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KIRKLANDPEN
Private Equity Newsletter

April 28, 2011

UK Bribery Act 2010

PENpoints

The UK Bribery Act will take effect on July 1, 2011. Under the Act, a commercial organization, which includes corporations, LLPs and partnerships, commits an offense if a person "associated with" it bribes another person with the intention of obtaining a business advantage for the organization.

After much political and public debate, the UK Bribery Act will take effect on July 1, 2011. Much of the debate focused on the new corporate offense of "failing to prevent bribery," with some commentators suggesting the offense is so broad that firms would even have to prohibit employees from taking clients for lunch. To allay some of these fears, the UK Government has published guidance designed to help firms interpret the new legislation and implement adequate anti-bribery procedures.

In light of this new offense, private equity firms with UK connections should consider three key questions:

- whether the firm, its funds and/or any of its portfolio companies are within the scope of the offense;
- whether the firm or fund is responsible for implementing anti-bribery procedures at portfolio company level; and
- what anti-bribery policies and procedures to implement.

The scope of the offense

Under the Bribery Act, a "commercial organization" (which includes corporations, LLPs and partnerships) commits an offense if a person "associated with" it bribes another person with the intention of obtaining a business advantage for the organization, unless it can demonstrate that it has (and applies) adequate anti-bribery procedures designed to prevent such conduct.

The offense applies to any commercial organization:

- incorporated or established in the UK, wherever it carries on business; or
- carrying on a business, or part of a business, in the UK, wherever it is incorporated or established.

Thus, private equity firms incorporated as UK companies or LLPs, private equity funds established as English or Scottish limited partnerships, and UK-incorporated portfolio companies are all within scope, as are non-UK firms (including U.S., Cayman and Channel Islands entities) that carry on any part of their business in the UK. The UK Government has, so far, offered little guidance on what will constitute "carrying on business in the UK," indicating that this is a matter for the courts to determine.

Are private equity firms responsible for their portfolio companies?

If a portfolio company commits bribery in the furtherance of its own business, the private equity firm (or fund) can be held liable under the "failing to prevent bribery" offense only if the portfolio company is "associated with" the private equity firm (or fund) in the manner prescribed by the Act. This requires that:

- the portfolio company "performs services for or on behalf of" the private equity firm (or fund)—a question of fact in each case; and
- any act of bribery by the portfolio company be committed with the intention of securing a business advantage for the private equity firm (or fund).

The Government guidance helpfully confirms that receipt of an indirect benefit is very unlikely, in itself, to amount to proof of such an intention, so liability for this offense should not arise simply from owning, investing in, receiving dividends from or making loans to a portfolio company.

However, there are a number of additional issues to consider:

- Bribery or corruption allegations at a portfolio company could seriously damage the reputation of both the portfolio company and the private equity firm, even if an investigation does not ultimately end in a successful prosecution.
- The UK Serious Fraud Office (SFO) has indicated that firms should not rely on "technical arguments"

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or "being foreign" as grounds for avoiding investigation under the Act, so the SFO may, in practice, treat private equity firms and their portfolio companies as "associated" for investigative purposes, even if the statutory tests are not satisfied.

- Even where there is no offense under the Bribery Act, an offense may be committed under UK anti-money laundering legislation if a fund receives the direct or indirect proceeds of bribery or other illegal activity.

Therefore, as a matter of good practice, private equity firms should consider whether portfolio companies are exposed to bribery risks and ensure that they have appropriate anti-bribery procedures in place to address identified risks.

What anti-bribery policies and procedures should firms put in place?

A private equity firm should first identify where risks of bribery might arise in its business. This will vary from firm to firm, but key areas to consider include:

- Fundraising, where there is a risk that investors may be improperly influenced to invest in funds managed or advised by the firm. Additional considerations arise where a firm engages a placement agent or finder to assist with fundraising, as the firm will have less direct control over discussions with prospective investors; and
- Deal origination, where there is a risk that prospective counterparties or co-investors may be improperly influenced to deal with the firm. Again, additional considerations will arise where the firm uses third party consultants or agents.

The private equity firm should then develop policies and procedures—or expand existing policies (e.g., gifts, expenses, anti-money laundering and U.S. Foreign Corrupt Practices Act policies)—to address identified risks. Firms should also consider taking additional steps, such as:

- drafting an express statement of the firm's zero tolerance toward bribery and corruption, to be included on the firm's intranet and website;
- delivering anti-bribery training to staff;
- developing formal policies on payment or reimbursement of investor expenses, such as travel to investor meetings or advisory board meetings; and/or
- carrying out formal due diligence on placement agents' (and other agents') anti-bribery policies.

