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Passage of UK Bribery Act has Profound Implications

On April 8, 2010, the United Kingdom Parliament enacted the Bribery Act 2010 (the “Bribery Act”) into law, creating one of the most stringent and far-reaching anti-corruption initiatives in the world. The Bribery Act, which is expected to go into force in October 2010, greatly increases the potential criminal liability of companies doing business in foreign countries, in particular by creating strict criminal liability for companies that fail to prevent their employees and other associated individuals from engaging in bribery. Businesses with any connection to the UK should re-evaluate their compliance programs in light of the new law.

Offenses

The Bribery Act sets out three separate criminal offenses: (1) the offense of a person bribing another person; (2) the offense of a person requesting or receiving a bribe; and (3) the offense of a commercial organization failing to prevent bribery.

It is notable that the Bribery Act criminalizes the giving and receiving of bribes to both public officials and private persons. It is an offense to offer, promise, or give a financial or other advantage to a public official (or to a third person at the official’s request) with the intent to influence the official and to obtain a business advantage. It is irrelevant whether the influence intended or received is within the scope of the public official’s actual authority. It is also an offense to offer, promise, or give a financial or other advantage to any person with the intent to induce that person to “perform improperly” a relevant function or activity, or to reward such improper performance. The Bribery Act defines relevant functions and activities as any activity connected with a business, any activity performed in the course of a person’s employment, and any activity performed by or on behalf of a body of persons.

What constitutes an “improper performance” of a relevant function or activity is to be decided on a

case-by-case basis, using the general guideline of what a reasonable person in the UK would expect. The Bribery Act explicitly disregards local custom or practice where the offense took place.

The third offense created by the Bribery Act is groundbreaking, in that it creates strict criminal liability of commercial organizations for failing to prevent their employees, agents, or subsidiaries from engaging in bribery. The only defense to this charge is to prove that the company had in place “adequate procedures” designed to prevent bribery.

There is currently no guidance as to what procedures are adequate to prove this defense. The Bribery Act requires the Secretary of State to publish guidelines, and the government has indicated that it plans to do so before the Bribery Act goes into force. However, the published guidelines will not be determinative, and ultimately the question of whether “adequate procedures” were in place will be decided on a case-by-case basis, taking into consideration factors including the size of the company and its geographical reach. It also is unclear how criminal liability under the Bribery Act will be applied to various corporate structures, such as joint ventures, and further guidance from the UK government is expected.

Penalties

Under the Bribery Act, convicted individuals may be sentenced to a maximum of 10 years imprisonment and/or fined an amount within the statutory maximum. Convicted commercial organizations may be fined, with no maximum limitation placed on the amount.

Extra-Territorial Reach

The Bribery Act is applicable to British citizens, individuals “closely connected” to the UK (including residents), any corporation or partnership formed under UK law, and any non-UK cor-

Offices

Atlanta
Austin
Chicago
Dallas
Houston
London
Los Angeles
New Orleans
New York
Sacramento
San Francisco
Washington DC

Passage of UK Bribery Act has Profound Implications (cont'd.)

poration or partnership that conducts any part of its business in the UK, regardless of whether the alleged offense is related to that part of the business. The broad scope of the Bribery Act exposes any company with an office in the UK to potential criminal liability for any act of bribery committed by an employee or a third-party agent worldwide.

Comparison to the FCPA

The Bribery Act is different in several key areas from the U.S. Foreign Corrupt Practices Act ("FCPA"). Under the Bribery Act, a company is strictly criminally liable when any person associated with the company bribes another person with the intent of obtaining an advantage related to the company's business. Comparatively, while the FCPA prohibits a company from engaging in bribery of foreign officials to obtain business advantages, vicarious liability must be established in order to impute the actions of an employee or an agent to the company. Another key difference is that the Bribery Act covers both the traditional notion of corruption of public officials as well as commercial bribery of private persons, while the FCPA addresses only the public aspect, leaving the prosecution of commercial bribery to the States. Further, unlike the FCPA, the Bribery Act does not contain an exception for "facilitation payments" (small payments for routine governmental actions), nor an exception for reasonable and bona fide expenditures incurred in connection with promoting a company's business or executing a contract. Finally, the FCPA limits the fine for a company in violation of the law to \$2,000,000, while the Bribery Act places no limit at all on the amount a commercial organization that fails to prevent bribery may be fined. At this early date, it is unclear what type of monetary penalties the UK will pursue under this provision, but with no statutory maximum, the numbers could be astronomical.

Impact

International efforts to combat corrupt business practices have been increasing for some time, but the recent enactment of the UK Bribery Act

emphasizes the critical need for companies engaged in international business to create, implement, and monitor internal compliance programs. Compliance programs must be developed with consideration towards the FCPA, the Bribery Act, and other local and international anti-corruption laws.

Locke Lord Bissell & Liddell LLP's White Collar Criminal Defense and Internal Investigations Group has extensive experience advising clients on foreign anti-corruption compliance, and stands ready to assist in evaluating current compliance programs, as well as in developing and implementing cost-effective and comprehensive anti-corruption compliance programs.

About the Authors

Tim Johnson is the co-chair of Locke Lord's White Collar Criminal Defense and Internal Investigations practice in the Houston office. As the United States Attorney for the Southern District of Texas from 2008-2010, Mr. Johnson led one of the largest U.S. Attorneys' offices in the country. In addition to his many years with the U.S. Attorneys' office, Mr. Johnson has nearly two decades of experience in private practice representing individuals and corporations in matters before the United States and its various agencies.

Stacy Williams is a partner at Locke Lord. He practices complex commercial litigation and has extensive experience conducting internal and governmental investigations. He also advises clients on corporate governance and compliance matters. He has advised clients on a wide variety of criminal and civil business fraud, including matters involving the Foreign Corrupt Practices Act, antitrust, class actions, export control requirements, and Commodities Exchange Act.

Erin Kolodny is an associate at Locke Lord. She practices complex commercial litigation and also concentrates on white collar defense and internal investigations.