

## THE UK BRIBERY ACT 2010: A GUIDE TO THE NEW OFFENCES

19 May 2010

To Our Clients and Friends:

The Bribery Bill received Royal Assent on 8 April 2010 and, as a result, the UK Bribery Act 2010 (the “Bribery Act”) became law on that date. However, the Bribery Act will come into force, and the existing UK corruption legislation repealed, on a date to be appointed by the Secretary of State.

This update supplements our previous Bribery Bill updates<sup>1</sup> and focuses on key aspects of the new offences.

The new offences contained within the Bribery Act will be of importance to all businesses, since they potentially criminalise activities which, at first sight, might not fall within the lay-person’s definition of “corruption.”

In addition, the Bribery Act places an onerous responsibility on companies and partnerships that carry on business in the UK to ensure they have in place “adequate procedures” to prevent persons who perform services for or on behalf of them from committing offences.

For over 30 years, the United States Foreign Corrupt Practices Act (“FCPA”) has been widely viewed at a global level as the most powerful piece of anti-corruption legislation, primarily because of its broad scope of application. However, the scope of the Bribery Act is, in some respects, broader than that of the FCPA.

- Firstly, while the FCPA applies solely to the bribery of foreign government officials, the Bribery Act also applies to bribery in a wide variety of non-governmental contexts — for example, activities connected purely with private business, or activities performed in the course of a person’s employment that are wholly unconnected with government officials.
- Secondly, while the FCPA criminalises payments to foreign public officials which are “corrupt,” that is, intended to secure an improper advantage, the offence of bribery of a

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<sup>1</sup> *Bribery Bill Update: Anti-corruption Developments in the UK dated 12 March 2010, and The Draft Bribery Bill, dated 29 September 2009.*  
Both of these client updates are available at: <http://www.debevoise.com/thebriberyact>.

foreign public official under the Bribery Act requires neither a corrupt intent nor an intention to secure an improper advantage.

- Thirdly and finally, while the FCPA contains explicit carve-outs for “pure” facilitation payments, and for reasonable promotional expenditures, the Bribery Act takes a strict line, and contains no such exceptions. As such, the Bribery Act potentially criminalises conduct which, on the face of it, might be carried out by a business for *bona fide* reasons, and without any intention to act in a corrupt fashion. Accordingly, UK corporations will need to consider their position very carefully when determining whether, in any given situation, hospitality arrangements amount to the unlawful giving of an “advantage.”

## THE NEW OFFENCES

The Bribery Act creates four new offences. Many consider the most controversial of these to be the new “corporate offence” which imposes strict liability on a “relevant commercial organisation” (whether organised as a company or a partnership) for failure to prevent bribery by a person performing services for or on behalf of it subject to the “adequate procedures” defence outlined below.

The capacity in which the person performs services for or on behalf of the relevant organisation does not matter. The Bribery Act makes clear that employees, agents and subsidiaries and others may all fulfil that role depending on “all the relevant circumstances.”

For the purposes of this offence, which can result in the levying of an unlimited fine, it is not necessary for the relevant bribery to have taken place in the UK. Rather, the UK authorities derive their jurisdiction from the location of the business.

Indeed, the offence applies to a company or partnership (i) incorporated or formed in the UK or (ii) incorporated or formed overseas and which carries on a business, or part of a business, in the UK.

It is a defence for the relevant commercial organisation to prove, on the balance of probabilities, that it had in place “adequate procedures” designed to prevent bribery. The UK Government is required by the Bribery Act to publish guidance on what is meant by this important term, and has committed to doing so before the offence comes into force. However, it remains to be seen exactly how prescriptive such guidance will be.

A second new offence is the new offence of bribery of a foreign public official (“FPO”). The Bribery Act provides that a person who offers, promises or gives a financial or other advantage to an FPO is guilty of an offence if that person intends (i) to influence the FPO in his or her capacity as an FPO and (ii) to obtain or retain business, or an advantage in the

conduct of business, unless permitted to do so under local *written* law. For the purposes of the Bribery Act, customary practices would not amount to such permission.

As noted above, there is no requirement that the financial advantage be offered “corruptly,” nor with an intention to obtain an “improper” advantage in the conduct of business. Given the new and comparatively low evidential threshold the prosecution would need to satisfy to prove the offence of bribing a foreign public official, any company that carries on business in the UK should consider reviewing its procedures in relation to promotional expenditure and corporate hospitality.

It may be of relatively little comfort that, during the course of the Bill’s passage through Parliament, it was highlighted that where legitimate promotional expenditure and corporate hospitality have been incurred, the prosecuting agencies may be expected to use their prosecutorial discretion. Claire Ward, the former Parliamentary Under-Secretary of State for Justice, stated at Committee stage in the House of Commons that<sup>2</sup>:

“The [Act] cannot provide every type and detail of corporate hospitality or promotional expenditure that would fall on one side of the line or the other. The matter is one for prosecutorial discretion. I expect that businesses are more than capable of determining what is appropriate behaviour to ensure that they are not engaging in bribery.”<sup>2</sup>

The third and fourth offences under the Bribery Act are known as the “general offences” – one involving the payment of bribes, the other the receipt of bribes. Each of these offences is broken down into sub-offences, depending on the particular conduct alleged.<sup>3</sup> However, both offences possess the common element that the bribes must relate, in some way, to the “improper performance” of one of four “relevant functions or activities.”<sup>4</sup> The Act imposes an objective test of whether or not a relevant function or activity has been performed

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<sup>2</sup> Hansard, House of Commons, Committee Stage, 16 March 2010, Col. 54.

<sup>3</sup> For more details on these, please see our client update on [The Draft Bribery Bill](#) of September 29, 2009. No changes were made to the various cases discussed therein between the presentation of the draft Bribery Bill and the passing of the Bribery Act.

<sup>4</sup> Two different thresholds have to be crossed in order for an activity to constitute a “relevant function or activity.” To begin with, the function or activity in question must be one of the following four: (i) any function of a public nature; (ii) any activity connected with a business; (iii) any activity performed in the course of a person’s employment; or (iv) any activity performed by or on behalf of a body of persons. Once this threshold has been crossed, it is then necessary for one of three conditions to be satisfied, namely that the person performing the function or activity is (a) expected to perform it in good faith; (b) expected to perform it impartially; or (c) is in a position of trust by virtue of performing it.

improperly; the definitive question is whether a reasonable person in the UK would have considered the relevant function or activity to have been performed improperly.

There is no doubt that the Bribery Act is hugely significant given the broad scope of the Act. In light of the Bribery Act, all businesses operating in the UK should be actively reviewing how they can continue to put in place adequate procedures to prevent bribery by those performing services for or on their behalf.

We will provide a further update when the guidance on “adequate procedures” is published by the Secretary of State.

In the meantime, please feel free to contact any of the undersigned if you have any questions.

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