

## UK Anti-Corruption Update - The Bribery Bill 2009

On 25 March 2009, the UK Government published a new draft Bribery Bill ("the Bill") that, if enacted, will have a major impact on the way companies based or doing business in the UK operate. The Bill seeks to overhaul the UK bribery laws by rationalising the current patchwork of common law and statutory offences into a single, clearer set of statutory offences applicable to bribery occurring in the UK and abroad.

In a number of respects, the Bill is more wide-ranging than other countries' anti-bribery regimes, including the US Foreign Corrupt Practices Act. In particular, the Bill seeks to create:

- **an international commercial bribery offence**, as the proposed offence of offering, promising or giving a bribe includes bribing persons outside the UK in the context of a business activity; and
- **corporate liability for negligently failing to prevent bribery**, which would make companies incorporated in the UK or that carry out all or part of their business there more clearly responsible for any failure to address the issue of bribery at a management level or impose adequate anti-bribery controls on their employees and agents.

If the Bill becomes law, the new corporate liability offence, coupled with the proposed imposition of criminal liability on corporate officers whose companies commit bribery with their consent or connivance, likely will enable the UK authorities to prosecute companies and their corporate officers for bribery offences more easily than has been the case previously.

### The proposed bribery offences

The Bill proposes an enhanced and consolidated set of bribery offences, which would cover:

- individuals who or companies that offer, promise or give bribes, including to foreign public officials;
- individuals who or companies that request, agree to receive or accept bribes;
- companies that negligently fail to prevent their employees or agents from giving bribes; and
- company directors, managers, corporate secretaries and other similar company officers who consent to or assist in the commission of a bribery offence by their company.

### Giving and receiving bribes

The Bill makes it an offence for a person to **offer, promise or give an "advantage"** to someone (1) with the intention of inducing that person to behave "improperly", (2) as a reward for that person behaving in an "improper" manner or (3) knowing or believing that the recipient's acceptance of the "advantage" would constitute "improper" behaviour. The Bill defines an "advantage" as including both financial and other benefits. The recipient of a bribe also will be guilty of an offence if he / she

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requests, agrees to receive or accepts an “advantage” in certain circumstances.

### **Bribery of foreign public officials**

The Bill creates a separate offence of bribing a foreign public official. A person will be guilty of this offence if he / she **offers, promises or gives an “advantage” to a foreign public official** that is not permitted or required to be accepted under the law of the official’s country. 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 (1) to influence that person in his or her capacity as a foreign public official and (2) to obtain or retain business or an advantage in the conduct of business.

The Bill’s definition of “foreign public official” covers both foreign government officials and individuals working for international organisations. 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 within their authority when doing so.

### **To whom do these offences apply?**

The offences of giving and receiving bribes and bribing foreign public officials will apply to UK companies, UK citizens and individuals ordinarily resident in the UK wherever the relevant act occurs, whether inside or outside the UK. They also will apply to non-UK nationals or companies whenever an act or omission forming part of the offence takes place in either England and Wales or Northern Ireland (but not Scotland).

### **Criminal liability of senior company management**

The Bill introduces statutory personal criminal liability for senior officers (*i.e.* directors, managers, corporate secretaries and other similar officers) whenever their companies have committed a bribery offence with their consent or assistance.

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

Historically, it has been difficult to convict companies of crimes under English law as it is typically necessary to show that a company’s directors were directly involved in the commission of the crime, which has proven hard to demonstrate in practice. The Bill seeks to ease this prosecutorial burden by creating a new offence that imposes corporate liability for a company’s negligent failure to prevent bribery by its employees and agents. The new offence will be committed if (1) one of the company’s employees or agents bribes another person, (2) the bribe was made in connection with the company’s business and (3) members of the company’s anti-bribery compliance function (or if this function does not exist, the company’s senior officers) negligently fail to prevent the bribe.

There is no need for the employee or agent to have been prosecuted for bribery, provided that the employee or agent is or would be guilty of the offence of giving a bribe or of bribing a foreign public official under the Bill.

The proposed offence would apply to all companies (and partnerships) that carry on any part of their business in the UK (except Scotland), whether they are incorporated in the UK or elsewhere. In practice, the proposal would require every such company to address at board level the question of how to deal with and prevent bribery being undertaken by employees and agents of the company. Also, as an offence is committed irrespective of where the acts or omissions comprising the offence take place, compliance measures of some sort will be needed everywhere a company does business. A company or partnership will not be guilty of this offence if it can demonstrate that it had adequate procedures to prevent its employees or agents from committing bribery. What might constitute adequate procedures is, to say the very least, unclear at this point.

## Penalties

In relation to any of the proposed corruption offences, the Bill proposes a maximum penalty of:

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

## Conclusion

Particularly in light of the Bill's proposed new offence of negligent failure to prevent bribery, it is important that companies incorporated in the UK or active there review their compliance, training and other anti-bribery measures in preparation for the Bill's likely entry into force.

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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