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A CHANGING ANTI-CORRUPTION LANDSCAPE:

BY LEE G. DUNST & JOSEPH LA PERLA



WHAT THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW UK BRIBERY ACT MEAN TO YOUR COMPANY

In today's regulatory climate, both companies and individuals are exposed to increasing potential for criminal and civil liability in connection with allegedly corrupt business practices. The economic costs associated with these liabilities can be enormous — hefty fines, disgorgement of profits associated with the corrupt conduct, as well as the internal costs associated with conducting an investigation and, if necessary, retaining a compliance monitor. With the stakes so high, and both US and UK regulators focused on this area, it is imperative that companies and individuals understand the potential liabilities associated with corrupt business practices on both sides of the Atlantic.

ANTI-CORRUPTION ENFORCEMENT IN THE US

Armed with the Foreign Corrupt Practices Act, regulators in the US traditionally have been at the forefront in the fight against corruption. Enacted in 1977, the FCPA's anti-bribery provisions make it illegal to offer or provide money or anything of value corruptly to officials of foreign governments or foreign political parties with the intent to obtain or retain business. Companies that are registered on a national securities exchange or are required to file periodic reports with the US Securities and Exchange Commission must also make and keep accurate books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the issuer's transactions and

disposition of assets, as well as devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.

Although regulators have rarely used it in the years following its enactment, the FCPA has become a mainstay for regulators over the last decade. In 2004, the SEC and the US Department of Justice brought a total of five FCPA enforcement actions. Through the first eight months of 2010, there have been more than 40 enforcement actions, including a sweeping sting operation by the Federal Bureau of Investigation that resulted in the arrests of 22 individuals on FCPA charges in February. There is no sign



“The bill will . . . increase the maximum penalty for bribery from seven to 10 years imprisonment, with an unlimited fine.”

that this enforcement activity will slow down, as it is estimated that the DoJ currently has over 130 open FCPA-related investigations.

By violating the FCPA, companies face exposure to significant financial costs and individuals run the risk of loss of liberty. Most recently, in August 2010, Patricia and Gerald Green each were sentenced by a federal judge in California to six months of incarceration, followed by six months of home confinement. The Greens, husband-and-wife Hollywood movie producers, were convicted last year following a jury trial where they were found to have made approximately \$1.8m in improper payments to an official at the Tourism Authority of Thailand. As a result of the payments, the Greens obtained \$13.5m in contracts relating to the Bangkok International Film Festival. In addition to the prison sentence, each was ordered to pay \$250,000 in restitution.

ANTI-CORRUPTION ENFORCEMENT IN THE UK

In stark contrast to the US government's aggressive prosecution of corruption cases, the UK previously has faced extensive criticism for its failure to enact comprehensive anti-corruption legislation that complies with the Organization for Economic Cooperation and Development Convention on Combating Bribery in International Business Transactions, as well as failure to prosecute companies that engage in corrupt activity. These criticisms, however, may start to fade as the UK is poised to play a prominent role in the international fight against corruption. On April 8, 2010, the Crown granted royal assent to the UK Bribery Act 2010, thereby signing it into law. The Bribery Act, which, in some ways, may be tougher and more far reaching than the FCPA, represents a comprehensive overhaul of the UK's current bribery legislation. Although originally planned to take effect in October 2010, the Ministry of Justice has recently

announced that the Bribery Act will enter into force in April 2011. As such, companies need to understand this new regulatory regime before it comes fully online.

EXPANDING JURISDICTION UNDER THE BRIBERY ACT

Under the Bribery Act, the UK will, at least on paper, have extremely broad jurisdictional authority to fight corruption. Regulators will be able to bring an enforcement action against companies incorporated in the UK, as well as companies that do business in some permanent way in the UK. Theoretically, a company with an office in the UK could be charged if an improper payment was made on the company's behalf anywhere in the world, regardless of whether any UK employees were involved. In this respect, the jurisdictional hook of the Bribery Act is potentially wider than that of the FCPA. For example, the FCPA does not cover conduct by a company if the corrupt activity had no nexus to the US and the company was not listed on a national securities exchange, even if the company conducted some unrelated business in the US.

