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Understanding the UK Bribery Act

The Bribery Act

After several years of political efforts, and over a year of drafting and debate, Parliament has passed a new Bribery Act this month that revolutionizes the UK's approach to anticorruption enforcement and has the attention of lawyers, law enforcement and corporate executives throughout the world. The Bribery Act is modelled closely on the United States' Foreign Corrupt Practices Act (FCPA), but reaches beyond it in a number of notable respects. The new legislation was introduced following several years of criticism of lax enforcement of existing anticorruption laws, and more than a decade of failed efforts to pass similar legislation.

The Bribery Act replaces a patchwork of existing anticorruption laws and common law offences dating to World War I and before, which had become outdated and underutilized.

What follows is a review of how the Bribery Act will change the landscape in the UK, and potentially beyond. It includes a discussion of each of the Bribery Act's four offences, highlights areas where it differs from the FCPA, and offers guidance on its impact on corporations located in or doing business in the UK.

Resetting the Field

Bribery is already a criminal offence in the UK (pursuant to the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and 1916, the Anti-Terrorism Crime and Security Act 2001 and at common law) prior to enactment of the Bribery Act. However, it was generally accepted that the anti-bribery legislation was piecemeal and in need of reform.

In addition, UK law enforcement has been the subject of consistent criticism in recent years regarding its record on anticorruption enforcement from groups such as the Organisation for Economic Co-operation and Development (OECD). UK officials have taken significant steps to counter this in the last several months alone, with initiation of a number of key anticorruption investigations and prosecutions, and increasing cross-border cooperation with their counterparts in the United States. The Bribery Act provides UK law enforcement a strong platform upon which to build new anticorruption enforcement efforts by modernizing its enforcement regime under comprehensive, unified legislation.

It follows what the UK's Serious Fraud Office (SFO) describes as "major transformational changes" within that organization over the last 18 months, which appear to have refocused and reenergized its personnel. This overhaul of the primary UK investigative and enforcement entity for corruption-related cases has included new management, changes to the SFO's approach to internal and external communications and partnerships, and creation of new units and organizational structures. This could be further bolstered by proposals from the Conservative Party for the creation of a new financial crime regulator, which could give anticorruption enforcement in the UK an additional boost.

The Offences

The Bribery Act creates four offences. Two of these are general bribery offences, along with an offence specific to the bribery of foreign public officials and a corporate offence for failing to prevent bribery. The fourth offence is a notable departure of the Bribery Act from similar statutes such as the FCPA. It is a strict liability offence allowing for stiff fines against commercial organizations that fail to prevent a bribe being paid for or on its behalf. Although corporations facing an FCPA enforcement action pursuant to the accounting provisions or a *respondeat superior* theory are arguably facing a strict liability offence, the Bribery Act makes it explicitly so with a wider jurisdictional reach than the FCPA's accounting provisions.

The Act does away with the previous requirement that the Attorney General consent to the prosecution of any bribery offence.¹ The Bribery Act has removed that requirement, allowing prosecutions to be instituted by the Director of Public Prosecutions, the Director of the SFO, or the Director of Revenue and Customs Prosecutions.²

The Bribery Act also establishes severe penalties, including a maximum of 10 years' imprisonment for violations by individuals, and unlimited fines for entities under the strict liability commercial organization offence.

The following provides more detail regarding each offence:

General Bribery Offences

The Bribery Act's general offences are offering (Section 1) or receiving (Section 2) a bribe.

Under these provisions, the offence is committed when "the provider" offers a financial or other type of advantage to another person, "the receiver," with a view to inducing them to act "improperly." The receiver's behavior will be considered improper where the offender was expected to act in good faith, impartially or in accordance with a position of trust. An offence is committed whether the bribe was offered directly or through an agent or third party.

An "expectation test" is then applied to determine what is expected from a person who exercises a function that is the subject matter of the bribe, and is "What a reasonable person in the United Kingdom would expect in relation to the function or activity concerned." In deciding what would be expected from a reasonable person in the performance of these activities or functions, "Local

¹ For certain offences, Parliament requires Attorney General consent to bring a prosecution. This requirement, in the bribery setting, has been heavily criticized by the OECD in successive formal reviews of UK non-performance under the OECD Anti-Bribery Convention, which the UK signed in December 1997. Although this is removed by the Bribery Act, in exceptional cases the Attorney General will still be able direct that a prosecution or investigation not be started or be discontinued on national security grounds, after consultation with the Director of Public Prosecutions, the Director of the SFO or the Director of Revenue and Customs Prosecutions, as the case may be, followed by a report to Parliament.

