

# ARNOLD & PORTER (UK) LLP

## CLIENT ADVISORY

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## UK PROPOSES SWEEPING NEW ANTI-BRIBERY LEGISLATION

In what is likely to be a major change in the English anti-bribery laws, Jack Straw, the Secretary of State for Justice and Lord Chancellor, has proposed legislation that would significantly alter the approach of England, Wales, and Northern Ireland to preventing bribery.<sup>1</sup> In particular, the new legislation will lead companies—and corporate officers—operating in the United Kingdom and abroad to put in place new internal procedures to improve their compliance programs to ensure that their employees abide by the new law.

Despite years of international and domestic criticism, the UK has relied, since the early 20th century, on a patchwork of statutory and common law prohibitions against bribery. The UK anti-bribery laws are widely considered a hindrance to public corruption investigations and consist of a “motley of common law and statutory offences...in need of rationalisation and simplification” that leave violations unclear and prosecutions difficult.<sup>2</sup> The current laws do not consistently apply to public and private actors and do not even apply consistently to citizens and those resident in the UK. Current law also requires the Attorney General’s consent to some bribery prosecutions; in 2006, for example, that consent provision was used to dismiss a major corruption prosecution involving a Saudi Arabian arms deal on the basis of national security, creating considerable controversy in the UK and abroad. The Organisation for Economic Co-operation and Development (OECD) and others have often noted that due to weaknesses in its laws, the UK obtains few bribery convictions despite involvement by UK companies and personnel in international business transactions in countries at greater risk of corruption.

Even as the UK has failed in recent years to update its laws to reflect modern corporate behaviour, other nations have begun tightening their public corruption laws and increasing enforcement of bribery offences. The United States, in particular, has used its Foreign Corrupt Practices Act (FCPA) to prosecute public corruption both at home and abroad, most recently settling an FCPA case against Siemens AG for US\$800 million. The total global fines in the Siemens case exceeded US\$1 billion, making it one of the largest multinational public corruption cases in history. As the Siemens prosecution showed, countries such as Germany and the United States are willing to prosecute foreign companies even for actions that occur overseas if the companies in question also operate domestically.

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In light of such international pressure, the Ministry of Justice has proposed legislation that seeks to bring bribery law in England, Wales, and Northern Ireland into compliance with international standards for preventing public corruption (the Bribery Bill).<sup>3</sup> The Bribery Bill seeks to consolidate the current multitude of laws into one statute broadly prohibiting public and private corruption for anyone closely connected with the UK. The Bribery Bill is modeled on a proposal by the Law Commission in its report of November 2008 entitled “Reforming Bribery.” In presenting the Bribery Bill, Straw described the current reforms as seeking to “provid[e] our courts and prosecutors with the tools they need to tackle bribery effectively, whether it occurs at home or abroad.”<sup>4</sup>

## I. SUMMARY OF PROPOSED LEGISLATION

The Bribery Bill, if enacted, would apply to both domestic and international activity, including actions by companies incorporated in the UK and any citizens or residents of England, Wales, or Northern Ireland. Moreover, the Bribery Bill would make UK companies liable for certain acts occurring abroad. In particular, it would allow prosecution of violations in the courts even if the violations occur abroad, if the wrongdoer has a “close connection” with the UK and if the offence would have been illegal had it occurred in England and Wales or Northern Ireland.<sup>5</sup> Those with “close connection[s]” would include British citizens and residents and also companies incorporated in the UK. It would also cover persons domiciled abroad, but ordinarily resident in the UK.

The four major provisions of the Bribery Bill are as follows:

- (1) **Paying Bribes.** The Bribery Bill would prohibit paying or offering bribes (a financial or other advantage) to anyone with the intention of bringing about an improper performance by the recipient of a function or activity.<sup>6</sup> The function or activity may be in the public or private sector and covers any activity performed in the course of a person’s employment. It would not matter under the Bribery Bill whether the potential payer of the bribe acted through a third party (such as a consultant) in offering the bribe.
- (2) **Receiving Bribes.** The Bribery Bill would prohibit receiving or soliciting bribes from anyone in similar circumstances to those described above.<sup>7</sup> The

provisions make clear that the receipt or solicitation may itself constitute the improper performance of the function or activity. Moreover, the Bribery Bill would bar the potential bribe recipient from causing someone else to perform one of the listed actions improperly, even if the other person did not know that the action was improper. Again, it would not matter whether the bribe solicitation was made through a third party or even whether the bribe was to be paid to a third party.

