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Private Commercial Bribery: The Next Wave Of Anti-Corruption Enforcement?

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In this article, the authors examine the international trend toward prohibition of private commercial bribery as well as tools that the U.S. authorities might use if they decide to aggressively punish commercial bribery abroad.

Government officials in the U.S. and abroad have in recent years roundly condemned the bribery of government officials, calling it harmful to development, an unfair business practice, and morally reprehensible.[1] If one assumes, as the government does, that bribery misallocates economic resources and results in the delivery of inferior products and services for a given price, all of these descriptions apply equally well to bribery of a private, non-governmental person. Indeed, recent actions by American enforcement authorities, and what appears to be a growing international consensus against private commercial bribery, suggest that companies should expand their international compliance programs to aggressively prohibit commercial bribery as well as bribery of

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government officials. This article examines the international trend toward prohibition of private commercial bribery as well as tools that the U.S. authorities might use if they decide to aggressively punish commercial bribery abroad.

KICKBACKS AND BRIBES

Commercial bribery is the corrupt dealing with agents or employees of prospective commercial partners in order to secure an advantage over business competitors.[2] In its classic form, commercial bribery would involve paying a kickback to a purchasing agent in order to cause that agent to choose to buy the briber's products rather than those of a competitor. Private commercial bribery is illegal under the laws of most U.S. states. Commercial bribery involving a foreign government official has, of course, been illegal under federal law since the 1977 passage of the Foreign Corrupt Practices Act ("FCPA"), but private commercial bribery is not explicitly prohibited by federal law. The Department of Justice, however, has used state laws, in combination with wire fraud statutes and the Travel Act, to prosecute domestic private commercial bribery. Thus, the fact that the foreign private commercial bribery is not explicitly prohibited by federal law should not allow companies to act with impunity, because many of the tools that the DOJ is accustomed to using domestically may be equally applicable overseas.

While the U.S. stood more or less alone in its strong stance against bribery involving government officials for several years after the FCPA was enacted, over the last decade international views regarding corruption have begun to shift towards the U.S. view. And, as regards private commercial bribery in particular, the international community has been even more aggressive than the U.S. Article 8 of the Counsel of Europe's Criminal Law Convention on Corruption, which entered into force in July 2002, provides that:

> Each Party shall adopt such legislative or other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the

> promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.[3]

Similarly, the United Nations Convention against Transnational Organized Crime, which entered into force in September 2003, requires that state parties consider establishing non-governmental corruption as a criminal offense.[4] And the United Nations Convention against Corruption, which entered into force on December 14, 2005, encourages member states to criminalize both public and private commercial bribery.[5]

As just one example of the international trend toward aggressive anti-corruption enforcement, the United Kingdom has just passed a Bribery Bill that in many ways moves the U.K. towards a more American-style enforcement and investigation regime, including extraterritorial provisions that would make the law applicable to any company that carries on a business in the U.K. The Bribery Bill applies to bribery of private persons, such that a company would violate the law if it is intended that, by paying the bribe, the recipient would be expected to act otherwise than in good faith, an impartial manner or in accordance with a position of trust.

Prohibition of commercial bribery is seen even in countries which are known to have corruption problems. China, for example, has prohibited commercial bribery since 1996 but has strongly stepped up enforcement in recent years. The PRC Anti-Unfair Competition Law prohibits the offering business counterparts money or property to induce them to purchase or sell products.[6] In addition, one definition of a bribe under China's criminal law is the provision of money or property to an employee of a private company for the purpose of seeking an improper benefit.[7]

After years as the undisputed world-wide leader of anti-corruption enforcement, including aggressive attention to public sector bribery in countries that have not chosen to enforce their own laws, it might be expected that the U.S. will allow other countries to take the lead on foreign private commercial bribery. But, while, as noted above, there are no federal laws specifically dealing with private commercial bribery, the government does have tools at its disposal that will allow it to extend its already-aggressive

extraterritorial enforcement activities to the purely private sphere should decide to do so. And it is equally plausible that U.S. authorities, knowing that private bribery is increasingly criminalized around the world, will feel more empowered to use those enforcement tools.

ACCOUNTING RULES

One of those tools is the FCPA's accounting rules. These provisions, which apply only to issuers, can be divided into two parts: "books and records" and "internal control" provisions. The books and records provision requires that a company's books, records and accounts be kept in reasonable detail to accurately and fairly reflect transactions and dispositions of assets.[8] It is crucial to note that the relatively low "reasonable detail" standard is used to evaluate a company's books and records instead of a high "materiality" standard. The internal control provisions demand that a system of internal accounting controls is devised in order to:

- Provide reasonable assurances that transactions are executed in accordance with management's authorization;
- Ensure that assets are recorded as necessary to permit preparation of financial statements and to maintain accountability for assets;
- Limit access to assets to management's authorization; and
- Make certain that recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[9]

The FCPA's accounting provisions apply to publicly held U.S. companies considered "issuers" under the Exchange Act. (The definition of "issuers" is sufficiently broad to cover corporations with American Depository Receipts traded on U.S. markets or stock exchanges.)[10] In addition, the accounting provisions apply to all majority-owned subsidiaries (domestic and foreign) of U.S. issuers and, with respect to any company (including joint ventures) in which the issuer or one of its subsidiaries holds 50 percent or less of the voting power, the issuer is required to make

a "good faith" attempt to cause the minority-owned firm to follow the accounting rules.

