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April 15, 2010

THE BRIBERY ACT 2010 - A BRAVE NEW WORLD FOR BUSINESS?

Summary

On 8 April 2010, the UK Bribery Bill received Royal Assent as the Bribery Act 2010 (the "Act"). The Act, which became law in the final days of the current Parliament, represents the most fundamental overhaul of the UK's anti-bribery regime in over 100 years. The Act's stated aim is to reform and modernise the UK's bribery laws. In furtherance of that goal, the Act introduces the concept of "improper performance" as the basis for the offences of giving and receiving bribes. Further, these offences will apply to instances of private sector bribery connected with the activities of a business, trade or profession, whether committed in the UK or abroad. The Act also creates a separate offence of bribing a foreign public official. Most significantly for companies and partnerships that carry on all or part of their business in the UK, the Act creates a new offence of failure by a commercial organisation to prevent bribery.

The Act bears a strong resemblance to the UK Bribery Bill (the "Bill") that was introduced into Parliament on 19 November 2009, although it incorporates a number of amendments that were proposed at various stages of the Bill's passage through Parliament. For more information on the Bill and its passage through Parliament, please consult our previous client advisories, "UK Anti-Corruption Update - The Bribery Bill 2009 Is Introduced Into Parliament" and "The Current Status of the UK Bribery Bill."

The Act is expected fully to come into force in the Autumn/Winter 2010. The reason for the delay is to permit businesses to align their existing anti-bribery compliance programmes with the statutory guidance on adequate bribery prevention procedures that the Act requires the UK Government to publish. Businesses active in the UK that already have US Foreign Corrupt Practices Act 1977 ("FCPA") compliant anti-bribery procedures nonetheless will need to ensure that their compliance programmes reflect the new UK regime since the UK regime differs from and extends the requirements of the FCPA in several respects.

The importance of taking these precautionary steps in a timely manner cannot be over-emphasised, largely because the new corporate offence of failing to prevent bribery, coupled with the imposition of criminal liability on corporate officers whose companies commit bribery

offences with their consent or assistance, likely will enable the UK enforcement authorities to prosecute companies and their corporate officers more easily than has been the case in the past.

The Bribery Offences

The Act repeals the existing common law and statutory bribery offences and replaces them with four new offences that cover:

- individuals who or companies/partnerships that give, promise or offer bribes;
- individuals who or companies/partnerships that request, agree to receive or accept bribes;
- individuals who or companies/partnerships that bribe foreign public officials; and
- companies or partnerships that fail to prevent persons acting on their behalf from paying bribes.

Giving and Receiving Bribes in the Public and Private Sectors

The Act makes it an offence for a person to offer, promise or give an "advantage" to someone (1) with the intention that he / she or another will be induced to behave "improperly," (2) as a reward for him / her or another behaving in an "improper" manner or (3) knowing or believing that the recipient's acceptance of the "advantage" would constitute "improper" behaviour. The offence expressly applies to circumstances in which an agent is used to offer, promise or pay a bribe.

The recipient of a bribe also will be guilty of an offence if he / she requests, agrees to receive or accepts an "advantage" (1) with the intention that he / she or another will behave "improperly," (2) as a reward for that person or another person behaving in an "improper" manner, (3) when the request, agreement or acceptance itself constitutes "improper" behaviour or (4) when that person or another person has behaved "improperly" either in anticipation or consequence of the request, agreement to receive or acceptance of an "advantage." For the purpose of this offence, it is immaterial whether the "advantage" is for the benefit of the recipient and/or whether the recipient requested, agreed to receive or accepted the "advantage" directly.

In circumstances (2), (3) and (4) directly above, it is irrelevant whether the recipient knows or believes that the behaviour in question is "improper." Further, when a person other than the recipient of an "advantage" behaves "improperly" in circumstance (4) it is also irrelevant whether they know or believe that the behaviour in question is "improper." The breadth with which these offences have been drafted necessitates that companies and partnerships check that their

current business practices do not inadvertently fall foul of the Act, particularly because the decision to pursue a conviction for giving or receiving a bribe will be the subject of prosecutorial discretion.

