

The Upswing In US And UK Anti-Bribery Enforcement

Law360, New York (September 24, 2010) -- The year to date has evidenced continued focus on anti-bribery issues as regulators in the United States and United Kingdom continue to ratchet up enforcement, while companies and individuals engaged in international business revise and strengthen compliance initiatives in response to guidance from the U.K. Serious Fraud Office ("SFO") on the contours of potential exposure under the recently enacted Bribery Act.

Since the beginning of 2010, four U.S. settlements have been announced that are among the six largest in Foreign Corrupt Practices Act enforcement history. BAE Systems settled for \$400 million, behind only Siemens AG at \$800 million and KBR/Halliburton at \$579 million.[1] Snamprogetti/ENI settled for \$365 million, Technip settled for \$338 million, and Daimler settled for \$185 million, all in the first seven months of 2010.[2]

During the same time period, U.S. courts have sentenced two individuals to the longest jail sentences in FCPA history, and two of their co-conspirators to the fourth and fifth longest.[3]

Charles Paul Edward Jumet, a Virginia resident and former executive of Ports Engineering Consultants Corporation, was sentenced to more than seven years in prison for his role in bribing Panamanian officials for engineering contracts to maintain ports along the Panama Canal.[4] John W. Warwick, Jumet's co-defendant, was sentenced to 37 months in jail.[5] Juan Diaz, a Miami businessman in the telecommunications sector, was sentenced to 57 months in prison for participating in a scheme to bribe Haitian government officials.[6] Robert Antoine, a former Haitian government official, was sentenced to 48 months in jail for accepting bribes in that case.[7]

Prosecutors continue to roll out new FCPA-related charges that tack on additional jail time, most recently charging an employee with "obstructing an investigation within the jurisdiction of a federal agency" under Section 802 of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1519, for destroying documents before an interview with her employer's internal investigators, just two days after the company self-disclosed potential FCPA violations to the government.[8] In that case, Hong "Rose" Carson, a former employee of Control Components Inc., was charged with 15 counts of violating the FCPA and the Travel Act, and the additional charge of obstruction alone carries a 20-year penalty.[9]

And on top of rising penalties, increasingly sophisticated law enforcement techniques are being used to detect bribery, and prosecutors and investigators are coordinating with their counterparts overseas. In January 2010, 22 individuals were arrested in a highly publicized international action that culminated in a sting operation at the Las Vegas, Nev., Shot Show.[10] Discussing law enforcement techniques in May 2010, U.S. Assistant Attorney General Lanny Breuer said, "[g]one are the days when we relied solely on

tips from whistleblowers to build cases. Instead, we are now bringing the tools of organized crime investigations to white collar investigations.”[11]

The U.S. Congress recently added more fuel to the enforcement action wildfire by providing the government a new carrot to use for detecting bribery. Under the Dodd-Frank financial reform law enacted July 21, 2010, the U.S. Securities and Exchange Commission will offer employees a cash reward for blowing the whistle on their employers’ corrupt activities.[12] Final guidelines on the reward program are forthcoming from the SEC, but employees already can submit complaints and supporting evidence online.[13]

Meanwhile, across the Atlantic, implementation of the U.K. Bribery Act has been delayed to April 2011, a year after the act passed, providing businesses with a small window to ensure their compliance and ethics programs are fully developed and well implemented. That is good news even for companies with strong FCPA-based compliance policies, because they may need revising to fully comply with the new U.K. law, which does not include familiar FCPA exceptions and which may require zero-tolerance policies where strict limitations satisfied the FCPA.

As background, the FCPA has two enforcement mechanisms: (1) the anti-bribery provisions, which prohibit giving or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his official capacity or to secure an improper advantage in order to obtain or retain business,[14] and (2) the accounting provisions, which require companies publicly traded in the U.S. to maintain accurate books and records and reasonably effective internal controls.[15]

By contrast, the U.K. Bribery Act creates four separate offenses: (1) bribing, (2) being bribed, (3) bribing a foreign public official, and (4) failing to prevent bribery, which is applicable to corporations only.[16]

Criminalizing bribery of a foreign public official is a centerpiece of both the U.S. and U.K. legislation, and both provisions are analogous, but the U.K. version has many fewer exceptions and defenses.[17]

First, the U.K. chose not to incorporate the “facilitation payments” exception, while under U.S. law, a company will not be prosecuted for small payments made to secure routine governmental action. The act also does not make room for bona fide promotional expenses, which are narrowly permitted under the FCPA. Third, the U.K. further limited the “local law” exception to permit a payment, gift, or offer of the same only if the local law governing the official’s conduct requires or permits him to be so influenced.

