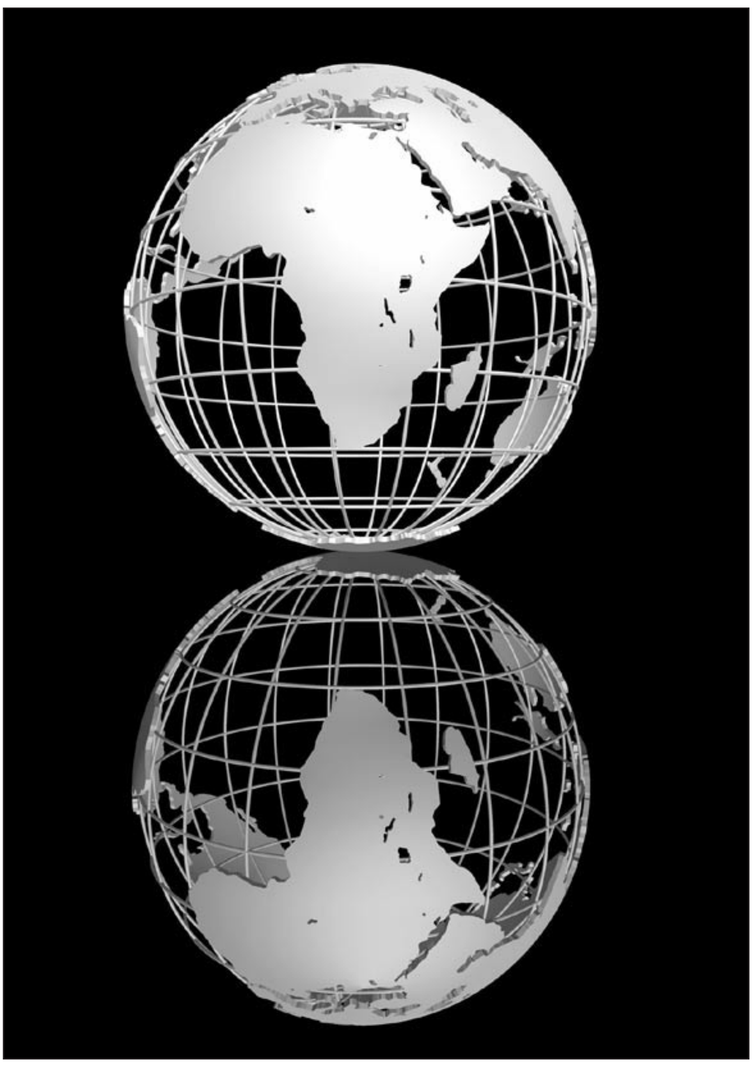
Anti-Corruption Update: **Change on the Horizon**

By Bethany Hengsbach



2010 brought an explosion of anti-bribery and anti-corruption activity around the globe. In the United States, the U.S. Department of Justice and Securities and Exchange Commission stepped-up enforcement of the Foreign Corrupt Practices Act, recording nearly $2 billion in fines and penalties. Congress and the White House also entered the fray, enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Dodd-Frank Act includes provisions to reward "whistleblowers" who come forward with information regarding their employers' potential violations of the FCPA. Across the Atlantic, the United Kingdom enacted the Bribery Act of 2010, a law that will create a new and complex layer of anti-corruption regulations for companies with any connections to the U.K.

The FCPA was enacted in 1977 to combat bribery of foreign government officials. It is divided into two parts: anti-bribery provisions and accounting provisions. Under the anti-bribery provisions, it is unlawful to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business or securing an improper advantage. The anti-bribery provisions are generally enforced by the Department of Justice. The FCPA's accounting provisions require that "issuers" (generally, companies that trade stock on a U.S. exchange or are required to file periodic reports with the SEC) make and keep books and records that accurately and fairly reflect the corporation's transactions and maintain an adequate system of internal accounting controls. The SEC generally enforces the accounting provisions.

Section 922 of the Dodd-Frank Act, enacted in July 2010, provides that the SEC "shall" pay between 10 percent and 30 percent of any recoveries exceeding $1 million to anyone who voluntarily provides "original information" to the SEC leading to the successful enforcement of violations of federal securities laws, including the FCPA. On Nov. 3 2010, the SEC proposed rules to implement these whistleblower provisions. It then accepted comments through Dec. 17, 2010. The SEC is required to implement final rules by April 21, 2011.