² The Attorney General is the legal advisor of the Government and a law officer of the Crown. The Crown Prosecution Service (CPS), led by the Director of Public Prosecutions, is the principal prosecuting authority in England and Wales. The Revenue and Customs Prosecution Office (RCPO) has merged with the CPS as of January 1, 2010. It is responsible for specific types of cases such as tax, export and related money laundering. Unlike the CPS and RCPO, the SFO is both an investigative and prosecuting body. It is responsible for serious or complex fraud and corruption cases, typically in excess of £1 million, and/or with significant international aspects or widespread public concern. The CPS, RCPO and SFO Directors are all subject to the oversight and strategic guidance of the Attorney General, who is accountable for their prosecutions.

practice and custom must not be taken into account, unless such practice is permitted by written law.”

The purpose of this proviso is to prevent individuals and/or corporate entities from relying upon accepted practices in foreign countries to justify carrying out corrupt practices. In any event, the fact that a bribe could be authorized by the “written law” of the foreign country is not strictly a defense; rather it is only a factor to assess whether the relevant provider had an improper expectation.

Consequently, the Act creates an international offence of bribery, in the context of business and other activities, encompassing acts committed inside and outside the UK, so long as at least one element of the offence occurs within the UK or is committed outside the UK by a person with a “close connection” to the UK (e.g., a British citizen, one ordinarily resident in the UK or a body incorporated under UK law).

Bribery of Foreign Public Officials

The Bribery Act creates a separate offence of bribery of a foreign public official (Section 6) which closely follows the requirements of the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and is very similar to the FCPA’s bribery provisions.

Under the Act, a foreign public official is defined as a person “Who holds a legislative or administrative or judicial position of any kind whether appointed or elected,” or a person “who is an official or agent of a public international organization.”

The Act provides that the offence is committed when a financial or other advantage is offered to a foreign public official that is not “legitimately due” with a view to obtaining or retaining business. As with the general bribery offences, an offence is committed whether the bribe was offered directly or through an agent or third party.

The test applied to determine whether the advantage is legitimate or not is whether, under the laws that apply to that official, the payment is legal. Unlike the general bribery offences outlined above, the Act provides for the defense that the bribe is authorized by the “written laws” of the foreign country.

Jurisdiction for this offence is the same as that for the general bribery offences.

Failure of Commercial Organization to Prevent Bribery

The Bribery Act creates a strict liability offence for commercial organizations that fail to prevent bribery (Section 7). This allows for the direct prosecution of commercial organizations (including corporations and partnerships), with no requirement for the prosecuting authority to show that any directors or partners were directly involved in the commission of a crime.

Under this offence, a commercial organization has committed a crime if a person acting on its behalf bribes someone in connection with the organization’s business in an effort to “*obtain or retain business*” for the organization or to “*obtain or retain an advantage in the conduct of business*” for the organization. The prosecution will have the burden of proving that the purpose of the bribe was to obtain or retain business for and on behalf of the commercial organization. The bribe does not need to be directed at a foreign official; the provision is triggered even if the bribe relates only to the business activities of private entities.

This offence applies to both UK corporations or partnerships, and corporations or partnerships doing business in the UK. Further, it applies irrespective of whether the acts or omissions forming part of the offence take place in the UK. In theory, the Bribery Act's jurisdictional provisions mean that a U.S. business with a UK operation could be held liable under this offence for bribery occurring wholly outside the UK, and with no connection to the UK. However, it is a defense if the company can prove it had an adequate system in place to prevent bribery. According to the Government's commentary on the draft Bill, although "it is not explicit on the face of the bill, the standard of proof the defendant would need to discharge would be the balance of probabilities." The intent is to encourage adoption of robust compliance programs within such companies.

A new Section 9 was adopted at the third reading of the Bill before the House of Lords, which requires the Ministry of Justice to publish guidance on what constitutes "adequate procedures." The Ministry of Justice will update the guidance given from time to time, and will be required to consult Scottish Ministers before publishing such guidance.

Reach of Corporate Liability

Commercial organizations may also be held criminally liable for any of the bribery offences committed "with the consent or connivance of" a senior officer, director or person purporting to act in such a capacity. This applies to extraterritorial offences only if the consenting official has a "close connection" to the UK, as discussed above. Further, officers and directors who consent to or assist in a bribery offence may be held liable for that offence. Organizations may face liability under the strict liability offence for the bribery of individuals acting on the organization's behalf, including not just employees, but also agents and other third-party representatives.

This new legislation will force commercial organizations, whether formed in the UK or carrying out part of their business within the UK, to ensure that their personnel are familiar with the new legislation and that the management has set up appropriate anticorruption policies, procedures and control systems designed to identify, prevent and remediate potential bribery issues within the organizations.

