Approaching the fifth anniversary of the UK Bribery Act

Lessons learned for internationally operating companies

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Introduction

The UK Bribery Act 2010 (UKBA) entered into force on July 1, 2011. Prior to this date, enterprises worldwide took advice on their position, and legal departments and external advisors were kept busy updating and modifying internal anti-corruption compliance systems to meet the high standards required under the UKBA. However, those in the business community have expressed surprise that four and one-half years after the act came into force, the first UKBA cases are only now being concluded. As we approach the fifth anniversary of the UKBA, we examine the act and discuss recent enforcement activity as well as the risks and consequences involved for internationally operating companies regarding antibribery compliance.

The UK Bribery Act – the toughest antibribery legislation in the world

When it came into force, the UKBA was described as “the toughest antibribery legislation worldwide.” Why then is it considered so tough?

As a reminder:

- **Extraterritorial reach**: The UKBA has extraterritorial reach for both UK companies operating abroad and foreign companies that carry on a business or part of a business in the UK, for example, through representative offices.

- **Broad scope of application**: Unlike the US Foreign Corrupt Practices Act (FCPA), the UKBA covers both bribery of public officials and private bribery. The “general bribery offenses” are set out in sections 1 and 2 of the UKBA, and bribery of foreign public officials is a crime under section 6 of the UKBA. The separate section 6 offense was created to simplify the prosecution of those who bribe foreign public officials by recognizing (a) the evidential difficulties in establishing the functions for which a foreign public official is responsible and (b) that securing evidence can be reliant upon the cooperation of the state any such officials serve.

- **Strict corporate liability for failure to prevent bribery**: It was the corporate offense under section 7 of the UKBA that led to the increase in workload for compliance departments and professional advisors. This offense was intended to make the prosecution of corporates for bribery offenses a
The early years – the slow start of the UK Bribery Act

After the initial fanfare, there was little publicity regarding the UKBA, despite its very strict provisions and the serious consequences for which it provided. In the business community, there had been great expectations regarding enforcement of the UKBA and a perception that little had happened. There were some initial prosecutions by the Crown Prosecution Service regarding minor bribery, including, for example, a student who tried to bribe his tutor, but there was no corporate enforcement until 2015. This was not a surprise to white-collar crime practitioners. The UKBA criminalized conduct that wholly occurred after July 1, 2011. Offenses predating July 1, 2011, or committed partly before the date would be assessed under the previous corruption laws. It was therefore unlikely that the Serious Fraud Office (SFO) would have prosecuted many cases under the UKBA because the offenses would have had to have post-dated July 1, 2011, in its entirety and would have had to have come to light and then be investigated and brought to trial. The SFO is a specialist prosecuting authority that tackles the top level of serious and complex fraud, bribery and corruption. Such cases involve voluminous documentary evidence, and it is normal for such a case to take three to five years to reach trial following the start of an investigation.

The previous SFO director, Richard Alderman, had taken a constructive approach to dealing with corporates. He encouraged companies to self-report to the SFO and instruct a law firm to conduct an independent internal investigation. A corporate could then receive a criminal or a civil settlement, so this approach motivated corporates to self-report. The use of civil settlements was, however, criticized by one of England’s most senior judges. When David Green was appointed as director of the SFO in 2012, he restated the role of the SFO as that of a prosecutor. The era of constructive engagement with companies by the SFO appeared to end. In February 2014, the SFO gained the ability to enter into a deferred prosecution agreement (DPA) with a corporate. A DPA is available for specified offenses including UKBA offenses and has the effect of suspending criminal proceedings subject to the corporate’s agreement to a course of conduct. The DPA process includes judicial scrutiny. At the conclusion of the term of the DPA, the matter is concluded without prosecution if the corporate has complied with the necessary obligations under the DPA. Terms can include a financial penalty and the use of a monitor.
to assess and oversee a company’s internal controls.

Recent enforcement – enforcement in the UK is picking up speed

A number of recent cases have demonstrated the UK is committed to enforcing the UKBA and to taking action against corporates.

