International Impact of National Laws:
UK and US Bribery Acts, US Dodd-Frank Act and US FATC Act

A. US Foreign Corrupt Practices Act (enacted 1977)

1. While intended to prohibit the payment of bribes to foreign officials by US businesses, FCPA was amended in 1998 to extend its anti-bribery provisions to certain foreign firms and persons. "US" now includes any company listed on a US stock exchange, selling securities in the US or doing business in the US. As a result, only one of top 10 settlements by US authorities since FCPA was enacted is a US based company. *See New York Times article.*

2. FCPA does provide an exception to liability under the bribery provisions for "facilitation" payments. These are payments made for the purpose of expediting or securing performance of "routine governmental action." There are also exceptions for payments that are otherwise lawful under local laws or for "reasonable" and "bona fide" expenditures. However, there are not well established precedents for these exceptions.

3. Due diligence costs and effects:

Public companies and private equity firms have decided to scrap deals after the due diligence phase due to FCPA issues and public perception concerns.

Does restructuring of deals work after the US Court of Appeals upheld the "willful blindness" doctrine under FCPA?

Opportunities for TAGLaw cooperation?

B. UK Bribery Act (enacted 2010) – *See article from Herrick, Feinstein*

Unlike the FCPA, there is no exception for facilitation payments.

C. US Dodd-Frank Act (enacted 2010)

1. Volker Rule:

Generally prohibits "banking entities" from engaging in proprietary trading and from investing in or sponsoring private equity and hedge funds. Foreign banks with US subsidiaries ("FBO") are exempt only if (i) the trading activity is conducted outside the US, (ii) the FBO has a compliance program, and (iii) the FBO follows prudential requirements.

How will a FBO trade in US securities or other financial instruments without US exchange trading, clearance or settlement facilities?

2. Collins Amendment:

Generally raises capital standards and restricts capital elements (becomes a floor for Basel III standards in the US). Applies to US subsidiaries of foreign banks beginning in 2015.

3. Living Wills (Section 165(d)):

Could affect up to 100 foreign banks operating in the US. Will the final rules be consistent with the resolution planning standards under development by the Group of 20?

D. US Foreign Account Tax Compliance Act (FATCA) (enacted 2010)

1. Beginning in 2015, foreign financial institutions ("FFIs") must report directly to the US IRS certain information about financial accounts held by U.S. taxpayers (or by foreign entities in which U.S. taxpayers hold a substantial ownership interest). To properly comply with these new reporting requirements, an FFI will have to enter into a special agreement with the IRS by June 30, 2013. Under this agreement a "participating" FFI will be obligated to:

(i) undertake certain identification and due diligence procedures with respect to its accountholders;

(ii) report annually to the IRS on its accountholders who are U.S. persons (or foreign entities with substantial U.S. ownership); and

(iii) withhold and pay over to the IRS 30% of any payments of U.S. source income, as well as gross proceeds from the sale of securities that generate U.S. source income, made to (a) non-participating FFIs, (b) individual accountholders failing to provide sufficient information to determine whether or not they are a U.S. person, or (c) foreign entity accountholders failing to provide sufficient information about the identity of its substantial U.S. owners.

Note: This would require a US counterparty to an ISDA derivatives transaction to withhold 30% of any US source payment to a FFI unless the FFI has entered into the special agreement and satisfied the reporting requirements.

2. US/UK Intergovernmental Agreement executed September 2012.
Under FATCA, US will enter into reciprocal agreements with other national taxing authorities based upon a model IG agreement.

3. "Reciprocal Exchange" implications:
Will there be an imbalance between the information requested by other countries and that being sought by the US IRS?
Will entities like partnerships with no non-domestic reporting requirements otherwise have to reveal information to prove they are not being used for tax evasion?