Departures from the FCPA

Although the Bribery Act's general structure is familiar to anyone who has experience with the FCPA, the UK has taken that model several steps further. Notable differences in the two anticorruption regimes include:

- **Coverage of activities unrelated to governmental officials.** The FCPA is focused exclusively on foreign government officials, whereas the general bribery and organizational oversight provisions of the Bribery Act cover any improper inducement. As a result, the Bribery Act creates offences that bring purely commercial business-to-business activities inside and outside the UK within their scope.
- **Business nexus.** Under the FCPA, the improper inducement must be offered or paid in order to obtain or retain some business advantage. Although this is an increasingly low hurdle, it is not required by the Bribery Act's general bribery offences, which focuses instead on whether the provider is attempting to induce improper action betraying a position of trust. The strict liability corporate offence does require a business nexus.

- **Scope of the strict liability corporate offence.** Although the FCPA’s accounting provisions³ do carry the risk of criminal liability for failure to maintain adequate systems of internal controls and are essentially a strict liability regime with regard to inaccurate financial books and records, the Bribery Act’s strict liability approach is potentially more stringent and certainly covers a wider band of activities that can trigger liability. Further, it applies to all commercial organizations under its jurisdiction, whereas the FCPA’s accounting provisions apply only to publicly-traded companies.
- **Facilitation or “grease” payments.** Under the FCPA, certain low-level payments meant to facilitate a non-discretionary government act are allowable, while in the UK they are not. Notably, corporations have approached this FCPA exception in an increasingly conservative fashion to the point that few U.S. companies allow their personnel to make such payments. Richard Alderman, the current director of the SFO, has stated publicly that prosecutions involving small amounts of money are unlikely.
- **Bona fide business expenditures.** The FCPA provides an affirmative defense for payments that are reasonable and bona fide business expenditures directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof. There is no similar counterpart under the Bribery Act, although this could be addressed via the guidance mandated by Section 9.
- **The impact of local law.** Under both the FCPA and the foreign official provision of the Bribery Act, it is a defense if the offer or inducement at issue was allowed under written local law. However, the general bribery offences allow this only as a mitigating factor or consideration.
- **Advisory opinions.** The U.S. Department of Justice offers an FCPA advisory opinion procedure (FCPA Opinion Procedure) that provides a presumption of FCPA compliance if the opinion is relied upon and implemented by the requesting party. The SFO offers similar guidance, but without a formal procedure as such.
- **Civil enforcement.** Unlike the FCPA, which provides for civil enforcement by the Securities and Exchange Commission (SEC) or Department of Justice (DOJ) under lower standards and subject to lesser penalties, the Bribery Act offers only criminal enforcement. However, the CPS, RCPO and SFO do have separate statutory authority to make confiscation orders.
- **Severity of penalties.** The Bribery Act carries the potential of up to 10 years’ imprisonment for individuals, and potentially unlimited fines for commercial organizations. By comparison, under the FCPA’s bribery provisions, the maximum sentence is generally five years’ imprisonment and up to \$250,000 in fines for individuals and a \$2 million fine for entities. Penalties for willful violations under the FCPA accounting provisions are much more severe, with potential imprisonment of up to 20 years and \$5 million in fines for individuals and up to \$25 million in fines for entities.⁴

³ The Bribery Act does not have provisions similar to the FCPA’s accounting provisions, although the UK does have similar provisions under its Money Laundering Regulations (2007) and the Companies Act (2006).

⁴ Under the Alternative Fines Act, 18 U.S.C. § 3571, penalties for FCPA violations can actually be much higher, up to twice the benefit sought by making the corrupt payment.

Although the UK does not have similar precedents for high corporate penalties in this area as those secured in the United States in recent years, a handful of UK cases since 2008 have involved multimillion pound settlements and fines of increasing size.

Next Steps

The Bribery Act received the Royal Assent on April 8, 2010, but it has yet to come into force. The Act's commencement date will be determined by the new Ministry of Justice, which will be appointed by the Conservative-led coalition government that took power following the General Elections of May 6, 2010. Commencement is anticipated anywhere from October 2010 to sometime in 2011.

The critical next step is for the Ministry of Justice to provide guidance as to what constitutes adequate anticorruption procedures, pursuant to the mandate of Section 9. The previous government had committed to providing this guidance before the new offences take effect, to give commercial organizations adequate time to address any potential shortcomings in their own internal compliance functions. At the February 2, 2010 third reading of the Bill before the House of Lords, Lord Tunnicliffe indicated that the Ministry of Justice had already begun working closely with business groups and non-governmental organizations to develop a set of principles to serve as the basis of the guidance document. This guidance is expected to focus on:

- The responsibility of boards of directors to design, implement and regularly review policies for preventing bribery within their organizations;
- The importance of boards of directors taking responsibility for anticorruption programs and for appointing a senior corporate officer to be accountable for their oversight;
- The need to assess risks specific to the organization;
- The need to establish employment procedures and training for new hires and existing personnel on anticorruption procedures;
- The need to have internal financial controls and recordkeeping that minimise the risk of bribery; and
- The establishment of whistle-blowing procedures providing employees the ability to report corruption safely and confidentially.