The Act defines an "advantage" widely to include both financial and other benefits. As with a number of other provisions of the Act, what constitutes such an advantage is not addressed in the Act and is instead to be determined by the UK courts.

The test for "improper" behaviour under the Act involves an assessment of whether the person performing the relevant function / activity was expected to perform it in good faith, expected to perform it impartially or acted from a position of trust and, in turn, whether that person's performance was in breach of the relevant expectation. A "relevant function / activity" can be performed in the public or private sectors, can be performed abroad and does not need to have a connection with the UK. Under the Act, the "relevant expectation" is what a reasonable person in the UK would expect. Consequently, when the performance of the function / activity is not subject to UK law, local custom or practice is to be disregarded unless it is permitted or required in writing by local legislation, the governing constitution or case law.

Bribing Foreign Public Officials

The Act creates a separate offence of bribing a foreign public official, which is designed to comply with the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). A person will be guilty of this offence if he / she - whether directly or indirectly - offers, promises or gives an "advantage" to a foreign public official that is not permitted or required to influence that person in his / her capacity as a foreign public official under the written constitution, legislation or case law of the official's country (or in the case of an official of a public international organisation, the written rules of that organisation). The giving of an "advantage" to another person with the official's permission, or at their request, also would constitute an offence.

For this offence to be committed, the "advantage" must be intended to influence the person in his / her capacity as a foreign public official to obtain or retain business or some other advantage in the conduct of business. Consequently, for the purpose of this offence it is not necessary for the person offering, promising or giving an "advantage" to know or intend that the relevant foreign public official might act "improperly." An intention to influence the official is sufficient. This element of the offence goes beyond the requirements of the OECD Convention, which requires such a person to seek an "improper" advantage.

Under the Act, "foreign public official" means (1) an individual who holds a legislative, administrative or judicial position outside the UK, (2) an individual who exercises a public function for or on behalf of a country, territory or public agency / enterprise outside the UK or (3) an official or agent of a public international organisation. Such officials will be considered to have been "influenced" if they fail to exercise their functions or seek to use their official position to a particular end, even if acting outside their authority when doing so.

Facilitation Payments and Hospitality

Under the Act, facilitation payments will remain a criminal offence. When introducing the Bribery Bill (the "Bill") at its Second Reading in the House of Lords, Lord Bach - the Minister for Justice - warned that companies that make facilitation payments to obtain a business advantage run the risk of prosecution because "[b]ribery on any scale cannot and should not be tolerated or condoned." The Government has indicated that the policing of such payments will be by means of prosecutorial discretion exercised in the public interest. In that connection, Lord Bach has suggested that it may not be in the public interest "to prosecute where payments are small," although he qualified that observation by stating that much will depend on the particular circumstances of a case. No further official guidance yet has been issued on this point.

The Government has stated that corporate hospitality is an accepted part of modern business and that it does not seek to penalise corporate hospitality for legitimate business purposes. Richard Alderman - the Director of the Serious Fraud Office - also has suggested that "most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct." However, the Government also believes that prosecutors are best placed to differentiate between legitimate and illegitimate corporate hospitality. Consequently, prosecutors will be able to prosecute corporate hospitality that is given with the intention of influencing the recipient of the hospitality to act "improperly" or, in the case of corporate hospitality provided to a foreign public official, when there is no written law that permits the hospitality to be given to the official.

To Whom Do These Offences Apply?

The offences of giving and receiving bribes and bribing foreign public officials apply to UK citizens, UK companies, UK partnerships and individuals ordinarily resident in the UK regardless of where the relevant act occurs. They also apply to non-UK nationals, companies and partnerships if an act or omission forming part of the offence takes place in the UK.

Criminal Liability of Senior Company Management

Under the Act, directors, managers, corporate secretaries and other similar officers of companies and partnerships who consent to or assist in the commission of one of the above-mentioned bribery offences by their company or partnership will face personal criminal liability provided that they have a close connection with the UK (*e.g.*, they are a British citizen or are ordinarily resident in the UK).

