

Draft UK Bribery Bill Would Expand Scope of UK Anti-Corruption Initiatives and Jurisdiction

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On March 25, 2009, the UK Ministry of Justice published a draft Bribery Bill ("the Bill") that would update and consolidate the existing patchwork of anti-corruption legislation in the UK, while providing for new offenses and expanding the UK Government's territorial reach in this area.

While the Bill still must progress through the parliamentary approval process—a process that can take many months and could result in various changes to the text of the Bill—there is strong support for this legislation and it is likely that it will enter into force in some form. Given the broad scope of the Bill, as described below, UK individuals and companies, as well as non-UK individuals and companies, that have a close connection to the UK (including conducting business there) should be aware of the contents of the Bill and what it may mean for corporate compliance requirements in the near future.

The Four Offenses: Making a Bribe, Taking a Bribe, Bribing a Foreign Official and Negligent Failure of a Company to Prevent Bribery

The Bill would replace common law offenses (such as common law bribery and embracery, the bribery of jurors) and those listed under statutes from the late 19th and early 20th centuries¹ with four offenses: (1) making a bribe; (2) taking a bribe; (3) bribing a foreign official; and (4) negligent failure of a company to prevent bribery. The most important features of these offenses are:

- bribery goes beyond bribing government or other public officials, and includes "commercial bribery" of private business officials in some cases;
- bribery can be committed by both individuals and corporations, both of whom also can be liable for the actions of their agents;
- corporations and partnerships can be liable for "negligent failure to prevent bribery"; and
- UK authorities can pursue UK individuals and companies as well as non-UK individuals and companies that have a close connection to the UK (including conducting business there) for bribery offenses regardless of where the relevant conduct occurred.

The proposed offenses in the Bill are discussed in greater detail below.

Making a Bribe

Making a bribe is offering a "financial or other advantage" to another person, intending it as a reward for performing, or that it will cause the other person to perform, improperly a function or activity. There are a number of important aspects to this definition. First, the meaning of "financial or other advantage" is left to be determined "as a matter of common sense" by the courts.² Second, the "function or activity" in question is defined broadly, such that it includes not only public or government functions, but also includes commercial functions, including activities of a business, trade, professional, employment or corporate nature. There must be a reasonable expectation that the function or activity will be performed in good faith, impartially, or that the person performing it is in a position of trust, and the improper performance (or omission) must breach that expectation.

The Bill also ensures that an individual can be guilty of making a bribe even if the offer is made through someone else and even if the person who receives the offer is different from the person who performs or is to perform an improper activity. This means that, among other things, an individual can be guilty of making a bribe through an agent or other third party.

Foreign bribery is included here to the extent that it does not matter whether the function or activity has any connection with the UK or is carried out entirely outside the UK. Finally, it is not necessary actually to pay a bribe to be convicted of bribery—an offer or promise is sufficient.

Taking a Bribe

The Bill also criminalizes accepting an offer of a bribe with a definition that is close to the mirror image of making a bribe, with the exception that there is no express provision including bribes relating to functions with no connection to the UK. Thus, taking a bribe includes requesting, agreeing to receive, or accepting an advantage, regardless of whether it is actually received, provided that the recipient intends improper performance of a function or activity to result from the bribe. The function or activity includes not only public functions, but also commercial activities, with the same expectations of good faith or impartiality as above. In most cases, a person can be convicted for taking a bribe through an agent. Also, importantly, in most cases, it is irrelevant whether the person improperly performing the activities knows that such performance is improper.

Bribing a Foreign Official

The Bill also creates a separate offense of bribery of a foreign public official (including individuals working for international organizations), which tracks the legislative requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. As defined in the Bill, this offense may overlap in some ways with the provision covering the making of bribes. This part of the Bill does not, however, outlaw foreign public officials' acceptance of bribes.

Under the Bill, it is an offense to offer a financial or other advantage to a foreign public official that is "not legitimately due" to that official in order to obtain or retain business. Importantly, it does not matter whether the action that is sought from the public official is itself improper or not—it only matters whether, under the law that applies to that official (i.e. the law of the foreign country in question), he is not entitled to the payment. Moreover, it is not a defense to a charge under the Bill that such payments, while technically illegitimate, are customary, widespread or officially tolerated in

that country.

As with the general bribery provisions above, it does not matter whether the bribe is offered or paid to someone other than the foreign public official if it is made at the official's request or with his assent or acquiescence. It also does not matter whether the offer is made directly by the person charged with the offense, or whether it was made through an agent or other third party. Finally, a person can be convicted as long as he offers or promises a bribe intending to influence a foreign public official in the performance of his official functions—it is irrelevant whether a bribe is actually paid, whether the official actually follows through with an action or omission resulting from the offer, or indeed whether the official even has the authority to use his position in the way sought by the person.

