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International Information for International Business

Volume 18, Number 5 May 2012

The Extraterritorial Implications Of The U.S. Foreign Corrupt Practices Act And The UK Bribery Act: Why Nearly Every Global Company Needs A Robust Anti-Corruption Compliance Program

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Business in today's world is global, and anti-corruption enforcement is as well. Given the extraterritorial reach of the U.S. Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (Bribery Act), multinational corporations with connections to the United States and the United Kingdom are becoming increasingly aware of the risks of enforcement of these two statutes by the U.S. and UK authorities.[1] Many companies operating or headquartered outside the United States are questioning how these laws may be applied to their conduct, and, if so, what course of action they should take to protect themselves from liability.

Recent statistics reflect the global nature of enforcement. In 2011, 72 percent of the financial penalties in FCPA cases were assessed by U.S. authorities against non-U.S. companies, even though these companies comprised only 41 percent of those investigated.[2] In the past two years, 16 of the 36 corporate FCPA enforcement cases—nearly half—have involved non-U.S. parent companies.[3] Nine of the 10 largest penalties to date imposed by U.S. authorities for alleged FCPA violations were levied against foreign companies.[4] Additionally, in 2011, there was a record number of non-U.S. individuals charged with crimes in the United States—of the 18 individuals charged in 2011, 12 were non-U.S. citizens.[5]

While enforcement of the Bribery Act is just getting underway in the aftermath of the law's July 2011 effective date, the UK Serious Fraud Office (SFO) has made clear that the law will be enforced broadly on a worldwide scale. The Director of the UK Serious Fraud Office, Richard Alderman, has commented that the Bribery Act's extraterritorial jurisdictional provision is a crucial means by which the SFO intends to address his primary concern that the Bribery Act would otherwise "put ethical UK companies at a disadvantage with the consequential effect on their employees."[6]

This article highlights key principles of extraterritorial jurisdiction of the FCPA and the Bribery Act that multinational corporations should consider in connection with their international compliance efforts.[7]

Overview of Offenses under the FCPA

The FCPA, enacted in 1977, consists of two general categories of offenses:

- Its **anti-bribery provisions** prohibit making—or offering to make—a corrupt payment to a foreign (*i.e.*, non-U.S.) government official for the purpose of securing an improper advantage or obtaining or retaining business for or with, or directing business to, any person.

- Its **books and records provisions** require foreign or domestic issuers of securities that are registered on U.S. stock exchanges to comply with its additional provisions on recordkeeping and internal accounting controls. Books and records of covered entities must accurately and fairly reflect transactions (including the purposes of an organization's transactions), and covered entities must devise and maintain an adequate system of internal accounting controls.

Extraterritorial Jurisdiction under the FCPA

The FCPA applies broadly to numerous categories of U.S. and non-U.S. persons and businesses, and in many cases can give rise to liability even where the corrupt act takes place entirely or mostly outside the United States.

There are three key extraterritorial features of the law:

First, U.S. persons and businesses are prohibited from undertaking corrupt conduct that violates the FCPA anywhere in the world. Such U.S. persons and businesses include U.S. citizens and resident aliens, as well as businesses organized under U.S. law or with a principal place of business in the United States. In addition, these U.S. persons and businesses may be considered responsible for the activities of their officers, directors, employees, and third-party agents (regardless of their citizenship), as well as of their foreign subsidiaries.[8] The FCPA thus applies to the activities of U.S. persons, including companies, around the world.

Second, any issuer of securities on a U.S. stock exchange, whether the issuer is a U.S. or non-U.S. company, or any officer, director, employee, or third-party agent of such issuer or any stockholder thereof acting on behalf of such issuer, is prohibited from using the U.S. mails or any means or instrumentality of U.S. interstate commerce for corrupt conduct anywhere in the world.[9] For example, companies that are listed on the New York Stock Exchange will find themselves subject to the FCPA even though their headquarters and principal place of business are located elsewhere.

The increasingly common reality is that U.S. enforcement agencies can make use of [the FCPA's extraterritorial provisions] to exert jurisdiction on the basis of actions as slight as registering American Depository Receipts, sending incriminating emails, or making a transfer to a U.S. bank account.

