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A Comparison of the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act

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Introduction

The U.S. is the global leader in enforcing anti-corruption legislation, while the U.K. has compared unfavorably in prosecuting individuals and corporations pursuant to the country's anti-bribery rules. The U.K. Bribery Act 2010 (the "Bribery Act"), which received Royal Assent on April 8, 2010, seeks to change that by overhauling the U.K.'s bribery laws and going beyond the U.S. Foreign Corrupt Practices Act of 1977 ("FCPA") in several respects.

As highlighted below, however, the broad scope of the Bribery Act creates several areas of uncertainty. Official guidance on these areas is expected in early 2011, prior to the Bribery Act's effective date in April 2011. The U.K. government expects corporations to use this period to bring their anti-corruption policies and programs into compliance with the Bribery Act, and is seeking input from corporations in defining the "adequate procedures" required by the Bribery Act. The period of consultation is expected to close on November 8, 2010. Entities interested in participating in the consultation may visit www.justice.gov.uk.

This alert highlights the key differences between the FCPA, as applied, and the Bribery Act, as written, and summarizes issues meriting consideration by affected entities.

Jurisdiction Under the Bribery Act

The FCPA applies to all U.S. companies and citizens, foreign companies listed on any U.S. stock exchange or required to file disclosures under the U.S. Securities and Exchange Act, individuals acting on behalf of such companies or individuals, and entities that commit an offense in the U.S. Under the Bribery Act, the two general offenses of offering a bribe and accepting a bribe, as well as the offense of bribing a foreign public official, have a similar territorial scope as the FCPA. Jurisdiction is conferred when the relevant act or omission: (1) takes place in the U.K.; or (2) takes place anywhere in the world when committed by a person closely connected with the U.K. "Closely connected" is defined in the Bribery Act with several examples.

As written, the Bribery Act's corporate offense of failing to prevent bribery by persons associated with a corporation has a wider reach. It applies to:

(a) U.K. partnerships, limited partnerships and incorporated companies wherever they do business (irrespective of where the offense is committed); and

(b) commercial organizations that "carry on business or part of a business" in the U.K. wherever registered or incorporated.

Non-U.K. entities may be held liable under the Bribery Act if conduct in furtherance of the offense occurs in the U.K. Moreover, a foreign corporation that did some business in the U.K., but does not have a U.K. office, may be criminally liable if an agent, employee or subsidiary offered or accepted a bribe anywhere in the world, regardless of whether the misconduct involved the U.K. business or occurred in the U.K., and even if the company had only limited contacts with the U.K. In addition, the person who is associated with the entity and who committed the offense need not be closely connected to the U.K. to confer jurisdiction upon the U.K.'s Serious Fraud Office ("SFO") under the corporate offense.

The SFO has announced that it will support ethical U.K. businesses by prosecuting foreign corporations that undercut British companies using improper tactics. Against this backdrop, it is likely that U.K. courts will impose a low territorial jurisdiction threshold in prosecuting companies and individuals under the Bribery Act. It remains to be seen whether a fine imposed for acts that occurred by a non-U.K. affiliate of a non-U.K.-registered or non-U.K.-based company would affect only the portion of U.K. business by the indicted company or whether it would have a broader reach to the non-U.K.-generated revenue.

Recipient Bears Liability

The FCPA does not criminalize the acceptance of a bribe, unlike the Bribery Act. The Bribery Act expressly prohibits the requesting, agreeing to receive, or accepting of a financial or other advantage. A bribe under the Bribery Act is broadly defined as a "financial or other advantage," which is expected to capture more conduct than the FCPA's definition of "anything of value." In practice, "anything of value" has been applied broadly by the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), rendering it in line with its U.K. counterpart, despite its arguably more limited definition in the statute.

Commercial Bribery Prohibited

The FCPA only criminalizes the bribery of foreign government officials. Although the FCPA defines "government officials" broadly to include employees of state-owned or state-controlled entities – even if local procurement laws do not consider such entities governmental – some element of government involvement is necessary. The Bribery Act, on the other hand, prohibits both commercial and public bribery and imposes liability on both the payor of the bribe and the recipient, even if both are private individuals. To be actionable, the offering, promising, or giving of a financial or other advantage must be done with the intention of inducing the recipient to perform "improperly" a "relevant function or activity."

Unlike the FCPA, the definition of "foreign official" under the Bribery Act does not include candidates for public office. Accordingly, bribery of such individuals falls within the proscriptions of the general bribery offenses.

Notably, prosecutors in the U.S. are using the Travel Act to penalize individuals who engage in commercial bribery overseas. The Travel Act criminalizes the use of "the mail or any facility in interstate or foreign commerce" with the intent to "facilitate the promotion, management, establishment or carrying on of an unlawful activity." "Unlawful activity" includes "bribery . . . in violation of the laws of the state in which committed or of the United States." The U.S. does not have a federal commercial bribery statute, but almost all states do, and a majority of those statutes set a low bar, outlawing any benefit intended to influence conduct. Any telephone call, mail, wire transfer, or travel qualifies as interstate or foreign commerce, rendering the Travel Act expansive in its scope and potential application similar to the Bribery Act.