The UK Government has emphasized repeatedly that firms should take a common sense approach to anti-bribery procedures, so taking clients for meals or to sporting events should not cause problems if events are not unreasonably lavish or extravagant. However, firms should be alert to situations that might give rise to an appearance of impropriety.

To avoid inadvertent violations of the Act, both firms and individuals should also be conscious of the primary bribery offenses, which include giving or receiving a bribe in any business context and bribery of foreign public officials.[1] The territorial scope of the Act is wide, covering situations where:

- any act or omission forming part of a bribery offence takes place in the UK; or
- any act or omission that would be a bribery offense under UK law is committed elsewhere in the world by a UK company, LLP or partnership, a British citizen or any person who is ordinarily resident in the UK.

The issues for portfolio companies will vary significantly depending on the type of business, and management will need to conduct a risk assessment before implementing appropriate policies and procedures. The Ministry of Justice's Guidance on the Bribery Act gives some indication of how businesses should approach this task.

In addition, proceeds derived from acts of bribery are likely to constitute "criminal property" for the purposes of UK anti-money laundering legislation, so a UK-regulated firm will likely have a money-laundering reporting obligation if it has reasonable grounds to suspect that another person (including a portfolio company) is engaged in bribery.

1 In contrast to the U.S. Foreign Corrupt Practices Act, there is no exception for "facilitation payments" (small payments made to facilitate routine government action that is otherwise due to be provided to the payer). Making such payments is a criminal offense under the Bribery Act.

If you have any questions about the matters addressed in this *KirklandPEN,* please contact the following Kirkland authors or your regular Kirkland contact.

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PENnotes

Kirkland & Ellis' Seventh Annual Restructuring Group Cocktail Reception
New York, New York
May 5, 2011

The New York office of Kirkland & Ellis will host the Seventh Annual Restructuring Group Cocktail Reception on Thursday, May 5, 2011. For more information, or to register for this event, please contact Suzanne Svendsen at +1 (312) 862-4427.

The M&A Advisor's Alternative Investing & Financing Summit
Chicago, Illinois
May 16, 2011

The M&A Advisor's Alternative Investing and Financing Summit brings together institutional investors, hedge fund managers, private equity fund managers, lenders and financial advisors for a symposium on May 16, 2011. Kirkland partner Bruce I. Ettelson, P.C., will participate in a panel discussion at this event. For more information, or to register, please visit: http://www.maadvisor.com/events/2011-financing-summit-and.

Bisnow's New York Investment Summit
New York, New York
May 17, 2011

Bisnow's New York Investment Summit, which will be held at the New York Bar Association on May 17, 2011, will bring together national and local figures in real estate for a real-time look at the equity and debt markets. Kirkland is a sponsor of this event, and partner Stephen G. Tomlinson, P.C., will moderate the panel discussion. For more information, please visit: http://www.bisnow.com/events/ny/2011/investment-summit/index.htm.

The Chicago-Kent College of Law 30th Annual Tax Institute
Chicago, Illinois
May 19 - 20, 2011

The 30th Annual Tax Institute will feature comprehensive discussions on cutting edge legal, legislative and policy developments and their impact on tax planning, compliance and controversy techniques. Kirkland partner Jack S. Levin, P.C., will give the keynote speech on "A Tribute to Martin Ginsburg," and partner Todd F. Maynes, P.C., will speak on "Financially Troubled Debt Instruments: Traps for the Unwary."

The 33rd Annual NYU International Hospitality Industry Investment Conference
New York, New York
June 5 - 7, 2011

Kirkland & Ellis will sponsor the 33rd Annual NYU International Hospitality Industry Investment Conference, which will be held on June 5-7, 2011, at the New York Marriott Marquis in New York City. The conference will feature general sessions, workshops and networking. Kirkland partner Stephen G. Tomlinson, P.C., will be speaking on the "Private Equity: Deals? Deals, Deals!" panel. For more information, or to register, please visit: http://www.scps.nyu.edu/areas-of-study/tisch/hospitality-conference/.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis LLP's nearly 400 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. The Firm was named Best M&A Firm in the United States at World Finance's 2011 Legal Awards and was recognized as "Law Firm of the Year" in *Buyouts* magazine's "2010 Deal of the Year Yearbook." Kirkland was also honored with the 2010 "Award for Excellence" in Investment Funds by Chambers & Partners at its annual Chambers USA Awards. Kirkland was ranked in the first tier among law firms for both Private Equity Buyouts and Private Equity Funds by *The Legal 500 U.S. 2010*. Additionally, *Pitchbook* named Kirkland as one of the most active law firms representing private equity firms in its 2010 "Private Equity Breakdown."

The Lawyer magazine recognized Kirkland as one of the "The Transatlantic Elite" in 2008, 2009 and 2010, noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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