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UK Bribery Act Enforcement is on the Horizon

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Law360, New York (February 12, 2013, 7:10 PM ET) -- Since the U.K.'s Bribery Act 2010 came into force (on July 1, 2011) the last 18 months have not been filled with the enforcement activity som e expected or hoped for. Rather than headline-grabbing dawn raids by the Serious Fraud Office, or big name takedowns, the first case to reach prosecution was of a much lower profile. The lack of big name cases does not mean, however, that the enforcement authorities have been lax, nor that the Bribery Act is toothless.

Initial Prosecutions Under the Bribery Act

The first prosecution under the Bribery Act involved a magistrates court clerk, the subject of a "sting" reporting operation by the Sun newspaper. Caught (and filmed) accepting cash bribes of around £500 in return for not recording driving offenses in the court database (thereby helping people to avoid driving bans), the clerk was convicted in October 2011 of bribery and misconduct in public office. A three-year prison term was imposed for the bribery offense. Although the clerk was found to have been accepting the bribes since 2009, the prosecution was based on the one 2011 offense that occurred after the Bribery Act entered into force.

Despite the apparent initial enthusiasm, Bribery Act prosecution activity slowed. A number of cases became public, but generally involved charges under previous laws. For example, in November 2012 Scottish drilling company Abbot was fined £5.6 million for corrupt payments (that took place in 2007), having self-reported following an internal audit.

The lack of Bribery Act cases against corporate entities may seem frustrating, but we anticipate the first may be just around the corner. The Bribery Act enforcement actions to date can be seen as the SFO "clearing its books" and readying itself to tackle future case load. The SFO has indicated that a number of cases are currently being investigated. Should the circumstances be right, these may lead to prosecutions.

New Sheriff, New Approach?

Historically, the SFO has been keen to encourage self-reporting by companies of potential wrongdoing by reassuring that in return for disclosing, the SFO would be predisposed to civil remedies as opposed to criminal sanctions. A number of cases under the old laws were settled by way of civil remedy order, normally including forfeiture of the criminal activity's proceeds under money laundering legislation, instead of full criminal prosecution. Indeed, the Ministry of Justice's guidance that accompanied the Bribery Act referred to the SFO's "policy … of cooperation" with companies that self report. It stated that

if companies were cooperative and made full disclosure, this would be a factor in deciding whether to proceed with a criminal prosecution.

A change of leadership took place at the SFO in April 2012, with David Green replacing Richard Alderman as director. Green's style has been characterized as "war, war," rather than "jaw, jaw," and his influence can clearly be seen in the recent policy decisions taken by the SFO.

Under Director Green's influence, the SFO's updated and modified guidance published in October 2012 moved away from its characteristic conciliatory position and adopted a harder line, stating that no guaranteed protection exists against criminal prosecution. Although it will always be important to promptly carry out internal investigations to determine the extent and severity of an issue, determining whether and when to disclose to the authorities may now be even more challenging and will depend on a number of factors, not least the SFO's harder line stance.

The situation in the U.K. is further complicated by the application of the money laundering rules, which place obligations on specified individuals, or professional advisers, to report suspicious activity to the Serious Organized Crime Agency (SOCA). SOCA reports, which will catch "proceeds of crime" stemming from illegal bribery, are accessible by the SFO and may lead to investigation. The filing of a SOCA report, however, will not be treated as a self-disclosure to the SFO, and the failure to inform both entities at the same time might be treated as failure to cooperate.

The introduction of deferred prosecution agreements also appears on the horizon for the U.K. enforcement toolkit. Following a consultation in May 2012, the U.K. government confirmed at the end of October 2012 that it will introduce DPAs as part of the Crime and Courts Bill, which is currently moving through the legislative process. DPAs will be available as a method for tackling economic crime, including offenses under the Bribery Act. It is anticipated that DPAs will promote criminal enforcement methods, possibly trending away from U.K. authorities' previous reliance on civil remedies.

Some concern has been expressed, however, as to whether DPAs might lead the U.K. to adopt some of the U.S. system's bad habits. Namely, the perception exists in the U.K. that U.S. authorities have used DPAs to exert unwarranted pressure on companies to settle cases. Others, however, view the flexibility afforded by DPAs as one of keys to U.S. authorities' success in tackling bribery and corruption. DPAs have been used in the U.S. as a means to settle many high-profile criminal cases, and have resulted in significant penalties and associated payments by the offenders. While reaching a DPA foregoes a criminal conviction, it may nonetheless have serious impact on the alleged offender.

The outlook for 2013 and 2014 suggests an increase in Bribery Act enforcement activity. The SFO's preference to avoid the "low-hanging fruit" and pursue the "bigger" cases appears to be intact, and many would like to see the jurisdictional aspects of the Bribery Act put to the test. With the Bribery Act having now been in force for around 18 months, illegal activities from the early part of that period are ripe to be uncovered by management teams through periodic audits and reviews, or notified to authorities by competitors and whistleblowers.

The lack of prosecutions in 2012 does not equate to lack of action. Instead, a normal time lapse is expected before for violations surface that took place after the Bribery Act came into force. For entities involved in trade in the U.K., compliance with the Bribery Act remains a real and significant concern, and an area for attention, focus, and adequate measures and controls in an effective corporate compliance program.

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