Finally, unlike in the FCPA, there is no requirement in the English statute for the payment to be “corrupt,” although prosecutorial discretion may of course be used in cases where a payor did not intend to induce a foreign official to misuse his or her official position.[18]

The fourth U.K. offense, “failing to prevent bribery by an associated person,” does not have a U.S. analog. The act defines “associated person” as any employee, contractor or subsidiary that is doing anything on behalf of the company, regardless of whether a formal relationship between the company and the third party.[19] If a bribe is paid for the benefit of the company, the only defense to criminal liability in the U.K. is to prove that the company has in place “adequate procedures” for preventing bribery.[20]

Draft guidelines published Sept. 14, 2010, set forth six familiar principles that should be the bedrock of anti-bribery policies and procedures, including: (1) risk assessment procedures appropriate to the size,

activities, customers and markets where the organization operates, (2) top-level commitment from management, (3) due diligence procedures covering all parties to a business relationship, (4) clear, practical and accessible policies and procedures, (5) effective implementation of anti-bribery policies and procedures, and (6) financial monitoring, bribery reporting and incident management procedures, especially in larger organizations.[21]

The jurisdictional scope of anti-corruption legislation currently is a topic of much discussion. The FCPA applies to issuers, domestic concerns (any individual who is a U.S. citizen, national, or resident of the U.S., or any business organization that has its principal place of business in the U.S. or that is organized in the U.S.), and any other persons who take any act in furtherance of a corrupt payment while within the territory of the U.S.[22]

U.S. prosecutors and courts have interpreted the FCPA's jurisdictional provisions broadly, finding, for example, jurisdiction where allegedly corrupt payments were made from a U.S. bank account.[23] But if U.K. prosecutors enforce the U.K. act to the outer reaches of its provisions, as compared to the FCPA, they may reach more fringe conduct than their U.S. counterparts.

The U.K. act criminalizes bribery and related activities by U.K.-incorporated companies, as well as non-U.K. companies that do business in some permanent way in the U.K.[24] Thus, under the Act, merely establishing an office in the U.K. hypothetically may subject a company to the U.K.'s jurisdiction for corrupt conduct anywhere in the world, regardless of whether any U.K. employees are involved. If the Act is enforced as written, U.K. prosecutors may have wider reach than their U.S. counterparts enforcing the FCPA which, for example, would not cover conduct by a foreign company (that was not U.S.-listed) if the corrupt activity had no nexus to the U.S., even if the company conducted some unrelated business in the U.S.

Like the FCPA, the Bribery Act also targets individuals. The U.K. act creates personal criminal liability for individuals guilty of one of the principle offenses, as well as senior officers and directors of a company that commits bribery offenses.[25] A senior officer can be prosecuted if he participated, or if he gave his "consent or connivance" for the corrupt activity, including even passive acquiescence if that practice amounted to consent to the bribery.[26]

For an individual to be prosecuted in the U.K. for a charge based on his own act of bribery, he must either be a U.K. citizen or have a close connection with the U.K. (such as residing there), or the act of bribery that he participated in must have occurred in the U.K.[27] Where the crime is committed by a company and the individual is liable because he consented to the company's crime, then he can be prosecuted as long as the U.K. court has jurisdiction over the company and the individual has a close connection to the U.K.[28]

The U.K. act explicitly criminalizes receipt of a bribe, and it applies equally to offering or receiving bribes in the public or private sector. While the FCPA does not itself criminalize receipt of a bribe, the U.S. government recently has prosecuted foreign officials as part of its FCPA enforcement actions, including the conviction and sentencing of Robert Antoine in the Haiti Teleco case.[29] Antoine, former director of international affairs for Haiti's state-owned national telecommunications company, was indicted under the U.S. anti-money laundering statutes, and, in addition to his four-year prison sentence, he was ordered to pay over \$3 million in fines and restitution.[30]