One area of major concern created by the whistleblower provisions is their reference to "original information." This reference appears to create a powerful monetary incentive for employees to "blow the whistle" to the SEC instead of utilizing their employers' internal compliance systems (e.g., the ethics "hotline") to report potential violations of the FCPA. Proposed Rule 21F-4(b)(7) attempted to address this concern, but did not alleviate it. According to that proposed rule, information may be deemed "original" for purposes of the whistleblower provisions even if the would-be whistleblower first reported it to his or her employer's internal compliance apparatus. If the whistleblower ultimately reports the same information to the SEC, he or she will retain the benefit of the date of the internal report (to keep the employee's place in line for the reward).

While on the surface this proposed rule appears to promote the use of internal reporting procedures (at least in the first instance), it suffers from two fatal flaws. First, it proposes to limit the lifespan of "original" information to just 90 days after the employee makes an internal report. If implemented, this "ticking clock" will likely force employers to attempt to investigate and resolve (to the would-be whistleblower's satisfaction) potentially complex and nuanced FCPA compliance issues at breakneck speed or risk the whistleblower reporting the perceived violation to the SEC.

Second, though the proposed rule seems to carve out a "safe harbor" for employees who report potential problems internally, there is no requirement that employees do so. Under the proposed rules, the choice to make an internal report or go directly to the SEC is left entirely up to the would-be whistleblower. Whether the employee first reported a problem to an internal compliance system may play a role in the SEC's decision to award a whistleblower more than the statutory minimum reward of 10 percent (of moneys recovered in excess of $1 million). However, given the ballooning size of FCPA fines (eight of the top 10 FCPA settlements of all time occurred last year), it seems unlikely that an employee would "risk" losing an already substantial reward to a speedier whistleblower for an unspecified chance at increasing the reward's value. How the SEC will treat these shortcomings, if at all, should become apparent when it releases its final rules in the coming months.

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The U.K's Bribery Act received Royal Assent in April 2010. It creates strict liability for companies that fail to prevent bribery unless the bribery occurred notwithstanding the installation of "adequate procedures" to prevent it. Enforcement was placed on hold so the U.K. government could issue final guidance as to what constitutes "adequate procedures." That guidance was scheduled to be released by the end of January 2011. But in late-January, the British press reported that enforcement of the Bribery Act had been delayed in response to business leaders' lobbying efforts. By mid-February, however, U.K. Justice Secretary Kenneth Clarke had reportedly advised British lawmakers that he had no intention of "watering down" the Act's rules to appease concerned businesses, and that he was "trying to get on with it." Although the time of the implementation remains a question mark, the U.K. government has declared that the Bribery Act will not go into effect until at least three months after the guidance is issued.

Although they share common anti-bribery and anti-corruption goals, there are some significant differences between the FCPA and the Bribery Act. Like the FCPA, the Bribery Act prohibits bribery of foreign officials. Unlike the FCPA, however, the Bribery Act also prohibits commercial bribery.

Another difference involves extraterritorial reach. The FCPA has a fairly broad extraterritorial reach — the U.S. government has asserted that it has jurisdiction over non-U.S. companies and non-U.S. citizens under the FCPA on the basis of e-mails or regular mail sent to recipients in the United States. The Bribery Act, however, goes one step further — there is no requirement that the bribery be connected to the U.K.. All that is required is that the *entity* involved have a close connection to the U.K., or for some provisions, that the entity carry on part of a business in the U.K.

Another significant difference between the laws is that, unlike the FCPA, the Bribery Act does not have an exception for facilitating payments to speed up routine governmental functions that do not involve the discretion of a foreign official). For example, under the FCPA it would likely be permissible to pay a nominal sum of money to expedite the issuance of a visa or the connection of utility services, e.g., water and power. There is no such exception under the Bribery Act.

The FCPA also contains an exception for bona fide expenditures directly related to business promotion or contract performance. As written, the Bribery Act does not contain an equivalent exception. However, speaking before the U.K. House of Commons, Secretary Clarke reportedly stated that "ordinary hospitality to meet customers, network with customers [and] improve relationships is an ordinary part of business and should not be a criminal offense." This tension between the letter of the law and the public comments made by U.K. officials has caused a great deal of justifiable concern in the anti-corruption compliance community.

Attorneys dealing with compliance issues arising under the FCPA and Bribery Act can count on a busy 2011. The SEC's final rules implementing the whistleblower provisions will hopefully answer some questions, but will very likely raise new ones as well. For companies with connections to the U.K., the long wait to see what enforcement of the Bribery Act will look like may soon be over.

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