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A NEW WEAPON IN THE ARSENAL FOR THE FIGHT AGAINST CORRUPTION: THE U.K. BRIBERY ACT OF 2010

After more than a decade of deliberation, the United Kingdom enacted new anti-corruption legislation on April 8, 2010. The "Bribery Act" replaces a patchwork of common law and statutory offenses dating back to 1889, and it is designed to simplify and modernize the United Kingdom's current restrictions on bribery. The U.K. Bribery Act differs from the U.S. Foreign Corrupt Practices Act ("FCPA") in several key respects, including the addition of a new corporate offense for failing to prevent bribery and an outright ban on facilitating payments.

The Bribery Act criminalizes paying a bribe to a foreign public official, as well as offering, promising, requesting, accepting, or agreeing to receive a bribe. The jurisdictional principles of the Bribery Act are almost identical to those of the FCPA, in that the U.K. law applies to bribes made on U.K. soil by foreign companies and bribes made overseas by U.K. citizens, including businesses, passport holders, and residents. Unlike the FCPA, the Act's restrictions encompass both domestic private corruption and the overseas bribery of foreign officials. Furthermore, where a company commits an act of bribery with the "consent or connivance" of a senior officer, that individual may also face personal criminal liability. Given the broad reach of the new Act, companies based in and outside of the U.K. must pay careful attention to the nuances of the law and the ways in which it differs from the FCPA.

FAILURE TO PREVENT BRIBERY

The Act introduces a corporate offense for failing to prevent bribery by persons associated with any entity that conducts any part of its business in the U.K., without respect to its corporate citizenship or where the conduct occurred. Commercial organizations violate this section of the Act where a person associated with the organization commits an act of corruption with the intention of obtaining or retaining business or of obtaining or retaining an advantage in the conduct of business for the organization. For purposes of this legislation, a person is deemed to be "associated" with a commercial organization if he or

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she performs services for or on behalf of the organization, without regard to whether the person is an employee, agent, or subsidiary company.

The corporate offense is subject to strict liability. Earlier drafts of the legislation imposed liability only if the organization was negligent in failing to prevent bribery. These limitations were excluded from the final version of the Act, and a commercial organization can, therefore, be found guilty of an offense regardless of its state of mind or the state of mind of those who control it. Despite this far-reaching prohibition, the Act contains a statutory defense whereby an organization can escape liability by showing that it had in place "adequate procedures" designed to prevent bribery. Although the Act does not define "adequate procedures," it imposes a statutory duty on the Secretary of State to publish relevant guidance. While that guidance will not be prescriptive, the government has indicated that it will reflect a proportionate, risk-based approach to what constitutes "adequate procedures." The "failure to prevent" offense will not become binding until after that guidance is published and a grace period in which organizations will have the opportunity to consider the guidance and implement appropriate anti-bribery procedures has passed. It is anticipated that the offense will come into force in October 2010.

NO EXCEPTION FOR FACILITATING PAYMENTS

The Bribery Act contains no exception akin to the FCPA's treatment of facilitating or "grease" payments. To the contrary, the Bribery Act contains an outright ban on all bribery. Opponents challenged this aspect of the Act, noting that it would prohibit activities permitted in jurisdictions such as the U.S. and place U.K. businesses at a commercial disadvantage. The fears of such consequences on competition appear overblown. Because the FCPA's exception for "facilitating payments" provides a notoriously unreliable legal standard, many U.S. companies opt to ban such payments altogether. Indeed, in this respect, the Bribery Act is in line with broader trends in anti-corruption law. Only last year, the Organization for Economic Cooperation and Development ("OECD") called for member countries to prohibit facilitating payments. For more information about the facilitating payment exception under the FCPA, *see Jones Day Commentary*, "OECD Calls for an End to Facilitating Payments Exception" (December 2009), available at http://www.jonesday.com/oecd__calls/.

PENALTIES

The Bribery Act also increases the penalties applicable to corrupt payments under U.K. law. A natural person convicted on indictment of an offense faces a maximum penalty of up to 10 years (formerly seven years), in addition to any fine imposed. Corporations face an unlimited fine under the Bribery Act. As importantly, corporations convicted of a corruption offense can be subject to debarment from selection for public contracts under the Public Contracts Regulations of 2006, which implemented the European Union Public Sector Procurement Directive of 2004.