While the FCPA accounting provisions have traditionally been used in conjunction with the anti-bribery provisions (charging companies with failing to properly account for, and failing to adequately prevent, a payment made to a foreign government official), there is no statutory requirement that limits the accounting provisions to foreign government bribery. Perhaps the most dramatic example of "independent" FCPA accounting enforcement thus far has been in connection with the Iraq Oil for Food scandal. The Oil for Food program, which was terminated in 2003, was established with the stated intent to allow Iraq to sell oil on the world market in exchange for food, medicine, and other humanitarian needs for ordinary Iraqi citizens without allowing Iraq to rebuild its military. The Saddam Hussein regime, however, often required participating companies to pay illegal bribes to the government in order to participate in the program. Because the bribes were for the most part paid to the government itself, rather than to "government officials," the payments could not be prosecuted under the FCPA's anti-bribery provisions. However, since the companies failed to account for the bribes correctly, they violated the FCPA's accounting provisions. So far at least a dozen companies have been charged by the SEC with violations of the FCPA's accounting provisions in connection with the Oil for Food program.

The precedent set by the Oil for Food cases could just as easily be applied to private commercial bribery abroad. Much like the Oil for Food bribes to a sovereign government were not punishable under the FCPA's anti-bribery provisions but were considered accounting violations, a bribe to a private citizen or commercial counterparty, if recorded falsely on the company's ledger, would also give rise to a books and records violation.

THE TRAVEL ACT

A second tool in the government's arsenal is the Travel Act, which effectively federalizes the various state private commercial bribery laws. The Travel Act makes it a federal crime to " travel [] or use [] the mail or any facility of interstate commerce with the intent to…promote, manage,

establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity."[11] Notably, the Travel Act defines "unlawful activities" as including "bribery… in violation of the laws of the State in which committed or of the United States."[12] Thus, to prove a violation of the Travel Act, "the government [is] required to establish that [defendant]: (1) used a facility of interstate or foreign commerce; (2) with intent to commit any unlawful activity…; and (3) thereafter [performed] an additional act to further the unlawful activity."[13] In other words, the use of a facility of interstate commerce such as telephones, fax transmissions, wire transfers, or internet communications[14] to further a private bribe would create Travel Act liability.

In order to use the Travel Act to punish private commercial bribery, federal authorities must rely on state statutes which outlaw private commercial bribery.[15] Such statutes, however, are common. New York law, for example, provides that "[a] person is guilty of bribing …when he confers, or offers or agrees to confer, any benefit upon an employee, agent of fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs."[16]

California has a similar private commercial bribery law,[17] upon which the Department of Justice relied to bring Travel Act charges in a recent foreign bribery case, *United States v. Control Components, Inc*.[18] The CCI case included traditional FCPA bribery charges, but CCI also pled guilty to conspiring to bribe decision-makers of several foreign privately-owned businesses in order to induce them to purchase CCI's products. While there have been few federal actions based solely on foreign private commercial bribery,[19] the CCI matter should be seen as a "warning shot" designed to put corporations on notice that the U.S., like many other nations, is becoming serious about stopping private commercial bribery. Use of the Travel Act is also notable because, unlike the FCPA's accounting provisions, there is no requirement that the defendant be an issuer on a stock exchange.

Other statutes that the U.S. government could potentially use to crack down on private commercial bribery include the mail and wire fraud statutes,[20] racketeering charges,[21] or section 2(c) of the Robinson Patman Act,[22] an antitrust law which has been held to encompass private commercial brib-

ery.[23] Mail and wire fraud charges would likely be easily supportable in cases of foreign commercial bribery, because the mail and wire fraud statutes "make it a crime to devise a scheme to deprive another of the right of honest services,"[24] and because the Supreme Court has explicitly approved the use of wire fraud charges to punish foreign conduct.[25] The use of the RICO or antitrust laws, however, would be a more complicated endeavor than using the FCPA accounting provision or the Travel Act. Therefore we think it likely that government enforcement actions will initially focus on the latter two statutes, as well as mail and wire fraud charges.