Bribery of a Foreign Official

While the FCPA requires that a bribe be made with the corrupt intent to obtain or retain business or a competitive advantage, the Bribery Act contains no "corrupt intent" element in the offense of bribing a foreign official. The Bribery Act merely requires that the bribe be paid to obtain or retain business or an advantage in the conduct of business. The Bribery Act's proscriptions on intent and scope of the offense are more narrow when a government official is involved than when a private individual is the recipient of the "financial or other advantage." Indeed, there is no comparable requirement in the offense of bribing a public official that the payor intend to induce the recipient to behave improperly.

An item of value provided to a foreign government official with the intention of familiarizing that official with a company's products or services and of creating a favorable impression of the company is a technical violation of the Bribery Act, as the SFO has acknowledged, but it is not likely to lead to a prosecution because the conferred "financial or other advantage" must be intended to influence (and, based on value, be capable of influencing) the recipient's behavior. If the advantage is reasonable or a bona fide business expense, it is unlikely to have the effect of influencing behavior, thereby resulting in no liability. Nevertheless, the treatment of reasonable and customary business hospitality expenses involving government officials is a source of concern for corporations until more specific guidance is released by the U.K. government in early 2011, and compliance policies should ensure that personnel and agents are aware of what constitutes reasonable business expenses.

Payments to foreign officials made through third parties can form the basis of an offense under both the Bribery Act and the FCPA. The Bribery Act does not require knowledge on the part of the third party to impose liability on the corporate. In the absence of any guidance on this point, it is expected that English courts and prosecutors will be tasked with determining whether to import a knowledge and/or conscious avoidance test. Under the FCPA, "knowledge" has been imputed where an entity was willfully blind to misconduct or consciously avoided examining red flags. The fact that the Bribery Act does not impose a knowledge requirement renders it likely that prosecutors will adopt a more expansive definition as in the U.S.

Business Promotional Expenditures

The FCPA permits reasonable and bona fide business expenditures provided they directly relate to promotional activities. Although the early drafts of the Bribery Act considered including language to permit legitimate commercial conduct, the House of Lords rejected such exception to the rule, concluding that prosecutors should have the discretion "to differentiate between legitimate and illegitimate corporate hospitality" in deciding whether a prosecution "would be in the public interest."[1] Under the Bribery Act, any advantage given or promised could constitute a bribe if a reasonable person in the U.K. would consider that action improper or an inducement to act improperly. As the

U.K. Ministry of Justice acknowledged, "corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalise expenditure on corporate hospitality for legitimate commercial purposes." However, abuse is likely to occur when hospitality is excessive in value, given too often, or leaves the recipient in a position of obligation. While no further official guidance has been offered, following consultation with the SFO, Transparency International, a non-governmental organization which was a member of the Joint Committee that gave pre-legislative scrutiny to the Bribery Act, has published more detailed guidelines. This guidance suggests that corporate hospitality is likely to be acceptable if: (1) as under the FCPA, it is reasonable and bona fide; (2) it is transparent; (3) it is proportionate; and (4) the organization has adequate procedures and policies in place to monitor and regulate the expenses. The Transparency International guidance may be found at: www.transparency.org.uk.

Accordingly, corporations should be conscious of whether their travel and entertainment policies clearly distinguish between acceptable and unacceptable corporate hospitality and impose stricter guidelines for hospitality involving government officials, as defined by the Bribery Act, to minimize incurring liability under the corporate offense. Regardless of whether the policies are required as a defense to the Bribery Act's corporate offense, such policies reflect best practices in an anti-bribery program – a key factor to be considered by courts in assessing liability for any other offense under the Bribery Act.

Strict Corporate Liability

The Bribery Act imposes strict liability on corporates for failing to prevent bribery by a person "associated" with the corporation who intends to obtain or retain business or an advantage in the conduct of business for the organization. An "associated person" includes employees, agents, representatives, and subsidiaries, i.e., those who perform services for, or on behalf of, the organization.

The only available defense is that the corporation had "adequate procedures" in place designed to prevent associated persons from engaging in misconduct. Satisfying this element requires showing not just that the company adopted comprehensive written policies, but also that it undertook appropriate steps to apply and enforce them, including training its agents. In mid-September 2010, U.K. officials began to elicit public comments on how to define "adequate procedures." Such comments will inform the guidance that the U.K. government intends to publish in early 2011. It is expected that the guidance will set out general principles for anti-bribery programs supported by case studies, but will not contain detailed descriptions of the design and implementation of adequate procedures. Thus far, the U.K. government has articulated six principles on which compliance programs should be based to satisfy the "adequate procedures" defense, but what actually constitutes "adequate procedures" will remain at the discretion of the courts.