Negligent Failure of a Company to Prevent Bribery

The Bill also creates a relatively novel offense of negligently failing to prevent bribery, an offense that can only be committed by a commercial organization such as a UK corporation or partnership or any corporation or partnership doing business there. Under this offense, a company commits a crime where a person acting on behalf of such a company (including an employee, an agent, or the employee or agent of a subsidiary) bribes someone in connection with the company's business and a responsible person or group of people affiliated with the company negligently failed to prevent the bribe. The "responsible person" is either the person or people tasked with preventing bribes, or if there is no such person, then any senior officer of the company. This part of the Bill only addresses failing to prevent the making of bribes, not the taking of bribes.

The Bill provides that it is a defense to prove that the company had in place adequate measures designed to prevent its representatives from making bribes. This defense, however, is not available if the negligence was due at least in part to a senior officer.

The Bill emphasizes that this "corporate offence is not regulatory in nature and there will be no monitoring of compliance," and that "[t]he intention here is that the offence will have a beneficial effect for corporate governance by encouraging those companies which have not already done so to adopt adequate systems to prevent bribery."³ The Bill does not, however, describe any particular anti-bribery measures that should be taken or that would satisfy the defense.

Bribery Offenses by Companies

In addition to the new offense of negligent failure to prevent bribery, the Bill also provides for corporate criminal responsibility for making and taking bribes and for bribing foreign public officials, and thus it is possible for UK authorities to pursue any "body corporate" for these offenses concurrently with individuals affiliated with such corporations.

Special Concerns for Officers and Directors of Corporations

If one of the above offenses is proved to have been committed by a corporation with the consent or connivance of a senior officer of a corporation, both the officer and the corporation are guilty of the same offense. Although this does not create a separate "consent or connivance" offense, it

essentially permits UK authorities to pursue the officers and directors of corporations for bribery offenses where it can be shown that the corporation is guilty of an offense and an officer or director consented to or connived at the commission of the offence.

Extra-territorial Jurisdiction to Prosecute Bribery Committed Abroad

The Bill permits UK authorities to prosecute offenders if any part of the offending conduct took place in England and Wales or Northern Ireland. In cases where none of the offending conduct took place in England and Wales or Northern Ireland, UK authorities still may prosecute offenders if they are a British national or resident, a national of a British overseas territory or a body incorporated in the United Kingdom. Because the offense of negligent failure to prevent bribery is limited to UK corporations or partnerships or any corporation or partnership doing business there, it is irrelevant where the offending conduct takes place.

Penalties and Retroactivity

Any offense under the Bill committed by an individual is punishable either by a fine or imprisonment for up to 10 years, or both. An offense committed by a corporation or partnership is punishable by a fine. If the authorities use an indictment process, the potential fine is unlimited. The Bill is not intended to be retroactive.

The Bill in Context

Efforts to draft a comprehensive bribery law for the United Kingdom have been underway since the 1995 Nolan Committee's Report on Standards in Public Life, which was set up in response to concerns about unethical conduct by those in public office, recommended consolidation of the statutory law on bribery. The Law Commission made its first proposals for reform in a 1998 report,⁴ and the first draft legislation was submitted to Parliament in 2003.⁵ This bill failed to win sufficient parliamentary support, and following further consultation between the Government and the Law Commission, the Law Commission issued a consultation paper in October 2007⁶ and a further report on November 20, 2008.⁷ The legislative proposals in the Bill are built on the proposals in the Law Commission's 2008 report.

Conclusion

Perhaps the most important implication of the Bill for multinational corporations operating in the UK is that they would be advised to review their anti-bribery and corruption policies to ensure that there are adequate measures in place to prevent such activity by their employees, agents and representatives wherever they operate. Such policies may in part be similar to those already in place to ensure compliance with other anti-corruption regimes such as the US Foreign Corrupt Practices Act; however, due to differences in the underlying offenses under the Bill, such as the inclusion of commercial bribery offenses, it will be important to conduct an independent review to ensure compliance with all aspects of this Bill if and when it enters into force.

¹These are the offenses contained in the Public Bodies Corrupt Practices Act 1889, the Prevention

of Corruption Act 1906, and the Prevention of Corruption Act 1916, which would all be repealed.

² Explanatory Notes, para. 12.

³ Explanatory Notes, para. 98.

⁴ Legislating the Criminal Code: Corruption 1998 report No. 248.

⁵ Corruption Draft Legislation Cm 5777.

⁶ Reforming Bribery (No. 185).

⁷ Reforming Bribery (Law Comm. No. 313).

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