Third, non-U.S. persons are prohibited from using U.S. mails or any means or instrumentality of interstate commerce or doing any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value corruptly to a foreign official. For example, the U.S. Justice Department asserted extraterritorial jurisdiction over Bridgestone, a Tokyo-based manufacturer, regarding FCPA violations based on emails sent between Japan and the United States in connection with a bribery scheme.[10]

Thus, liability under the FCPA does not end with U.S. persons and businesses or issuers of securities on U.S. exchanges, but also includes individuals of any citizenship that take any action that can be construed to be in the United States in furtherance of a corrupt payment to a foreign government official. In today's matrixed business world with worldwide electronic communication and intertwined financial transactions, the reach of the FCPA can extend quite far. Accordingly, non-U.S. companies may find themselves subject to the FCPA because some business activity that relates to the misconduct has a U.S. connection, even though this connection is not great.

In addition to liability under the FCPA, non-U.S. persons and companies could be liable for conduct outside the United States that constitutes ancillary offenses under U.S. criminal law, such as conspiracy or aiding and abetting. For example, if a non-U.S. person who is not otherwise expressly covered under the FCPA assists a covered U.S. person in consummating a corrupt act under the statute, the non-U.S. person might in some circumstances be subject to U.S. prosecution for providing that assistance.

   ISSN 1357-0889

The increasingly common reality is that U.S. enforcement agencies can make use of these extraterritorial provisions of the FCPA to exert jurisdiction on the basis of actions as slight as registering American Depository Receipts, sending incriminating emails, or making a transfer to a U.S. bank account. Companies also face significant risks related to third-party agents who act on their behalf in dealing with foreign governments.[11]

Another major consideration is that, if an investigation is started by the U.S. government, a company subject to that investigation may try to raise the lack of jurisdiction as a defense. In that context it is likely that an investigation into the underlying conduct will proceed, with considerable defense costs being incurred while jurisdictional arguments are raised. From a practical perspective, therefore, the uncertainty of ultimately prevailing on a defense based on jurisdictional grounds will likely result in a negotiated settlement, particularly if there is underlying conduct that appears improper. In short, jurisdictional arguments will not prevent the costs and operational disruption of an investigation from being incurred.

Thus, it is crucial that multinational corporations, whether operating in the United States or not, take into consideration the potential liability under the FCPA to which their operations may be exposed.

Overview of Offenses under the UK Bribery Act

The Bribery Act came into force with enormous fanfare on July 1, 2011.[12] Much of the commentary in relation to the Bribery Act agonizes over what is perceived to be its broad jurisdictional reach.

The Bribery Act creates three offenses which seek to capture actual acts of bribery: bribing another person,[13] being bribed,[14] and bribing a foreign public official[15] (collectively "the Bribery Offenses"). In addition, the Bribery Act creates an entirely new offense for commercial organizations that fail to prevent bribery.[16]

Extraterritorial Jurisdiction of the Bribery Offenses under the Bribery Act

In summary, the Bribery Act extends jurisdiction to both offenses committed in the United Kingdom and those committed elsewhere that retain a "close connection" to the United Kingdom.

In cases where the Bribery Offenses are committed in whole or in part in the United Kingdom, the nationality or place of incorporation of the culprit is irrelevant. In this regard, the Bribery Act is not, in any way, new or controversial. It accords with both the general criminal law of the United Kingdom, which is usually concerned with conduct within the jurisdiction, and the pre-existing bribery legislation, which was brought into force in 2002 and later repealed and replaced by the Bribery Act. Under the Bribery Act, senior officers of a corporate body who are implicated in the commission of the Bribery Offenses are guilty of the same offense.[17]

The UK Bribery Act creates an entirely new offense that broadly expands the law's extraterritorial reach: the criminalization of a commercial organization's failure to prevent bribery.

The jurisdictional reach of the Bribery Offenses is wider when the criminal conduct is committed by individuals or corporate bodies with a "close connection" to the United Kingdom.[18]

British citizens, citizens of British overseas territories, and bodies incorporated under the law of any part of the United Kingdom, among others, are deemed to have a "close connection" with the United Kingdom,[19] and they may be prosecuted where the offense takes place outside the United Kingdom.[20] While this exertion of jurisdiction does constitute an extension of the general criminal law of the United Kingdom, it is largely in accordance with pre-existing legislation. In fact, the only significant extension under the Bribery Act is that the Bribery Offenses now capture foreign nationals who commit bribery offenses abroad while domiciled or habitually resident in the United Kingdom.[21]

Extraterritorial Jurisdiction of the Failure to Prevent Bribery Offense under the UK Bribery Act

While prosecution of the Bribery Offenses largely relies on conventional principles of jurisdiction, the Bribery Act also creates an entirely new offense that broadly expands the Bribery Act's extraterritorial reach: the criminalization of a commercial organization's failure to prevent bribery. Liability for the actions of another in the context of a serious criminal offense like bribery is unusual in the United Kingdom, but it is an important part of the new offense under the Bribery Act.

