

## The Bribery Bill

Although drafts have been discussed since March 2009, the Bribery Bill before Parliament was not revealed until a speech by the Queen on 18 November 2009. It is anticipated that Parliament will respond quickly to the Bill and it is likely to be enacted into law before Parliament's current legislative session ends and prior to the 2010 general election.

### Existing Anti-Corruption Legislation in the UK

Although bribery is already a criminal offence (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), it is generally accepted that this current legislation was piecemeal and in need of reform.

After several years of criticism over lax enforcement of existing anti-corruption laws by the Organisation for Economic Co-operation and Development ("OECD"), and more than a decade of failed efforts to pass similar legislation, expected passage of the now pending Bribery Bill would give the UK a strong platform upon which to build new anti-corruption enforcement efforts. The purpose of the new anti-corruption legislation is to modernise it by creating a single piece of legislation criminalising bribery, and other associated corrupt activities, and by repealing what is generally accepted to be outdated legislation.

If the Conservative Party wins the upcoming elections in 2010, it has pledged to create a new financial crime regulator, which could give anti-corruption enforcement in the UK an additional boost.

### The Draft Bribery Bill - Key Provisions

The [Bribery Bill](#) creates four offences; two general offences of bribery, one specific offence of bribing a foreign public official and a new corporate offence for failing to prevent bribery.

Perhaps the most striking departure is the Bill's fourth offence, which creates a new strict liability offence allowing for stiff fines against commercial organisations failing to prevent a bribe being paid for or on its behalf. Under this offence, a commercial organisation has committed a crime if a person acting on its behalf bribes someone in connection with the organisation's business in an effort to "*obtain or retain business*" for the organisation or to "*obtain or retain an advantage in the conduct of business*" for the organisation.

This offence applies to both UK corporations or partnerships, and corporations or partnerships doing business in the UK. However, it is a defence if the company can prove it had an adequate system in place to prevent bribery. The Bill states that the intent of the strict liability offence is to encourage adoption of robust compliance programmes within such companies.

In terms of the penalties they may face, if the offence is tried on indictment, the Bill in its current form specifies a maximum of 10 years imprisonment for individuals and, an unlimited fine for the offence relating to Commercial Organisations.

The Bill replaces the requirement for the Attorney General's consent to prosecute a bribery offence. Prosecution may be instigated by the Director of Public Prosecutions, the Director of the Serious Fraud Office ("SFO") or the Director of Revenue and Customs Prosecutions.

### **General Bribery Offences**

The general bribery offences concern the offence of offering a bribe (Clause 1) and the offence of receiving one (Clause 2).

In essence, an offence is committed when *"the Provider"* gives a financial or other type of advantage to another person, *"the Receiver"*, with a view to inducing R to act *"improperly"*. The Receiver's behaviour 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 which 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 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 authorised by the *"written law"* of the foreign country is not strictly a defence, rather it is only a factor to assess whether the relevant expectation has been breached.

Consequently, the Bill creates an international offence of bribery, in the context of business activities, which encompasses acts committed both inside and outside the UK.

### **Bribery of Foreign Public Officials**

The bill creates a separate offence of bribery of a foreign public official (Clause 6) which closely follows the requirements of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It only concerns the offering of the bribe and not the acceptance of a bribe by a public official.

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 organisation"*.

The bill provides that the offence is committed when a financial or other advantage is offered to a foreign public official which 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 which apply to that official, the payment is legal. Unlike the general bribery offences outlined above, the Bill provides for the defence that the bribe is authorised by the *"written laws"* of the foreign country.

## **Failure of commercial organisation to prevent bribery**

The Bill creates a strict liability offence for commercial organisations which fail to prevent bribery (Clause 7). This new offence enables the direct prosecution of commercial organisations (including companies and partnerships), as there is no requirement for the prosecuting authority to show that the organisation's directors or partners were directly involved in the commission of a crime.

Under this offence, a commercial organisation has committed a crime if a person acting on its behalf bribes someone in connection with the organisation's business in an effort to "*obtain or retain business*" for the organisation or to "*obtain or retain an advantage in the conduct of business*" for the organisation. 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 organisation.

There is a defence for the commercial organisation to prove that the organisation had put in place adequate measures to prevent bribery being committed. According to the government's commentary on the 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*".

Commercial organisations 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 the 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. Organisations may face liability under the strict liability offence for the bribery of individuals acting on the organisation's behalf, including not just employees, but also agents and other third-party representatives.

This new legislation will force commercial organisations (created in the UK or created outside the UK which carry out part of their business within the UK) to ensure that their staff are familiar with this new legislation and that the management has set up appropriate anti-bribery policies and controls within these organisations.

### **Guidance**

The Ministry of Justice will be required (see Clause 9) to provide guidance as to what constitutes adequate anti-corruption procedure, which will be issued before the Bill comes into force, to give commercial organisations sufficient time to prepare. The intended guidance will be structured and will contain a section dealing with the legal background of both domestic and international anti-bribery obligations. The government has indicated that it will stress the importance of board directors of commercial organisations taking responsibility for anti-corruption programmes and to appoint a senior officer accountable for oversight; it will highlight the importance of assessing risk specific to the organisation, of establishing enforcement procedures and of training new and existing staff in anti-bribery procedures, of having financial controls and record keeping to minimise the risk of bribery, and of establishing internal whistleblowing procedures. The government has announced that the guidance will also deal with general policies set out in a board-level statement and will also give an indication as to what is acceptable in terms of corporate hospitality, as well as address facilitation payments.

This approach was recently endorsed in guidelines on overseas corruption cases issued in July 2009 by the SFO. These guidelines focus on voluntary disclosure by corporations, followed by remedial actions and cooperation with investigators in exchange for civil rather than criminal resolution of overseas corruption matters.

As the Bribery Bill progresses through Parliament it will be further amended. Consequently, the draft Bribery Bill and the associated analysis set out above is far from the final word on what the offences are likely to be. Although sources inside the Conservative Party have alluded that while they are supportive of the Bill in principle and have been pursuing similar legislation for the last 10 years, it is possible that amendments will be necessary to ensure passage before the 2010 elections. However, because it is in both the Conservative and Labour Parties' interest to pass the Bill during the current legislative session, it is unlikely that significant changes in the direction of the Bill will occur.

Further updating notes will be issued by McGuireWoods as and when the Bill is amended.

### **Impact of the Bribery Bill**

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 individual prosecutions, and notable parallel investigations and settlements involving the coordination of UK and U.S. law enforcement. These actions follow announcements this past fall that the SFO is pursuing several high-profile anticorruption investigations.

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

According to the Government's financial assessment of the Bill, its implementation would result in a net annual increase of administration costs for the criminal justice system of GB£2.18 million. This assessment is based on the assumption that only a small number of additional prosecutions will arise as a result of the Bill. The government is also of the view that the Bill will not impose a significant additional administrative burden on businesses.

Companies incorporated in the UK or partnerships formed in the UK, or commercial organisations formed outside the UK, but doing business within the UK, must ensure that they have adequate anti-corruption procedures in place before the Bill comes into force.

Bearing in mind that it may take up to several months to implement such procedures, if they have to be put in place for the first time, action is required now to avoid criminal liability being triggered when the Bill comes into force.

### **McGuireWoods**

McGuireWoods has extensive experience defending anti-corruption investigations; conducting anti-corruption risk assessments, audits and internal investigations, as well as designing and helping to implement overall and anti-corruption-specific corporate compliance programmes and training. As recognised by the Bribery Bill and SFO guidelines, the most valuable weapons a corporation and its officers and directors have against potential anti-corruption 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.