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BRIBERY

The U.K. Bribery Act's Hold on American Business

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The U.S. Foreign Corrupt Practices Act, which has historically served as the sheriff regulating American corporate behavior abroad, no longer sets the gold standard for international business conduct. The worldwide call for governments to adopt sweeping anti-corruption measures was heard by the U.K. Parliament and prompted the passage of the U.K. Bribery Act 2010 (Bribery Act), which received Royal Assent in April 2010 and is scheduled to take full effect July 1.

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Once implemented, the act will have lasting impact on the way business is conducted throughout the world, and American entities must be acutely aware of the Bribery Act's stringent mandates. Much like the FCPA, the Bribery Act has far-reaching jurisdictional gravity. Furthermore, unwitting violators pay hefty fines and can possibly face lengthy prison sentences.

American firms conducting business in foreign markets can easily find themselves entangled with both domestic and foreign prosecutors if they run afoul of bribery laws. Not only is the regulation of business through criminal prosecution a growing trend, but when this impulse is coupled with the boundless ability of governments to regulate transactions only tangentially related

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to the United States, American businesses face vast challenges. With the passage of the Bribery Act, American business is once again caught in a legal quagmire and must tread through a minefield of increased regulations.

Most countries in which American businesses conduct transactions have their own versions of the FCPA, albeit with varying standards of what qualifies as corrupt behavior. What is ''corrupt'' in one country may be considered an acceptable practice in another. Given the close economic relationship between the United States and the United Kingdom, and the fact that many American firms maintain offices on British soil, proper compliance with the Bribery Act will become just as essential as compliance with the FCPA. In fact, the Bribery Act is significantly more robust than its American counterpart and contains unusual provisions that every American firm doing business abroad should understand and seek to comply with.

Significant Differences

Some significant differences between the FCPA and the Bribery Act must be noted at the outset:

- While the FCPA focuses on the corruption of foreign ''officials,'' the Bribery Act goes further and prohibits the bribery of anyone, including private individuals.
- The FCPA occasionally permits the extension of ''facilitation'' or ''grease'' payments, while such payments are explicitly banned by the Bribery Act.
- The Bribery Act prohibits certain forms of ''corporate hospitality'' if they are ''intended to subvert the duties of good faith or impartiality that the recipient owes to his employer.''
- The Bribery Act's innovative application of strict liability for the failure of a corporate official to prevent bribery extends far beyond the FCPA, which has no strict liability provisions by statute or by judicial construction.
- The Bribery Act contains heightened penalties, including incarceration maximums that more than double its American counterpart, as well as limitless fines.

Unlike the FCPA, the Bribery Act is violated when an individual bribes, or attempts to bribe, another person with the intention of gaining some benefit. The criminal act is completed even if an individual only makes a promise to bribe or if the intended goal underlying the bribe is never realized. Furthermore, a bribe is not necessarily defined as monetary or substantial—the conferring of any ''benefit'' is sufficient to trigger prosecution. The Bribery Act prohibits both public officials and those ''connected with a business'' from offering bribes to anyone.

Categories of Offenses

In general, the Bribery Act contains four distinct categories of offenses:

(1) promising, giving, or offering a bribe to another individual;

(2) accepting, requesting, or agreeing to receive a bribe;

(3) bribing a foreign public official; and

(4) a strict liability corporate offense of failing to prevent bribery.

The first two constitute general offenses and permit prosecution for bribery offenses not involving public officials; however, the third offense involves the corruption of government officials and agents, while the fourth introduces a strict liability scheme for failing to prevent bribery. This last provision is the act's most perilous innovation, as intent is discarded as an element of the crime and firms can be held liable for failing to prevent noncompliance. This represents a significant break with previous anti-corruption laws in both the United States and the United Kingdom, and businesses on both sides of the Atlantic must take notice.

With regard to extraterritorial application of the Bribery Act, any U.K. citizen or British company conducting business anywhere in the world is within its reach. Even transactions occurring outside the United Kingdom remain subject to its stringent requirements. In addition, foreign companies maintaining offices or conducting business in the United Kingdom—and even those who merely employ U.K. citizens—fall under much of the act's jurisdiction.

For example, an American corporation with an Egyptian office employing a British citizen may be held liable for actions committed by a partially owned subsidiary based in China transacting business in Liberia. As nonsensical as that appears, there is no requirement that the offending transaction be channeled through British bank accounts, markets, or corporations—any tangential connection to the United Kingdom may subject an entity or person to prosecution under the Bribery Act. The scope of the government's enforcement authority will be determined only over time.

Defining a Bribe

This begs the question of what exactly constitutes a bribe? Unfortunately for businesses, prosecutors retain a great deal of discretion in making this determination, and the standard is subjective. Essentially, if a person or entity offers something of value to induce ''improper'' performance by another party in the execution of their otherwise lawful duties, such an action constitutes illicit conduct. Furthermore, ''improper'' performance is a breach of what would be expected of the honest, fair, and impartial execution of duties expected of one holding the public's trust. In addition, not only does the Bribery Act give prosecutors the ability to punish those offering bribes, but those receiving bribes will be subject to criminal charges as well. This gives the British government almost unlimited power to regulate many American businesses with the threat of costly, high-stakes prosecution.

Severe Punishment. The penalties for violating the Bribery Act are draconian; accordingly, every corporate entity transacting business abroad should implement programs to avoid prosecution. In fact, the presence of a compliance scheme is the only available defense against the strict liability provisions. With penalties for each offense imposing up to 10 years in prison and unlimited fines, corporations and their leadership should maximize efforts to avoid provoking prosecutors and take affirmative steps to avoid even the appearance of impropriety.

