that prosecutors will target the foreign-owned parent company in a bribery investigation, according to the U.K. Ministry of Justice's guidelines.

In addition to easing concerns over how far the U.K. Bribery Act would reach beyond Britain's borders, the agency clarified the law's provisions on gifts and hospitality expenses, facilitation payments and the kinds of programs a company can put in place to prevent bribery and avoid prosecution.

The Bribery Act was passed last year, but its implementation was twice delayed when the Justice Ministry pushed back the release of its guidance amid outcry that certain terms were not well-defined, leaving companies to guess at how they could comply with the law.

"I have listened carefully to business representatives to ensure the act is implemented in a workable way — especially for small firms that have limited resources," Secretary of State for Justice Kenneth Clarke said. "And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures."

The Serious Fraud Office and Director of Public Prosecutions — the agencies responsible for prosecuting public and private bribery under the law — also released their guidance to prosecutors Wednesday.

Overall, the guidelines explain the law but do not actually change the language in the act. Attorneys still expect the courts to further define the law after the government begins to bring enforcement actions.

Organized into six guiding principals and over more than 40 pages, the Justice Ministry's guidelines even provide case studies.

"It's good news really, in terms of clarifying some of the areas where there was uncertainty," said Barry Vitou, a partner at Pinsent Masons LLP and the co-author of a blog called thebriberyact.com.

With Wednesday's clarification, the U.K. government seemed to soften what critics said was an aggressive and expansive jurisdiction overseas. A company based anywhere in the world is subject to the law if it "carries on a business or part of a business" in the U.K., according to the act.

When the bill was still being drafted, legislators debated whether to include a more specific definition of that phrase. But lawmakers decided instead to maximize flexibility and let the meaning of the phrase play out though court challenges and case law, according to Andrew Legg, a senior litigation partner at Mayer Brown LLP in London.

The courts will still ultimately define the phrase, but the guidelines will help shape future cases by preventing prosecutors from going after companies merely because they have a subsidiary or are listed on the stock exchange in the U.K.

"It is a bit of a sea change for the government to actually provide guidance on this point when it had been resistant to doing that a year ago," Legg said.

Even Vivian Robinson, general counsel of SFO, said that prior to the issuance of the guidelines, he had believed that a company would be subject to the law just by being listed on the London exchange.

During an Internet discussion Wednesday hosted by the website Securities Docket, Robinson admitted that in seminars, he has been saying that "if I had to give a decision off the cuff it would be that in my view such a listing did indicate the carrying on of a business or part of a business in the U.K.," he said.

"Of course we abide... by the guidance and that's how we shall administer the matter," he said.

But he also cautioned overseas companies that even if they complied with the U.S.' overseas bribery law, the Foreign Corrupt Practices Act, they still needed to review the Bribery Act for possible exposure to liability.

"It should not be assumed that because a company is FCPA-compliant that that alone will necessarily make it Bribery Act-compliant," Robinson said.

For instance, prosecutors trying to determine liability would still look at whether an overseas parent company had some control of a U.K. subsidiary — like nominating a director for the subsidiary — when bribery allegations arise, Robinson said.

Overseas companies cannot just rely on their official structure to escape the law's jurisdiction. They still need to review exactly how their subsidiaries, partnerships, agents and third parties operate in the U.K. to understand whether they face exposure under the act, attorneys said.

"You need to look at your operations, not just your legal structure," Vitou said.

The guidelines also eased corporate fears by taking a lighter-than-expected stance on hospitality expenses — travel costs, hotels, meals, and entertainment provided to foreign officials, for example — as long as there is a legitimate business reason for the payments.

"No one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix," Clarke said in the guidelines.

Robert Amaee, of counsel at the London office of Covington & Burling LLP and the former head of anti-corruption at the SFO, said that "[t]he guidance sets a rather permissive tone when it comes to interactions with foreign public officials and seeks to provide comfort when it comes to the provision of corporate hospitality."

Hospitality expenses could, however, be considered a bribe if prosecutors can show that such costs were covered in an effort to influence an official in order to gain an unfair business advantage, according to the SFO's guidelines.

The more lavish the expenses, the more likely they are to draw the attention of prosecutors, the SFO said.

Also covered in the guidelines are facilitation payments — sometimes called grease payments — which are small bribes usually made to an official in order to speed along some routine process.

While the act provides no exemption for such payments, prosecutors could go easy on people who make such payments under duress in order to protect someone's life or well-being in a hostile area.

They also said that they did not expect companies to be able to fully eradicate all grease payments immediately, and that they did not intend to go after legitimate companies that had made strident efforts to phase out such bribes.

Robinson said the SFO would be "looking at a gradual process of elimination" of such payments.

"You can't change things overnight. But organizations are going to be expected to move to this zero-tolerance approach," Legg said. "The clear message is that facilitating payments have to be very much the exception rather than the norm."

The government also provided clarity on a measure that some attorneys in the U.S. have been clamoring for when a client is accused of failing to prevent bribery: a defense based on the notion that a company had put in place adequate procedures, proportionate to the risk they face in a particular region and industry, to weed out corruption.

A company's procedures for preventing bribery should be "proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organization's activities," the guidelines said.

They should also be well-communicated throughout a company, be "clear, practical, accessible, effectively implemented and enforced," and they should indicate that managers at the very top of the organization are committed to preventing bribery.

It will still be up to companies to prove they implemented adequate procedures when they raise the defense in court, the guidelines said.

While the guidelines still leave some questions unanswered, they will give companies around the world a better idea of how to use the next three months to make sure they are in compliance with the law before it goes into effect, attorneys said.

They "will largely be appreciated by the business community because dialogue is preferable to guessing what the regulators expect," said Joel Cohen of Gibson Dunn & Crutcher LLP.

--Editing by Jocelyn Allison and Greg Ryan.