

UK BRIBERY ACT LIKELY TO AFFECT UK LISTED COMPANIES

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To Our Clients and Friends:

Any company that “carries on business” in the UK would be wise to carefully consider and properly understand the new sweeping “corporate offence” contained in the UK Bribery Act 2010 (“Bribery Act”). The Bribery Act is expected to come into force in April 2011 and will supplant the existent medley of common law and statutory corruption offences. The practical impact is that many more companies will be subject to the jurisdiction of the Serious Fraud Office (“SFO”) and other enforcement agencies than is the case under the existing corruption legislation. In particular, it is likely that a foreign company which lists its shares, Global Depository Receipts or other securities on an exchange in the UK may become subject to prosecution under the Act, even if that were the company’s only link to the UK.

OVERVIEW OF THE CORPORATE OFFENCE

Under the new “corporate offence” contained in section 7 of the Bribery Act, a relevant “commercial organisation” will be criminally liable if any “associated person” bribes another intending to obtain or retain business (or a business advantage) for the commercial organisation, unless the commercial organisation can prove it had in place “adequate procedures” to prevent persons from committing bribery.

The corporate offence has several striking features:

- The jurisdiction of the SFO and other UK prosecuting agencies is radically extended to allow them to prosecute foreign commercial organisations for corruption, so long as the commercial organisation carries on at least part of its business in the UK.
- The corporate offence creates strict liability for commercial organisations for bribery anywhere in the world engaged in by an “associated person,” subject only to a single defence. That defence requires a company to prove it had “adequate procedures” in place to prevent bribery.
- A commercial organisation faces an unlimited fine if convicted of the corporate offence.
- The “associated person” does not need to be convicted of a bribery offence for the commercial organisation to be criminally liable.

To better understand the implications of the corporate offence, it is necessary to reflect on the meaning of “commercial organisation” and “associated person.”

COMMERCIAL ORGANISATION

A “relevant commercial organisation” is defined very broadly. It includes: (i) any body incorporated in the UK; (ii) any partnership formed under the law of any part of the UK; and (iii) any corporation or partnership incorporated or formed outside the UK, which carries on a business, or part of a business, in the UK.

The Bribery Act does not contain a definition of what it means to “carry on business” in the UK. Many of the terms contained in the Bribery Act were deliberately framed in a broad way so that they could be applied by prosecutors and interpreted by courts in a purposive manner and so that formal limitations of corporate structure would not constrain the jurisdictional ambit of the corporate offence. The SFO has indicated it intends to construe broadly the concept of “carrying on business” in the UK.

It is likely that applying such a broad interpretation would lead the SFO to conclude that it has jurisdiction to prosecute a foreign company which lists its shares, Global Depository Receipts or other securities on an exchange in the UK, even if that were the company’s only link to the UK. Raising finance in the public markets of the UK, which is then used to meet or advance a company’s business objectives, may be considered sufficient by the prosecutors to satisfy the definition of “carrying on business.” This means that foreign companies with a listing in the UK should consider implementing an appropriate anti-corruption programme to shield themselves from falling foul of the corporate offence.

ASSOCIATED PERSON

The other crucial element of the corporate offence which merits consideration is the meaning of an “associated person.” Section 8 of the Bribery Act defines an associated person as one who “performs services for or on behalf of” the relevant commercial organisation. Section 8 makes clear that the capacity in which an associated person performs services on behalf of the commercial organisation does not matter. Accordingly, an associated person may be an employee (in which case there is a rebuttable presumption that performance is on behalf of the commercial organisation), agent, sub-contractor or subsidiary.

Section 8 further sets out how to determine whether an associated person performs services for or on behalf of a commercial organisation. That section makes explicit that the determination should not be made merely by reference to the formal nature of the relationship between the parties but rather is to be made “by reference to all the relevant circumstances.”

Commercial organisations must be especially mindful in their dealings with agents, joint venture partners and consortia. While it may be commercially accepted that a commercial organisation may have limited control over an agent or joint venture partner, this may not exempt the commercial organisation from liability under section 7 if its agent or partner pays a bribe.

ADEQUATE PROCEDURES

The Ministry of Justice recently released draft guidance about procedures that relevant commercial organisations can implement to prevent associated persons from paying bribes. There is an ongoing public consultation under way. The final guidance is expected to be published early in 2011. The draft makes clear that the guidance will not be prescriptive, in recognition of the need for organisations to develop procedures appropriate to their own circumstances, the business sectors in which they operate, and their particular risk profile. For further information on the content of the draft guidance, see our client update published on 22 September 2010, [Bribery Act Update: Ministry of Justice Invites Consultation on Guidance for Commercial Organisations in the Prevention of Bribery](#).

CONCLUSION

In light of the potentially expansive way in which terms such as “carrying on business” and “associated persons” may be applied by the UK enforcement agencies, companies with a listing in the UK may wish to consider reviewing, and if necessary revising, their anti-bribery programme to make sure that suitable anti-corruption procedures are in place across all potentially relevant jurisdictions.

Please feel free to contact any of us if you have any questions.

Lord Goldsmith Q.C.

+44 20 7786 3007

phgoldsmith@debevoise.com

Peter J. Rees Q.C.

+44 20 7786 9030

prees@debevoise.com

Karolos Seeger

+44 20 7786 9042

kseeger@debevoise.com

Tom Epps

+44 20 7786 3010

tepps@debevoise.com