Even without the new law in full effect, the SFO recently has ramped up anti-bribery enforcement and U.K. courts have begun setting rules for the SFO. In March 2010, the SFO coordinated the arrest of three U.K. directors of engineering firm Alstom for bribes allegedly paid in Brazil and other countries.[31]

During the same month, U.K. prosecutors also participated in negotiating a global settlement with Innospec for \$40.2 million, which was reluctantly approved by Lord Justice Thomas of the Crown Court at Southwark after the judge chastised U.K. prosecutors for allegedly overstepping their constitutional powers when they negotiated the settlement.[32] The judge said that sentencing was squarely within the authority of the judiciary, calling into question whether companies with global corruption charges will be able to negotiate global settlements in the future.[33]

In May 2010, the U.K. appellate court further reprimanded the SFO when it begrudgingly suspended a 12-month jail sentence the lower court had imposed on a cooperating witness.[34] The SFO had recommended a suspended sentence for Robert Dougall after he admitted to playing a role in bribing Greek health care officials, because the SFO said Dougall was cooperating in an ongoing investigation into his former employer, DePuy International Limited.[35]

When the Court of Appeal criticized the SFO's handling of its first prosecution of a British manager for foreign bribery, it further called into question the SFO's ability to engage in U.S.-style dealmaking. Nonetheless, when the new bribery law takes effect in April 2011, the SFO will have broader jurisdiction and more significant powers to prosecute corruption offenses.

It is clear that the U.S. commitment to combating bribery is unwavering. In a July 2010 speech at the African Union Summit, Attorney General Eric Holder said, "[t]oday, when the World Bank estimates that more than one trillion dollars in bribes are paid each year out of a world economy of 30 trillion dollars, this problem cannot be ignored ... [C]orruption imperils development, stability, competition and economic investment. It also undermines the promise of democracy." [36]

Companies subject to the FCPA already should have strict internal control procedures in place, but some revisions may be needed to meet the requirements of the Bribery Act. Policies that permitted facilitating payments under the FCPA exception may run afoul of the new Bribery Act, and although recent guidance from the Ministry of Justice recognized that "routine and incidental business courtes[ies]" of small value are unlikely to violate the act, strict guidelines on business courtesies are essential.[38]

Given the broad potential for corporate liability for the actions of third parties, due diligence programs may need to be strengthened and expanded to include additional third parties beyond agents and joint venture partners. As regulators on both sides of the Atlantic continue to pour resources into anti-corruption enforcement and develop mechanisms to seek stiffer penalties for violations, to mediate compliance risks, companies should continue with high priority to revise and strengthen their anti-corruption controls.

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The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.

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Million in Combined Criminal Fines, DOJ Press Release No. 08-1105 (Dec. 15, 2008) available at www.justice.gov/opa/pr/2008/December/08-crm-1105.html; Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine, DOJ Press Release No. 09-112 (Feb. 11, 2009) www.justice.gov/opa/pr/2009/February/09-crm-112.html.

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[3] Virginia Physicist Pleads Guilty to Illegally Exporting Space Launch Data to China and Offering Bribes to Chinese Officials, DOJ Release No. 08-1020 (Nov. 17, 2008) available at www.justice.gov/opa/pr/2008/November/08-nsd-1020.html.

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[5] Virginia Resident Sentenced to 37 Months in Prison for Bribing Foreign Government Officials, DOJ Release No. 10-750 (June 25, 2010) available at www.justice.gov/opa/pr/2010/June/10-crm-750.html.

[6] Florida Businessman Sentenced to 57 Months in Prison for Role in Foreign Bribery Scheme, DOJ Press Release No. 10-883 (July 30, 2010) available at www.justice.gov/opa/pr/2010/July/10-crm-883.html.

[7] Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme, DOJ Press Release No. 10-639 (June 2, 2010) available at www.justice.gov/opa/pr/2010/June/10-crm-639.html.

