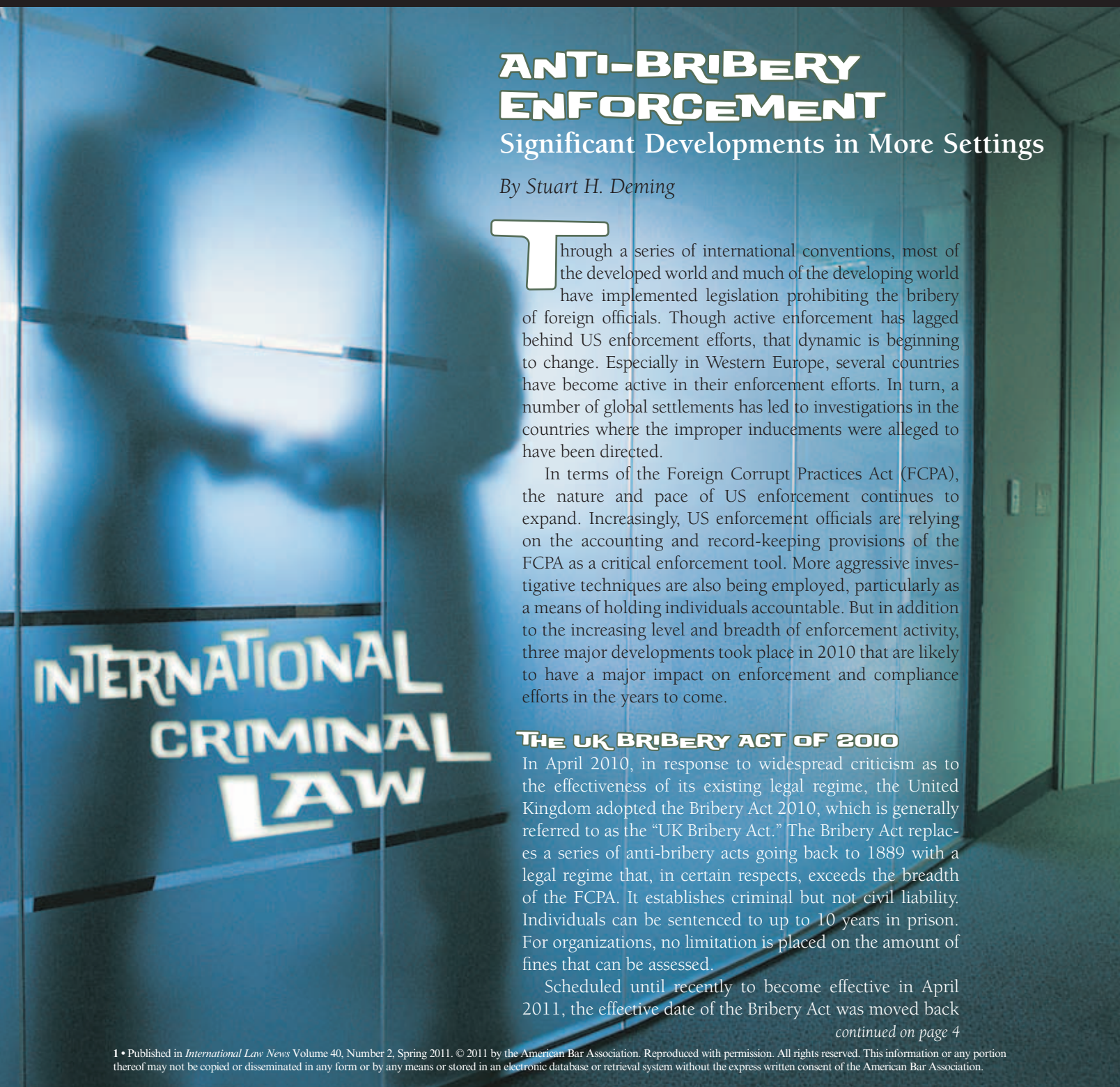
WWW.AMERICANBAR.ORG/GROUPS/INTERNATIONAL_LAW

INTERNATIONAL LAW NEWS

SPRING 2011 VOL. 40 NO. 2

SECTION OF INTERNATIONAL LAW AMERICAN BAR ASSOCIATION



ANTI-BRIBERY ENFORCEMENT

Significant Developments in More Settings

By Stuart H. Deming

Through a series of international conventions, most of the developed world and much of the developing world have implemented legislation prohibiting the bribery of foreign officials. Though active enforcement has lagged behind US enforcement efforts, that dynamic is beginning to change. Especially in Western Europe, several countries have become active in their enforcement efforts. In turn, a number of global settlements has led to investigations in the countries where the improper inducements were alleged to have been directed.