The first step for any multinational corporation is to recognize that the FCPA is no longer the international standard for the prevention of corrupt practices. Al-

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though businesses should ensure compliance with both the FCPA and the Bribery Act, particular attention should be paid to the Bribery Act and its strict liability measures because they provide a plethora of hidden traps.

As the lord chancellor notes in his proposed consultation guide, there are six principles for bribery prevention incorporated into the legislation that address Parliament's concerns with corporate corruption:

(1) ensuring that corporations remain engaged in efforts to understand bribery risks in their particular markets;

(2) encouraging top-level management to establish a clear, zero-tolerance culture in which bribery is completely unacceptable;

(3) fostering proper due diligence so that corporate entities know those with whom they are transacting business;

(4) facilitating clear, practical policies and procedures;

(5) effective implementation; and

(6) continued monitoring and review.

Businesses should use these policy goals as a guide as they develop compliance programs and train their risk assessment officers to orient the overall culture of the firm toward facilitating these objectives.

Constant Assessment

The regular and comprehensive assessment of an entity's exposure to the risk of committing a violation of the Bribery Act must include efforts to gauge:

- country risk,
- transaction risk, and
- partnership risk.

Country risk is the peril a business encounters as a result of conducting transactions in nations that lack clear anti-corruption laws and that are often known to be rife with corruption in both the public and private sectors. A lack of transparency in the government, media, and business community all indicate a heightened risk of corruption. In addition, reputable organizations, including the United Nations, publish league tables detailing perceived levels of corruption in various countries. These factors should be considered together to promote an understanding of particular business environments and the risks associated with undertaking certain transactions.

Transaction Risk. Transaction risk describes those business dealings that involve public procurement, government-issued licenses, charitable and political contributions, and government agents or subsidiaries. For example, an American airplane manufacturer with close ties to the United Kingdom must exercise an abundance of caution in selling products to a Chinese airline in which the government owns stock. Depending on the country and industry involved, quid pro quos—implicitly or expressly—are often a standard prerequisite to conducting business or even having the opportunity to meet with those responsible for awarding contracts. It is particularly important to realize that what may be considered customary business practices in one region may be considered criminal to British prosecutors.

Businesses should also know their business partners. Partnership risks—those potential liabilities incurred as a result of joint ventures—are often a problem when firms engage in projects with partners in high-risk jurisdictions or government officials in other parts of the world. It is easy for American corporations to rely upon the judgment of foreign partners, but this behavior facilitates a breakdown of proper compliance procedures and provides enough latitude for partners to make bad decisions that might be vetoed by American management. Even if foreign partners are honest in their conduct, a lack of proper oversight can lead to an unwitting violation of both British and American law.

Promoting Positive Environment

To foster an atmosphere of honesty and transparency, businesses must possess a commitment to compliance with the Bribery Act at all levels of management. A corporation's tone is set by its senior executives, and a firm resolve to comply with anti-corruption laws must be a clear priority. Businesses should add anti-corruption policies to their employee handbooks and employment agreements and should include them in all contracts. Corporations should take a zero-tolerance attitude toward anyone found in violation. Senior management must communicate its commitment to honest business practices to its foreign and domestic partners and should refrain from joint ventures with entities of ill repute. Finally, corporations should consider appointing a senior member of the management team to oversee compliance operations, thus ensuring that anti-corruption measures are executed at the highest levels in a fashion similar to diversity or harassment policies. Such a commitment not only would engender compliance at lower levels but would also ensure that there is a uniform application of preventive measures throughout the corporate body.

Crystal Clear. In addition, unambiguous, pragmatic policies should be articulated with regard to blackmail and extortion, and corporations should be ready to counsel their agents and employees in areas of gift giving, donations, providing hospitality, and promotional expenses. Unqualified submission to whistleblower acts, including the U.K. Public Interest Disclosure Act of 1998, should further demonstrate a corporation's commitment to honesty and fair dealing.

Given the extraordinary reach of both the FCPA and the Bribery Act, a corporation should engage in extensive due diligence with all of its partners, suppliers, and associated entities. If risk assessment is to be effective, businesses must intimately know the potential for hazards they face through their associations with other entities. Particular attention must also be paid to the costs associated with the performance of a particular contract—if a deal seems unusually good, compliance officers should be on high alert. For instance, if it usually costs $2 to manufacture a single unit of a particular good, but a supplier offers it for less than half the standard market price, a compliance officer should tread carefully and be suspicious of the potential that some corrupt practice is involved.

Checks and Balances. The task of compliance with the Bribery Act and similar regulations should be spread among senior management in a system of checks and balances, and internal policies should be continually reviewed and modernized. Senior management in large and small businesses should closely monitor cash flows

to ensure that money is not being funneled to illegal activities, and any suspicion of bad behavior must be reported to an auditing committee or board of directors. To increase transparency, some businesses may want to consider the use of external auditors to conduct anti-bribery investigations. This will not only ameliorate the concerns of government examiners, but it will permit shareholders to know that management is compliant with all applicable regulations. Such transparency is particularly important if a company has been accused of violating anti-bribery laws or if management suspects that an isolated incident has occurred and wishes to address it promptly.

Outlook

Many variables remain with regard to the practical application of the Bribery Act, and there are already widespread calls for its repeal. Many of the act's provisions are unclear, and the only known consequence will be the stifling of international transactions involving the United Kingdom. In this fragile economy, Parliament's need to engage in hyper-regulation may have a chilling effect on long-term fiscal growth.

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