[8] U.S. v. Stuart Carson et. al, Case No. SA CR No. 09-0077 (C.D. Cal. Apr. 8, 2009) (Indictment) available at www.justice.gov/criminal/fraud/fcpa/cases/docs/carson-indictment.pdf.

[9] Id.

[10] Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme, DOJ Release No. 10-048 (Jan. 19, 2010) available at www.justice.gov/opa/pr/2010/January/10-crm-048.html.

[11] International Criminal Law Enforcement: Rule of Law, Anti-Corruption and Beyond, Remarks of Lanny A. Breuer, Assistant Attorney General for the Criminal Division, U.S. DOJ, Council on Foreign Relations (May 4, 2010).

[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 922 (2010), available at www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

[13] SEC Website, available at www.sec.gov/complaint/selectconduct.shtml.

[14] 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a).

[15] 15 U.S.C. § 78m(b)(2)(B); 15 U.S.C. § 78m(b)(7).

[16] Bribery Act Website, available at www.legislation.gov.uk/ukpga/2010/23/contents. The offense of bribing a foreign public official is in Section 6 of the Act, and the offense of failing to prevent bribery is in Section 7.

[17] Gibson Dunn 2010 Mid-Year FCPA Update (July 8, 2010) available at www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx.

[18] According to the U.S. legislation, the “The word ‘corruptly’ is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.” H.R. Rep. No. 95-640, at 7 (1977).

[19] Bribery Act, Section 8.

[20] Bribery Act, Section 7(2).

[21] UK Ministry of Justice, Guidance about Commercial Organizations Preventing Bribery (Section 9 of the Bribery Act 2010), Reference Number CP11/10, available at www.justice.gov.uk/consultations/briberyactconsultation.htm.

[22] 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a); 15 U.S.C. § 78c(a)(8); see Lay-Person’s Guide to FCPA, DOJ, available at www.justice.gov/criminal/fraud/docs/dojdocb.html.

[23] See Criminal Information at ¶ 4, United States v. Daimler AG, No. 1:10-cr-00063-RJL (Mar. 22, 2010) (asserting jurisdiction based on Daimler AG’s “use of U.S. bank accounts and U.S. companies in transacting certain business”); see also id. ¶¶ 25-42, 149 (asserting FCPA jurisdiction over Daimler AG’s Russian subsidiary based on a wire transfer through a U.S. bank account).

[24] Bribery Act, Sections 7, 12(5).

[25] Bribery Act, Section 14(2).

[26] Id.

[27] Bribery Act, Section 12(2).

[28] Bribery Act, Section 14(2) to (3).

[29] Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme, DOJ Press Release No. 10-639 (June 2, 2010) available at www.justice.gov/opa/pr/2010/June/10-crm-639.html.

[30] Id.

[31] Directors of Alstom Arrested in Corruption Investigation Following Raids on Nine Properties, SFO Press Release (Mar. 24, 2010) available at www.sfo.gov.uk/press-room/latest-press-releases/press-

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[32] Nick Clark, Judge Attacks SFO Deal with Innospec, *The Independent* (Mar. 27, 2010) available at www.independent.co.uk/news/business/news/judge-attacks-sfo-deal-with-innospec-1928636.html; Alex Spence, Judge's Comments Throw Into Doubt BAE's £30m Pact over Fraud Inquiry, *The Times*, (Mar. 27, 2010) available at business.timesonline.co.uk/tol/business/law/article7078250.ece.

[33] See id.

[34] Michael Peel, Judges Criticise SFO Role in DePuy Court Case, *Financial Times* (May 14, 2010) available at www.ft.com/cms/s/0/d3a4d3b6-5eef-11df-af86-00144feab49a.html (subscription required).

[35] Id.

[36] Attorney General Holder at the African Union Summit, DOJ Speech, Kampala, Uganda (July 25, 2010) available at www.justice.gov/ag/speeches/2010/ag-speech-100725.html.

[37] See UK Ministry of Justice, Guidance about Commercial Organizations Preventing Bribery (Section 9 of the Bribery Act 2010), Reference Number CP11/10, available at www.justice.gov.uk/consultations/briberyactconsultation.htm.

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