**INFORMATION TECHNOLOGY**

## WHAT THE UK BRIBERY ACT "IS" AND "IS NOT"

**(As published in the *Law360*, May 12, 2011)**

by Kelly L. Frey, Sr.

Recent commentary on the U.K. Bribery Act of 2010 and related guidance has been excellent at describing the potential impact of the Act on multinational companies and contrasting it with the U.S. Foreign Corrupt Practices Act. Thus, most ethics and compliance professionals now know what the U.K. Act "is" (especially in contrast to the FCPA provisions). What seems lacking in the literature is some exposition on what the U.K. Act "is not."

The U.K. Act is not morally or ethically superior to the FCPA, a supra-set of principles applicable to all situations, or the "Golden Rule" – it is merely a local variation in applied ethics to which most compliance professionals within its jurisdiction will adapt. The U.K. Act does indeed significantly expand the scope of inquiry and enforcement from just the government dealings covered under the FCPA to encompass commercial bribery. However, this is an expansion of scope and not a qualitative ethical difference between the U.K. Act and the FCPA.

Bribes are bad – in the U.S., the FCPA provides sanctions for bribes to government officials (and continues to broaden the definition of that category), while the U.K. Act sanctions bribes to both foreign public officials and in private commerce. The U.K. Act also explicitly prohibits facilitation payments, while the FCPA has a carve-out of such small, "one of" payments to expedite performance of routine governmental actions. Once again, however, this is a difference in degree rather than a qualitative ethical difference.

Facilitation payments are bad – they are prohibited under the U.K. Act but subject to limited carve-outs under the FCPA. In that regard, Law360 recently reported (April 19, 2011) on the Panalpina World Transport settlement, in which the cumulative payments of approximately US$49 million in small increments as facilitation payments were not permissible under the FCPA (i.e. facilitation payments as part of a standard business practice were not acceptable, even with the FCPA "carve out").

Will adjustments need to be made in current compliance programs to accommodate the U.K. Act? Yes. Will those adjustments require a company subject to the UK Act to do a top-down overhaul of its basic ethics programs? No. The U.K. Act merely dictates the same type of reasoned accommodations to compliance enforcement that companies routinely make as they localize their ethics programs to the various jurisdictions to which the companies may be subject.

The U.K. Act is not a reactionary backlash to financial crisis – it is merely a synthesis of a multiplicity of prior legislation (dating back to the Public Bodies Corrupt Practices Act of 1889) and recent compliance principles as articulated in such documents as the Woolf Committee Recommendations (in response to the BAE System inquiry).

In the U.S., the acceleration of the enforcement and settlement activities related to the FCPA seems to be tied, at least temporally if not conceptually, to the financial crisis, especially with respect to companies subject to the U.S. Securities and Exchange Commission (SEC). Major network coverage in the U.S. of the SEC's handling of the Madoff scandal used terms such as "jaw-dropping incompetence" and "disastrous handling."

Damage control in order to maintain regulatory credibility in response to such accusations has resulted in high-visibility enhanced enforcement to validate that effective governmental control systems are now in place to protect the public. Similarly, the recent Dodd-Frank laws included an integral section with respect to whistleblower programs (the legislative branch essentially offering up "bounties" to private individuals for informing on corporate misconduct in response to Wall Street scandals) – conduct distasteful, if not unlawful, in some countries within the European Union.

Should bribery, corruption, and other economic crimes be prosecuted? Yes. Should prosecutions be driven by the need to regain government regulatory credibility or by the promise of individual enrichment? No. Rather than the need in the U.S. to use the FCPA (and adjunct whistleblower provisions) to generate high-profile press in an effort to provide public reassurances that corporate activities are effectively regulated, the U.K. Act merely seeks to conform local legislation to international standards and local sensibilities.

The U.K. Act is not the beneficiary of a fully primed enforcement infrastructure – it is handicapped by the very practical limitations of its primary enforcement arm, the Serious Fraud Office (SFO). While recent SFO penalties and enforcements demonstrate the will and ability to maintain adequate enforcement of the U.K. Act, economics and attrition may limit future SFO effectiveness.

The Financial Times recently reported that the SFO "is threatened by shrinking budgets, staff resignations and a planned reorganization by the government." According to the Times, the SFO's budget has been cut by 26 percent since the 2009 fiscal year and is due for another 25 percent cut by 2014 and six prominent staff members, including the heads of policy and anti-corruption, have quit in the past few months. Contrast this with the opening of new U.S. Department of Justice (DOJ) offices and increasing SEC enforcement activities.

Does the SFO intend to seriously enforce the U.K. Act? Yes. Is the U.K. enforcement infrastructure comparable to the joint DOJ/SEC enforcement capability (coupled with the legislative bounty programs for private informants) in the U.S.? The economically rational answer must be No. That doesn't mean that companies subject to the U.K. Act should merely bet on not

getting caught for violations because of the practical limitations imposed upon the SFO. However, it does mean that there is a clear difference in capabilities between the U.K. and the U.S. with respect to compliance investigation and enforcement (especially for the U.K. Act that nominally incorporates significant extra-jurisdictional impact).

The U.K. Act is significant in its breadth and scope and requires that every company subject to its provisions make incremental accommodations. However, the U.K. Act may not be the watershed event in ethics and compliance that some commentaries would suggest. Most compliance program accommodations that are required by the U.K. Act are more operational than conceptual.

The context for compliance enforcement in the U.K. is substantially different from that in the U.S. And, the U.K. Act is still inchoate, with preliminary guidance and a weakened enforcement arm. The consequence is that the U.K. Act must be viewed in context. The U.K. Act "is" a serious piece of legislation that demands an appropriate level of attention. The U.K. Act "is not" an apocalyptic event that requires an over-reaction within the international ethics and compliance community.

FOR MORE INFORMATION, CONTACT:

**Kelly L. Frey,** is a member in Dickinson Wright's Nashville office and can be reached at 615-620-1730 or kfrey@dickinsonwright.com.