While common sense would suggest that statutes designed for domestic law enforcement would have a narrower jurisdictional reach than an explicitly foreign-oriented law like the FCPA, the extraordinarily aggressive view of enforcement jurisdiction exhibited by the DOJ and SEC in recent years shows that even the slightest jurisdictional "hook" could result in an enforcement action. Thus, to the extent that private commercial bribery might involve even the slightest uses of the U.S. mail system, phone or internet or banking system, companies should assume that the federal enforcement authorities believe they have jurisdiction to investigate and punish.

INCREASING INTERNATIONAL ENFORCEMENT

The increased internationalization of anti-corruption enforcement will pose significant challenges to corporations doing business abroad. Despite sometimes dubious claims to jurisdiction, U.S. enforcement officials are increasingly monitoring what U.S. companies do outside the U.S. borders. While companies have sometimes struggled with implementing FCPA compliance, the somewhat limited scope of traditional FCPA enforcement has allowed companies to pay particular and specialized attention to matters involving government customers or government officials. An expansion of the enforcement mandate to dealings that do not involve the government imposes additional burdens on the legal and compliance departments of corporations. In addition, the line between legitimate promotional or entertainment expenses, which can be difficult to draw even in relation to government officials, will be even harder to police when the counter parties do not, like government officials, generally make pub-

licly available their rules for accepting such benefits. Finally, increased visibility of state private commercial bribery statutes, combined with the extraordinary fines and penalties extracted by enforcement authorities in recent years, may well lead to aggressive prosecution of private commercial bribery by state Attorneys General.

CONCLUSION

Even though it may be a difficult task, companies have no choice but to begin preparing for the possibility of overseas commercial bribery enforcement, whether from the U.S. government or from the countries in which they do business. In addition to updating their relevant policies and procedures to explicitly prohibit private commercial bribery, companies should begin to consider how they can best educate and monitor their foreign employees.[26] Because the scope of relevant transactions will be much larger than just those involving government officials, companies should work towards greater integration of their sales and accounting functions and their compliance function. Only by creating a true culture of compliance can a company hope to prevent foreign private commercial bribery.

NOTES

[1] *See*, e.g., Lanny Breuer, Assistant Attorney General, Criminal Division, Address to the 22nd National Forum on the Foreign Corrupt Practices Act (November 17, 2009).

[2] Black's Law Dictionary, 7th Ed.

[3] Counsel of Europe Criminal Law Convention, Art. 8. Available at http://conventions.coe.int/treaty/en/treaties/html/ 173.htm.

[4] United Nations Convention against Transnational Organized Crime, Art. 8, available at http://www.unodc.org/unodc/en/treaties/CTOC/index.html#Fulltext.

[5] United Nations Convention against Corruption, Art. 15-21, available at http://www.unodc.org/unodc/en/treaties/CAC/index.html#textofthe.

[6] Anti-unfair Competition Law of the People's Republic of China Art. 8, available at http://en.chinacourt.org/public/detail.php?id=3306.

[7] Criminal Law of the People's Republic of China Art. 164, available at

http://www.asianlii.org/cn/legis/cen/laws/clotproc361.

[8] 15 U.S.C. §78m(a)(2)(A).

[9] 15 U.S.C. §78m(a)(2)(B).

[10] 15 U.S.C. §78l.

[11] *United States v. Kozeny*, 493 F.Supp. 2d 693, 705-06 (S.D.N.Y. 2007), citing 18 U.S.C. § 1952.

[12] 18 U.S.C. § 1953 (b)(2).

[13] *Kozeny* at 706, quoting United States v. Salameh, 152 F.3d 88, 152 (2d Cir. 1998).

[14] *United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006).

[15] *Perrin v. Unites States*, 44 U.S. 37 (1979).

[16] N.Y. Penal Law § 180.03.

[17] California Penal Code § 614.3.

[18] No. 09-00162 (C.D. Ca. 2009).

[19] In 2000, the DOJ brought Travel Act bribery charges against members of the Salt Lake City Bid Committee in connection with their corrupt activities in attempting to secure an Olympic Bid for Salt Lake City, presumably because the bribed members of the IOC were not considered "foreign officials" under the FCPA. *United States v. Welch*, 248 F.3d 1081 (10th Cir. 3003).

[20] 18 U.S.C. § 1341 (mail fraud), 1343 (wire fraud).

[21] 18 U.S.C. § 1961-68.

[22] 15 U.S.C. § 13 (c).

[23] *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169 (1960).

[24] *United States v. Sancho*, 157 F.3d 918, 920 (2d Cir. 1998).

[25] *United States v. Pasquantino*, 544 U.S. 349 (2005) (holding that a plot to defraud the government of Canada of tax revenue violated the wire fraud statute).

[26] The United Nations Global Compact, a UN-sponsored initiative to encourage businesses worldwide to adopt socially responsible policies, issued guidance to its members encouraging them to report on their anti-corruption measures, including efforts to prevent private commercial bribery. Press Release, United Nations Global Compact, New Anti-Corruption Guidance Raises Bar for Company Reporting (December 9, 2009).