Under the Bribery Act, once it is established that a commercial organization carries on a business or part of a business in the United Kingdom (regardless of where it is incorporated), if an "associated person"[22] (for example, an employee, agent, or subsidiary) bribes another person or a foreign public official for its benefit, the organization may be guilty of the offense unless it can demonstrate that it had adequate procedures in place to prevent such conduct. Importantly, it does not matter if the "associated person" has no connection with the United Kingdom or that the offense took place abroad. This means that, theoretically, a parent company incorporated in Australia whose agent based in Vietnam bribes a Chinese official for the parent's benefit could be prosecuted in the United Kingdom because its subsidiary is located in London, regardless of the fact that the subsidiary is uninvolved in the offense.

In this way, the jurisdictional reach of the offense of failure to prevent bribery is broader than the jurisdictional reach of the Bribery Offenses, in that the former extends to overseas commercial organizations that carry on a business or part of a business in the United King-

dom, whereas the latter are restricted to entities with a "close connection" with the United Kingdom, as described above.

Therefore, with regard to the offense of failure of a commercial organization to prevent bribery, there has, indeed, been a significant extension of jurisdiction under the Bribery Act, well beyond both the general criminal law of the United Kingdom and the pre-existing legislation. Given this extensive scope, there is clearly potential for multinational corporations to find themselves subject to concurrent scrutiny by the UK authorities under the Bribery Act and the U.S. authorities under the FCPA. It is important to note that there are significant differences as to what may constitute an offense under the Bribery Act and the FCPA; therefore, corporate clients must ensure that their anti-corruption measures satisfy both jurisdictions.

It remains to be seen whether the SFO will succeed in utilizing its extensive new jurisdictional reach under the Bribery Act by prosecuting overseas commercial organizations with a presence in the United Kingdom for failure to prevent bribery outside the jurisdiction. As previously mentioned, the SFO has certainly expressed bullish intentions in this regard, and, when asked whether it would investigate and prosecute companies that have a limited connection to the United Kingdom, the SFO is quoted as saying:

> We welcome the ability to investigate and prosecute companies carrying on part of a business here, irrespective of where they are registered. It is part of creating a world level playing field which would see those companies having to adhere to the same international standards of our own companies and the international community.[23]

In this climate, multinational corporations with a presence in the United Kingdom would be well-advised to take the precautionary step of ensuring the adequacy of their compliance procedures. In other words, they should ensure to implement an effective anti-corruption compliance program.

This is particularly important in light of the fact that the SFO has recently taken steps to enhance its intelligence gathering faculties, which may indicate that such words are not mere prosecutorial puff. On November 1, 2011, the SFO launched a new service for confidential reporting of suspected fraud or corruption. In a message to potential whistleblowers, SFO Director Richard Alderman said,

> I want people to come forward and tell us if they think there is fraud or corruption going on in their workplace. Company executives, staff, professional advisors, business associates of various kinds or trade competitors can talk to us in confidence.[24]

Increased Importance of Anti-Corruption Compliance Program

Years of enforcement by the U.S. Justice Department and the U.S. Securities and Exchange Commission have shown that the U.S. government is serious about applying the FCPA extraterritorially to the actions of both non-U.S. companies and foreign subsidiaries of U.S. corporations. And, although the UK Bribery Act is newer and lacks the enforcement history of the FCPA, as discussed above, the SFO has indicated that it will investigate and prosecute companies worldwide.

