

Debate

The U.S. Foreign Corrupt Practices Act (FCPA) and the U.K. Anti-Bribery Law

ISSUE: Will the FCPA and the U.K. Anti-Bribery Law affect a firm's competitiveness?

The U.S. Foreign Corrupt Practices Act (FCPA) prohibits American companies from making payments to foreign officials for the purpose of obtaining or retaining business. In 1988 Congress became concerned that American companies were operating at a disadvantage compared to foreign companies whose governments do not forbid bribes. In 1998 the United States and 33 other countries signed an agreement intended to combat the practice of bribing foreign public officials in international business transactions, with exceptions for payments made to facilitate routine governmental actions (known as facilitation or “grease” payments). Prosecution of bribery has increased, with the U.S. Justice Department making violations of the FCPA a top priority.

Bribery has become a problem for some major corporations. IBM, Daimler AG, and Monsanto were all charged with violating the FCPA and paid heavy fines. Although sometimes bribery is done with the full compliance of top management, larger companies with multiple branches, global operations, and many employees have a harder time detecting misconduct such as bribery.

Violations of the act can result in individual fines of \$100,000 and jail time. Penalties for companies can reach into the millions. Some FCPA violations are easier to detect than others. For example, some of the riskiest practices include payment for airline tickets, hotel and meal expenses of traveling foreign officials, the wiring of payments to accounts in offshore tax havens, and the hiring of agents recommended by government officials to perform “consulting” services. Current enforcement agencies are targeting these third-party bribery payments.

Many nations, including China and European nations, are taking a tougher stance against bribery. However, the United Kingdom has instituted perhaps the most sweeping anti-bribery legislation to date. The U.K.'s new Anti-bribery Act will likely cause companies doing business in the U.K. to dramatically change their compliance reports. While the act overlaps with the U.S. Foreign Corrupt Practices Act, it takes further steps to curb bribery. For example, under the law British residents and businesses, as well as foreign companies with operations in the U.K., can all be held liable for bribery, no matter where the offense is committed or who in the company commits the act, even if the bribe itself has no connection with the U.K. Unlike under the FCPA, companies are not required to have explicit knowledge of a bribe to be held criminally liable. Additionally, the Anti-bribery Act classifies bribes between private businesspeople as illegal and does not make provisions similar to those in the FCPA allowing for “grease payments”—small payments used to speed up services that otherwise would be delayed. Another part of the law requires corporations to find out whether their subsidiaries or joint-venture partners are involved in bribery at any level. The act has increased the maximum jail time for bribery from seven to 10 years.

Such encompassing provisions against bribery have created concern for businesses that operate in the United Kingdom. Some fear that something as simple as taking a business client out to dinner will be considered a bribe under U.K. law. However, U.K. officials and legal experts have stated that acts of hospitality will not be considered

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illegal. Additionally, businesses can protect themselves from heavy penalties by instituting an effective compliance program that management supports. In other words, managers should set the correct tone at the top along with implementing proper reporting procedures, periodic reviews of the company's code of conduct and compliance programs, risk assessments, and other policies. Some legal experts question whether the Serious Fraud Office in the U.K. will choose to prosecute cases that deal with small "grease" payments or cases that occur outside the U.K.

There are two sides to every issue:

1. Firms that are subject to the FCPA and Anti-bribery law will remain just as competitive as those not subject to the laws.
 2. Firms that are subject to the FCPA and Anti-bribery law will be placed at a competitive disadvantage compared to firms not subject to the laws.
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Sources:

Adapted from O.C. Ferrell, John Fraedrich, and Linda Ferrell, *Business Ethics: Ethical Decision Making and Cases*, forthcoming 9th ed. (Mason, OH: South-Western Cengage Learning, 2013).