OTHER ANTI-CORRUPTION DEVELOPMENTS IN THE UNITED KINGDOM

The enactment of the Bribery Act capped a particularly busy first quarter for anti-corruption prosecutors in the U.K. More anti-bribery and corruption activity by the Serious Fraud Office ("SFO") as well as the U.K.'s financial regulator, the Financial Services Authority ("FSA"), has led to a number of settlements, sizable fines, and criminal convictions.

U.K. authorities are poised to ramp up all manner of enforcement activities and have encouraged more companies to self-report violations. Last year, the SFO issued a guide to self-reporting, "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" ("Guide"), designed to encourage companies to bring violations to the attention of the U.K. enforcement authorities in exchange for the prospect of lighter penalties, if in the interests of justice.

As recent comments by a high-ranking justice official in the United Kingdom suggest, however, the SFO does not have the same authority as the U.S. Department of Justice to resolve cases by agreement. On March 26, 2010, a British judge warned the head of the SFO, Richard Alderman, that he may recommend the terms of plea agreements for corruption prosecutions, but the final decision remains with the court in all cases. The court's objections appear to have arisen primarily from the fact that plea agreements in the U.K. have traditionally been subject to a greater degree of judicial consideration and discretion than in the United States, where prosecutors have more freedom to negotiate the terms. The judge's concerns may have been triggered in part by the disparity between the $12.7 million fine paid to the U.K. by one corporation and the $27.5 million in fines and penalties that the same company paid to U.S. authorities.

DIVERGENT U.K.-U.S. ENFORCEMENT PHILOSOPHIES

Publicly reported events suggest that, despite the new U.K. legislation and mutual expressions of support for the effort to stamp out international corruption, authorities in the U.S. and the U.K. differ in their approach to enforcement. In recent years, the DOJ has picked up at least one prosecution under the FCPA after the SFO very publicly declined to pursue corruption charges in a highly charged political environment. It thus comes as no surprise that, even as the U.K. ramps up enforcement, a rift may still exist between the manner in which each country applies its ban on foreign bribery.

In early March, SFO head Alderman received press attention for remarks that he made during a public discussion of the U.K.'s new Bribery Bill. Mr. Alderman suggested that there might be circumstances in which the SFO would not take action even when "a bribe" (his characterization) had been paid. Mr. Alderman pointed to mitigating "moral and ethical" difficulties that might exist in a case where prosecution was declined, and he noted that in some circumstances there could be a lack of intention on the part of the payer to act corruptly. The circumstances about which Mr. Alderman was speaking involved granting a foreign official a 51 percent stake in a subsidiary in explicit exchange for the right of that subsidiary to continue a profitable business in a country. As reported by the SFO, Mr. Alderman stated:

> While we cannot compromise overall ethical standards, there needs to be considerable sensitivity as to how those standards play out….
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> And so, what does this mean? Let me give you an example. I was approached by the Board of a corporate that is involved in one of these countries. They had a 100 percent subsidiary. This was becoming very profitable and so they received an approach from the Government. They were told that if they wanted to continue to do business in the country then they would need to transfer a 51 percent interest in the subsidiary to the family of the President. That gave rise to all sorts of worries for them for obvious reasons. One of these was whether or not the SFO would take the view that payment in this way was a bribe. They were concerned we might investigate and prosecute. I assured them that I would have no intention of doing that whatsoever. I said I recognised the very great difficulty of the moral and ethical position that they were in. This was something they would have to resolve. What I could do though was to give them comfort that whatever they did, we would be sensitive to the circumstances here and would not seek to take any action, even if technically the transfer of the interest in the subsidiary constituted a bribe. They found that very helpful.

It appears doubtful that the U.S. DOJ or the SEC would share Mr. Alderman's interpretation of these facts. Indeed, Mr. Alderman subsequently suggested that these remarks were motivated by a desire to bring the right cases before criminal juries and concentrate the SFO's resources on the egregious cases. Businesses should not, therefore, be lulled into a false sense of security by Mr. Alderman's comments, whether under U.S. or U.K. law.

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