ARNOLD & PORTER (UK) LLP

ADVISORY

August 2010

UK Government Announces Timing For Implementation of the Bribery Act 2010

Following the recent change in UK government, the Ministry of Justice has recently announced that the Bribery Act 2010 (the Act) will become effective in April 2011.[1] Before the Act comes into force, the UK government is required to publish high level guidance (the Guidance) on the procedures companies are expected to have in place to prevent persons engaging in bribery on their behalf. The Guidance is expected to be published early in 2011, following a short public consultation period that will start in September 2010.

Following our previous advisory which sets out an in-depth analysis of the provisions of the Act[2], this advisory answers some common questions that we have received, examines the systems and controls requirements and compares the Act's provisions to those of the US Foreign Corrupt Practices Act (FCPA). These issues are important for all companies and individuals who do business with the UK.

What are the main offences under the Bribery Act?

The main offences are bribing another person, receiving a bribe and bribing a foreign public official. The offences apply both to private and public sector bribery and corruption.

Additionally, there is a new offence of failure by a commercial organisation to prevent bribery. Under this offence (which is discussed in more detail below), companies will be liable for improper conduct by any employee or third party agent performing services for or on behalf of the company unless they can demonstrate that they have adequate procedures in place to prevent employees and third parties from engaging in bribery and corruption.

How does the Bribery Act change the UK regime?

Under current UK law, the general rules for attributing criminal liability to companies make it difficult to prosecute companies for bribery and corruption unless the Board of Directors is involved in the underlying improper conduct. The Bribery Act introduces a new offence

1 *See* http://www.justice.gov.uk/news/newsrelease200710a.htm.

2 *See* "UK Bribery Act 2010: An In-Depth Analysis," *available at:* http://www.arnoldporter.com/public_document.cfm?id=15833&key=23D1.

Contacts

Ian Dodds-Smith
+44 (0)20 7786 6216

Alison Brown
+44 (0)20 7786 6207

Oliver C.A. Kerridge
+44 (0)20 7786 6220

Jacqueline Bore
+44 (0)20 7786 6211

Benjamin Kieft
+44 (0)20 7786 6132

under which a company will be liable for improper conduct by employees or third parties *performing services for or on behalf of the company*. Thus potential liability will expand to cover UK and foreign employees, subsidiaries and agents and may also extend to joint ventures, joint venture partners, distributors and consultants worldwide. The new offence will essentially be one of strict liability (which means that companies will be liable even if they are unaware of the underlying improper conduct by the third party) subject to a defence applying where the company can demonstrate that it has implemented and rolled out adequate systems and controls to relevant third parties.

Is criminal liability for the acts of third parties wider than under the FCPA?

A company will be liable for improper acts committed by third parties even where it is not able to exercise "control" over them. This is a stricter standard than the Foreign Corrupt Practices Act (FCPA). The Bribery Act test is whether the third party performs services *"for or on behalf"* of the company. Furthermore, the Bribery Act allows prosecution even where the company was not aware of the underlying improper conduct by the third party. Finally, it should be noted that, companies may be liable for improper conduct by third parties (such as private sector bribery and corruption) even where such conduct is not itself illegal in the jurisdiction where it occurs. Accordingly, companies must ensure that third parties are not only compliant with local law but also with UK requirements which may be more restrictive than local requirements and/or the FCPA.

Will there be a defence to such potential liability?

Yes. The Bribery Act allows a defence if the company has adopted "adequate procedures." The UK government is committed to publishing the guidance as to the content of "adequate procedures" before the Act comes into force in April 2011. The Guidance is expected to be published early in 2011 following a short public consultation period that will start in September 2010. We expect that the Guidance will include requirements for tailored policies and risk management procedures (with responsibility at Board level). In practice, it is likely that the courts will concentrate not only on the existence of adequate procedures, but also on whether they are properly implemented at third parties.

Should companies wait for the publication of the Guidance before changing their systems and controls?