- (3) **Bribing a Foreign Public Official.** The Bribery Bill would prohibit bribing a foreign public official, whether directly or through a third party, in order to receive a business advantage from the official’s improper actions.<sup>8</sup> Foreign public officials include foreign government officials, foreign elected officials, and employees of public international organizations (such as organizations whose members are other countries). In order to violate the law, the bribe must be something that the official is not permitted or required by law to accept.
- (4) **Negligently Failing to Prevent Bribes.** For companies, the Bribery Bill bars negligently failing to prevent someone working on behalf of a company from paying a bribe in connection with the company.<sup>9</sup> If the person paying the bribe is an employee of the company, the Bribery Bill presumes that the person was working on behalf of the company when the bribe was paid. Companies can defend themselves by showing that they have adequate procedures in place to prevent these types of violations, and companies operating in the UK will need to implement such procedures if the Bribery Bill becomes law. However, that defence is waived if the negligent failure was by a senior officer for the company (or someone claiming that title). In addition, senior corporate officers (and those claiming that title) can themselves be prosecuted for consenting to the company’s payment of a bribe or conniving in its payment.

Penalties for violating the new prohibitions include up to 10 years in prison and an unlimited fine for conviction on indictment, but summary convictions of individuals for paying bribes, receiving bribes, and bribing foreign public

officials would result in a lesser penalty.<sup>10</sup> Moreover, a company could only be convicted of negligent failure to prevent bribes by conviction on indictment.<sup>11</sup>

In addition, the Bribery Bill does away with the current law's requirement that the Attorney General consent to bribery prosecutions. However, the legislation would create an exception to the general bribery offences for national security activities authorized by the Secretary of State.<sup>12</sup>

## II. IMPLICATIONS OF THE PROPOSED LEGISLATION

While the Bribery Bill, if enacted, will have many ramifications for companies based in the UK, the most immediate impact is likely to be that companies will need to enhance their compliance programs. As the prohibitions in the Bribery Bill would take effect after its enactment, it is recommended that enhancement efforts commence in advance of the effective date of the statute.

Governments worldwide expect companies to comply with all applicable laws and to have a compliance program that prevents, detects, and responds to wrongdoing. Regulators may view individual incidents of non-compliance/misbehaviour as corporate encouraged/sanctioned behaviour, resulting in corporate liability that may include criminal charges if a compliance program is not effective. This viewpoint is mirrored in the proposed legislation.

Worldwide regulators are focusing on effectiveness in the overall prevention of misconduct and management of risk rather than solely on isolated responses to single issues or incidents. In this emerging global standard, effective compliance utilizes a risk-based approach that addresses developing risks most likely to occur in a company's line of business, and that constantly assesses and improves the program by incorporating lessons learned. Corporate Boards, Audit Committees and Senior Management will be required to implement effective compliance through management and mitigation of risks and escalation of issues where appropriate under the circumstances. While compliance should be embedded in the business as a line management responsibility, the compliance function must exercise appropriate governance and

oversight to meet the expectations of regulators and internal/external stakeholders.

Effective compliance programs are generally viewed as consisting of the following components:

- Having a robust compliance program, supervised by a Compliance Officer or similarly situated senior officer of the company;
- Developing and implementing written policies and procedures that specify the rules of conduct to be followed by company employees and agents;
- Developing effective lines of communication to enable employees to raise questions or concerns;
- Conducting effective training and education to permit employees to understand the rules governing their conduct;
- Conducting internal monitoring and auditing to assess whether employees are following company policies and procedures;
- Enforcing standards through well-publicized disciplinary guidelines; and
- Responding promptly to detected problems and undertaking corrective action to address employee misconduct or to improve or modify compliance program features.

It is clear that companies that will be subject to the new anti-bribery legislation will need to assess their current compliance programs, determine what, if any, gaps exist in their current programs as compared to the above standards, and consider making enhancements to their programs in advance of the effective date of the legislation to meet the requirements of the proposed legislation.

## III. CONCLUSION

Given the initial positive public reaction to the Bribery Bill and the international pressure on the UK in this area, it is likely that the UK will adopt some sort of bribery reform in the near future that at least resembles the Bribery Bill. A scrutiny committee will be formed in the near future to begin examining the drafting of the proposed legislation. With a general election occurring no later than next year, however, it is possible that Parliament will be unable to

agree on proper reform before dissolution. While that would postpone the approval of a reform bill, it would almost certainly not forestall it altogether.

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*We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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(Endnotes)

- 1 In its current version, the bill would not affect Scotland.
- 2 The Law Commission, Reforming Bribery, 2008, H.C. 928, at 10 (¶¶ 2.24-2.26).
- 3 Ministry of Justice, Bribery Bill of 2009, Cm. 7570.
- 4 Bribery Bill, Foreword at 3.
- 5 Bribery Bill, Section 7.
- 6 Bribery Bill, Section 1.
- 7 Bribery Bill, Section 2.
- 8 Bribery Bill, Section 4.
- 9 Bribery Bill, Section 5.
- 10 Bribery Bill, Section 11; see also Bribery Bill, Explanatory Notes at 13 ¶ 55. Summary convictions would result in a maximum sentence of 12 months in England and Wales and six months in Northern Ireland, as well as a fine not in excess of £5,000.
- 11 Bribery Bill, Explanatory Notes at 13 ¶ 55 (with the statute providing for an unlimited fine).
- 12 Bribery Bill, Section 13.