

Insights and Commentary from Dentons

On March 31, 2013, three pre-eminent law firms—Salans, Fraser Milner Casgrain, and SNR Denton—combined to form Dentons, a Top 10 global law firm with more than 2,500 lawyers and professionals worldwide.

This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

FCPA + UK Bribery Act = greater global exposure

Jan 28 2011 [Michelle Shapiro](#)

Enforcement of the US [Foreign Corrupt Practices Act](#), which prohibits bribery of foreign officials, has skyrocketed in recent years. 2010 was no exception, with the government bringing an unprecedented number of FCPA actions. This upward trend is sure to continue, particularly in the light of announcements that the US Department of Justice and Securities and Exchange Commission will each commit additional resources to investigating FCPA violations. The passage of provisions in the Dodd-Frank Act that financially reward whistleblowers for reporting FCPA violations may further result in a dramatic increase in the number of FCPA investigations.

While the US has led the charge in the global battle against corruption, other countries are now following suit. Most notably, the United Kingdom, which historically addressed bribery through common law and antiquated statutes, enacted the Bribery Act of 2010. Although it does not go into effect until April 2011, the UK [Bribery Act](#) has already been described as the harshest bribery legislation in the world and dubbed "the FCPA on steroids." Recently, senior officials of the UK's Serious Fraud Office reportedly cautioned that FCPA compliance will not necessarily equate to Bribery Act compliance. Just a few days later, however, amid growing concerns that the regulatory burdens imposed by the Bribery Act will stunt economic growth, Prime Minister David Cameron ordered a review of the legislation. This has led many to speculate that the Bribery Act may ultimately be enforced with less vigour than the FCPA. To help explain what this may mean, this article provides a short comparison of the scope of prohibited conduct, available defences, jurisdiction and penalties under both statutes.

Scope of prohibited conduct

The FCPA has two components: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions prohibit US persons, companies (and their officers, directors, employees and agents) and others acting within the US from "corruptly" paying, offering, or promising anything of value to a foreign official in order to obtain or retain business. The accounting provisions require all US "issuers" (i.e., companies that file reports with the SEC.) to keep accurate books, records and accounts so that the true nature of transactions are properly recorded, and to maintain a system of adequate internal accounting controls.

The UK Bribery Act goes beyond the scope of the FCPA in several key respects. First, and perhaps most controversially, it prohibits the bribery of private actors and local public officials, and not just bribery of foreign officials. Second, unlike the FCPA, which prohibits only the offer of a bribe, the Bribery Act prohibits both the offer and acceptance of a bribe. (Bear in mind that while the FCPA does not prohibit the acceptance of a bribe, other US statutes may apply to the bribe recipient. For instance, in 2010, a foreign official who allegedly accepted a bribe was charged with violating the US money laundering statute.) Moreover, with respect to the prohibition against bribery of foreign public officials, while the FCPA requires "corrupt" intent, the Bribery Act requires only intent to influence the foreign public official in his/her official capacity and intent to obtain or retain business. (In cases of bribery not involving a foreign public official, the defendant must intend to influence a person to perform his or her duty "improperly.")

The UK Bribery Act also creates a strict liability offense for a company's failure to prevent bribery by an "associated" person if that company did not have "adequate procedures" in place designed to prevent bribery. The term "adequate procedures" is not defined in the Bribery Act, although the UK's Ministry of Justice issued draft guidance and is expected to release final guidelines in the near future. While this offense goes well beyond the FCPA, the adequacy of a company's procedures may ultimately overlap with the internal controls requirements of the FCPA's accounting provisions. Finally, when considering the relative scope of the two statutes, it is worth noting that whereas the FCPA has a five-year statute of limitations, the Bribery Act has none.

Available defences

The FCPA includes two affirmative defences under its anti-bribery provisions: "reasonable and bona fide expenditures" related to certain promotional activities are allowed, as are payments that are lawful under the written law of the foreign jurisdiction. Also, under very limited circumstances, facilitating or "grease" payments of modest amount are permitted to expedite or secure the performance of "routine governmental action." In contrast, the UK Bribery Act includes no exceptions or defences for bona fide promotional expenditures or facilitating payments. Draft guidance from the UK's Ministry of Justice

suggests, however, that "reasonable and proportionate" promotional expenditures will not be prosecuted, and officials have stated that prosecutorial discretion will be used in determining whether facilitating payments will be prosecuted. Payments permitted or required by the written law of the foreign country are permissible under the UK Bribery Act, but only in the case of bribery of a foreign public official; otherwise, foreign law is merely a factor in determining whether the conduct was "improper."

Jurisdiction

The FCPA's anti-bribery provisions apply to US citizens and residents, as well as to US corporations and their officers, directors, employees and agents, regardless of where in the world the conduct occurs. The FCPA does not generally apply to foreign corporations unless some conduct occurs within the US. As for the Bribery Act, the UK has jurisdiction over the offenses of giving a bribe, receiving a bribe and bribing a foreign public official if: (i) any part of the offense occurred in the UK or (ii) an act or omission was carried out by any person or entity with a "close connection" to the UK (such as a British citizen or resident, or a company incorporated in the UK).

The corporate offense of failing to prevent bribery can be prosecuted in the UK regardless of where the bribe took place or where the company is registered, incorporated, or holds its principal place of business, so long as the company carries on at least part of its business in the UK. Thus, for example, a US-based company with a satellite office in the UK could, under the language of the Bribery Act, be held liable even if an employee of its non-UK subsidiary (or even more tangentially, an agent or other "associated person" of its non-UK subsidiary) offers a bribe outside the UK. The Serious Fraud Office has indicated, however, that it would not prosecute under such circumstances.

Penalties

Individuals prosecuted under the anti-bribery provisions of the FCPA face up to five years' imprisonment, criminal fines of up to \$250,000, and civil penalties of up to \$10,000 per violation, plus restitution and forfeiture. Companies face criminal fines of up to \$2,000,000 per violation, and civil penalties of up to \$10,000 per violation, plus restitution and forfeiture. (Criminal and civil penalties for violating the FCPA's accounting provisions are separate.) Under the Bribery Act, individuals face up to 10 years' imprisonment (double the maximum prison sentence for bribery under the FCPA), and individuals and companies face unlimited fines.

Ancillary penalties may arise under both statutes. For example, individuals and companies convicted under the FCPA may be suspended or prohibited from contracting with the US government, and companies face the possibility of having their import/export licenses revoked or denied. Similarly, a company convicted under the UK Bribery Act, or its directors, may be barred from participation in public sector contracts in the European Union.

While in many respects the language of the UK Bribery Act goes beyond the broad scope of the FCPA, how the SFO will ultimately choose to exercise its prosecutorial discretion in pursuing cases, and what will come of the review mandated by the Prime Minister, remain to be seen.

SNR DENTON 
Michelle J. Shapiro is a partner at SNR Denton, based in New York.

*Originally published on www.complinet.com. © Complinet Group Ltd.
Complinet Group Ltd is a Thomson Reuters business.*