Other topics to be addressed by the guidance document will include the monitoring of anticorruption policies, how organizations embed their programs into their administrative structures and issues concerning facilitation payments and corporate hospitality.

However, the guidance consultation and development process was paused, pending the resolution of the recent elections. It had been anticipated that the re-election of Labour would result in the Act coming into force in October 2010, following a July 2010 release of the guidance required by Section 9. If the Conservatives were to prevail, commencement of the Act was expected to be pushed to 2011 in order to allow for the preparation of different guidance than that under development by the previous government. This could include a new round of consultations with businesses and other relevant entities. However, by failing to deliver a clear majority ("hung Parliament"), the coalition government produced by the elections could further delay promulgation of guidance and commencement of the Act.

Regardless of the how the political dust settles, the guidance is ultimately expected to set out broad guidelines that will illustrate "good practices examples, rather than detailed and prescriptive standards." It is also expected that the courts will take into account the size and needs of a business

when assessing whether its policies and procedures are adequate to satisfy the “adequate system to prevent bribery” defense during the course of a prosecution.

As with any new piece of legislation, particularly involving criminal offences with such a potentially broad impact, the Bribery Act comes with as many unresolved questions as it does answers for how to handle issues in this area going forward. Only time and experience will be able to address these open questions, such as:

- What type of incentive or inducement will be considered sufficient to satisfy the elements of an offence?
- How will the UK determine who will be considered a “governmental official”?
- How vigorously will the UK enforce the strict liability offence?
- Does the UK intend to pursue extraterritorial activities under the general bribery provisions?
- Which enforcement agency will take the lead in investigations and prosecutions?

Impact of the Bribery Act

Although it is impossible to tell at this early date how vigorously UK law enforcement will seek to investigate and prosecute possible offences, the end of 2009 and beginning of 2010 have seen a noteworthy uptick in enforcement activities indicating that the SFO is ready to expand its activities in this area and invigorate enforcement efforts. This has included charges brought against individuals and corporations in a number of high profile cases, and notable parallel investigations and settlements involving coordination between UK and U.S. law enforcement. This follows recent announcements that the SFO is pursuing several high-profile anticorruption investigations.

The passage of the Bribery Act in the current environment of corporate scrutiny adds to the growing chorus cautioning companies to take great care in how they handle their international business transactions. The Act offers both a carrot and a stick crediting the notion that companies taking steps to implement a robust compliance organization can avoid or mitigate the risk of prosecution under its provisions.

The UK Government’s current assessment is less sanguine about a significant rise in enforcement actions as a result of the Bribery Act’s passage. According to the UK Government’s financial assessment of the Act, its implementation will result in a net annual increase of costs for the criminal justice system of £2.18 million. This is based on the assumption that only a small number of additional prosecutions will arise as a result of the Act. The Government is also of the view that the Act will not impose a significant additional administrative burden on businesses.

Companies incorporated in the UK or partnerships formed in the UK, or commercial organizations formed outside the UK but doing business within the UK, must ensure that they have adequate anticorruption policies and procedures in place before the Act comes into force later this year. Bearing in mind that it may take up to several months to implement such measures from scratch or to bring existing systems up to speed, action is required now to ensure adequate protections are in place when the Act comes into force. And even though an entity may already have an FCPA compliance program in place, the Bribery Act’s departures from the FCPA caution even those with a robust program in place to revisit and revise it as necessary to ensure compliance with UK law.

McGuireWoods LLP

McGuireWoods has extensive experience defending anticorruption investigations; conducting anticorruption risk assessments, audits and internal investigations; and designing and helping to implement overall and anticorruption-specific corporate compliance programs and training. As

recognized by the Bribery Act and SFO guidelines, the most valuable weapons a corporation and its officers and directors have against potential anticorruption issues are preparedness, responsiveness, and the deployment of a robust compliance program designed to identify, address and prevent issues before they become government investigations.

For more information about McGuireWoods' capabilities in this, or any other area, please contact Adam Greaves in the London office or Howard C. Vick Jr., Charles Wm. McIntyre, Timothy E. Flanigan, Kenneth D. Bell, J. Patrick Rowan or Jeremy D. Freeman in the Richmond, Washington, New York and Charlotte offices.