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Delayed Implementation of the 2010 UK Bribery Act: The Devil is in the Details

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The 2010 UK Bribery Act is the new "elephant in the room" of the global anti-corruption effort. The Act sets forth the UK's version of the US's Foreign Corrupt Practices Act (FCPA), and it significantly modifies the UK's domestic bribery laws. These changes should be on the radar screens of many US companies because the UK Bribery Act applies to any companies that do business in the UK.

Although the Act was passed in 2010, issues of practicality, timing, and vague drafting have recently created a storm of controversy and delayed the Act's implementation. The purpose of this article is to summarize the Act's current status, make predictions about how the pending issues will be resolved, and offer suggestions for an interim course of action for companies that may be covered by the Act.

At the urging of the US, in 1998 the Organization for Economic Cooperation and Development (OECD) issued a convention requiring signatory countries to adopt legislation criminalizing the payment of bribes to foreign officials to obtain foreign business. In effect, the signatories to the OECD convention were committing their countries to passing their own FCPA-like laws. In total, 38 countries signed that convention.

The UK, however, did not immediately pass such an FCPA-like law. As a result, pressure was brought to bear on the UK by the countries which had complied with the OECD convention, and by various other global anti-corruption organizations, such as Transparency International.

When the UK finally decided to take action, it did so with vigor, updating and expanding its own domestic anti-bribery laws as well. The result was the 2010 UK Bribery Act, which covers both foreign bribery, as contemplated by the OECD convention, and domestic bribery.

Some have criticized the Act, however, because its foreign bribery provisions are broader than those of the FCPA, and the domestic bribery provisions are much broader than the Act's common law and statutory predecessors. The Act has thus been criticized as being "the FCPA on steroids."

The UK Bribery Act differs from the FCPA in numerous ways and therefore should be studied carefully by companies that do business in the UK and are covered by the Act. Not only is the Act extremely broad and "cutting edge," it is also quite vague in many important regards. Here is a good example: Under the Act, a company can be held strictly liable for failing to prevent a foreign bribe -- a legal standard that is both broad and "cutting edge" -- but a defense exists for companies that have used "adequate procedures" to prevent such bribes.

Unfortunately, nobody can figure out what "procedures" will be regarded as "adequate." That is extremely disconcerting to company officials because the cost of preventative measures can range from minimalist to downright astronomical. Companies are confused about what they have to do to avoid prosecution.

To its credit, the UK has recognized this problem and promised to issue guidance on this and other practical issues implicit in the Act. Just as importantly, the UK has promised not to implement the Act until at least three months after issuance of this guidance.

However, "the devil is in the details." The Act was passed in April 2010 and was originally scheduled for implementation in October 2010. The required guidance proved difficult to finalize, and the implementation date was first postponed until April 2011, with the guidance scheduled for publication by January 31, 2011.

The UK recently announced that the January 31 deadline would not be met either, so the Act's implementation has effectively been postponed until some unknown date in the future, three months after the guidance is finalized -- whenever that may be.

Not unexpectedly, there has been an outcry by the various organizations and countries that had been pressing the UK to bring its anti-bribery laws into compliance with the OECD convention. After all, the UK signed the OECD convention in 1998, 13 years ago.

In some ways, this outcry has reached an almost comical level: The OECD recently threatened that unless the Act is implemented quickly, the UK may be blacklisted and treated like countries with truly horrible anti-corruption records, like Nigeria and Russia, even though the UK generally has a quite good reputation in that regard.

The UK's current dilemma can be described by two aphorisms: "Be careful what you wish for," and "Timing is everything." The UK Bribery Act has taken a very big bite at a very big problem. The Act is not simply an effort to comply with the OECD convention through an FCPA-like law; it is a concerted effort to put the UK in the forefront of the global anti-corruption battle, making the UK a world leader in that fight.

As laudable as that goal may be, taking that bigger bite poses practical problems for companies whose compliance programs were more modestly based on the UK's old common law and statutory bribery provisions, or were directed at compliance with the US's FCPA. And businessmen around the world are rightly asking, how exactly does an international company comply with the different FCPA-like laws of all applicable countries?

And the timing couldn't be worse. The world economy is still struggling to pull itself out of a deep recession, and companies are reasonably trying to be cost-efficient in determining how much to spend on compliance programs. Simply telling such companies to undertake "adequate procedures" doesn't quite get it done. UK companies are rightly asking, "Why now, when we're all struggling to keep afloat?" And like their US counterparts in the late-1970's, UK companies are also asking, "Why be so tough on the companies in your own country?"

Where will all of this lead? To begin with, let's try to keep some perspective. The UK Bribery Act is here to stay, and the UK is taking it seriously. The OECD is almost certainly not going to blacklist the UK simply because of delays in implementing the Act. That is an idle threat to keep the UK from backsliding and capitulating to pressure from financially-strapped companies. Guidance will be in fact be issued, probably soon, and the Act will become effective shortly thereafter.

As happened with the FCPA in the US, enforcement will start slowly, as companies become accustomed to the new law and figure out what compliance measures actually work and/or warrant "credit" with the Special Frauds Office (SFO), which prosecutes the Act.

On its part, the SFO will initially be cautious in determining when to bring cases under the Bribery Act, especially where a company has demonstrated a good faith effort at compliance, and doubly-especially where the violation was voluntarily disclosed to the SFO. More practically, the SFO's budget is simply too meager to attempt anything but a few investigations and prosecutions, presumably emphasizing those that present the most egregious conduct and the most straightforward culpability.

In short, all is not lost. The SFO appears to be handling the Act responsibly and professionally, if not as quickly as the OECD might like.

In the meantime, what can companies do to prepare for the eventual implementation of the Act? After all, the Act covers not just UK companies, but any companies that do business in the UK, and a full compliance program may take more than three months to become fully effective.

To start with (and most obviously), such companies can read and acquaint themselves with the Act itself. Perhaps more helpfully, even before any formal guidance is issued by the SFO, such companies should consider alternative

sources of comparable guidance. The area of anti-corruption efforts may be complex, but it isn't rocket science. The problems are more practical than visionary.

A number of alternative sources of guidance are available for companies who want to "get a leg up" on compliance with the Act. (1) The GC 100 has issued a draft of guidance for what may constitute "adequate procedure"; (2) the OECD itself has issued "good practice" guidance on compliance with its anti-corruption convention; (3) Transparency International has a list of anti-bribery strategies for complying with the UK Bribery Act; and (4) a Global Infrastructure Anti-Corruption (GIAAC) guide covers similar ground.

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