

The New Bribery Bill – a substantive attack on international corruption or a civil remedy with tax raising opportunities for cash-strapped Government?

On 25 March 2009 the Rt Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice, presented the Bribery Bill to Parliament for its consideration. In so doing, he stated:

“In my role as anti-corruption champion, I am [also] co-ordinating the development of the UK’s strategy against foreign bribery. Law reform is one of the key elements of this programme

The new Bill will provide the basis for a modern, clear and consolidated law that complements and supports our international efforts and equips our courts and prosecutors to deal effectively with bribery of all kinds, wherever it occurs.”

Once the new Bill passes through Parliament, will the Serious Fraud Office (‘SFO’) and others take up the mandate and boldly prosecute where others have failed to prosecute before?

Well, no: the brave new world is not what it might at first seem.

The Regulatory Impact Assessment (‘RIA’) presented to Parliament estimates that there will be an additional 1.3 prosecutions a year for the bribing of foreign government officials, one a year by the SFO and a further 0.33 a year by the Criminal Prosecution Service, hardly the stuff of CEOs’ nightmares.

The RIA also states that there will only be an additional £2.3m set aside for investigating and prosecuting such offences and that criminal action is unlikely to have any impact on prison populations.



Where then does the real threat lie? For the answer to that question one must look to a recent article *“Fighting Corruption: the SFO perspective”* by Charlie Monteith, senior policy advisor to the SFO, published in *Fraud Intelligence* in March 2009.

In his article Mr Monteith points out that the SFO now has new civil powers to seek a civil recovery order for property obtained through illegal conduct without the need for criminal proceedings. He states that the creation of Serious Crime Prevention Orders enables prosecutors to obtain controls on the way businesses conduct themselves in the future. Orders can require companies to produce information for review, prohibit them from trading in specific geographies or limit the things that they do or sell. Such orders are *“a significant weapon for prosecutors where the evidence in relation to the recovery of assets does not meet the criminal standard”*.

He cites the case of Balfour Beatty where in 2008, after self-disclosure of

financial misreporting that took place between 1996 and 2001, prosecutors entered into a plea agreement that was placed by the parties before the High Court. In essence this contained a non-criminal liability order requiring Balfour Beatty to pay £2.25m and a contribution towards the SFO’s costs, and agree to enhance its compliance procedures.

Why should any party agree to this? Here again Mr Monteith provides the answer, explicitly warning board directors of the EU Procurement Directive 2004/18/EC that excludes from participation in public contracts any tenderer who has been convicted of corruption.

So: compromise quickly or risk being the one additional prosecution a year and subsequent disbarment from EU tendering opportunities. This is a process made far easier by the new Bribery Bill, even though the SFO wants to avoid prosecution at all possible cost.

And the deal? Pay us, the Government, for investigating you, pay a fine and let us have confidential information and

Bill Waite

Group Chief Executive Officer
The Risk Advisory Group

Bill Waite is a lawyer and has more than 20 years' experience in white collar crime matters. During the last 15 years he has spent a significant amount of time helping US and European multinationals and overseas governments implement and execute anti-corruption policies and procedures. He also has significant experience in investigating allegations of corruption.

London (Head Office)

Russell Square House
10-12 Russell Square
London WC1B 5EH
t: +44 (0) 20 7578 0000
f: +44 (0) 20 7578 7855
e: general@riskadvisory.net

Dammam

Suite 504 Tower B
Al Bandareyah Trading Centre
P.O. Box 852
Al Khobar 31952
Kingdom of Saudi Arabia
t: +966 3 887 4655
e: saudi@riskadvisory.net

Dubai

PO Box 502952
Dubai Knowledge Village
Dubai
United Arab Emirates
t: +971 (0)4 3754 013
f: +971 (0)4 4290 972
e: dubai@riskadvisory.net

Moscow

Suite 1101, 11th Floor, Section 3
4th Dobryninskiy Pereulok 8/10
Moscow 119049
Russia
t: +7 495 937 7080
f: +7 495 937 7081
e: moscow@riskadvisory.net

Rotterdam

Weena 695 Unit B7.029
PO Box 2810
3000 CV Rotterdam
The Netherlands
t: +31 (0) 10 4146562
f: +31 (0) 10 4149512
e: benelux@riskadvisory.net

control aspects of your business for the next five years, without “*beyond reasonable doubt*” ever crossing anyone’s lips.

All of the above is of course strikingly familiar. It is after all, what the US Department of Justice and the Securities and Exchange Commission have been doing increasingly regularly for the past 30 years. Any Department of Justice attorney will tell you that the Foreign Corrupt Practices Act (‘FCPA’) enforcement programme is considered a significant success and is widely approved of by Congress, largely because it raises so much revenue. That, in spite of the ever increasing corruption scandals in the US which make the deterrence argument a difficult one to run.

Talk to internal counsel and the defence bar in the US and they will tell you that the FCPA has indeed been used to raise hundreds of millions of dollars in revenue. They will also say it has been used to stretch legal theories of criminal liability to breaking point and beyond and, up until 2008, to launch a substantive attack on the notion of legal professional privilege.

Only in the latter case did common sense prevail when the American Bar Association reminded the Department of Justice of the rule of law by seeking to promote legislation to protect that critical right.

What then does the new law mean for corporates? According to the RIA not very much. There will be no increased bureaucratic burden and – aside from £3 million in defence costs – no actual cost.

Mr Monteith does not agree. “*I anticipate that establishing the requisite “due diligence” will be a necessity for all those within the corporate world*”, and when it comes to self-reporting and, one assumes, the decision of whether to prosecute or not, “*The sorts of measures we will look for will include the following: Monitoring, Culture Change and Training, Board Level Commitment and Restitution*”.

Businesses must consider now what “*adequate procedures*” may be required to stop people in their organisations or those representing them from paying bribes to foreign government officials. They must also implement them.

It is inevitable that the SFO, when considering whether or not to prosecute and/or challenge the statutory defence, will look to US corporates for guidance on what is procedurally adequate, and therefore so should your company.

A failure to do so may not go down too well with Mr Monteith or his colleagues on Elm Street, irrespective of what the Lord Chancellor and Secretary of State for Justice has said to Parliament.

About The Risk Advisory Group

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Taking strategic decisions requires reliable information and timely advice. The insight we provide enables clients to mitigate risk and take decisions with confidence. Our knowledge and experience helps our clients bring threats and opportunities into sharp focus, and to understand clearly the risks standing in the path of success.