

# UNDER THE WATCHFUL EYE



As the number of players on the international anti-corruption stage continues to multiply, we examine the implications for doing business in Latin America. First members of Gibson Dunn LLP's London and New York offices examine the UK's new Bribery Act, arguing that it could prove to be tougher and more far reaching than the US's Foreign Corrupt Practices Act. Then, focussing on the already long arm of the US law, three FCPA specialists provide solutions to carrying out business in Venezuela without running up against FCPA prosecutors.

# THE LONG ARMS OF UK AND US LAW

Gibson Dunn LLP partners Lee Dunst and Philip Rocher, senior counsel Charles Falconer and associate Elizabeth Goergen gauge the broad reach of US and UK legislation that tackles fraud overseas



Lee Dunst



Philip Rocher



Charles Falconer



Elizabeth Goergen

Latin American companies and individuals are increasingly facing criminal exposure in the United States and United Kingdom for corrupt business activities. Since 2004, US prosecutors have investigated and initiated enforcement actions against a number of businesses operating in Latin America for allegedly paying bribes to government officials in Argentina, Brazil, Costa Rica, Ecuador, Haiti, Honduras, Mexico, Panama and Venezuela. As a result of prosecutions under the US Foreign Corrupt Practices Act (FCPA), these companies have been forced to disgorge millions of dollars in profits, pay fines to US regulators, and in some cases, retain costly compliance monitors.

In addition, the US government has prosecuted individuals involved in these corrupt activities. In a recent May 2010 speech at the Organisation for Economic Co-operation and Development (OECD), US Attorney General Eric Holder noted that the US has criminally charged nearly 80 individuals since 2004. Prosecuting individuals, he said, will remain a cornerstone of US enforcement strategy because of its power to discourage the business community from viewing large monetary penalties as merely the cost of doing business: “The risk of a prison sentence for bribery is real, from the boardroom to the warehouse.”

In some cases, the US government has prosecuted non-US citizens for corrupt activities in Latin America, and many of these individuals have been sentenced to jail time and forced to pay significant fines.

While the US government has been aggressive in prosecuting corruption cases in recent years, criticism had been directed at the government in the UK for failing to enact comprehensive anti-corruption legislation and to prosecute companies when they engaged in corrupt activity. However, the UK recently has taken a more

active role on the international anti-corruption stage. And with the enactment of the comprehensive UK Bribery Act on 8 April, Latin American companies will need to make sure that all persons and activities within the UK’s broad reach obey the new bribery law which may prove to be tougher, in some ways, and more far-reaching than the FCPA.

## Focus on Latin America by US prosecutors and regulators

Companies doing business in Latin America have been under US government scrutiny for corruption for some time. The US Department of Justice (DoJ) and Securities and Exchange Commission (SEC) have brought many enforcement actions for corrupt conduct in Latin America, which have included payments to government officials to obtain new contracts or more favourable contract terms, and payments to customs officials in return for more favourable inspections, duty rates, and to permit importation of products without proper registrations. These actions have involved companies in the manufacturing, engineering, telecoms, oilfield and consumer products industries, including, for example, Latin Node, Nature’s Sunshine Products, Siemens, Tyco International and Willbros Group.

In recent DoJ and SEC actions involving Latin America, Pride International announced that it was setting aside US\$56.2 million to settle charges brought by the DoJ and SEC for bribes allegedly paid in Mexico and Venezuela in connection with its oil and gas operations there. Similarly, Alcatel-Lucent recently announced that it expects its subsidiary Alcatel Centraamerica will plead guilty to bribery-related charges for alleged corrupt activity in Costa Rica, and that the company will pay a criminal fine of US\$92 million and disgorge US\$45.4 million in profits for corrupt activities around the world. Also,

in a separate civil action filed in Florida on 7 May, the Costa Rican telecoms and electricity provider has sued Alcatel-Lucent under civil racketeering statutes for damages stemming from the bribery.

