



THE FUTURE OF ANTI-CORRUPTION ENFORCEMENT

An Interview with Homer Moyer, Member at Miller Chevalier

Written by Ethisphere Magazine

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Until the soon-to-be-released UK Bribery Act guidance is actually published, companies are left in a state of anxiety as to how strictly the Act will be enforced. Furthermore, until the Act is actually enforced in a meaningful way, questions abound as to the impact the Act will have in the U.S., and whether the DOJ might be “dethroned” as the world’s top anti-corruption cop. Ethisphere spoke with Homer Moyer, FCPA expert at Miller Chevalier, to discuss these questions and the broader uncertainty around the future of anti-corruption enforcement.

E Now that the UK Bribery Act appears to actually be ready for implementation, will the DOJ react and become even more aggressive, or will it let the UK take some of its thunder?

HM My guess is that the UK Bribery Act will not significantly affect U.S. enforcement and that the trend lines in the U.S. will continue as they have been for the last couple of years. If the UK law is implemented and meaningful enforcement begins, what we might see is more coordination between the two countries. I don’t think that U.S. agencies will slow down their enforcement.

The one exception is that U.S. enforcement may be used less to prod foreign governments to enforce their own laws, which has occasionally been the case in the past. If, in fact, the UK begins to enforce its law seriously, that could usher in more active collaboration. For many years the U.S. was something of a lone ranger in anti-corruption enforcement. As other countries begin to get serious about enforcement, be it Germany or UK or others, I think U.S. enforcement authorities will be open to collaboration and that could mean a little drop off in the number of non-U.S. companies prosecuted in the U.S. But we are still some time away from that point, I think.

E The DOJ has prosecuted several companies that are headquartered outside of the U.S. for an instance of bribery that took place outside of the U.S. because the companies are listed or have operations in the U.S. Do you anticipate the DOJ will continue that approach?

HM DOJ and SEC have aggressively enforced the FCPA against non-U.S. companies, on the grounds either that a foreign company is an “issuer” of securities in the United States or that some part of the bribe-paying activity has occurred within the United States, subjecting the company

to U.S. jurisdiction under what’s known as “dd-3” of the statute. These provisions will remain unchanged and the U.S. will be unlikely to back away when it has a jurisdictional hook. Enforcement practices may evolve, however, when we move into a zone of concurrent jurisdiction by two states that are both actively enforcing their anti-corruption laws. We’ve had a taste of that in a few cases, but we will see more if there is meaningful enforcement by other countries.

Simeultaneous prosecution by more than one country will force more coordination, as companies seek to avoid duplicative sanctions to the extent possible. So if in a few years you have a situation similar to Siemens, with a number of countries actively investigating the same pattern of improper payments, we will see pressure to manage those investigations in a coordinated way.

E Which country, in the course of 5-10 years, will develop the next “most talked about” anti-corruption regulation, or will be the next active enforcement agency in anti-corruption?

HM I think the Germans are leading that race at the moment. They have had pretty active enforcement. I think the UK is a very

interesting question mark. There has been a torrent of commentary about the coming UK law and how fearsome it will be and how broad its jurisdictional reach will be. I think it will be fascinating to see how that plays out.

E Do you predict the commercial provisions of the UK Bribery Act will be enforced as stringently as the government-bribery provisions?

HM I expect that the guidance that comes out in the UK in the next few weeks will address this issue and will allay some of the most alarmist concerns, namely that the UK law will prohibit all business promotional activity and all business hospitality. I have trouble believing that the Act will either be interpreted in that manner or enforced in that manner. My suspicion is that a few aspects of the UK law that have attracted the most commentary will, in reality, turn out to be less aggressive than some people have feared.

E Ethisphere has spoken with many companies that are worried about the Act and are concerned as to whether or not their current compliance programs satisfy the Act's requirements. What one piece of advice can you offer companies that are developing or improving upon current anti-corruption programs in order to meet requirements of both the FCPA and UK Bribery Act?

HM The most important step is to have in place a good, thoughtful, risk-based compliance program. If a company has a strong compliance program that meets the ever-moving target of best practices under the FCPA, it should be well-positioned. Companies may well want to tweak their programs to meet new UK standards, but those standards have yet to be fully articulated. A strong anti-corruption compliance program that reflects the best practices standards that have developed over time under the FCPA will likely meet all or most of the standards that the UK may announce.

It would be a mistake, I think, to build a program right now around the strongest of the Chicken Little cries about what the UK Bribery law is going to prohibit or require. I would look to FCPA best practices, or the new OECD guidance, and then wait to see the guidance that comes out of the UK.

At the end of the day, I will be surprised if the differences between the FCPA and Bribery Act – both of which implement the OECD convention – are dramatically different. There will be differences, but I suspect that the implementation process in the UK will bring the two together more than it will separate them.

Let me add one qualification to that which is focused on the phrase “adequate procedures.” There is a scenario in which that phrase could be defined in such a way as to create a new floor, if you will, below which

compliance programs should not drop. I don't know that it will be defined with the degree of precision some of the comments coming out of the SFO suggested. It will be a bit more of an organic test and less of a checklist, but that is the one provision of the Act that I think, depending on implementation, could make significant changes to the compliance program.

E Do you believe the UK Bribery Act will actually be successful in preventing bribery that otherwise would not have been prevented by the FCPA?

HM Well the UK Bribery Act certainly will have a broader jurisdictional reach and therefore apply to many corporations that may now not be subject to the FCPA except where there is some connection with the U.S. I think that is the significant difference. As I said, whether the full jurisdictional scope will be implemented and its exercise remains to be seen, and whether it's fully consistent with principles of international law remains to be seen, but it's very broad and deep. It is broader than the FCPA and could, for example, produce

a prosecution of a German company doing business in South America and paying a bribe about which there is no connection to the UK other than the fact that the German company has unrelated business operations in the UK. That's a very broad jurisdictional reach, but one that the law as written suggests.

Author Biography

Homer Moyer, the architect of Miller & Chevalier's preeminent international practice, is regarded as one of the country's leading Foreign Corrupt Practices Act (FCPA) lawyers.