The six principles largely mirror those of the U.S. Federal Sentencing Guidelines for effective internal controls and the OECD's Good Practice Guidance on Internal Controls, Ethics and Compliance. They are: (1) Risk Assessment, which varies based on, among other things, the size of the company, its business sectors, the markets in which it operates, the use of third-party agents, and the volume of government business; (2) Top-Level Responsibility, particularly at the board of directors level, for fostering a culture of compliance, integrity, and zero-tolerance of corruption; (3) Due Diligence, vetting, and monitoring of third parties; (4) Clear, Comprehensive, Practical, and Accessible policies and procedures regarding anti-corruption issues; (5) Effective Implementation of the Compliance

Program, including training of personnel and third parties and mechanisms for reporting concerns; and (6) Monitoring and Review of the policies, procedures, and conduct.

The Bribery Act does not require any intent by a corporation in imposing liability. However, the person associated with the corporate who committed the original offense must have engaged in the conduct with the intention of obtaining or retaining business or an advantage for the company.

Liability of Senior Officers

Under the Bribery Act, senior officers are not personally liable for the corporate offense of failing to prevent bribery. In contrast, the FCPA imposes liability on a senior officer for a corporation's failure to create and implement appropriate anti-corruption controls. Senior officers are also liable for FCPA violations in their capacity as a "control person."

A senior officer may be liable under the Bribery Act for the general offenses of commercial bribery or for the offense of bribing a public official, if the offense was committed by the body corporate with the "consent or connivance" of a senior officer. The inclusion of this provision in the Bribery Act likely foreshadows an interest in prosecuting individuals for corruption-related corporate offenses similar to the activities of prosecutors in the U.S.

A senior officer is defined by the Bribery Act as a director, manager, secretary or other similar officer of a body corporate. Similarly, under the FCPA, an officer, director, supervisor, manager, or another person having "control" over the conduct may be held liable if he or she acquiesced in the misconduct, failed to prevent the misconduct despite having reason to believe it was occurring, was willfully blind to the misconduct, or actively participated in it.

Facilitation Payments

Facilitating or expediting payments to foreign officials is permitted by the FCPA, but is prohibited by the Bribery Act. Such payments are often made to expedite the processing of licenses, permits, or other necessary business documents to which the body corporate is entitled and are given to low-level employees who are not in a position to award business to the company. Nevertheless, obtaining a license sooner than a competitor by making a facilitation payment can provide a competitive advantage to the corporation, which is proscribed under the Bribery Act (as well as the FCPA).

Many companies' codes of conduct expressly forbid facilitation payments or severely restrict them because they are not uniformly permitted by international anti-bribery laws and create a risk even under the FCPA if they do not satisfy the regulators' limitations. Moreover, the SFO has acknowledged that it is unlikely to take action against a company for a nominal facilitation payment because grease payments remain a fact of doing business in many parts of the world, but the SFO does possess the discretion to prosecute an entity if the payments exceed what a reasonable person would find nominal.

Enforcement

Only criminal proceedings may be brought under the Bribery Act; there is no corresponding civil claim as under the FCPA. Prosecutions under the Bribery Act may only be brought by, or with the consent of, the Director of Public Prosecutions, the Director of the SFO, or the Director of Revenues and Customs Prosecutions. The Director of the SFO, which is likely to be the primary enforcing body, has commented that his organization will not have the resources to prosecute every violation of the

Bribery Act, particularly given the broad nature of certain provisions. Nevertheless, prosecutors are afforded wide discretion under the Bribery Act to bring claims, and offenses have been left purposefully broad to provide such discretion.

Penalties

An individual guilty of an offense under the Bribery Act faces imprisonment for up to ten years and an unlimited fine. A corporation found guilty of failing to prevent bribery faces an unlimited fine.

Bribery offenses under the FCPA carry a less severe maximum sentence of five years imprisonment and fines of up to $250,000 for individuals and fines of up to $2 million for corporations. Corporations also face other sanctions such as debarment, disgorgement of profits, and imposition of corporate monitors.

Books and records or internal control violations under the FCPA carry a maximum sentence of 20 years imprisonment and fines of up to $5 million for individuals and up to $25 million for corporations. There is no comparable offense in the Bribery Act. Prosecutions for similar offenses in the U.K. would be under company law, the Fraud Act 2006 or the Theft Act 1968.

Conclusion

Much like the FCPA, the Bribery Act's intention is to remove corruption from business practices and to compel corporations to adopt rigorous and robust compliance programs. Companies with business interests in the U.K. face exposure under the Bribery Act and must establish compliance programs consistent with the U.K. government's guidance. Companies whose compliance programs are modelled along the FCPA may need to revise those policies and procedures to account for the differences between the FCPA and the Bribery Act and the broader scope of offenses covered by the latter. Board-level commitment to adopting strict anti-bribery measures is critical and will impact the SFO's (as well as the DOJ's and SEC's) view of a corporation's commitment to compliance. The broad territorial reach of the Bribery Act, combined with its expansive offenses and prosecutorial discretion, render it prudent for entities to consider whether their compliance protocols conform to the evolving international enforcement landscape being shaped by the Bribery Act.

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[1] January 14, 2010 letter by Lord Tunnicliffe, Minister in the Government Whips Office, Government Spokesperson for the Ministry of Justice, to Lord Henley of the House of Lords.