Changes Coming:
US Sentencing Guidelines, UK Bribery Bill
and the OECD on Facilitation Payments

At its April 7, 2010 meeting the United States Sentencing Commission approved amendments to its Sentencing Guidelines. The next day on April 8, 2010, the UK Bribery Bill received Royal Assent. These two events follow the December 9, 2009 release by the Organization for Economic Co-Operation and Development's (OECD) *Recommendation for Further Combating Bribery of Foreign Public Officials*, when the OECD marked the tenth anniversary of the entry into force of the OECD Anti-Bribery Convention.

These three releases, which comprise of two changes in the legal schemes by two of the world's largest economic players and the proposal of one of the largest Non-Governmental Organizations (NGO) dedicated to ending corruption across the globe portend significant changes in how companies will be structured and transact business going forward in the new decade. This article will discuss the changes that companies, with any US or UK presence, will be required to implement. The initial post will be on the changes to the US *Sentencing Guidelines*; we will then consider the changes required by the UK *Bribery Bill*; and we will end with the recommendation as found in the OECD's *Recommendation for Further Combating Bribery of Foreign Public Officials*.

I. US Sentencing Guidelines

These guidelines are used in the sentencing of organizations and serve as the de facto blueprint for corporate ethics and compliance programs. The changes, which were approved at an April meeting, must be formally submitted to Congress by May 1, and will take effect November 1, 2010, unless Congress passes legislation to reject or modify them. These proposed changes follow public hearings and public comment period which ended in March. The most significant changes in the Sentencing Guidelines are as follows.

1. Direct Report. The amendment would change the reporting structure in corporations where the Chief Compliance Officer (CCO) reports to the General Counsel (GC) rather than a committee on the Board of Directors. The proposed change reads "the individual…with operational responsibility for the compliance and ethics program…have direct reporting obligations to the governing authority or any appropriate subgroup…(e.g. an audit committee or the board of directors)". If a company has the CCO reporting to the GC, who then reports to the Board, such structure may not qualify as an effective compliance and ethics program under the Sentencing Guidelines. The better practice would now appear to be that the CCO should be a direct report to the Board or appropriate subcommittee of the Board such as compliance or audit.

2. Discovery of Problem Inside the Organization Rather Than Outside. This amendment encourages a company to have a hotline and other mechanisms to detect any compliance and ethics violations internally. While most companies have a Code of Conduct, with attendant implementation policies and procedures in place, training thereon and a hotline; many companies have yet to implement any type of self-audit program to measure Foreign Corrupt Practices Act (FCPA) compliance program performance. This encourages companies to not only monitor its internal self reporting to actively test the information available to it through a system such as continuous controls monitoring. For post on CCM, see here.

3. Promptly Report. This amendment inserts specific language regarding the "prompt" reporting of any violation of a compliance and ethics program. While no definition of the word "prompt" is provided, the revisions to the Commentary note that an organization will be "allowed a reasonable time to conduct and internal investigation" and that no reporting is required if "… the organization reasonably concluded…that no offense has been committed". Nevertheless this language reiterates what many former Department of Justice (DOJ) employees tell industry representative at conferences and events regarding the FCPA. It is *always* preferable to report a violation to the US government rather than the US government finding out and coming to you.

4. No Person With Operational Responsibility Condoned or Was Willfully Ignorant. This proposed amendment is aimed at those personnel within a company's compliance and ethics organization. While operational responsibility could be defined to mean only those who might report to the Board, this commentator would suggest the better approach is to include all company personnel with direct reporting responsibility in the compliance and ethics group. The definition of "willfully ignorant" has not changed from the current version of the Sentencing Guidelines, which is provided in Application Note 3 of Commentary to §8A1.2 (Application Instructions-Organizations). The definition reads in full "An individual was "willfully ignorant of the offense" if the individual did not investigate the possible occurrence of unlawful conduct despite knowledge of circumstances that would lead a reasonable person to investigate whether unlawful conduct had occurred".

II. UK Bribery Bill

There are several differences between the FPCA and the UK Bribery Bill which all companies should understand. These include:

- The Bribery Bill
    - has no exception for facilitation payments.
    - creates strict liability of corporate offense for the failure of a corporate official to prevent bribery.
    - specifically prohibits the bribery or attempted bribery of private citizens, not just governmental officials.
    - not only bans the actual or attempted bribery of private citizens and public officials but all the receipt of such bribes.
    - has criminal penalties of up to 10 years per offense not 5 years as under the FCPA.

There is one affirmative defense listed in the Bribery Bill and it is listed as the "adequate procedures" defense. The Explanatory Notes to the Bribery Bill indicate that this narrow defense would allow a corporation to put forward credible evidence that it had adequate procedures in place to prevent persons associated from committing bribery offences. The legislation requires the Secretary of State for Justice to publish guidance on procedures that relevant commercial organizations can put in place to prevent bribery by persons associated with their entity.