Increasingly, after reaching a settlement with a company under investigation, the US government is bringing criminal prosecutions against the company's employees and agents who were involved in or responsible for corrupt activities. Most recently, two employees of Virginian engineering firm Overman Associates pleaded guilty to bribery charges in connection with payments the company made to Panamanian officials to obtain contracts for Panama Canal maintenance and tariff collection. Later, both employees pleaded guilty to bribery charges, and on 19 April, one of them was sentenced to more than seven years in prison, the longest prison sentence to date for FCPA violations.

In fact, the US has prosecuted individuals for corrupt activity in Latin America even when they were not US citizens. In June 2007, Christian Sapsizian, an employee of Alcatel-Lucent, pleaded guilty to FCPA charges relating to bribes allegedly paid to officials in Costa Rica. The US asserted jurisdiction over Sapsizian because he was the employee of a company listed on a US stock exchange, even though he was a French citizen residing in Costa Rica and the alleged corrupt activity overwhelmingly took place in Costa Rica. Subsequently, Sapsizian was sentenced to 30 months in jail and ordered to forfeit US\$261,500. More recently, in November last year, a Mexican citizen pleaded guilty to FCPA conspiracy charges for his role in a kickback scheme between Swiss ABB and a Mexican state-owned electricity company, the Comisión Federal de Electricidad. According to the government's charges, ABB hired the Mexican agent as an intermediary to pay kickbacks to Mexican government officials on its behalf.

### **Broad reach of UK Bribery Act**

Increasingly, global businesses are likely to find themselves exposed under the UK Bribery Act's broad jurisdictional provisions. The act criminalises bribery and related activities by UK incorporated companies, as well as non-UK companies that do business in some permanent way in the UK. Thus, under the act, a Latin American company with nothing more than an office in the UK could theoretically be charged under UK law if a bribe was paid on the company's behalf anywhere in the world, regardless of whether any UK employees were involved. The act has a wider reach than the FCPA which, for example, would not cover conduct by a Latin American company if the corrupt activity had no nexus to the US and the company was not listed on any US stock exchange, even if the company conducted some unrelated business in the US. The broad jurisdiction of the Bribery Act is designed to facilitate worldwide investigations, often in concert with other countries' prosecutorial bodies.

Under the act, a senior corporate officer can be prosecuted for offences committed by his company if he in any way participated in the acts of bribery. For an individual to be prosecuted in the UK on a charge based on his own act of bribery, he must either be a UK citizen or have a close connection with the UK (such as living there), or the act of bribery he participated in must have occurred in the UK. 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 UK court has jurisdiction over the company. That means the individual could be prosecuted even if he does not live in the UK, has no close connection to the UK and all the relevant acts were committed outside the UK.

### **The US and UK Anti-Bribery Regime: familiar concepts with some new twists**

A critical part of both the FCPA and the UK Bribery Act is to make bribery of a foreign public official a crime. But the UK version has many fewer defences than in the US. For example, there is no requirement in the English statute that the payment be "corrupt", as there is in the FCPA. So while it may not be a crime under either law if local law allows the official to receive the benefit, it will be a crime under UK law if it was only permitted under local custom, not codified law, even if the payer honestly believed the payment was lawful.

Similarly, the FCPA allows facilitation payments to be made while the UK law does not. Also, the FCPA allows benefits to be bestowed on the foreign official if they are bona fide, reasonable promotional expenses. The Bribery Act has no such exception.

Also, companies under the UK's jurisdiction can be prosecuted for the new offence of "failing to prevent bribery by an associated person". Associated person means any employee, contractor or subsidiary that is doing anything on behalf of the company. The act makes clear that it does not matter what the formal relationship between the company and the associated company is: all that matters is whether the third party does something tangible for the company.

Once it has been established that a bribe has been paid for the benefit of the company, the only defence to criminal liability in the UK is to prove that the company has in place "adequate procedures" for preventing bribery. The UK justice secretary has not yet issued the required guidelines for "adequate procedures", but compliance programmes that foster a culture of compliance beginning with senior management and including training for all levels of employees will likely be essential to avoid possible charges under this provision.

