



Haynes and Boone, LLP and Lawrence Graham LLP

welcome you to a panel discussion on

Anti-Bribery Goes Global:

**A Review of International Business Concerns
including the U.S. Foreign Corrupt Practices Act
and the New U.K. Bribery Law**

Tuesday, June 29, 2010

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Setting precedent.



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Foreign Corrupt Practices Act



- Anti-Bribery
 - Payment with corrupt intent
 - Foreign official
 - To obtain or retain business / business advantage
- Books & Records
 - accurately, fairly reflect transactions
 - system of internal accounting controls
- Facilitating Payments Exempted
- Positive Defences
 - lawful under local law
 - promotional expenses
- DOJ Opinion Procedure

- Member-States must criminalise bribery of Foreign Public Officials (FPOs)
- Terms similar to FCPA
 - FPOs only
 - business purpose test
 - facilitating payments exempt
- Working Group monitors compliance

UK Bribery Act 2010

- Royal Assent 8 April 2010
- *Probably* in force October 2010
- Abolishes previous law
- Re-defines general payment and receipt offences ss.1 – 5
- Two new offences:
 - s.6 bribery of a foreign public official
 - s.7 failure of commercial organisation to prevent bribery
- Jurisdiction greatly extended
- No public / private distinction
- Prosecution decision for Serious Fraud Office (SFO) not AG
- 10 years/ unlimited fine on indictment

FCPA

Accounting Provisions

- Issuer

Antibribery Provisions

- Issuer
- Domestic concerns
 - US citizens
 - Companies located in US
 - Companies organized under US law
 - Employees, shareholders, or agents of domestic concerns
- Anyone engaging in an act in US in furtherance of bribe

Bribery Act

S.1, 2, 6

- UK nationals, UK companies, in any location
- UK residents, of any nationality, in any location
- Non-UK nationals / residents if any element takes place in UK
- Private bribery as well as public officials

S.7

- Any body corporate (wherever incorporated) carrying out business or part of business in UK

Bribery of Foreign Public Official

FCPA

- offers or gives anything of value
- to foreign public official, political candidate, or political party
- to corruptly influence the recipient's performance of duties
- to "obtain or retain business"
- Defences
 - facilitation payments
 - reasonable promotional expenses
 - payments permissible under local written law
 - DOJ opinion (only applicable to party that obtains opinion)

Bribery Act

- P offers promises or gives advantage to F (or connected person), and
- P intends to influence F and intends to obtain / retain business advantage
- F not permitted/required by written law *to be influenced by* the offer etc.
- no defence of promotional expenses
- no defence of expedition of routine govt. action (facilitation payment)

Facilitation Payments

- Does not mean “small”
- SEC v. Avery Dennison Corp. (July 2009) – through China division, paid kickbacks, sightseeing trips and gifts to Chinese government officials totaling approximately \$30,000 and illegal petty cash payments to customs officials and others in several countries totaling \$51,000

FCPA

- “any officer or employee of a foreign government or any department, agency, or instrumentality thereof”
- any officer or employee of a public international organization

Bribery Act

- Has legislative, judicial, administrative position in foreign country / territory
or
- Exercises a public function
 - for foreign country/territory
or
 - for public agency/ public enterprise in foreign country
or
- Is official or agent of international organisation

Who is an FPO?

- Government officials in Kyrgyzstan and Thailand (or anywhere) -- SEC v. Bobby J. Elkin et al.
- Director of a public, state-owned hospital in Italy -- In the matter of Immucor, Inc. and SEC v. DeChirico; Doctors and laboratory employees who controlled purchasing decisions at state-owned hospitals in China – In the matter of Diagnostic Products Corp.
- Consultant making payments to employees of Petroleós de Venezuela, S.A. – In the matter of Oil States International, Inc.; SEC v. Bobby Benton (Pride International)
- Egyptian Air Force officials – SEC v. Thomas Wurzel (ACL Technologies)
- Officials at majority state-owned companies or joint ventures with government – In the matter of Con-Way, Inc.

S. 7 "Commercial Organization" failing to prevent bribery

If:

- a person (e.g. employee, agent, JV) *providing services for or on behalf of C.*
 - commits payment offence (s.1) or FPO offence (s.6)
 - intending to obtain / retain business / advantage for C.
 - then C is guilty of the offence
 - subject to defence of "adequate procedures"
-
- S.14 – "senior officer" consenting / conniving at a s.1 or s.6 offence also liable, does not have procedures defence
 - Govt. will issue guidance on adequate procedures
 - Applies to private and public, domestic and international
 - Applies to any "commercial organisation " carrying on business in UK