• First conviction of a company at trial regarding an overseas bribery scheme: Smith and Ouzman Ltd. In December 2014, Smith and Ouzman Ltd, a company specializing in printing security documents, and two of its senior executives were convicted of agreeing to pay bribes totaling approximately £500,000. The payments were used to influence the award of contracts in Kenya and Mauritania. The company and executives were charged with bribery offenses under old bribery laws as the offenses predated the UKBA coming into force. The directing mind principle was therefore relevant to prosecution of the company under the old law. The company was not, however, large and, as a result, a conviction was easier to achieve than had it been a large multinational company with a more complicated governance structure. Smith and Ouzman Ltd was fined a total of £2.2 million and the SFO has subsequently charged other companies under the old law. One of the executives was sentenced to three years in jail and the other was given an 18-month suspended sentence.

• First resolution of a case relating to section 7 of the UKBA: Brand-Rex Ltd. Scotland’s prosecution service, the Crown Office, concluded a civil settlement in the amount of £212,800 with Brand-Rex Ltd, a developer of cabling solutions. In June 2015, solicitors for Brand-Rex Ltd had submitted a self-report to the Crown Office. The company had been operating a reward program for UK distributors and installers for achieving certain sales targets, and the program included foreign holidays as one of the rewards. The program itself was legitimate, but one of the independent installers passed on his reward, in the form of his company’s travel tickets, to an employee of a customer. The employee was in a position to influence decisions as to where his company purchased cabling. As a result of this behavior, Brand-Rex Ltd was in breach of section 7 of the UKBA.

• First DPA and first offense related to section 7 of the UKBA before an English court: Standard Bank plc: Standard Bank plc was the subject of a charge alleging failure to prevent bribery contrary to section 7 of the UKBA. The charge was suspended pursuant to a DPA. The suspended charge related to a $6 million payment made by a former sister company of Standard Bank plc, Stanbic Tanzania, to a Tanzanian company that was owned by three shareholders, one of whom was a current high-ranking public official and another a former high-ranking public official. The SFO alleged the payment was a bribe intended to induce members of the Tanzanian government to favor Stanbic Tanzania and Standard Bank plc’s proposal for a $600 million private placement to be carried out by the government of Tanzania. The placement generated transaction fees of $8.4 million that were shared between Stanbic Tanzania and Standard Bank plc. Standard Bank plc submitted a self-report to the SFO and voluntarily provided evidence. Standard Bank plc agreed to pay the following penalties under the DPA: compensation of $6 million, interest of $1.15 million, disgorgement of profit of $8.4 million, a financial penalty of $16.8 million, and prosecution costs of $330,000.

• First guilty plea regarding an offense under section 7 of the UKBA: Sweett Group plc: Sweett Group plc had originally submitted a self-report to the SFO ahead of an article in the media that alleged the company had been involved in bribery in the UAE. Sweett Group plc subsequently entered into a dialogue with the SFO regarding a separate issue. The relationship with the SFO appears to have deteriorated and the SFO ultimately did not invite Sweett Group plc to take part in a DPA process. Sweett Group plc ultimately agreed to plead guilty to an offense under section 7 of the UKBA. A sentence is expected to be handed down on February 19, 2016.

These cases indicate that the much anticipated enforcement of the UKBA has now begun. The coming years will...
potentially see a number of provisions of the UKBA litigated in the appellate courts and perhaps guidance on the meaning of “adequate procedures” will emerge. The SFO is, however, now willing and able to strictly enforce the UKBA and will take an aggressive approach with corporates regarding overseas bribery. Even with the chance of obtaining a DPA, many white-collar crime practitioners believe there is little advantage in cooperating with the SFO under the current administration. The SFO is taking on high-profile cases and a number of household names are currently under investigation regarding allegations of overseas bribery.

Lessons learned – consequences for globally operating enterprises

The latest developments in UKBA enforcement and prosecution reveal that the UKBA is – now more than ever – a very relevant risk for companies operating internationally given the broad reach of the statute and the danger “associated persons” can pose to a company. It has become even more important now that the SFO and the UK courts have proven they are getting serious with enforcing the act. It is time to review and stress test compliance, and especially antibribery programs, to see if they meet the stringent requirements imposed by the UKBA.

It is not enough for a company to have a policy to make use of the adequate procedures defense. The policy must be implemented properly and tailored to your firm’s business. A policy will need to be reviewed over time to ensure it remains fit for purpose. The UK Ministry of Justice published guidelines in March 2011 that enshrined six principles necessary to accept a company’s compliance as “adequate”: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training), monitoring and review. Only companies having procedures available that comply with these principles will have a defense against liability under section 7 of the UKBA. This includes appropriate steps to manage the risk of third parties performing services, including due diligence, contractual protections and, potentially, compliance audits.

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