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The Global Reach Of The UK Bribery Act

The Editor interviews ***Justin Williams****, Partner in the London office of Akin Gump Strauss Hauer & Feld LLP, practicing international litigation and arbitration, and* ***Wynn H. Segall****, Partner in Akin Gump's Washington DC office, whose practice focuses on global security and global trade compliance.*

Editor: The UK Bribery Act is now in force. What major provisions distinguish this statute from the FCPA? In what respects does it have a broader reach?

Williams: In a number of respects the UK Bribery Act has a broader reach than the FCPA in that activity that would not be an offense under the FCPA might be an offense under the UK Act. For example, under the Bribery Act commercial bribery (i.e., bribery of persons who are not public officials) is an offense, and likewise acceptance of bribes is an offense. The most significant difference, however, is in relation to corporate liability. If a company "carries on business" in the UK, then if it or a person "associated" with it bribes anyone then the company has committed a strict liability offense in the UK to which the only defense is that the company has in place "adequate procedures" to prevent bribery. What that effectively amounts to is a reversal of the burden of proof — once it is found that a bribe has been paid, then the burden of proof shifts to the company to show that it has in place "adequate procedures" to prevent bribery. If the company fails to discharge that burden, then it commits the offense.

This raises issues as to what is the meaning of "carries on business" in the UK, "associated" person and "adequate procedures." The UK government has given some guidance, but there remains significant uncertainty in this area. We'll have to wait for clarification until cases reach judgments in the UK courts.

Segall: While the FCPA has been aggressively enforced in the U.S., the U.S. law does not include similar express mandates for internal controls and compliance programs

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despite the practical incentives for companies to avoid and prevent violations. The mandate for adequate procedures under the Bribery Act does raise the stakes, placing a premium on compliance programs in a new way. Before the Bribery Act it has become increasingly common for large global companies to maintain formal internal controls, including elaborated written anticorrruption compliance policies and procedures. However, such measures have not been required by law. Smaller corporations and non-public companies have varied more widely in their approach to anticorruption compliance measures. Until now, the adoption of formal internal compliance programs to address these issues has been an option but not a mandate.

The Bribery Act creates a clear impetus for companies that carry on business in the UK to adopt formal compliance programs that are well-articulated, consistent with basic benchmarks that track with established global business best practices that are recognized in guidance that the SFO has provided on key elements associated with "adequate procedures" to address anticorruption compliance under the Bribery Act. Accordingly, formalized compliance safeguards are a necessity for U.S. companies that have a foot in the UK.

The fact that commercial bribery as well as bribery of foreign officials is captured under the UK Bribery Act also could have real significance for affected U.S. companies because it expands the potential basis for extraterritorial enforcement against U.S. companies under English law to areas of concern not previously subject to the FCPA. However, it is still unclear how British authorities will approach these issues.

The UK Bribery Act certainly provides a clearer potential basis for dual prosecution by British authorities of companies that have a business presence in both the United States and the United Kingdom in a way that goes beyond what we have seen in the past. But it remains to be seen how the SFO approaches its new mandate.

The FCPA still appears to provide a more aggressive basis for assertion of jurisdiction than the Bribery Act. Under the FCPA, U.S. enforcement can and has been pursued against non-U.S. companies solely based on the fact that they are an issuer of securities in the United States. In its initial guidance the SFO has indicated that it does not intend to take a similar approach where the only nexus with U.K. jurisdiction is the fact that a company is an issuer of securities in the United Kingdom. So this is an area in which it appears that British authorities may be somewhat less aggressive in their approach to enforcement than their American cousins. However, there are still more questions than answers regarding how the UK will approach extraterritorial enforcement.

Editor: What are the guidelines that stipulate when the Act becomes effective vis-à-vis U.S. or other foreign businesses?

Williams: The Act came into force on July 1, 2011. It's not retroactive so it only covers bribery as from that date, but it means that organizations should be acting now if they haven't already put in place the protections that they will need.

The Bribery Act will affect all U.S. companies and all companies globally who "carry on business" or a part of a business in the UK. It means that if someone associated with them pays a bribe anywhere in the world, then that is an offense in the UK. If a U.S. corporation carries on business in the UK and one of its employees pays a bribe in Brazil, it doesn't matter that the bribe has nothing whatsoever to do with the UK. But, in principle, it would be an offense under the UK Bribery Act. This

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means, in practice, that U.S. corporations that conduct business in the UK will need to ensure that they have in place "adequate procedures".

Segall: The United States has pursued enforcement actions against non-U.S. companies that have a nexus with U.S. jurisdiction under the FCPA for quite some time. There do appear to be important distinctions between the SFO's anticipated approach and the way in which the Justice Department and the SEC have asserted jurisdiction over non-U.S. companies in the past. The United States has pursued enforcement and secured substantial penalty assessments against companies that have had relatively little nexus with the United States. For example, Statoil, a foreign company, was previously subject to U.S. enforcement a few years ago in connection with alleged bribery that occurred offshore the United States on the basis that Statoil was an issuer of securities in the United States. This occurred was after Statoil was first subject to investigation and enforcement in its home country. Ultimately the U.S. penalties levied under the FCPA were substantially higher than the penalties assessed by Norway. In recent guidance on the U.K. Bribery Act, the SFO has indicated that it is not inclined to pursue enforcement of the new U.K. law solely based on the fact that a non-U.K. company is an issuer of securities in the United Kingdom absent other indicators that it carries on business in the country.

