Innospec, the UK Bribery Act, and the Future of International Anti-Bribery Enforcement

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Since the dawn of anti-bribery legislation in the 1970s with Congress' passage of the Foreign Corrupt Practices Act ("FCPA"), combating global corrupt practices has been almost exclusively an American endeavor. White collar criminal defense and securities enforcement practitioners have observed over the past few years incremental, yet mild, steps in international cooperation. However, two events in recent months have placed practitioners and industry professionals on a high state of alert. The recent settlement involving Innospec, Inc. ("Innospec") and the more recent passage of the UK Bribery Act mark significant advances within the dynamic anti-corruption enforcement realm and signal its increasingly international and cooperative nature.

On March 18, 2010, Innospec – a specialty fuel and chemical manufacturer – agreed to pay $40.2 million to resolve global corruption claims by the Department of Justice, Securities and Exchange Commission, Office of Foreign Assets Control, and the United Kingdom's Serious Frauds Office. The agency investigations and the settlement stemmed from Innospec's payments or promises to pay more than $9.2 million in bribes to government officials in Iraq and Indonesia in exchange for $176 million in contracts for the fuel additive tetraethyl lead ("TEL").

On April 8, 2010, the British Parliament adopted its own version of the FCPA, the Bribery Act. The Bribery Act is stricter than the FCPA, insofar as it imposes strict liability for failure to prevent bribery, prohibits "facilitation payments" otherwise permitted under the FCPA, and criminalizes "private-to-private" bribery that is unconnected to any public or governmental office.

As both developments make abundantly clear, international cooperation in this enforcement area is on the rise and shows no signs of abating. Now more than ever, companies operating across international borders should step up their vigilance to potential liabilities stemming from corrupt practices, as even the most well-intentioned companies are vulnerable to the snare of the FCPA, the Bribery Act, and increased enforcement cooperation among foreign nations.
The FCPA's Origins and Growing International Support

As a reaction to the increased attention to public corruption following the Watergate scandal, the passage of the FCPA in 1977 was designed to combat corruption on two fronts: prohibiting the payment of bribes to foreign government officials, and requiring public companies to maintain accounting records and internal controls to ensure against improper use of corporate assets. The FCPA was widely criticized at the time of its passage – by foreign countries who were offended by its paternalistic imposition of "American business morality," and by U.S. businesses who feared a competitive disadvantage in global trade. However, "recognizing the corrosive effect bribery and similar activities have on social, political, and economic systems," conventions and programs against corruption adopted by the Organization for Economic Cooperation and Development, United Nations, Organization of American States, and World Bank collectively demonstrated a shifting perspective in international support for the FCPA and its anti-corruption mission.

Until now, the United States – through its agencies the SEC and DOJ – has often stood alone in its efforts to combat global corrupt practices. However, SFO's investigations and prosecutions and the passage of the Bribery Act demonstrate that the United Kingdom is taking an increased interest in combating bribery.

One recent sign of growing international cooperation was made evident in the January 18, 2010, undercover DOJ sting in which twenty-two individuals, alleged to have agreed to pay kickbacks in connection with arms sales to outfit an African country's presidential guard, were arrested in connection with allegations of FCPA violations. The two-year investigation and undercover operation is notable in its own right as the largest single investigation and prosecution of individuals and as the first large-scale use of an undercover operation in the history of the FCPA. But it also signaled a more robust practice of cooperation among regulators of different countries. The American investigation was aided by authorities in the United Kingdom, as City of London Police executed search warrants in connection with their own investigation. Assistant Attorney General Lanny Breuer praised the UK assistance, noting that "international cooperation is growing every day and getting better and better." Breuer further stated: "The fight to erase foreign bribery from the corporate playbook will not be won overnight, but these actions are a turning point."