With respect to individuals, the Bribery Act also provides an expansive jurisdictional reach. For individual acts of bribery, the actor must either be a citizen of, or have a close connection, with the UK (such as, for example, permanent residence), or the act of bribery in which the actor participated must have occurred in the UK. Where the improper conduct is committed by a company, regulators can charge a senior corporate officer for violations committed by his or her company if he or she in any way participated in the corrupt business practice or gave his or her “consent or connivance,” including even passive acquiescence if that practice amounted to consent to the bribery. Any individual may be liable if he or she consented to



the inappropriate conduct. In this situation, the individual can be prosecuted assuming jurisdiction exists over the company. Jurisdiction potentially could exist, therefore, where an individual does not live in the UK, has no close connection to the UK, and the relevant conduct occurred outside the UK. The risks for individuals are very high. In a speech given in January 2010, then-justice secretary Jack Straw said the government “will have the right tools to take on bribery and see those convicted of bribery punished properly... The bill will... increase the maximum penalty for bribery from seven to 10 years imprisonment, with an unlimited fine.”

THE BRIBERY ACT'S NEW ANTI-CORRUPTION FRAMEWORK

At the core of both the FCPA and the Bribery Act is a prohibition on improper payments to foreign public officials for the purpose of obtaining or retaining business. The Bribery Act, however, could expand potential liabilities for companies and individuals beyond that of the FCPA. The Bribery Act both casts a wider net over conduct that runs afoul of its provisions and provides fewer defenses.

The Bribery Act also prohibits conduct not covered under the FCPA. For example, it goes beyond foreign public officials to prohibit commercial bribery in the private sector. It explicitly creates an offense for the receipt of an improper payment. By contrast, US regulators have had to utilize other federal criminal statutes to pursue recipients of bribes because the FCPA does not explicitly prohibit the receipt of a bribe. For example, the DoJ obtained indictments for money laundering against two former Haitian public officials who allegedly accepted bribes from a number of telecommunications companies involved in an FCPA investigation. As a result of this enforcement action, one Haitian official was sentenced to four years in prison and ordered to pay more than \$3m in fines and restitution.

Under the FCPA, liability exists only where the defendant acted with the requisite culpable state of mind. This requires regulators to demonstrate that the defendant “corruptly” engaged in improper conduct under the FCPA. The Bribery Act, on the other hand, only requires that the defendant intended to influence the

foreign public official; therefore, a payer who honestly believed that a payment to a foreign public official was lawful under local custom still may violate the Bribery Act while not having the requisite intent to run afoul of the FCPA. The Bribery Act also creates a strict liability offense applicable to companies for “failing to prevent bribery by an associated person.” Associated persons include employees, contractors, or subsidiaries that act on behalf of the company. The only defense to liability is to demonstrate that the company had in place at the time of the improper conduct “adequate procedures” for preventing bribery. The Ministry of Justice has only issued a draft version of the required guidelines for “adequate procedures.” This version identifies “six principles of bribery prevention,” which include: (1) a regular and comprehensive assessment of risks relating to bribery; (2) “top level commitment” to preventing bribery; (3) due diligence procedures that cover all parties to a business relationship; (4) clear, practical, and accessible policies and procedures to prevent bribery; (5) effective implementation of anti-bribery policies and

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procedures; and (6) the use of monitoring and review mechanisms that ensure compliance. The Ministry of Justice intends to release its finalized version in early 2011. It is crucial that companies enact such procedures to help inoculate themselves against potential exposure under the Bribery Act.

Finally, the Bribery Act provides fewer defenses and exceptions to liability than the FCPA. Although considered a rather narrow exception to liability, the facilitating payments exception to the FCPA provides that small “grease” payments made to foreign public officials to secure or expedite performance of “routine governmental action” do not run afoul of the FCPA. The Bribery Act, however, provides no such exception to liability or defense for facilitating payments. Similarly, the FCPA creates an affirmative defense that allows benefits to be bestowed on the foreign official if they are bona fide, reasonable promotional expenses. The Bribery Act has no such exception or defense.

