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Is your business ready for the new Bribery Act?

Background

The UK Bribery Act of 2010 (the "Act") was enacted on April 8, 2010 and is expected to come into force in April 2011. This stringent new legislation will apply to all UK companies and non-UK companies that do business in the UK. Organisations and individuals doing business in China will be particularly hard hit by the Act.

The Act is being put in place, in part, because the UK's pre-existing anti-bribery and corruption ("ABC") laws were regarded as weak and inconsistent with the OECD Bribery Convention which the UK ratified in 1998. Readers will recall that the UK law enforcement authorities and its judiciary came under heavy criticism by the OECD for the way that bribery allegations against several high profile British companies were handled initially. The Act is meant to illustrate the UK government's commitment to getting tough on foreign bribery and corruption.

The passage of the Act, together with the UK Serious Fraud Office's increased enforcement on bribery recently, highlight the need for businesses to take all necessary steps to mitigate the risk of bribery and corruption.

The Act

The Act replaces and simplifies the pre-existing law on bribery in the UK and sets out four new offences:

- Offering, promising or giving a bribe (active bribery)
- Requesting, agreeing to receive or accepting a bribe (passive bribery)
- Bribing a foreign public official (corruption)
- A new corporate offence of failing to prevent bribery

In addition, the Act has several novel features. In particular:

- Like the U.S. Foreign Corrupt Practices Act ("FCPA"), it has unprecedented extraterritorial reach. The definition of "Commercial Organisations" spelt out by the Act includes all UK companies and partnerships carrying on business as well as any other corporate body or partnership (wherever established) which carries on business in the UK. Individuals and organisations that commit bribery offences in the UK or anywhere else in the world can be

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The contents are intended for general information purposes only and are based on our understanding of the relevant Chinese law and practice and our experience representing foreign companies in China. Law and practice concerning foreign related business in China are subject to change and may require confirmation from the relevant authorities. You are urged to consult an attorney concerning your own situation and any specific legal questions you may have.

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prosecuted, putting the Act on par with the FCPA. Non-UK entities can also be liable under the Act if an act or omission forming part of an offence takes place in the UK.

- The Act makes no allowances for local practices in countries where companies do business except where those practices are enshrined in written law.
- It creates a new corporate offence of failing to prevent bribery which imposes strict vicarious liability on any organisation where a person “associated” with the organisation commits any bribery offence for the purpose of obtaining or retaining business or an advantage for the organisation. The offence is designed to make companies and executives responsible for bribery committed on their behalf.
- The strict liability nature of this offence is unprecedented and means that the burden of proof rests with the accused organisation. For a company to be found guilty, its executives need not have any knowledge of bribery – it will be sufficient if the company failed to prevent the bribery.
- The range of persons and acts covered by the Act is as wide as under the FCPA. Businesses will be liable for acts of bribery and corruption committed by both employees and anyone else who performs services for or on behalf of the organisation, including third parties such as agents, sub-contractors and vendors.
- Penalties for bribery and corruption under the Act are exceptionally severe and include up to 10 years in prison (per offence) and unlimited fines for individuals and, if convicted, companies face an unlimited fine. Executives who participate in or have knowledge of bribery may be personally liable.

Relevance of the Act to China

Bribery and corruption are still rampant in China and widely regarded as merely a cost of doing business there. For organisations that view having a presence in China as vital to their competitiveness, the Act presents significant dilemmas. Such dilemmas include:

- Many companies rely heavily on their local staff and representatives in China who act on the companies’ behalf but who sometimes resort to ‘local practices’. The Act makes all UK companies responsible for preventing such individuals from committing acts of bribery or corruption.
- In far-flung towns and cities throughout China, government officials routinely solicit or expect a ‘facilitation payment’ merely for doing their job. No exceptions have been carved out of the Act for so-called facilitation payments, so paying these will mean that individuals (and by extension, the businesses they represent) could be charged with corruption.
- The Act’s definitions for “financial or other advantage” and “foreign public official” are very wide which means that UK businesses now need to curtail staff from offering seemingly innocent benefits (such as moon cake vouchers or concert tickets) to a broad range of business partners and individuals lest these gifts be taken out of context, exposing the organisation to liability for allowing bribery or corruption to occur.

How we can help

In the lead up to the Act coming into force next April, all UK commercial organisations doing business in China need to review their current ABC policies and procedures including financial controls, ethics guidelines, employment arrangements and procedures concerning third parties, carry out risk assessments and then take whatever steps are necessary to minimise the risk of foreign bribery and corruption. Given that companies only have until April 2011 to comply, this will involve a monumental effort.

We have extensive experience with FCPA and ABC compliance in China and are familiar with the various practical difficulties that businesses face when trying to implement compliance measures here. In particular, we can assist by working closely with responsible personnel to develop a suitable ABC programme that includes:



- An ABC risk assessment
- A Code of conduct
- Anti-corruption compliance audits
- Internal bribery/corruption and fraud investigations
- Appropriate third party due diligence procedures
- Advising on whistleblowing and internal reporting arrangements
- Employee & third party training and monitoring concerning ABC policies on gift giving, hospitality, facilitation payments

Companies cannot afford to wait before taking action. The “adequate measures” which the Act requires every organisation to put in place to prevent bribery will not be clarified until later in the year when the UK Ministry of Justice issues its guidelines but these are likely to be prescriptive only and will not provide specific solutions.

Conclusion

The Act is one of the most rigorous pieces of ABC legislation ever enacted anywhere and in several key respects, it surpasses the FCPA and China’s ABC laws. Consequently, UK organisations with operations in China and multinational companies operating in the UK cannot assume that the internal ABC measures they have put in place previously will ensure they are in compliance with the Act.

Organisations that are subject to the Act must prepare to avoid being caught out. Such preparation will need to cover several fronts but should start with an ABC risk assessment and follow up by experienced solicitors. Any weaknesses that are found must be addressed resolutely. If a complaint is filed after the Act comes into force, it will be too late at that point to take action.

It remains to be seen how aggressively the UK authorities will interpret and enforce the Act. However, passage of the Act, coupled with the recent enforcement of pre-existing laws against a number of UK companies, suggest that the UK government wants to prove that it is tough on foreign corrupt practices.

Later this year, the Ministry of Justice will issue its new guidelines on how to comply with the new corporate offence of failing to prevent bribery. The guidelines are expected to take into account responses the MOJ receives from a brief public consultation exercise which will be conducted in September.

Successful ABC initiatives are usually led from the top down and require significant lead time to devise and implement. With just over 6 months left before the Act comes into effect, the time to act is now.