Other than this commentary, the Bill provides no further information on what might constitute "adequate procedures" as a defense but the Government has signaled that it will work with the UK business community to provide appropriate guidance to this critical component of the Bribery Bill. The UK law firm KattenMuchin has indicated that they expect the Government will apply a test regarding the "adequate procedures" defense "with regard to the size of the company, its business sector and the degree to which it operates in high risk markets". The law firm of Covington and Burling, in a client advisory dated March 31, 2010, has opined that the Bribery Bill will not come into force until late 2010 because it will take the UK government until then to issue guidance on what may constitute "adequate procedures".

The Bribery Bill is a significant departure for the UK in the area of foreign anti-corruption. It cannot be emphasized too strongly that the Bribery Bill is significantly stronger than the US FCPA. The Bribery Bill provides for two general types of offence: bribing and being bribed, and for two further specific offences of bribing a foreign public official and corporate failure to prevent bribery. All the offences apply to behavior taking place either inside the UK, or outside it provided the person has a "close connection" with the UK. A person has a "close connection" if they were at the relevant time, among other things, a British citizen, an individual ordinarily resident in the UK, or a body incorporated under the law of any part of the UK. Many internationally focused US companies have offices in the UK or employ UK citizens in their world-wide operations. This legislation could open them to prosecution in the UK under a law similar to, but stronger than, the relevant US legislation.

These changes include the outright banning of facilitation payments and the outright banning of all bribery and corrupt payments by US companies to not only foreign governmental officials but all private citizens. The Bribery Bill certainly does away with any legal question of "who is a foreign governmental official" under the FCPA and the use of other legislation, such as the Travel Act, which bans bribery generally, to back corrupt actions made to a foreign person who is not a governmental official, into an FCPA violation. All US companies with UK subsidiaries or UK citizens as employees, should ban such acts as part of their overall compliance and ethics policies sooner rather than later.

III. Facilitation Payments

In late 2009, to celebrate "International Anti-Corruption Day" recognizing the Tenth Anniversary of the OECD Anti-Bribery Convention, the OECD released "The

Recommendation for Further Combating Bribery of Foreign Public Officials". In this report the OECD recommended changes relating to facilitation payments (aka "grease payments") such as those which are legal under the FCPA. OECD Secretary-General Angel Gurría described these low-level payments, designed to expedite performance of a "routine government action" such as obtaining mail delivery, phone or power service, as "corrosive . . . particularly on sustainable economic development and the rule of law".

Facilitation payments, also known as "expediting payments" or "grease payments," are bribes paid to induce foreign officials to perform routine functions they are otherwise obligated to perform. Examples of such routine functions include issuing licenses or permits and installing telephone lines and other basic services. The only countries that permit facilitation payments are the United States, Canada, Australia, New Zealand and South Korea. Facilitation payments, however, are illegal in every country in which they are paid. They have come under increasing fire under the FCPA as inconsistent with the totality of US policy on anticorruption.

This change by the OECD brings the considerable problems associated with facilitation in the international business arena into sharper focus. Just like large commercial bribes, grease payments abuse the public trust and corrode corporate governance. Treating them as anything other than outright bribery muddies the compliance waters and adds confusion where there should be clarity. This new stance by the OECD, coupled with the increased enforcement under the FCPA, may well bode the end of facilitation payments. There is no monetary threshold for determining when a payment crosses the line between a facilitation payment and a bribe. The accounting provisions of the FCPA require that facilitation payments must be accurately reflected in an issuer's books and records, even if the payment itself is permissible under the anti-bribery provisions of the law.

Facilitation payments carry legal risks even if they are permitted under the anti-bribery laws of a particular country. In the US enforcement agencies have taken a narrow view of the exception and have successfully prosecuted FCPA violations stemming from payments that could arguably be considered permissible facilitation payments. Violations of the accounting and recordkeeping provisions of the FCPA are also more likely when a company makes facilitation payments. Abroad, countries are increasingly enforcing domestic bribery laws that prohibit such payments. Companies that allow facilitation payments face a slippery slope to educate their employees on the nuances of permissible payments in order to avoid prosecution for prohibited bribes.

The global business environment has changed even as the FCPA has remained static. In the absence of any legislative action to roll back the facilitation payment exception, the DOJ and Securities and Exchange Commission (SEC) plainly have set out to repeal the facilitation payment exception on a case-by-case basis. US companies should recognize the weakening of the argument supporting a facilitation payment exception and should develop compliance policies that do not permit any kind of grease payments. A policy that prohibits all payments (unless there is high level of legal and compliance approval) will relieve businesses of the compliance burden of differentiating between lawful and unlawful payments. From the point of view of the modern global corporation, a compliance regime that attempts to differentiate between "good" corrupt payments and "bad" corrupt payments will do more harm than good.

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