Path to liability S.7

- i) C a commercial organisation, **and**
- ii) A performing services for / on behalf C, **and**
- iii) A provides advantage to FPO, intending to influence functions, to gain business or business advantage for C, FPO not permitted by law to be influenced by advantages, **or**
- iv) A provides advantage to anyone to induce or reward improper performance of relevant function and to gain business or business advantage for C, **or**
- v) A provides advantage to anyone who should not receive advantages as part of their relevant function, to gain business or business advantage for C, **and**
- vi) C cannot prove had adequate procedures designed to prevent such conduct by A **and**
- vii) any part of the offence committed in UK (decision, instruction, payment), **or**
- viii) C conducts any business in UK or is UK registered, **then**

C is liable under s.7. Depending jurisdiction, A liable under ss.6 or 1.

s.14 – as above, "senior officers" liable if consented to or connived in commission of offence by C but no adequate procedures defence, may also be guilty of conspiracy with A or C to commit s.1, s.6 offence.

- SEC v. Nature's Sunshine Products, Inc., Douglas Faggioli and Craig D. Huff, July 31, 2009
- SEC alleged the senior officers had supervisory responsibility over senior management and policies
- Allegations by the SEC that the two officers failed in their supervisory responsibilities over management and policies for books and records that accurately reflected the transactions and over management and policies for the company's system of internal controls.
- Expansion of personal FCPA liability and the SEC's willingness to pursue senior executives if they fail to establish or ensure compliance with corporate controls
- A defense where "the controlling person acted in good faith and did not directly or indirectly induce" the violation

US Sentencing Guidelines § 8B2.1

Key: to detect criminal conduct and promote a culture of compliance

- Establish standards and procedures to detect misconduct
- Knowledge and reasonable oversight by governing authority
- Exclusion from “significant authority personnel” of persons known to (or should have been known to) engage in illegal activities or conduct inconsistent with compliance
- Reasonable steps to communicate standards and procedures
- Reasonable steps to ensure compliance through monitoring and audits, evaluate effectiveness, and allow anonymous reporting
- Consistent enforcement and discipline
- Reasonable response to criminal conduct

Bribery Act

(Likely)

- Commitment from top
- Control hospitality, gifts and donations
- Vet and control third parties
- Provide training
- Keep proper records
- Audit appropriately
- Monitor the programme
- Protect whistleblowers
- Respond appropriately – investigate, cooperate

New UK Enforcement Regime

- Max sentence 10 years, unlimited fine
- Serious Fraud Office (Economic Crime Agency)
 - 100 staff on overseas corruption
- City of London Police / DFID Specialist Unit
- Other Agencies- FSA, SOCA

- Public interest test for all prosecutions
- Discretion re isolated facilitation payments
- A "plea-bargain" / leniency model for corporates?
 - SFO Guidance July 2009
 - *BAE, Mabey & Johnson, Balfour Beatty, Aon*
 - Maybe not: *R v Innospec, R v Dougall*

- OECD Convention States
- Japan
- Germany
- France
- Brazil
- Russia
- India
- China
- Offshore

“Anything of Value” – Lavish Entertainment



- FCPA specifically covers the payment of money or “anything of value” to any person if some or all of that money or thing of value will be provided to or used to influence a foreign official
- SEC v. UTStarcom, Inc., (N.D. Cal.), Dec. 31, 2009
- The SEC alleged that UTStarcom's wholly-owned subsidiary in China paid nearly \$7 million between 2002 and 2007 for hundreds of overseas trips by employees of Chinese government-controlled telecommunications companies that were customers of UTStarcom, purportedly to provide customer training. In reality, the trips were entirely or primarily for sightseeing.
- The SEC also claimed that UTStarcom provided lavish gifts and all-expenses paid executive training programs in the U.S. for existing and potential foreign government customers in China and Thailand. UTStarcom also purported to hire individuals affiliated with foreign government customers to work in the U.S. and provided them with work visas, when in reality the individuals did no work for UTStarcom.

FCPA

Who

- Domestic concern or foreign issuer of US securities

What

- Pay FPO, business purpose, corrupt intent
- Specific books/records offence
- Private sector excluded from antibribery provisions (outside US)

Defences

Facilitation Payment

Legitimate Expenses

DOJ Opinion

Bribery Act

Who

- Domestic concern or foreign entity with business in UK

What

- Pay FPO, business purpose, corrupt intent
- No specific books/records offence
- Private Sector included

Defences

Adequate Procedures
(corporate only)

De minimis cases not in public interest

- Universal Exports of TX sells aviation fuel, CEO is Dave.
- UE's non-US business run from Heathrow
- Lotus is Asian airline, 50% state owned, tendering for long-term fuel supply contract. Nick is CEO, and a Senator
- Dave dines with Nick in London
- UE's local JV (owned 50/50 with local partner):
 - endows university in Nick's home state
 - decides to book all flights through Lotus
 - offers consultancy to Nick's cousin
- UE wins tender and \$500m contract
- Dave invites Nick to exclusive retreat in Jackson Hole
- Dave receives platinum membership of Lotus generalissimo club

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