In terms of the Foreign Corrupt Practices Act (FCPA), the nature and pace of US enforcement continues to expand. Increasingly, US enforcement officials are relying on the accounting and record-keeping provisions of the FCPA as a critical enforcement tool. More aggressive investigative techniques are also being employed, particularly as a means of holding individuals accountable. But in addition to the increasing level and breadth of enforcement activity, three major developments took place in 2010 that are likely to have a major impact on enforcement and compliance efforts in the years to come.

THE UK BRIBERY ACT OF 2010

In April 2010, in response to widespread criticism as to the effectiveness of its existing legal regime, the United Kingdom adopted the Bribery Act 2010, which is generally referred to as the "UK Bribery Act." The Bribery Act replaces a series of anti-bribery acts going back to 1889 with a legal regime that, in certain respects, exceeds the breadth of the FCPA. It establishes criminal but not civil liability. Individuals can be sentenced to up to 10 years in prison. For organizations, no limitation is placed on the amount of fines that can be assessed.

Scheduled until recently to become effective in April 2011, the effective date of the Bribery Act was moved back

continued on page 4

Anti-Bribery Enforcement

continued from page 1

to July 1 as a result of delays associated with the issuance of interpretative guidance by the UK's secretary of state for justice. The guidance is helpful in providing greater clarity as to how the Bribery Act will be interpreted and applied. But, as opposed to the previously proposed guidance, the guidance as ultimately issued is generally viewed as suggesting a more relaxed approach toward how the new law will be interpreted and enforced. Nevertheless, the UK's Serious Fraud Office, which investigates suspected cases of serious or complex fraud, has reaffirmed its commitment to aggressive enforcement of the Bribery Act.

One of the Bribery Act's key provisions is a discrete offense prohibiting the bribery or attempted bribery of a foreign public official to obtain business or to obtain an advantage in the conduct of business. This offense largely tracks the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The act's prohibition applies to any branch of government, at any level, as well as those exercising public functions in any public agency or public enterprise and officials or agents of public international organizations. The concept of "advantage in the conduct of business" includes not only inducements intended to secure business, but also inducements that could in any way help a business.

The Bribery Act also creates a more general prohibition on the giving and receiving of a bribe, offering or promising a bribe, and requesting or agreeing to receive a bribe. Unlike the FCPA, the prohibition applies to the bribery of public officials as well as anyone in the private sector. This more general prohibition seeks to address conduct intended to induce improper performance of a "relevant function or activity." Improper performance is intended to be induced where it is intended that, by paying the bribe, the recipient of the bribe would be expected to act other than in good faith, in an impartial manner, or in accordance with a position of trust. Expectations are judged by standards within the UK and not local standards.

Under the Bribery Act, a bribe can include a promise or anything that might be of value to the recipient. It does not matter whether the improper inducement is made in an indirect manner. The inducement in question cannot be improper if permitted by the written law of the jurisdiction in question. As long as they are reasonable and proportionate, the issued guidance expressly allows for bona fide hospitality, promotional, or other business expenditures. Yet no exception for facilitation payments is provided. Prosecutors are expected to use their discretion. Prosecutions for facilitation payments are expected to be remote. The consequences may be different if the payments become a more regular practice.

Of particular significance is the Bribery Act's creation of an entirely new offense for the failure of a commercial organization to prevent bribes being paid by anyone "associated with" the organization. Those "associated with" the organization may include anyone performing services for or on behalf of the organization. In the absence of "adequate procedures," or what may be described as an effective compliance program, an organization can be held strictly liable.

The new offense applies to all forms of commercial organizations, including any organization that does business in the UK, regardless of where the underlying act of bribery occurred. As a consequence, as long as it carries on business in the UK, a foreign company can be found liable for the failure to implement "adequate procedures" for conduct taking place in a foreign country that bears no relationship to any business that may take place in the UK. Under the issued guidance, whether a company has securities listed in the UK or has a subsidiary that carries on business in the UK is not, in itself, determinative as to whether the company does business in the UK.

Aside from demonstrating that an improper inducement was not made, an organization can also defend itself by proving that it had in place "adequate procedures" designed to prevent bribery. The meaning of "adequate procedures" is not defined in the Bribery Act. It is left to

Stuart Deming, a vice-chair of the Section's International Anti-Corruption Committee, is a principal at Deming PLLC in Washington, D.C., and Kalamazoo, Michigan. Author of* The Foreign Corrupt Practices Act and the New International Norms *(2d ed. ABA, 2010), he has served in various capacities with the U.S. Securities and Exchange Commission and the U.S. Department of Justice.

