

Bribery Risk Update

ACC - DENVER

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Three things you need to know...

- Ever increasing regulation in this area world-wide
- Conflicting global mandates
- Agencies now geared to enforcement



The UK Threat – An increased interest in Bribery

- Overseas Corruption Unit set up in December 2007
- New management at the SFO in April 2008 – “open door” policy
- New self-reporting guidelines issued by SFO in July 2009
- Closer international co-operation and birth of “global settlements”
- Use of Civil Recovery Orders
 - **Balfour Beatty**: £2.25 million for failure to keep accurate records on Egyptian project
 - **AMEC**: £4.9 million for failure to keep accurate records in relation to Korean project
 - **BAE**: £30 million for failure to keep accurate records in relation to its activities in Tanzania

Recent background

- But still some criminal prosecutions:
 - **Mabey & Johnson** pleaded guilty to overseas corruption and to breaching UN sanctions. They were fined £3.5million, ordered to pay £1.1million in confiscation and £1.4million as reparation to Ghana, Jamaica and Iraq (September 2009)
 - **Robert Dougall** (past Vice President of DePuy International) was first “co-operating defendant” jailed for overseas corruption (14 April 2010) but this was overturned on appeal (13 May 2010)
- SFO encounters problems with plea bargain arrangements in **R v Innospec**, **R v Dougall** and **R v BAE**
- The new Bribery Act

UK SFO – its future approach

- Budget cuts due to “austerity measures”
- Government review which led to initial decision to merge with other law enforcement agencies but its future now safeguarded
- SFO loses key staff
- SFO Director due to retire April 2011
- On a criminal prosecution entitled to recoup nothing from court sanctioned fine
- On civil recovery entitled to recoup up to 35% of settlement value

Ramifications of breach: Siemens example

- Criminal prosecutions
 - €395m
 - \$450m DOJ
- Disgorgement of profits
 - €201m
 - \$350m SEC
- Debarment: UN
 - 6 months
- Independent monitor
 - 4 years
- Multiple investigation costs
 - 2010 - €900m
- Back taxes/interest
 - €179m
- Diversion of management
 - Cost?
- Civil litigation
 - Cost?

Timing of new UK Bribery Act

- Ministry of Justice guidance issued 30 March 2011
- Became law on 1st July 2011
- Not retrospective

How does it differ from the FCPA?

- Applies to pure commercial sector bribery as well as bribery of foreign officials
- Facilitation payments prohibited
- Criminalises asking for and receiving bribes
- Corporate Liability

Why is this UK Legislation Relevant to your Business?

It will affect you:

- If your company “carries on business” in the UK
- A “demonstrable business presence”

Multinationals

- The effect of:
 - A UK subsidiary
 - A UK Stock Exchange listing

4 Key Offences

- Active bribery
- Passive bribery
- Bribing a foreign public official
- Failing to prevent bribery

Who is caught by the Bribery Act?

Individuals

- If “Closely Connected” to the UK; or
- British Citizen/Ordinarily Resident in the UK

Corporations

- Incorporated in the UK; or
 - Incorporated outside UK but carries on business in UK
- Senior Officers (directors, managers, company secretaries) of a company if it is prosecuted

Place of the Wrongdoing

- Applies to Bribery anywhere in the world and no need for a UK connection

Bribery of a Foreign Public Official

- This offence requires only that the Offeror intend to influence the public official to obtain or retain business.
- It is not necessary that the action of the official be “improper.”
- It is a defence to show that the FPO is expressly permitted to be influenced in the particular manner.

Who is a Foreign Public Official?

- Legislative, Administrative or Judicial positions;
- Persons exercising a public function for a country or territory or for a public agency or enterprise
- Officials or agents of public international organisations
- Not clear if this is as broad as US FCPA

The Corporate Offence of “Failure to Prevent” Bribery

A company will commit an offence of bribery where an Associated Person carries out Active Bribery or bribes a FPO

The Policy behind the Failure to Prevent Rule

“The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf”

UK Secretary State for Justice

“Associated Person”

Includes not only:

(a) An employee or agent;

but also

(b) Any person who performs services for or on behalf of the commercial organisation

Difficult Areas

- Contractors/Agents
- Suppliers and supply chains
- Joint Ventures
 - Contract
 - Separate Legal Entity
- Subsidiaries

Key Elements

- Strict liability
- Irrelevant that the Company does not know about the bribe being paid
- The Company can be liable even if it does nothing improper

Defence of Effective Compliance

- The UK Law offers a defence to the Strict Liability Offense for Corporations
- The corporation must show it has “Adequate Procedures” in place. This means an effective compliance programme

The “Adequate Procedures” Defence and the Guidance

- UK Government suggested procedures and principles
- But leave it up to the organisation to decide what is appropriate
- Burden on organisation to prove it had adequate procedures
- Robust and effective anti-bribery systems and controls
- Proportionate to the Risks

The Six Principles

1. Proportionate Procedures
2. Top Level Commitment
3. Risk Assessment
4. Due Diligence
5. Communication (including training)
6. Monitoring and Review

1. Proportionate Procedures

- Proportionate to bribery risks the Company faces, and to the nature, scale and complexity of its activities
- Clear, Practical, Accessible, Effectively Implemented and Enforced
- Can be standalone or not
 - Tender process
 - recruitment

- High risk example: use of agent in foreign country to negotiate with public officials
- Existing associated persons
- Whistle blowing procedures

2. Top Level Commitment

- Culture that bribery is never acceptable
- Well publicised statement of consequences for employees and business partners
- Board level responsibility

- Make a senior manager actively responsible for the programme
- Repetition
- Protection and procedures for whistle blowing
- Internal and external

3. Risk Assessment

- Periodic informed and documented
- Proportionate to organisation size, nature and location of its business

- Internal Risks : remuneration structure, hospitality policy, financial controls
- External Risks :
 - Country
 - Sector
 - Type of transaction
 - Business opportunity
 - Business partner

4. Due Diligence

- Proportionate to the identified risk
- Know your business relationships
- Check :
 - the local risks and relevant laws
 - reputations
 - partner's own internal measures

Difficult Areas:

- Local law/convention requiring use of intermediaries
- Mergers and acquisitions
- Recruitment

5. Communication (including training)

- Policies and procedures embedded and understood
- “Tone from the Top”
- Cover all levels from board of directors down
- Cover “associated persons”
- Clear procedure on the response to incidents of bribery
- “Speak up procedures”

6. Monitoring and Review

- Identify issues as they arise
- Improve where necessary
- Report results of review to the Board
- Possible external verification of effectiveness

Corporate Hospitality

- “Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix” – Kenneth Clarke v. Secretary for State for Justice (March 2011)
- Also includes invitation to attend a Six Nations match at Twickenham

- “Reasonable and proportionate” - No dollar amount stipulated
- Hospitality “intended to induce” conduct which is wrongful
- Bona fide to improve a company’s reputation, present products or services or establish cordial relations

- Norms may be relevant
- Payment for foreign travel and expenses for bona fide fact finding cf for no bona fide reason

Facilitation Payments

- Small bribe to facilitate Government action
- Recognition of prevalence and difficulty for companies
- Companies should address in their prevention procedures

Questions?

