

## **Beware Of The New UK Bribery Act**

*Law360, New York (June 10, 2010)* -- Foreign corruption-related risk has increased significantly due to the passage of enhanced anti-corruption laws and increased enforcement in multiple foreign jurisdictions.

German enforcers obtained huge financial penalties against MAN AG, prosecuted former executives of Siemens AG, and worked in cooperation with Russian authorities to facilitate the arrest of multiple former employees of a subsidiary of a major U.S. public company. China recently prosecuted employees of Australian-based Rio Tinto for bribery of public officials. The United Kingdom criminally prosecuted BAE Systems PLC and Innospec Ltd., sentenced a med-device executive to prison, and arrested multiple others in connection with foreign anti-corruption enforcement.

Despite the increase in anti-corruption actions by foreign jurisdictions, the far more dramatic increase in enforcement of the U.S. Foreign Corrupt Practices Act — including the criminal prosecutions of dozens of corporate executives within the last 12 months — has prompted many companies to continue to largely focus their international compliance efforts on FCPA compliance. The impending implementation of the expansive U.K. Bribery Act of 2010, however, may create a different and greater foreign anti-corruption compliance risk for many U.S. companies.

Every company and individual with ties to the U.K. should be aware that compliance with the FCPA alone is likely insufficient to avoid significant criminal anti-corruption exposure. The Bribery Act, which was passed in April, is more stringent than the FCPA in several key respects and, for many offenses, applies to the worldwide conduct of any company that conducts business in the U.K.

Key differences between the Bribery Act and the FCPA include:

### ***1) Strict Corporate Liability for Failure to Prevent Bribery***

The Bribery Act explicitly provides for strict criminal liability for companies that fail to prevent their employees or others acting on the company's behalf from engaging in bribery, even where the companies' management had no knowledge of the bribes. The Bribery Act provides an affirmative defense for companies that can demonstrate that they implemented "adequate procedures" to prevent bribery.

### ***2) Private Sector Bribery Prohibited***

The Bribery Act specifically prohibits bribery of private citizens, as well as government officials. Though U.S. enforcers are increasingly sanctioning bribery of individuals who are not government officials (i.e., private sector or commercial bribery) through the use of the U.S. Travel Act, wire fraud statutes, or the application of the FCPA's books-and-records provisions, the FCPA does not directly prohibit commercial bribery.

### **3) Facilitating Payments Prohibited**

The Bribery Act contains no exception for “facilitation payments” — small payments to foreign officials for non-discretionary “routine governmental actions” that are permissible under the FCPA. This comports with the Organization for Economic Co-operation and Development’s (OECD) recent guidance recommending that member countries (including the U.S. and U.K.) ban such payments.

### **4) Prison Terms Twice as Long as the FCPA**

The Bribery Act provides for imprisonment of individuals for up to 10 years per violation, rather than the sanction of five years per violation under the FCPA. The impact of the Bribery Act is not limited to companies incorporated in the United Kingdom — any company that carries on business in the U.K. may be subject to the Bribery Act.

For example, a company incorporated in the U.S. that conducts business in the U.K. can be found criminally liable under the Bribery Act for failing to prevent one of the company’s Korea-based third-party agents from paying a bribe in China, even if the company’s operations outside of the U.K. are unconnected to its U.K. business activities.

Such a company could avoid criminal liability for failure to prevent the bribery if the company could establish it had implemented “adequate procedures” to prevent the bribery. Later this summer, the U.K. Secretary of State is expected to release guidance regarding the interpretation of the Bribery Act, including on the “adequate procedures” that can serve as a defense to the Bribery Act’s strict liability.

If corporate counsel have not already done so, it is important to re-assess existing anti-corruption compliance programs to address not just the FCPA, but the applicable requirements of the anti-corruption laws in each jurisdiction in which the company conducts business.

While using the FCPA as a starting point is often helpful, given its breadth and the high level of U.S. enforcement, it is important to understand and adapt to differences in local anti-corruption laws. Some nations’ anti-corruption laws may be better addressed with policy adjustments that only apply to company activities in certain jurisdictions. Other laws, such as the Bribery Act, likely will require many companies to make global changes to their compliance policies and programs.

The anti-corruption laws of many nations are the result of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”), which sets forth minimum legal standards for foreign anti-corruption laws. Even among the 38 countries that are signatories, however, there remains a wide variance in anti-corruption laws. When comparing other nations’ anti-corruption laws to the FCPA, areas where important differences are often found include:

#### **1) Extra-Territorial Application**

Many nations’ anti-corruption laws provide for enforcement only against their own nationals, or based on conduct that occurred in those countries. However, laws like the FCPA and the Bribery Act have wide extra-territorial application and may require a company to ensure that all of its conduct worldwide complies with such laws.

#### **2) Conduct Criminalized**

Many anti-corruption laws, like the Bribery Act, prohibit commercial bribery and provide no legal exception for “facilitation payments.” Though the FCPA explicitly permits facilitation payments, a company or, depending on circumstances, an executive, who authorizes “facilitation payments” faces criminal liability under the Bribery Act.

### **3) Statute of Limitations**

The OECD Convention does not mandate a specific statute of limitations. This can affect the extent of due diligence required on an acquisition or agent, or the time period that should be covered by representations and warranties. While the FCPA's statute of limitations on an acquisition's past corporate conduct may have expired, if other applicable anti-corruption laws have longer limitation periods, the acquired entity could be devalued as a result of subsequent local enforcement actions.

### **4) Definitions of Key Terms**

Terms such as "improper business advantage," "foreign official," "instrumentality of a foreign government," and "public company" can vary widely, and may be broader even than interpretations of analogous FCPA terms.

### **5) Extent of Enforcement & Penalties**

When assessing risk, the severity of penalties under some nations' anti-corruption laws — such as life imprisonment for individuals, in some cases — may off-set lower rates of enforcement. The Bribery Act provides for imprisonment of up to 10 years per violation, twice that of the FCPA.

### **6) Resolution Mechanisms**

Unlike in the U.S., enforcers in some jurisdictions may be unable to resolve enforcement actions by agreement. For example, U.K. judges have recently warned that the United Kingdom's Serious Fraud Office lacks the legal authority to resolve foreign corruption offenses through negotiated settlements.

Counsel should also continue to monitor legislative developments and enforcement trends in the United States. On May 20, 2010, the U.S. Senate passed a financial reform bill that provides rewards for whistleblowers who report violations of the securities laws.

Congress is now working to resolve differences in the Senate bill with a similar bill passed by the U.S. House of Representatives. If the rewards provision is retained in the final bill and it is signed into law by President Obama, individuals who report violations of the FCPA's books-and-records provisions would be entitled to a recovery of 10 to 30 percent of fines assessed — a lucrative incentive to blow the whistle on perceived wrongdoing.

Even more recently, on May 31, 2010, U.S. Attorney General Eric Holder addressed the OECD in Paris and emphasized that U.S. enforcers were using every tool at their disposal, including undercover investigations, to combat FCPA violations. He also warned that "prosecuting individuals is the cornerstone of our enforcement strategy ... The risk of heading to prison for bribery is real, from the boardroom to the warehouse."

While the FCPA will remain an essential focus of anti-corruption compliance, the Bribery Act is the most recent example of why FCPA compliance alone can be insufficient to avoid devastating criminal anti-corruption liability.

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