

## **U.K. Bribery Bill, if Enacted, Will Impact U.S. Companies Doing Business in the U.K.**

### **I. Historical and factual overview**

Bribery law in the U.K. traces its roots to the Prevention of Corruption Acts 1889-1916 and the common law. In response to criticism that the current laws are outdated, the U.K.'s Ministry of Justice has proposed *The Bribery Act 2010*, a comprehensive overhaul of the country's criminal bribery law. The bill has passed the House of Lords and is expected to pass the House of Commons and receive Royal Assent by the end of the year.<sup>1</sup> If enacted, the Act would make it easier for the criminal justice system to hold companies criminally liable for bribery committed on their behalf anywhere in the world. It would also extend liability for such bribery to corporate officers and directors with British citizenship or residency.

The Ministry of Justice believes that the U.K.'s bribery law must be reformed because it is "complicated and fragmented across a number of statutes . . ." and "has been criticised domestically and internationally for its lack of clarity and inconsistencies in . . . terminology . . ."<sup>2</sup> The Ministry concludes that the current law does not "provide the right tools for the Government to ensure that bribery is deterred or punished effectively[,] . . . imped[ing] an effective response to bribery."<sup>3</sup> The Ministry cites dramatic statistics about bribery, including a World Bank estimate that more than one trillion dollars in bribes are paid each year, adding "up to 10% to the total cost of doing business globally."<sup>4</sup>

The Bribery Act is very comprehensive in its overhaul of criminal bribery laws. This memo, however, only addresses the impact the new law will have on corporate criminal liability.

### **II. Jurisdictional Reach of the Act is to Any Company "carrying on" Business in the U.K.**

If enacted, the Bribery Act will significantly impact U.S. companies and partnerships doing business in the U.K. The Act gives the U.K. jurisdiction to prosecute "relevant commercial organisations," which in addition to companies incorporated in the U.K. also includes "any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom . . ."<sup>5</sup> The Act applies to partnerships in the same way.<sup>6</sup> The Act provides jurisdiction to prosecute a company or partnership "irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere."<sup>7</sup>

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<sup>1</sup> See Josh Martin, *New U.K. Fraud Law Targets U.S. Corporate Directors*, Agenda Week (A Financial Times Service), Mar. 8, 2010.

<sup>2</sup> Ministry of Justice, *Impact Assessment of bill on reform of the law on bribery* at 4-5, 2009, available at <http://services.parliament.uk/bills/2009-10/bribery.html>.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> *Id.* at 6-7.

<sup>5</sup> Bribery Bill, 2010, H.L. Bill [69] (Gr. Brit.), at § 7(5).

<sup>6</sup> *Id.* at § 7(5).

<sup>7</sup> *Id.* at §12(5).

Thus, once a company comes within the Act’s jurisdiction under Section 7(5), bribery committed by any “associated person” anywhere in the world would be punishable under the Act. Read as a whole, the Act would make a U.S. company which “carries on a business” in the U.K. liable *in the U.K.* for bribery committed by an employee *anywhere in the world*.<sup>8</sup>

### III. Punishable Offenses under the Act

In essence, the Act makes companies that carry on business in the U.K. criminally liable for bribery committed on their behalf anywhere in the world. Under Section 7 of the Act, a commercial organization or partnership may be guilty of an offense if a person “associated” with the organization “bribes another person intending (a) to obtain or retain business for [the organization], or (b) to obtain or retain an advantage in the conduct of business for [the organization].”<sup>9</sup> The Act defines an “associated person” to be “a person who performs services for or on behalf of” an organization, such as an employee, agent or subsidiary.<sup>10</sup> The Act does not propose a bright-line test for determining if an individual is an associated person. Whether a person is an “associated person,” the bill proposes, “is to be determined by reference to all the relevant circumstances and not merely by reference of the nature of the relationship between” the person and the organization.<sup>11</sup> There is a rebuttable presumption, however, that an organization’s employee is an “associated person.”<sup>12</sup>

A violation of Section 7 is punishable by a fine, but the Act does not specify an amount.<sup>13</sup>

### IV. Defense Created for Corporate Defendants with “Adequate Procedures” to Prevent Bribery

The Act carves out a defense for companies or partnerships that “prove that [they] had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct.”<sup>14</sup> While the Act does not provide any details about what adequate procedures would look like, it requires the Secretary of State to “publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as [prohibited in the Act].”<sup>15</sup> The Act further provides that the Secretary of State “may, from time to time, publish revisions to [its] guidance . . .”<sup>16</sup>

### V. Liability of Corporate Directors

Section 14 of the Act extends liability for corporate bribery to the directors of an organization. A corporate director may be liable under the Act if an “offence is proved to have been committed with the

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<sup>8</sup> Bribery Bill, 2010, H.L. Bill [69] (Gr. Brit.), at §§ 7(5), 12(5).

<sup>9</sup> *Id.* at §7(1).

<sup>10</sup> *Id.* at §§ 8(1), (2).

<sup>11</sup> *Id.* at §8(4).

<sup>12</sup> *Id.* at §8(5).

<sup>13</sup> *See id.* at §11(3).

<sup>14</sup> *Id.* at § 7(2).

<sup>15</sup> *Id.* at §9(1).

<sup>16</sup> *Id.* at §9(2).

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[director's] consent or connivance . . . ."<sup>17</sup> Various news reports have suggested that U.S. corporate directors may be prosecuted under the Act.<sup>18</sup> This is the case, but only in very limited circumstances. To be liable under the Act, a director must have "a close connection with the United Kingdom[,]" which means directors that have British citizenship or nationality, or are "an individual ordinarily resident in the United Kingdom . . . ."<sup>19</sup>

## VI. Conclusions

If the Bribery Act 2010 becomes law, U.S. companies which "carry on" business in the U.K. will have to comply with the Act's strict guidelines regarding bribery. Although U.S. companies should already have procedures and controls in place to assure compliance with the Foreign Corrupt Practices Act, companies should review those procedures and controls to assure compliance with the Act, if enacted, and such guidance as the British Secretary of State will thereafter be required to publish.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com).

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<sup>17</sup> Bribery Bill, 2010, H.L. Bill [69] (Gr. Brit.), at §§ 14(2), (4).

<sup>18</sup> See, e.g., Josh Martin, *New U.K. Fraud Law Targets U.S. Corporate Directors*, Agenda Week (A Financial Times Service), Mar. 8, 2010, available at [http://www.agendaweek.com/account/?ref=/articles/print/20100308/fraud\\_targets\\_corpo](http://www.agendaweek.com/account/?ref=/articles/print/20100308/fraud_targets_corpo).

<sup>19</sup> See Bribery Bill, 2010, H.L. Bill [69] (Gr. Brit.), at §12(4), 14(3).