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Parallels Between the UK Bribery Act and the U.S. Foreign Corrupt Practices Act

After *Corporate Board Member* discussed the UK's new Bribery Act with Daniel Smith, senior associate, Latham & Watkins, we started thinking about the similarities and differences between the UK Bribery Act and the US Foreign Corrupt Practices Act. Latham colleague Barry Sabin, partner in the Washington, D.C. office, explained how the two acts are alike, and why the differences in types of offenses and reach are so important.

| | Enacted | Types of Offenses | Reach |
|-------------------------------|--|--------------------|--|
| Foreign Corrupt Practices Act | 1977 - dramatically increased resources lately | Criminal and Civil | <p>"U.S. jurisdiction under the FCPA can be established essentially in one of three ways:</p> <ul style="list-style-type: none"> • if you are an issuer, for example, you have securities on a particular marketplace in the U.S. or through the exchanges; • you're a domestic concern meaning you have activities or principal place of business in the United States; • or the acts in furtherance of the bribery scheme occurred within the jurisdiction of the United States." |
| UK Bribery Act | 2010 | Criminal | <p>"For the corporate offense in the UK there is not that link where the acts and "in furtherance of the bribery scheme" need to occur in the United Kingdom as a means of establishing jurisdiction. The acts supporting the bribery scheme can occur elsewhere, but as long as you're doing business in the United Kingdom under the corporate offense provision you could have exposure under the UK Bribery Act."</p> |

Corporate Board Member: The UK Bribery Act has been compared by some to the U.S. Foreign Corrupt Practices Act. Can you discuss how they are similar and dissimilar?

Barry Sabin: There are similarities and differences between the two statutory regimes. The Foreign Corrupt Practices Act has been in place since the 1970s. The Justice Department and other U.S.

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regulatory and enforcement agencies have in the past few years increased dramatically the resources, the investigative tools, and the number of proceedings in terms of parallel proceedings from a civil or criminal point of view, both as to corporations and individuals. While the corruption enforcement activities in the United Kingdom has not reached that level of quantity or high level fines or jail sentences as in the United States, there has been over the years increasing international cooperation, both formal and informal, between UK authorities and U.S. enforcement officials.

The UK Act applies to both commercial as well as public misconduct or criminal activities, while the FCPA doesn't address the commercial sphere. You have to use other United States criminal statutes to enforce those activities, but the FCPA only reaches the bribery of foreign public officials, and that is focused on the person who is making the bribe or agreeing to do the bribe rather than the recipient of the bribe, the foreign public official. The FCPA in terms of its actual scope is really very similar to what they refer to as Section Six of the United Kingdom's Act and doesn't address the other general offenses or corporate offense. The FCPA also has a direct stand-alone charge for accounting offenses relating to inadequate books and records or internal controls. So in addition to the FCPA's anti-bribery offenses, there are books and records and accounting internal control exposure that aren't present directly in the UK Bribery Act.

There are differences in terms of the available defenses. The United Kingdom's law does not contain explicit defenses for facilitating payments, which by that we mean small administrative payments made to government officials to perform routine administrative actions. And there's also an exception in U.S. law for bona fide and reasonable expenditures relating to the promotion or marketing or demonstration of particular services. The U.S. law explicitly provides for defenses on both of those facilitating payments and reasonable bona fide expenditures, while the UK law doesn't.

The FCPA has experienced criticism for its broad jurisdictional expanse and the enforcement of it by U.S. authorities aggressively over the past few years and the potential for the enforcement of the UK bribery statute is perhaps even wider than that.

There are certain similarities regarding, for example, the treatment of third parties. You don't have to directly undertake the bribe of the foreign official. It can be done indirectly through third parties and both statutes encompass that kind of direct and indirect bribery. There are also differences regarding the requisite intent that may be applied. In the United States the focus is on corrupt intent. So there are both similarities and differences and it's going to be important as to what prosecutorial discretion is undertaken in the United Kingdom. And obviously from a sort of practical standpoint what that means is how will companies consider internal investigations and misconduct that arises for potential voluntary disclosures to U.S. officials, to UK officials, to both, or to neither because of the uncertainty of how they will be treated in the UK, in the U.S., in light of the new statute.

CBM: What can boards do to prepare themselves for this new legislation?

BS: Risk management—clearly ensuring that you have adequate internal controls and training and policies in place to ensure that both in the United States and the United Kingdom, you can address the adequate procedures defense to the corporation violation or potential violation. The idea that you have the ability to have those internal controls in place is critical.