Editor: Initially, the Act seemed to be more comprehensive in its bribery provisions, which extended to any business dealings in the UK. Do you take heart that the enforcement of these provisions may be softened by subsequent guidance by the Ministry of Justice and the Serious Fraud Office? Was there serious business opposition to the Act when it first was passed?

Williams: The Bribery Act was enacted in the UK in the final days of the previous Labour Party administration. The incoming Conservative Party government has been a little more receptive to concerns raised by business and therefore the finalized guidance it has issued on the Act is more business-friendly than the consultation draft suggested it would be. In particular the finalized guidance provides more comfort about the effect of the Act on corporate hospitality, gifts, promotional expenditures and facilitation payments. However, there are no changes to the language of the Act by way of carve-outs in those areas as there are in the FCPA. Nevertheless, what the UK guidance emphasizes is that this regime will be enforced in a reasonable and proportionate way – in general terms, bona fide hospitality and promotional expenditure may continue unless intended to influence a public official or to obtain "improper" performance of a function. As to enforcement activity by the SFO, the relevant UK enforcement authority, I think that is likely to focus on the more egregious incidents of bribery.

Nevertheless, it is important for companies to have compliance policies that achieve compliance with the UK Act in all areas, including hospitality and facilitation payments.

Editor: Is the SFO staffing up for this?

Williams: There have been some suggestions that the SFO should itself be dissolved, and so it is under some political pressure to justify its existence. However, the SFO is to be given only an additional two million pounds for enforcement of the UK Bribery Act over and above its existing budget for enforcement of the preexisting old anticorruption regime in the UK. Therefore it will have only limited resources, which in turn will inform its enforcement strategy and focus.

Editor: Is there a different code of conduct for different types of businesses? Who makes the decision as to whether a company is in conformance with the norms for a given industry?

Williams: The regime is the same across different industries but the way the Act is applied may vary in certain respects. For example, one factor that you might take into account in deciding whether hospitality was intended to influence a foreign public official and therefore amount to an offense is what level of hospitality is normal in the relevant industry.

Editor: Are executives and board members of companies subject to prosecution if companies are found in violation, as in the U.S.?

Williams: Executives are exposed in two ways: one is if they personally were involved in the commission of an offense. But of wider concern is the provision in the Act that if an executive *connives* in such an offense, then that executive per se commits the offense. That raises a question of what does *connive* in the commission of an offense mean? It has been suggested that conniving might mean failing to put in place adequate procedures on the grounds that the executive is aware that the company is exposed to a risk, but closes his or her eyes to it .My view is that that interpretation in most cases would be extreme.

Segall: Companies that are subject to U.S. jurisdiction that carry on business in the United Kingdom now face a much more pronounced risk exposure and potential liabilities in connection with global anticorruption concerns. For U.S. companies it is important to note that the UK Bribery act substantially amplifies the potential legal liabilities and reputational harm that could flow from incidents of bribery in far-flung corners of the globe in ways that may prove relevant to considerations of materiality and Sarbanes-Oxley mandates for the maintenance of effective internal controls. With the possibility of U.K. penalties being assessed in addition to U.S. penalties for a single incident, the potential amount of direct legal liabilities may be substantially higher for affected companies in future cases where dual U.S. and U.K. prosecutions occur.

Editor: In the U.S. opinion letters may be rendered by the FCPA section of the Justice Department. To whom should a U.S. company with offices or activities in the UK appeal for guidance as to a contemplated marginal activity?

Williams: The UK's Serious Fraud Office is responsible for enforcement of the UK Bribery Act. The Director of the SFO, Richard Alderman, has actively encouraged companies with concerns as to the implications of the Bribery Act to approach it to ask for guidance.

Editor: What measures should a company take – whether operating in the U.S. or the UK – when engaging an agent to perform third party services?

Segall: The same compliance imperatives exist in the United States and the UK under the FCPA and the UK Bribery Act: be very careful in conducting diligence and use of agents; understand who such third parties are and how they conduct their business; provide clear instructions and conditions in contracts that condition such engagements on compliance with your company's established global anticorruption internal controls and procedures to safeguard compliance; include guidance on safeguards regarding use of agents in your compliance program and compliance training; maintain a written record of your communications with agents that expressly bar them from engaging in any acts of bribery; take steps to review and verify that any agents used conform their activities with these limitations in practice.

In our view, it is critical for companies to develop a harmonized global approach to their anticorruption compliance controls. Effective antibribery compliance programs should be aligned both with established benchmarks associated with the FCPA and the new standards of the UK Bribery Act, as well as other multilateral and national antibribery regimes. For any global business, consistent global anticorruption standards and mandates are elemental to maintain an effective global antibribery compliance program.