Like the US, the UK will prosecute individuals involved in bribery. The UK act establishes personal criminal liability for individuals guilty of one of the principle offences, as well as senior officers and directors of a company that commits bribery offences. A senior officer can be prosecuted if he gave his "consent or connivance" for the corrupt activity, including even passive acquiescence if that practice amounted to consent to the bribery. In a speech given in January on the launch of the Bribery Act, 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 UK act explicitly criminalises 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 criminalise receipt of a bribe, the US government has prosecuted foreign officials as part of its FCPA enforcement actions. In late 2009, the DoJ obtained indictments against two former Haitian government officials who allegedly accepted bribes from a number of telecommunications companies involved in an FCPA investigation. The officials were indicted under the US anti-money laundering statutes, and one was sentenced to four years in prison and ordered to pay over US\$3 million in fines and restitution.

### **Recent UK enforcement actions**

The Bribery Act has not fully come into effect, but the UK's Serious Fraud Office (SFO) has already ramped up its anti-bribery enforcement. Most recently, in March 2010, the SFO coordinated the arrest of three UK directors of engineering firm Alstom for bribes allegedly paid in Brazil and other countries. The men were seized from their homes in

a coordinated dawn raid, and then later released without charge. In September last year, bridge-building company Mabey & Johnson was the first major British business to be convicted of foreign bribery. The company was ordered to pay £6.5 million in connection with bribes allegedly paid in countries including Jamaica. When the new bribery law takes effect later this year, the SFO will have broader jurisdiction and more significant powers to investigate and prosecute corruption offences.

### Looking forward

International attention is increasingly focused on combating corruption. President Barack Obama has said that the fight against corruption “is one of the great struggles of our time”, and Attorney General Holder has reiterated its significance, saying that “put simply, corruption undermines the promise of democracy. It imperils development, stability and faith in our markets. And it weakens the rule of law.”

Similarly, in a press release in March, SFO Director Richard Alderman said: “The SFO is committed to tackling corruption. We are working closely with other criminal justice organisations across the world and are taking steps to encourage companies to report any suspicious corruption, either within their own business or by other companies or individuals.”

Like the DoJ, the SFO has encouraged companies to self-report corruption issues. And like the DoJ, the SFO has not provided companies with a way to measure the benefit they would receive. Attorney General Holder recently said: “If you come forward and if you fully cooperate with our investigation, you will receive meaningful credit for having done so... By working with the department, no charges may be brought at all, or we may agree to a deferred

prosecution agreement or non-prosecution agreement, sentencing credit, or a below-guidelines fine.” But given the risks of reporting and uncertain benefits, advisers will continue to struggle with the question of when to advise a company to self-report.

The methods for detecting corruption will likely become increasingly sophisticated in the US and UK. In an April 2010 speech, US Assistant Attorney General Lanny Breuer said: “Gone are the days when we relied solely on tips from whistle-blowers to build cases. Instead, we are now bringing the tools of organised crime investigations to white collar investigations”, such as a recent sting operation that resulted in the arrest of 21 individuals in Las Vegas, Nevada on FCPA charges. Also, US and UK prosecutors are likely to continue to work closely with local prosecutors, as the US prosecutors did following an investigation by the Costa Rican government into Alcatel-Lucent’s conduct.

Companies that have already developed compliance programmes for the FCPA will need to revise and strengthen them to meet the requirements of the Bribery Act, and to train their employees about the new rules. For example, a programme that permits employees to make facilitating payments under the FCPA exception will fall foul of the new Bribery Act. Even strict guidelines on corporate hospitality may permit expenditures that a UK prosecutor would not allow. And due diligence procedures may need to be revised and applied to more third parties than merely agents and joint-venture partners. As both the UK and US governments have recently promised to increase the resources they spend investigating and prosecuting corrupt activities abroad, companies in Latin America should continue to focus attention on anti-corruption efforts and this should remain a high priority for compliance programmes.