No. We expect that the Guidance will be high-level and "principles-based" and will recommend a risk-based approach. Accordingly, companies should already be assessing their main risk areas and should be evaluating which third parties perform services on their behalf, and of what type. Where companies enter into relationships with third parties that are likely to last beyond April 2011, it will be important either to ensure that the relationship can be made Bribery Act compliant before the Act is implemented or that appropriate systems and controls are already implemented at the third party.

Current indications are that the new Government is committed to ensuring that the Guidance is high-level and not prescriptive. The previous Government set out its understanding of the likely content of the Guidance[3] and other bodies such as the Organisation for Economic Co-Operation and Development (OECD)[4] and Transparency International UK[5] have given recommendations. Companies are also likely to need to take account of guidance that has been issued by industry regulators. For example, the UK Financial Services Authority has published recommendations for insurance brokers that it considers are relevant for financial institutions generally.[6] A final source that companies (especially those with US links) should check is §8B2.1. of the US Federal Sentencing Guidelines which sets out what elements are needed for a company to be considered to have an effective compliance and ethics programme for sentencing purposes.[7] Many of the other sources have been influenced by this guidance.

3 *See* http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf.

4 *See* "Good Practice Guidance on Internal Controls, Ethics and Compliance," *available at:* http://www.oecd.org/dataoecd/5/51/44884389.pdf.

5 *See* "The 2010 UK Bribery Act Adequate Procedures Guidance on Good Practice Procedures for Corporate Anti-Bribery Programmes," *available at:* http://www.transparency.org.uk/attachments/138_adequate-procedures.pdf.

6 *See* "Anti-bribery and Corruption in Commercial Insurance Broking - Reducing the Risk of Illicit Payments or Inducements to Third Parties," *available at:* http://www.fsa.gov.uk/pubs/anti_bribery.pdf.

7 *See* http://www.ussc.gov/orgguide.htm. *See* also the commentary in the US Attorneys' Manual at 9-28.800: "Corporate Compliance Programs," *available at:* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

Companies are therefore already in the process of enhancing their procedures to ensure that they are Bribery Act compliant.

Does the Bribery Act only apply to UK nationals and companies?

No. Although the precise reach of the Bribery Act is complicated, there are two main ways by which the UK authorities will be able to assert jurisdiction—territorial and national.

If an element of one of the main offences takes place within the United Kingdom, the UK authorities will be able to assert territorial jurisdiction.

Under the national jurisdiction, UK residents, citizens and companies can be convicted of committing one of the main offences anywhere in the world. If a company commits one of the main offences (under the general rules for attributing criminal liability to companies), then any senior manager who consents to, or connives in, the commission of the offence will also be liable.

There is also a new corporate offence which is wider in application. That offence may be committed by any commercial organisation that carries on a business, or part of a business, in the United Kingdom. Subject to the availability of the "adequate procedures" defence, the offence will essentially be one of strict liability with no need to prove any Board involvement or knowledge by the company of the underlying offence. The UK Serious Fraud Office has confirmed that it interprets this to mean that a German company with a branch in the UK will be liable for the improper acts of an agent in Japan, even if those acts are not themselves related to the UK business.

Can companies ignore the UK anti-corruption regime until the Bribery Act takes effect in April 2011?

No. Although the Act will make it much easier for the authorities to prosecute companies, the United Kingdom already has laws prohibiting domestic and foreign bribery and corruption. Recent cases such as *Innospec*[8], *Robert Dougall*[9] and *Mabey & Johnson*[10] show that the UK authorities are much more willing to enforce the law. This is coupled with increased and pro-active information sharing with the US and other authorities.

Can companies assume that if they have a fully compliant FCPA policy, they do not have to alter their systems and controls to be UK compliant?

No. Traditional FCPA policies are unlikely to be compliant with current UK requirements and will not satisfy the provisions of the Bribery Act. Unlike the position under the FCPA, both public and private sector corruption are prohibited under current UK law.[11] This position will be reinforced under the Act which requires companies that do business within the United Kingdom to adopt UK compliant systems and controls and to roll them out worldwide to third parties who perform services on their behalf.