The Innospec Settlement

It didn't take long before the Innospec settlement confirmed Breuer's "turning point" assessment. Again, the settlement related to Innospec's payments or promises to pay over $9.2 million in bribes to Iraqi and Indonesian officials in exchange for $176 million in TEL contracts. In its plea agreement with DOJ, Innospec pled guilty to conspiracy, wire fraud and FCPA violations for paying kickbacks to Iraq in violation of the United Nations Oil for Food Program. The sanctions included a $14.1 million criminal fine, the retention of an independent compliance monitor for at least three years, and full cooperation with DOJ and other agencies in ongoing investigations. Notably, DOJ refused to release potential claims against individuals within the company.
Innospec also agreed to disgorge $11.2 million in profits to SEC in order to settle a civil complaint alleging violations of the FCPA's anti-bribery, internal controls, and books and records provisions as a result of the payments for TEL contracts in Iraq and Indonesia. Innospec also agreed to pay OFAC a $2.2 million fine for violating the Cuban Assets Control Regulations by acquiring a foreign corporation that had a local sales office in Cuba.

In 2007, DOJ referred the Innospec matter to SFO, which launched its own investigation in May 2008. This investigation revealed that Innospec's UK subsidiary, Innospec Limited, paid more than $11.7 million in "commissions" to agents who then bribed officials in Indonesia to win or continue TEL contracts. SFO criminally charged Innospec with conspiracy to corrupt and noted that its investigation also revealed improper payments in Iraq, but deferred the investigation and prosecution of those payments to the SEC and DOJ. Innospec agreed to pay SFO a criminal penalty of $12.7 million, an amount mitigated by SFO's acknowledgement of Innospec's cooperation.

Although DOJ, SEC, OFAC and SFO worked collaboratively in the investigation of claims against Innospec, each agency initiated separate actions. However, the joint US-UK investigation and prosecution of Innospec signals SFO's steps towards enhancing its enforcement activity and a broader emerging tendency toward enhanced international cooperation in anti-corruption enforcement. Referring to the Innospec matter, SEC Director of Enforcement Robert Khuzami noted that the "action makes clear that law enforcement authorities within the United States and across the globe are working together to aggressively monitor violators of anti-corruption laws."7

The U.K. Bribery Act

The Bribery Act recently cleared both Houses of British Parliament with broad cross-party support.8 The legislation mirrors the FCPA in certain respects, in that it creates the specific offense of bribing foreign officials and penalizes companies for the failure to prevent a bribe being paid by it or on its behalf.

However, the Bribery Act departs from the FCPA in significant ways. First, the Bribery Act makes the failure to prevent an employee or agent of a company from paying a bribe a strict liability offense. A person within the company who has responsibility for preventing bribery can be held strictly liable for failing to prevent a bribe; if there is no person within the company responsible for preventing bribery, the legislation deems the action to be that of any senior officer (such as a director or manager). The only statutory defense is if the organization can show that it has adequate anti-corruption controls.9 By contrast, the FCPA contains numerous "scienter" requirements that can insulate companies and their executives from liability.10

Another chilling provision is that the Bribery Act's strict liability also applies to non-UK businesses. Thus, an American corporation's UK branch or subsidiary may be criminally liable in the UK for the bribes of its employees, agents, or subsidiaries anywhere in the world. The bribe need not initiate or be paid through the UK branch or subsidiary – the mere existence of a UK branch or subsidiary confers jurisdiction on UK prosecutors and courts. The UK legislation also covers private-to-private
bribery, meaning that any form of bribery is illegal, not just the bribery or attempted bribery of a foreign governmental official. The Bribery Act also omits the FCPA's exception for facilitation, or "grease," payments for routine services such as document processing, police protection, and mail services. Finally, the Bribery Act prescribes maximum penalties of ten years' imprisonment and an unlimited fine for individuals and unlimited fines for companies.

While the Bribery Act seems harsher than the FCPA at first blush, its provisions cast a spotlight on enforcement practices on our side of the pond. For example, in last year's *Nature's Sunshine Products* settlement, the SEC invoked "control person" liability of Section 20(a) of the Securities Exchange Act of 1934 to hold the company CEO and CFO liable for failing to control and supervise persons properly within the company who allegedly paid bribes to Brazilian officials to obtain business. The settlement indicated a movement towards liberalizing the scienter requirements that Congress specifically wrote into the FCPA.11

