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What's Next in Global Regulation of Corporate Corruption?

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It is now widely recognized that over the last decade hundreds of billions of dollars in business transactions have been influenced by bribery. The Organisation for Economic Cooperation and Development, the United Nations, and several other international organizations have publicized their commitment to eradicating corruption due to the insidious harm that bribery causes to the people and infrastructure in the countries and industries where bribes are being paid and, indeed, to the organizations paying the bribes.

With this increase in global focus on corporate bribery and public corruption, law enforcement and regulatory authorities around the world are expanding their arsenals for combating such misconduct. In the United States, the Department of Justice and the Securities and Exchange Commission have prioritized enforcement of the Foreign Corrupt Practices Act. In the United Kingdom, new anti-corruption legislation and guidance for corporations is on the near-term horizon. In many other overseas jurisdictions, regulators have developed more sophisticated programs for coordinating investigations with their cross-border counterparts.

The DoJ and the SEC have loudly publicized and demonstrated their recent mobilization of resources toward coordinated enforcement of the FCPA. They have punished multinational corporations with multi-year investigations culminating in record fines, public statements of embarrassing allegations and intrusive corporate compliance monitors. The DoJ reports approximately 140 companies currently under investigation for FCPA violations and the SEC recently announced the creation of a specialized FCPA enforcement unit that has promised "targeted sweeps and sector-wide investigations" as part of its commitment to aggressive investigations with the DoJ and international regulatory counterparts.

In the U.K., the Bribery Act of 2010 — enacted on April 8 — replaces the previous anti-bribery laws in the U.K. with an extensive new statutory scheme. It applies not only to U.K. companies, but to all companies doing business in the U.K., regardless of where they are organized or the location of the misconduct. Thus, non-U.K. companies with offices, personnel or even agents in the U.K. are subject to the new statute regardless of where the bribery occurred.

In several other respects, the Bribery Act is more expansive, comprehensive and current than the FCPA.

First, the Bribery Act addresses more forms of corruption than the FCPA does. The Bribery Act applies to corruption of both foreign and domestic public officials. In the U.S., domestic corruption of public officials is governed by a different statutory regime and subject to a separate enforcement program than that which applies to corruption of foreign officials under the FCPA. Moreover, the FCPA applies exclusively to corruption of public officials outside the U.S. The Bribery Act applies to corruption in both the public and private sectors, capturing the offense of commercial bribery that, in the U.S., is prohibited by a combination of federal tax fraud and mail and wire fraud statutes and state statutes.

Second, the Bribery Act establishes what many commentators are calling a "strict liability corporate offense" for failing to prevent bribery. This provision of the Act allows corporations to be held criminally liable if any employee or agent (regardless of seniority) performing services on behalf of a U.K. commercial organization (or an organization doing business in the U.K.) bribes someone intending to obtain or retain business or an improper advantage. The Act offers corporations an affirmative defense to such a charge — that the organization had in place adequate procedures designed to prevent persons associated with it from engaging in bribery. The U.K. government is expected to issue non-statutory, illustrative guidance on what will be considered adequate controls and procedures designed to address the risk of corruption within the corporate organization.

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Third, the Bribery Act does not carve out certain conduct that the FCPA does. The FCPA prohibits offers, payments and promises to pay money, gifts or anything of value for the purpose of corruptly influencing a foreign official. However, it excludes such payments made "to expedite or to secure the performance of a routine governmental action by a foreign official" — payments commonly known as "grease" or "facilitating" payments.

In addition, the FCPA provides two affirmative defenses if one can show that the payment or gift that was made or offered was either: (1) lawful in the jurisdiction in which it was made; or (2) a reasonable and bona fide expenditure, such as travel and lodging expenses, that was directly related to promoting or demonstrating a product or service or the execution or performance of a contract. Seemingly recognizing the dangers associated with the facilitating payment exception and the bona fide expenditure defense, the Bribery Act does not include comparable provisions.

Similar to the FCPA, the Bribery Act excludes payments that are lawful in the jurisdiction in which they were made, however, the Bribery Bill explicitly states that such payments must be permissible under a "written constitution or provision made by or under legislation applicable to the country or territory concerned" or a "judicial decision which is so applicable and is evidenced in published written sources" and not simply a matter of local custom or practice.

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Finally, the Bribery Act was designed to ensnare responsible individuals with harsher penalties than those provided for under the FCPA — up to 10 years per offense as compared to five years per offense under the FCPA. In addition, senior corporate officers who merely consent to or acquiesce in the misconduct are subject to criminal liability.

With mounting pressure and criticism from the international business and regulatory community, the U.K. Bribery Act is likely only the beginning of a wave of new or enhanced international legislation that will come to fruition in the coming years. Whether to satisfy the affirmative defense under this new legislation or mitigate the risk of misuse of corporate assets and reputational harm, the time is now to intelligently and comprehensively review and update as necessary corporate compliance controls and programs that address these risks.

About the Author

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He previously served in the Division of Enforcement at the SEC and as Senior Counsel of Investigations and Regulatory Affairs at General Electric Co.

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