Are facilitation payments exempted?

No. There is no exception under UK law for facilitation payments, which will continue to be prohibited under the Bribery Act. As with other improper payments, persons who authorise or process facilitation payments are also at risk of committing UK money laundering offences. The penalties for money laundering include an unlimited fine and/or prison for a term of up to 14 years. Penalties for corruption include an unlimited fine and/or prison for a term of up to 10 years.

Does the Bribery Act contain record keeping and internal controls provisions?

Although the Act does not itself contain record keeping and internal controls provisions (other than in introducing an "adequate procedures" defence for the new corporate offence), UK incorporated companies and their officers are required to *"keep adequate accounting records"* under the UK Companies Act 2006. Breaches of a similar requirement were used by the Serious Fraud Office in its enforcement actions against BAE Systems[12] and Balfour Beatty.[13]

8 *See* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/innospec-limited-prosecuted-for-corruption-by-the-sfo.aspx.

9 *See* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/british-executive-jailed-for-part-in-greek-healthcare-corruption.aspx.

10 *See* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx.

11 Note that US prosecutors are increasingly using the Travel Act and state law to prosecute private sector bribery and corruption.

12 *See* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx.

13 *See* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/balfour-beatty-plc.aspx.

How does the offence of bribery of foreign public officials apply?

The new public sector bribery offence introduced by the Act prohibits the offering or giving of a financial advantage to a foreign public official *in their capacity as foreign public official*. Although there is no need for "corrupt" intent, the offence will be committed if the giver intends to obtain or retain business or a business advantage.

Recognising that the offence can apply broadly, the UK government has stated that it is not intended to penalise *"legitimate and proportionate"* hospitality.

The definition of "foreign public official" mirrors that within the OECD Convention and is likely to include some employees of companies that have been rescued by foreign governments. However, unlike the FCPA, it does not include foreign political parties or candidates for foreign political office.

What is the likelihood that instances of corruption will be detected?

As well as encouraging self-reporting, the UK authorities are increasingly relying on other traditional methods for detecting corruption. Reports from competitors and whistleblowers are becoming more common and purchaser companies commonly seek pre-clearance in merger and acquisition deals.

Another detection method which is not as common outside the UK arises by virtue of the UK anti-money laundering regime. Under the regime, certain professionals such as accountants, auditors and bankers are under a pro-active duty to report to the authorities any knowledge or suspicion of corruption (or other financial crime) that they come across during the course of their business.[14] The test for "suspicion" is very low and leads to professionals reporting their clients, their counterparties and others. Failure to make such a report where knowledge or suspicion exists is a criminal offence.

14 From October 2008 to the end of September 2009, 228,834 such reports were made covering suspicions relating to financial crime (including corruption), terrorism and potential drug offences.

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

London

Ian Dodds-Smith
+44 (0)20 7786 6216
Ian.Dodds-Smith@aporter.com

Alison Brown
+44 (0)20 7786 6207
Alison.Brown@aporter.com

Jacqueline Bore
+44 (0)20 7786 6211
Jacqueline.Bore@aporter.com

Oliver C.A. Kerridge
+44 (0)20 7786 6220
Oliver.Kerridge@aporter.com

Benjamin Kieft
+44 (0)20 7786 6132
Benjamin.Kieft@aporter.com

FCPA Practice

Marcus A. Asner
+1 212.715.1789
Marcus.Asner@aporter.com

Drew A. Harker
+1 202.942.5022
Drew.Harker@aporter.com

Keith M. Korenchuk
+1 202.942.5817
Keith.Korenchuk@aporter.com

Mara V.J. Senn
+1 202.942.6448
Mara.Senn@aporter.com

Claudius O. Sokenu
+1 212.715.1787
Claudius.Sokenu@aporter.com