 Published in *International Law News* Volume 40, Number 2, Spring 2011.

the secretary of state to issue "guidance" as to what constitute adequate procedures. The final guidance issued by the secretary of state relating to adequate procedures is formulated around six general principles:

1. **Proportionate procedures.** A commercial organization's procedures to prevent bribery by people associated with it are proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organization's activities. They are also clear, practical, accessible, effectively implemented, and enforced.
2. **Top-level commitment.** The top-level management of a commercial organization (be it a board of directors, the owners, or any other equivalent body or person) are committed to preventing bribery by people associated with it. They foster a culture within the organization in which bribery is never acceptable. They take steps to ensure that the organization's policy to operate without bribery is clearly communicated to all levels of management, the workforce, and any relevant external actors.
3. **Risk assessment.** The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by people associated with it. The assessment is periodic, informed, and documented.
4. **Due diligence.** The commercial organization applies due diligence procedures, taking a proportionate and risk-based approach, in respect of people who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.
5. **Communication and training.** The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces.
6. **Monitoring and review.** The commercial organization monitors and reviews procedures designed to prevent bribery by people associated with it and makes improvements where necessary.

For companies, particularly those that are issuers registered with the U.S. Securities and Exchange Commission (SEC), complying with the Bribery Act should not pose a serious problem. Many of the considerations for determining the adequacy of internal controls under the FCPA's accounting and record-keeping provisions will be the same as those that will be necessary to establish the "adequate procedures" defense. Similarly, for companies that are not issuers and that have truly effective and comprehensive FCPA compliance programs that meet the U.S. Federal Sentencing Guidelines, the Bribery Act should not pose a problem.

> **COMPLYING** with the UK Bribery Act should not pose a serious problem for companies, particularly those that are issuers registered with the SEC.

Nonetheless, care must be exercised to harmonize compliance policies governed by the FCPA and Bribery Act. For example, facilitations payments will need to be prohibited throughout an organization. Prohibitions on improper inducements to private individuals or entities, often described as "private bribery," will also need to be implemented throughout an organization. Unlike the accounting and record-keeping provision, the FCPA's anti-bribery provisions do not apply to foreign subsidiaries. For that reason, special care needs to be exercised to ensure that the prohibitions extend to all foreign subsidiaries and affiliates.

The Multilateral Lending Institutions

In 2010, the World Bank, the International Monetary Fund, and other regional development banks, including the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development, agreed to the implementation of a cross-debarment regime among the multilateral development banks. The implications are daunting. In principle, debarment at one of the participating multilateral development banks will now automatically extend to the other participating multilateral development banks.

 Published in *International Law News* Volume 40, Number 2, Spring 2011.

Over time, the World Bank has implemented a sophisticated system of guidelines and procedures to enforce and adjudicate violations of the anti-bribery regime. In this regard, a unique voluntary disclosure program is now in place at the World Bank to encourage individuals and entities to disclose improper practices in exchange for eligibility to participate in procurement opportunities. It is a rigorous process requiring an internal investigation, full disclosure, and complete cooperation. Yet it affords a chance for an entity to make a clean break with its past in order to avail itself of procurement opportunities with the World Bank.

DODD-FRANK is significant in the context of anti-bribery enforcement because it makes the FCPA specifically subject to the SEC's jurisdiction.

Though the regional development banks have yet to take these steps, they have typically followed the model of the World Bank in terms of anticorruption policies and procedures. The reach of the anticorruption policies of the multilateral lending institutions cannot be overstated. Even entities that neither seek nor anticipate pursuing opportunities through the multilateral lending institutions may be affected. Failure to bring their business practices into compliance with these policies may bear on an individual's or entity's ability to secure business opportunities through others, whether as a subcontractor or in another capacity.

The Dodd-Frank Act

Legislation adopted in 2010, and which is commonly referred to simply as "Dodd-Frank," created programs within the SEC and the Commodity Futures Trading Commission for people to report violations of the laws and regulations subject to their jurisdiction. In the context of anti-bribery enforcement, this is significant in that the FCPA is specifically subject to the SEC's jurisdiction. When the monetary sanctions exceed $1 million, a reward from 10% to 30% of the sanctions actually recovered may be awarded.

Many of the precise contours of the Dodd-Frank legislation remain subject to implementing regulations. But, in general, a number of additional protections for whistleblowers were created. A major expansion of the relief previously afforded under Sarbanes-Oxley was included permitting direct access to federal courts, a much longer statute of limitations, and double backpay. These rights and remedies for whistleblowers cannot be waived or subject to a predispute arbitration agreement.

Significantly, Dodd-Frank also requires public disclosure by issuers to the SEC of payments made to the United States and foreign governments relating to the commercial development of oil, natural gas, and minerals. This includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or to the acquisition of a license for any such activity. Also included are payments made by issuers' subsidiaries, partners, or affiliates, or by any entity under their control, to the United States or a foreign government for such development.

Changing Attitudes

Aside from the risk of prosecution, the implications relative to procurement opportunities will increasingly be a factor in changing attitudes relative to compliance and in the manner in which investigations are resolved. Whether it be the European Union's Public Procurement Directives or similar requirements imposed by other countries and many organizations, like the multilateral lending institutions, eligibility for procurement opportunities can be forfeited with a finding of involvement with corruption-related activities. For any organization engaged in any form of international business, it is now virtually mandated that it have an effective compliance program in place to deter improper inducements to foreign officials. ✦