Further, the future of the FCPA facilitation payment exception is uncertain. Commentators have dismissed it as a relic of another era, warning that the global business environment that has developed since the passage of the FCPA, and DOJ's and SEC's attempts to weaken the exception, call into question the prudence of distinguishing between "good" corrupt payments and "bad" corrupt payments.12 Practitioners advise that companies abandon facilitation payments as a matter of best practices; to the extent companies persist in providing these types of payments, they are urged to vet them through their legal departments for approval and proper recordation.13

The maximum ten-year term of imprisonment in the Bribery Act may seem alarming in contrast to the FCPA's five-year maximum, but it too reflects a recent development in FCPA enforcement. For example, the defendants in the January 18, 2010 sting operation discussed above were charged with conspiracy to engage in money laundering, as well as conspiracy and substantive violations of the FCPA. Though the FCPA charges carry maximum five year terms, the maximum sentence for the money laundering conspiracy charges is twenty years. This represents a clear instance of American prosecutors' attempts to ratchet up the prosecution of FCPA violations.

On a positive note, the Bribery Act and current FCPA enforcement both permit an escape valve of sorts in the form of an effective compliance regime. While the Bribery Act provides that "adequate procedures" are a defense to corporate liability, the practice under the FCPA has been to credit companies for their prompt detection and self-reporting of potential violations, and to mitigate the penalties assessed on companies based on voluntary disclosure and cooperation with regulatory investigations. Upcoming FCPA cases also are likely to borrow heavily from DOJ techniques in determining whether to charge companies for individual employees' actions. Having a demonstrably effective compliance program cuts in a company's favor when governmental authorities are contemplating charging the company for the conduct of individual employees.
Conclusion

Standing alone, the Innospec settlement and the Bribery Act are each major causes for concern for companies that operate across international borders. They are even more alarming in tandem because they signal growing cooperation among foreign regulators to prosecute ever-stricter anti-bribery laws.

Though the Bribery Act is, on its face, stricter than the FCPA in the ways described above, an examination of recent FCPA enforcement activity makes painfully clear that similar conduct may expose companies and their executives to equally harsh penalties, whether under the FCPA or the Bribery Act. Notwithstanding SFO's deferral of the investigation and prosecution of the Iraqi payments to the SEC and DOJ in Innospec, it would be wise for the industry to operate on the assumption that regulators on both sides of the Atlantic will each investigate and prosecute foreign corrupt practices to the fullest extent of their laws, and that they will be aided by their counterparts.

Practitioners and industry members would be well-advised to appreciate the emerging international compliance regime represented by the Innospec settlement and the Bribery Act and to undertake a thorough review of their compliance programs accordingly. The Innospec settlement puts in sharp focus the extent of the costs associated with these types of regulatory investigations, as the company paid $32 million in investigation costs alone. The specter of stiffer sanctions under the Bribery Act and under recent FCPA enforcement makes the implementation and "stress-testing" of compliance programs that are effective under both laws more important now than ever.

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1 See Hector Gonzalez & Claudius O. Sokenu, Foreign Corrupt Practices Act Enforcement after United States v. Kay (Washington Legal Foundation 2006) (noting that the increased attention to public corruption following the Watergate scandal of the 1970s revealed the
existence of an American corporate culture that exploited the permissive attitudes in foreign nations towards corruption).

2 15 U.S.C. §§ 78dd-1(a); 78m.
3 Gonzalez & Sokenu, supra note 1, at i.
4 Id. at i-i.
6 Id. at i-i.

9 The defense is availing if an organization can show – on the balance of probabilities – that it has "adequate procedures" in place to prevent bribery. Presently, there is no additional guidance on what constitutes "adequate procedures" but the UK government has committed to develop further guidance before the law takes effect.
10 The FCPA contains three distinct scienter requirements: (1) a violation must be done "corruptly," 15 U.S.C. § 78dd-1; (2) for criminal penalties to be imposed on an individual, the individual must have acted "willfully," id. § 78ff(c)(2); and (3) for liability premised on a payment to a third party, the payment must have been made "while knowing" that the money or thing of value would be directed in whole or part to a foreign official. Id. § 78dd-1(a)(3); § 78dd-2(a)(3).
11 See Michael S. McGovern & Steven S. Goldschmidt, Snaring 'Control Person' Executives in FCPA Liability: How sharp is the § 20(a) saber the SEC has been rattling?, New York Law Journal, Feb. 8, 2010.