RECENT UK ENFORCEMENT ACTIONS

Although the Bribery Act will not come into force until Spring 2011, the UK Serious Fraud Office already has ramped up its anti-bribery enforcement efforts. Most recently, in April 2010, Robert John Dougall, a former director of marketing at DePuy International Limited, pleaded guilty to corruption charges, and was sentenced to 12 months’ imprisonment by the Southwark Crown Court. Dougall, who was in charge of business development in Greece, admitted his involvement in £4.5m of corrupt payments made through a local distributor to medical professionals in the Greek healthcare system.

In another recent action, on March 18, 2010, Innospec Ltd., the British subsidiary of fuel additive designer Innospec Inc., pleaded guilty in connection with corrupt payments made to Indonesian officials. Under the terms of the plea arrangement, Innospec Ltd. will pay a financial penalty of \$12.7m. According to an SFO press release, “the case is part of the first ‘global

settlement’ reached with a cooperating company and has been resolved in cooperation with US government authorities — DoJ, SEC and OFAC.”

WHAT THE FUTURE MAY HOLD

Based on these developments, companies and individuals should undertake every effort to ensure compliance with both the FCPA and the Bribery Act. It is clear that the pace of anti-corruption enforcement is only likely to accelerate in the near future.

According to President Barack Obama, the fight against corruption “is one of the great struggles of our time.” This sentiment has been echoed at both the DoJ and the SEC. In May 2010, US Attorney General Eric Holder Jr. stated that he has “made combating corruption one of the highest priorities of the Department of Justice.” To this end, the DoJ Criminal Division has established a fraud taskforce that seeks to focus high-level attention and resources on the prosecution of significant financial crimes, including corruption. In a May 2010 speech, Assistant Attorney General Lanny A. Breuer indicated that for 2011 he is seeking a 23 percent budget increase over 2010 levels for economic fraud enforcement. These additional resources will be used to add lawyers to the Criminal Division’s Fraud Section, which prosecutes crimes such as violations of the FCPA. Similarly, the SEC has established in its Enforcement Division a specialized unit devoted to FCPA enforcement. In a July 2010 speech, SEC Chairman Mary L. Schapiro stated that the SEC is “sending a clear message that those who engage in corrupt activities face a strong and united front around the world.”

The methods for detecting corruption will likely become increasingly sophisticated. In a May 2010 speech, Breuer said, “[g]one are the days when we relied solely on tips from whistle-blowers to build cases. Instead, we are now bringing the tools of organized-crime investigations to white-collar investigations.” The recent sting operation resulting in the arrests of 22 individuals is a prime example.

In the UK, regulators are preparing for the implementation of the Bribery Act. The Ministry of Justice started a short consultation exercise on September 14, 2010 in an effort to develop further its guidance pertaining to the “adequate procedures” defense for companies. The Ministry of Justice plans to publish the results of the exercise in early 2011 so as to provide companies with time to review and implement the findings before the Bribery Act’s implementation in April 2011.

Companies that have already developed FCPA compliance programs will need to revise and strengthen them to meet the requirements of the Bribery Act, and to train their employees about the new UK rules. Companies also should watch for changes that affect enforcement of the Bribery Act. Following the March 2010 Innospec settlement, a senior Crown Court judge stated that he had doubts about the SFO’s ability to enter into a global settlement with US regulators. According to the judge, English law provides that only judges can impose sentences. The newly elected coalition government in the UK has indicated its desire to create a new regulatory authority to handle prosecution of serious white-collar crime. According to a recent report that the coalition government released, “[w]e take white collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading.”

As both the UK and the US have demonstrated their commitment to investigating and prosecuting corrupt activities abroad, global companies with even the slightest connection to either jurisdiction should continue to focus attention on anti-corruption efforts. Ensuring compliance with both the FCPA and the Bribery Act should remain among the highest priorities for these companies’ compliance programs. ■

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