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From Herrick Feinstein Corporate Alert, July 2011:

Enactment of the UK Bribery Act

On July 1, 2011, the United Kingdom Bribery Act 2010 (the "Act") became effective. The Act introduces four new categories of offense: (1) offering, promising, or giving a bribe to another person (the active offense); (2) requesting, agreeing to receive, or accepting a bribe from another person (the passive offense); (3) bribing a foreign public official (specific principal offense); and (4) failing to prevent bribery (strict liability corporate offense). The broad jurisdictional reach of the Act significantly impacts United States companies doing business in the United Kingdom. For example, a U.S. company that carries on its business in the U.K. may be prosecuted for failing to prevent bribery if any of its employees commit bribery anywhere in the world, Thus, a U.S. company's global activities, even if they take place in a third country and are unrelated to the company's U.K. operations, may be brought within the jurisdiction of U.K. authorities pursuant to the Act.

The Act imposes potentially harsh penalties, including, for individuals, up to 10 years of imprisonment and/or a fine, and, for corporations, an unlimited fine. Other penalties may include debarment from public contracts, director disqualification in the U.K., and asset confiscation proceedings.

The only defense available to companies charged with failing to prevent bribery is for the organization to show that the company had "adequate procedures" in place to prevent the infractions. It is therefore prudent for all companies doing business in the U.K. to implement compliance systems that adequately prevent bribery in all locations where they do business.

UK Bribery Act 2010 (available at
http://www.legislation.gov.ukarkpga/2010/23/contents)

The New York Times

September 3, 2012

Foreign Firms Most Affected by a U.S. Law Barring Bribes

By LESLIE WAYNE

A law intended to prohibit the payment of bribes to foreign officials by United States businesses has produced more than $3 billion in settlements. But a list of the top companies making these settlements is notable in one respect: its lack of American names.

The companies that have reached the biggest settlements under the law, known as the Foreign Corrupt Practices Act, include Siemens, the German engineering giant; Daimler, the maker of Mercedes-Benz vehicles; Alcatel-Lucent, the French telecommunications company; and the JGC Corporation, a Japanese consulting company. The lone American company in the top 10 is KBR, the former Kellogg Brown & Root, a subsidiary of Halliburton, the Texas oil services company. As a group, they have paid nearly $3.2 billion in settlements.

Since the law was enacted in 1977, the definition of "American" has expanded greatly to include foreign companies that are listed on United States stock exchanges, sell securities in the country or do business here. At the same time, foreign companies that turn to "facilitation payments" and other forms of under-the-table dealings with local officials in far-flung places have run afoul of the act, either because of cultural differences in business dealings or because of failure to recognize the breadth of the law.

"These big settlements are with sprawling, multinational companies," said Andy Spalding, a law professor at the University of Richmond and a contributing editor to the F.C.P.A. Blog, which tracks the top settlements. "Yet they are based, in part, in the United States. A culture of compliance may be slower to take in other countries, and many are not aware of the rapid escalation of F.C.P.A. cases or its broad jurisdictional scope."

The best-known case is that of Siemens, which paid $800 million to the United States and another $800 million to Germany to settle a corruption investigation. Even though the financial settlements took place in 2008, the criminal case against eight former executives continues. In December, they were charged with paying $100 million in bribes to Argentine officials, including former President Carlos Menem, to secure a $1 billion contract for Siemens. All eight executives live in Argentina, Germany or Switzerland, and none have been arrested or extradited — a long and complicated process.

The Siemens case is illustrative. The bribery took place in Argentina. The people offering the bribes were not American, and the people demanding them were Argentine officials. Siemens is a German company. The hook for the United States was that Siemens's securities traded in the United States.

In the Daimler case, the company admitted that its subsidiary in Russia had bribed local officials, that a German subsidiary had made payments to Croatian officials using an American shell company and that improper payments had been made to Chinese officials in an effort to persuade the officials to buy Daimler vehicles. Some of the money flowed through United States bank accounts, and Daimler has extensive operations in the United States.

Peter Y. Solmssen, general counsel at Siemens, said European companies were only now becoming aware that the law applied to them. This is in part because of the attention given to his company's case.

"U.S. companies have been living with this law a lot longer than European companies," Mr. Solmssen said. "It's been part of their awareness. Our case was a real watershed. It woke up a lot of people in Europe. There had not been a lot of headline cases before that to make people sit up and take notice."