Failure of Commercial Organisations To Prevent Bribery

The Act creates a new offence for commercial organisations that fail to prevent bribes being paid on their behalf. This offence will be committed if a person who is performing services on behalf of a company / partnership bribes another person to obtain or retain business or an advantage in the conduct of business for that company / partnership and the company / partnership did not have adequate procedures to prevent people performing services on its behalf from engaging in bribery.

For the purpose of this offence, the capacity in which a person acts on behalf of a company or partnership is immaterial. The Act creates a rebuttable presumption that an employee acts on behalf of his / her employer. In other circumstances, this issue will be determined from an assessment of all relevant circumstances, not merely the nature of the relationship between the person and the company / partnership.

In this connection, a key issue will be the extent to which subsidiaries, joint ventures and consortia are held to be performing services on a company's / partnership's behalf. This issue is not addressed in the Act and, as yet, the Government has not fully clarified this point. However, Lord Tunnicliffe stated at the Bill's Committee Stage in the House of Lords that "[o]ur purpose is clear; we want to encourage organisations which are involved in joint ventures to ensure that they are satisfied that adequate procedures are built into the arrangements for their joint venture. The same can be said of any other business model."

There is no need for a person performing services on behalf of a company / partnership (*e.g.*, an employee, agent or subsidiary) to have been prosecuted for bribery, provided that he / she / it is, or would be, guilty of the offence of giving a bribe or of bribing a foreign public official.

The offence will apply to all companies and partnerships that carry on any part of their business in the UK, whether they are incorporated in the UK or elsewhere. The Act does not address what it means to carry on part of a business in the UK. However, the Government purportedly believes that the UK courts will interpret this phrase in a common sense manner. In practice, this offence

will require every company or partnership active in the UK to address the question of how to deal with and prevent bribery by those persons that perform services on the company's / partnership's behalf. Also, as an offence will be deemed to have been committed irrespective of where the acts or omissions comprising the offence take place, compliance measures of some sort will be needed everywhere the company or partnership does business.

It is a defence to this offence for companies and partnerships to prove that they have implemented adequate procedures to prevent persons performing services on their behalf from committing bribery. The Act requires the Secretary of State to publish guidance about such procedures. The Government has indicated that it will publish guidance on "adequate procedures" prior to this offence coming into force to provide companies and partnerships with an opportunity to align their compliance programmes with the statutory guidance, which will set out relevant principles backed up by illustrative examples of good practice rather than being prescriptive in nature. However, the Government has indicated that, prior to the publication of guidance, businesses should pro-actively take steps to implement compliance programmes that respond to the provisions of the Act.

The Ministry of Justice is currently engaged in drafting this guidance. Whilst there will be no formal consultation in relation to the guidance, input has been sought from businesses, as well as non-governmental organisations active in the anti-corruption field. During the Act's passage through Parliament, it was suggested that the issues the guidance likely would address are:

- board-level responsibility for anti-corruption compliance programmes;
- identification of a named senior officer with responsibility for the anti-corruption compliance programme within an organisation;
- the need for a clear code of conduct that is published both internally and on an organisation's website;
- risk assessment and management procedures;
- employment procedures that enable vetting of potential employees, the inclusion of express anti-corruption language in employment contracts and appropriate disciplinary measures to be taken against employees that commit corrupt acts;
- training to ensure that anti-corruption compliance procedures are adequately embedded throughout an organisation;
- effective due diligence prior to entering into business relationships;

- effective reporting, monitoring and review processes;
- gifts and corporate hospitality policies;
- financial control mechanisms;
- controls to avoid facilitation payments; and
- procedures to prevent bribery by agents, intermediaries, joint venture partners and syndicates.

Lord Bach has suggested that an organisation facing this charge will be able to point to its size, business sector and involvement in high-risk markets as factors relevant to the assessment of the appropriateness and proportionality of its anti-bribery compliance programme. In addition, the Government has said that when culpability at a management or board level is suggested by the evidence in a case, the courts should be permitted to consider this information when assessing whether an organisation's procedures were adequate in the circumstances.