A robust corporate compliance program can both help to stop violations from occurring and detect those that do occur so that a company may respond appropriately. However, a compliance program may also help to insulate a company from some criminal liability and possibly reduce the penalty for those liable. Under the UK Bribery Act, having "adequate procedures" to prevent bribery is an affirmative defense to the offense of failure of a commercial organization to prevent bribery.[25]

The FCPA contains no such affirmative defense, and a corporate compliance program certainly does not absolve a company of liability for past actions. However, the Justice Department has made it clear that remedial actions taken by a company, including the implementation or improvement of an effective compliance program, are to be considered in determining the treatment to afford a violator of the FCPA.[26] The Justice Department has also explicitly affirmed that it will look beyond the written policies of a company's compliance program to understand whether it is a truly effective program or simply a "paper program."[27]

Given the benefits of a compliance program and the expansive jurisdictional reaches of both the FCPA and the UK Bribery Act, implementing, improving and maintaining a robust anti-corruption program is more important than ever to global companies.

Conclusion

Global companies must be vigilant and acutely aware that both the FCPA and the Bribery Act may have direct impacts on their operations, even if they have only limited activity in the United States or the United Kingdom. As evidenced above, non-U.S. companies have frequently been the targets of U.S. enforcement actions. While the Bribery Act is relatively new, similar enforcement trends in the United Kingdom seem likely.

For these reasons, global businesses should strongly consider the implementation of effective anti-corruption programs in order to reduce the risk of violating either anti-corruption statute by preventing, detecting, and responding to improper conduct. Asserting jurisdictional defenses is simply not likely to create a successful defense once a government enforcement authority has determined that it will proceed to prosecute under any of the rationales for extraterritorial jurisdiction outlined in this article. Implementing and maintaining an effective anti-corruption program remains a prudent and recommended course of action to decrease corruption risks.

NOTES

[1] U.S. Foreign Corrupt Practices Act, 15 USC. §§ 78dd-1, *et seq.* (1977); 2010 UK Bribery Act, available at: http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

[2] *See generally* U.S. Dep't of Justice, Related Enforcement Actions, Chronological List 2011, available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2011.html; SEC Enforcement Actions; FCPA Cases, available at: http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.

   ISSN 1357-0889

[3] *See* U.S. Dep't of Justice, Related Enforcement Actions, Chronological List 2011, available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2011.html; U.S. Dep't of Justice, Related Enforcement Actions, Chronological List 2010, available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2010.html.

[4] The current top 10 list of FCPA fines is as follows: Siemens (Germany), U.S.$800 million; KBR/Halliburton (U.S.), U.S.$579 million; BAE (UK), U.S.$400 million; Snamprogetti (Netherlands/Italy), U.S.$365 million; Technip (France), U.S.$338 million; JGC Corporation (Japan), U.S.$218.8 million; Daimler (Germany), U.S.$185 million; Alcatel-Lucent (France), U.S.$137 million; Magyar Telekom (Hungary), U.S.$95 million; Panalpina (Switzerland), U.S.$81.8 million). *See* U.S. Dep't of Justice, Related Enforcement Actions, Chronological List 2011, available at: http://www.justice.gov/criminal/fraud/fcpa/cases/2011.html; U.S. Dep't of Justice, Related Enforcement Actions, Chronological List 2010, available at: http://www.justice. gov/criminal/fraud/fcpa/cases/2010.html; U.S. Dep't of Justice, Related Enforcement Actions, Chronological List 2009, available at: http://www.justice.gov/criminal/fraud/fcpa/ cases/2009.html; Arnold & Porter Advisory, Siemens Pays Record $800 Million to Settle Systemic and Widespread FCPA Violations, available at http://news.acc.com/accwm/downloads/ ArnoldPorter.FCPA_033009.pdf.

[5] *See* U.S. Securities & Exchange Commission, SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina, available at: http://www.sec.gov/news/press/2011/2011-263.htm; *U.S. Securities & Exchange Commission, United States v. Uriel Sharef et al.*, No. 11-CR-1056 (S.D.N.Y. December 12, 2011); SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro, available at: http://www.sec.gov/news/press/2011/2011-279.htm; *see also* U.S. Securities & Exchange Commission v. Paul W. Jennings No. 1:11-cv-00144 (D.D.C. January 24, 2011), available at: http://www.sec.gov/litigation/complaints/2011/comp21822.pdf (charging Jennings, a dual U.S. and UK national with violations of the FCPA).

[6] Richard Alderman, Director, UK Serious Fraud Office, Remarks at the Third Russia & CIS Summit on Anti-Corruption Conference (March 16, 2011), available at: http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2011/3rd-russia—cis-summit-on-anti-corruptionconference,- moscow.aspx.