There is a "culture in many northern European companies that they have to do these things to get business," he said. "Our message is that they don't have to."

It some ways, the foreign cases were easy pickings for the Justice Department: the behavior was obvious, and the cases fairly clear-cut. Many of the settlements involved events that took place a decade ago, before companies, especially foreign ones, were fully aware of the extent of the law or realized that it applied to them.

Given the many years it takes to develop and prosecute these cases, some of them are reaching the settlement stage only now, even if the companies have since halted the practices that landed them in trouble.

"Many of these are 'cash cow' cases for Justice," said Michael Koehler, an assistant professor at the Southern Illinois University School of Law who also writes the F.C.P.A. Professor blog. "It's a government program that is profitable to the U.S. Treasury. Even more, the U.S. feels that if the home countries are not going to prosecute, the U.S. has a moral obligation to do so."

Moreover, in a world where businesses operate in an almost borderless fashion, it is often hard to determine what is domestic and what is foreign.

"The world is flat," said Matthew T. Reinhard, a lawyer at Miller & Chevalier in Washington who represents corporations in cases brought under the law. "You could be based on Mars and Justice will come after you. There was a period before Siemens when the culture of compliance was not as prevalent in foreign-based companies as those in the U.S. But there is a cultural shift, and the U.S. is on the crest of this wave."

In addition, the United States law is much tougher and broader in scope than anticorruption laws in many other countries. Typically, laws to root out corporate bribery elsewhere in the world apply only to top corporate officials, not to all employees, as the United States law does.

Justice Department officials argue that it is in the United States's interest to prosecute corporate bribery wherever it takes place. American executives have long complained that they are at a disadvantage when competing for overseas business against bribe-paying foreign competitors. Department officials say that by prosecuting foreign companies, they are seeking to level the playing field — and to end the grumbling from American executives.

Lanny A. Breuer, an assistant United States attorney general who has made such cases one of his signature efforts, said he maintained an evenhanded approach in his pursuit of corporate bribe-payers. It is just that foreign companies are only now beginning to catch up to their American counterparts in altering their behavior, he said.

"Over all, we have pursued cases against American and foreign companies equally," Mr. Breuer said in an interview. He acknowledged that the top 10 settlements were skewed toward foreign companies, but said: "I am convinced that we are calling it down the middle. Some years we are criticized for it being too much American, other years that it is too much international. It is usually from the very same critics."

Of the 78 companies now under investigation for suspected violations of the law, most are American – among them Alcoa, Goldman Sachs, Pfizer and Wal-Mart. Avon disclosed in a regulatory filing last month that it was in talks to settle an investigation into whether it had paid bribes to foreign officials.

Jeffrey M. Kaplan, a lawyer in Princeton, N.J., who specializes in cases brought under the corruption act, said there was "something strange" about the fact that nine of the top 10 settlements involved foreign companies. But he added that when the specifics of the cases were examined, "no one would feel sorry for these companies."

The biggest settlements on the list stemmed from the Bonny Island bribery case, one of the biggest corruption cases in American history. It accounted for four of the top 10 companies: KBR; Technip, of France; JGC; and Snamprogetti Netherlands and its parent company, Eni, of Italy. The bribery, sweeping in scope and decades in duration, involved a $6 billion plan to bribe Nigerian officials to obtain engineering, procurement and construction contracts for a liquefied natural gas facility on Bonny Island in Nigeria.

These settlements accounted for more than $1.6 billion in fines and penalties to the Justice Department and the Securities and Exchange Commission. On top of that, American and foreign executives involved in the bribery scandal faced criminal sentences. In February, Halliburton's former chief executive, Albert J. Stanley, was sentenced to two and a half years in prison for his role in the scheme.

"There are a lot of multinational corporations that are operating in high-risk environments," Mr. Reinhard, the Washington lawyer, said. "In many of these countries, companies that are involved in oil or telecom or pharma are more likely to encounter foreign officials on a regular basis. They are your customers. That presents an opportunity in ways that dealing with other businessmen doesn't."