Penalties

In relation to any of the bribery offences described above, the Act provides for a maximum penalty of:

- ten years imprisonment, coupled with an unlimited fine, for an individual; and
- an unlimited fine for a company / partnership.

The UK courts will be required to ensure that the amount of the fine that is imposed reflects both the seriousness of the offence and the circumstances of the case, including the known financial circumstances of the offender. The recent sentencing remarks of Lord Justice Thomas in the case of Regina v. Innospec Limited provide some guidance concerning the approach the courts may take when imposing fines for bribery offences.

In his sentencing remarks in the Innospec case, Lord Justice Thomas characterised the corruption of foreign government officials / ministers as "at the top end of serious corporate offending both in terms of culpability and harm." He went on to state that whilst there may be reason to differentiate the custodial penalties imposed for corruption between the US and the UK, "there is every reason for states to adopt a uniform approach to financial penalties for corruption * * * so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state."

Enforcement of the Act

The current strategy of the lead enforcement authority under the Act - the Serious Fraud Office ("SFO") - is to encourage organisations to self-report suspected instances of bribery. In its July 2009 report, the Joint Select Committee on the Draft Bribery Bill (the "Committee") stated that the provisions of the Public Contract Regulations 2006 (the "Regulations"), which currently require a company convicted of a corruption offence to be automatically and permanently debarred from competing for public contracts in UK and the EU, pose a major impediment to the realisation of this goal. The Committee's report went on to suggest that self-reporting would be effective only if debarment under the Regulations was made discretionary.

During the Act's passage through Parliament, Claire Ward - a Justice Minister - stated that "active consideration" was being given, in particular, to whether the corporate offence of failure to prevent bribery would trigger mandatory debarment under the Regulations. In this connection, Ms. Ward noted that "[t]his is not a straightforward issue, and there are a number of complex points that we need to consider." During the Public Bill Committee Stage in the House of Commons, Ms. Ward further stated that the Government hopes to reach a view on this issue shortly but, in any event, "the Government's position will be clear before any of the offences are brought into force." The position that the Government eventually adopts on this issue likely will be of importance to the development of a culture of self-reporting among companies doing business within the public sector in Europe.

The SFO's approach to the prosecution of corruption was also addressed by Lord Justice Thomas in the recent Innospec case, which involved global settlement of a corruption offence brokered by the US and UK enforcement authorities. In his sentencing remarks, Lord Justice Thomas stated that "the SFO cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged" because that is a matter for the judiciary to decide based upon an assessment of the extent of the criminal conduct in the particular case. He went on to state that "it will rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order" because the perpetrators of such crimes should not be viewed or treated differently than other criminals. Finally, Lord Justice Thomas expressed the view that the imposition of compliance and monitoring orders is expensive and unnecessary and that the resources allocated to compliance with such orders should more properly be made available for fines, confiscation and compensation. It remains to be seen how the SFO will respond to the views expressed by Lord Justice Thomas in enforcing the provisions of the Act.

When Will the Act Come Into Effect?

The Act has cross-party support and its implementation therefore is unlikely to be impeded by any change of Government following the General Election. An implementation date of the Autumn/Winter 2010 currently is being discussed, although there has been some discussion concerning the desirability of implementing the Act in stages to allow companies to implement adequate procedures ahead of the corporate offence coming into force. If a phased approach to implementation ultimately is taken, some provisions of the Act are likely to be implemented in June 2010 and the remaining provisions are likely to be implemented in the Autumn/Winter 2010.

Conclusion

The Act has dramatically altered the conditions in which companies and partnerships that carry on all or part of their business in the UK will be operating. The wide latitude granted to prosecutors and the broad scope of the offences in the Act will require companies and partnerships to evaluate and enhance their existing compliance procedures. In light of the greater ease with which enforcement authorities in the UK likely will be able to achieve corporate convictions once the Act comes into effect, the need to complete this process expeditiously cannot be overstated.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our white collar practice group:

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