

China Alert

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United Kingdom enacts its own “FCPA”

Background

US companies doing business in China question the fairness of competing with European companies that are not bound by the Foreign Corrupt Practices Act (“FCPA”). Now the United Kingdom has leveled the playing field somewhat by enacting the Bribery Act of 2010 (the “Act”), which is even more rigorous than the FCPA.

The Act was enacted on April 8, 2010 and is expected to come into force in April 2011. The stringent new legislation will apply to all UK companies and non-UK companies that do business there. Entities doing business in China will be particularly hard hit by the Act.

The Act is being put in place in part because the UK's pre-existing anti-bribery and corruption laws were regarded as weak and inconsistent with the OECD Bribery Convention which the UK ratified in 1998.

The Act

The Act replaces and simplifies the UK's pre-existing laws on bribery in the UK and sets out four new offences:

- Offering, promising or giving a bribe (active bribery)
- Requesting, agreeing to receive or accepting a bribe (passive bribery)
- Bribing a foreign public official (corruption)
- A new corporate offence of failing to prevent bribery

In addition, the Act has several novel features. In particular:

- Like the FCPA, it has extraterritorial reach, covering all UK companies and partnerships carrying on business as well as any other company or partnership (wherever established) which carries on business in the UK. Individuals and companies that commit bribery offences in the UK (or anywhere else in the world) can be prosecuted. Non-British companies can be liable if an act or omission forming part of an offence takes place in the UK.
- It creates a new corporate offence of failing to prevent bribery which imposes strict vicarious liability on any company where a person “associated” with the company commits any bribery offence for the purpose

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of obtaining or retaining business or an advantage for the company. The offence is designed to make companies and executives responsible for bribery committed on their behalf.

- The range of persons caught by the Act is as wide as under the FCPA. Companies will be liable for bribery and corruption committed by both employees and anyone else performing services for or on behalf of the company, including third parties such as agents, sub-contractors and vendors.
- The strict liability nature of this offence is unprecedented and means that the burden of proof rests with the accused company. To be found guilty, a company's executives need not have any knowledge of any bribery – it will be sufficient if the company failed to prevent the bribery.
- Unlike the FCPA, there are no new whistle-blower provisions under the Act. Whistle-blowers will continue to be protected under pre-existing laws such as the Companies Act and it remains to be seen whether the UK will introduce whistle-blower incentives like those recently enacted in the US.
- Penalties for bribery and corruption under the Act are exceptionally severe and include up to 10 years in prison (per offence) and unlimited fines for individuals and if convicted, companies face an unlimited fine. Executives who participate in or have knowledge of bribery may be personally liable.

Relevance of the Act to China

Bribery and corruption are still rampant in China and regarded by many as merely a cost of doing business. The Act raises significant dilemmas for companies entering or operating in emerging markets like China. Such dilemmas include:

- Many US companies rely heavily on their PRC staff and representatives who act on companies' behalf but may resort to 'local' practices. The Act makes all companies responsible for preventing these individuals from committing acts of bribery or corruption.
- In far-flung towns and cities throughout China, government officials routinely solicit or expect a 'facilitation payment' for merely doing their job. However, unlike the FCPA, there is no exception for so-called facilitation payments in the Act, so paying these will mean that individuals (and by extension, the businesses they represent) could be charged with corruption.
- the Act's definitions for "financial or other advantage" and "foreign public official" are very wide which means that companies that are subject to the Act now need to curtail staff offering seemingly innocent benefits (such as moon cake vouchers or concert tickets) to a wide range of business partners and individuals to avoid these gifts being taken out of context and exposing the company to liability for allowing bribery or corruption to occur.

Conclusion

The Act is one of the most rigorous pieces of anti-corruption legislation ever enacted anywhere and in several key respects, it is more draconian than the FCPA and China's anti-corruption laws. Consequently, US multinational companies operating in the UK and China cannot assume that the internal anti-corruption measures they have put in place previously will ensure that they are in compliance with the Act.

In the lead up to next April, companies that are caught by the Act need to take steps to minimize the risk of bribery and corruption. The "adequate measures" which every company must put in place to prevent bribery have not yet been clarified but in October 2010, the UK government will issue guidelines on the measures.

It is still too early to tell how aggressively the UK authorities will interpret and enforce the Act but passage of the Act, coupled with recent enforcement of the UK's existing laws against BAE Systems, Aon, Balfour Beatty, Innospec and others suggest that the new UK government is looking to show it is getting tough on foreign corrupt practices of UK companies.