[7] For more information about creating an effective anti-corruption compliance program, *see* Keith M. Korenchuk, Samuel M. Witten, and Dawn Y. Yamane Hewett, Arnold & Porter LLP, "Advisory: Building an Effective Anti-Corruption Compliance Program: Lessons Learned from the Recent Deferred Prosecution Agreements in Panalpina, Alcatel-Lucent, and Tyson Foods" (March 2011), available at: http://www.arnoldandporter.com/publications.cfm.

[8] For example, the Justice Department entered into a deferred prosecution agreement with the U.S. company Johnson & Johnson in 2011 for conduct undertaken by its subsidiaries and agents in Greece, Poland, and Romania. Keith M. Korenchuk, Kirk Ogrosky, Samuel M. Witten, Benjamin H. Wallfisch, Arnold & Porter LLP, "Advisory: J&J Agrees to Pay US$78 Million to Settle Allegations of Payments Made to European Healthcare Providers" (April 2011), available at: http://www.arnoldandporter.com/publications.cfm. To cite another example, Pride International (Pride) signed a deferred prosecution agreement with the Justice Department to settle allegations that three of Pride's subsidiaries, located in Mexico, Venezuela, and India, falsified records to disguise bribe payments made to non-U.S. government officials by their employees abroad. While the actions were essentially taken by the overseas entities, the falsified records were consolidated into Pride's annual report. U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties, available at: http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html. Thus, violations of the FCPA's books and records and financial control provisions can also lead to liability for subsidiaries. The SEC has similarly imposed civil liability on parent companies where foreign subsidiaries of the parent falsified books and records. For example, the SEC filed an enforcement action against Nature's Sunshine Products, Inc. and two of its officers, relying heavily on false accounting records created by Nature's Sunshine's subsidiary in Brazil in connection with payments made to Brazilian officials. U.S. Securities & Exchange Commission, SEC Charges Nature's Sunshine Products, Inc. With Making Illegal Foreign Payment, available at: http://www.sec.gov/litigation/litreleases/2009/lr21162.htm.

[9] For example, French telecommunications company Alcatel-Lucent S.A. and three of its subsidiaries agreed to pay more than U.S.$137 million in fines and penalties to settle a foreign bribery investigation into illicit payments in Costa Rica, Honduras, Malaysia, and Taiwan. U.S. Securities & Exchange Commission, SEC Charges Alcatel-Lucent with FCPA Violations: Company to Pay More than $137 million to Settle SEC and DOJ Charges, available at: http://www.sec.gov/news/press/2010/2010-258.htm.

[10] U.S. Dep't of Justice, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials: Company Agrees to Pay $28 Million Criminal Fine, available at: http://www.justice.gov/opa/pr/2011/September/11-crm-1193.html.

[11] Keith M. Korenchuk, Samuel M. Witten, and Dawn Y. Yamane Hewett, Arnold & Porter LLP, "Advisory: Anti-Corruption Compliance, Avoiding Liability for the Actions of Third Parties" (April 2011), available at: http://www.arnoldandporter.com/publications.cfm.

[12] The Bribery Act 2010 (Commencement) Order 2011 (SI No. 1418 of 2011) (UK Bribery Act).

[13] *Id.* § 1.

[14] *Id.* § 2.

[15] *Id.* § 6.

[16] *Id.* § 7.

[17] *Id.* § 14.

[18] *Id.* § 12(2)(c).

[19] *Id.* § 12(4).

[20] *Id.* § 12(3).

[21] *Id.* § 12(4)(g).

[22] Defined in Section 8 of the Bribery Act.

[23] Memorandum submitted by the SFO in relation to the draft Bribery Bill, available at: http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115we19.htm.

[24] Richard Alderman, Director, UK Serious Fraud Office, Remarks on the Launch of New Confidential Service for Whistleblowers (November 1, 2011), available at: http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/blow-the-whistle-new-route-for-insiders-to-unmask-fraud-and-bribery.aspx.

[25] UK Bribery Act, § 7(2).

[26] U.S. Attorney's Manual: Principles of Federal Prosecution of Business Organizations (9-28.300A.6.), available athttp://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300.

[27] U.S. Attorney's Manual: Principles of Federal Prosecution of Business Organizations (9-28.800), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.800.

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