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In This Issue:

Baker & McKenzie's quarterly corporate compliance publication, "Inside the FCPA," is an electronic and hard copy newsletter dedicated to the critical examination of developments in U.S. and international anti-corruption compliance that are of particular concern to global companies (and their officers and employees). The newsletter is written with the intention of meshing specialized U.S. coverage with a select international viewpoint in order to meet the expectations of an international client base and a discriminating readership. We seek to make our guidance practical and informative in light of today's robust enforcement climate, and we encourage your feedback on this and future newsletters.

If you would like to provide comments, want further information about the matters discussed in this issue, or are aware of others who may be interested in receiving this newsletter, please contact Sue Boggs of Baker & McKenzie at sue.boggs@bakermckenzie.com or +1 214 965 7281. We look forward to hearing from you and to serving (or continuing to serve) your FCPA, international anti-corruption, and corporate compliance needs.

Brazil's New Anti-Bribery Law and Its Implications for Global Compliance Programs

by Esther M. Flesch, Bruno C. Maeda, Erica Sarubbi, and Carlos H. Ayres, São Paulo

On August 1, 2013, the Brazilian President approved a new Anti-Bribery Law (Law no. 12.846/2013), i.e., the "Clean Company Act" (hereinafter the "Act" or the "Anti-Bribery Law"). The Act is expected to come into full force in February 2014. (An unofficial English translation of the full text of the Anti-Bribery Law can be found here.)

The Anti-Bribery Law introduces offenses for Brazilian companies and foreign companies operating in Brazil for acts committed to the detriment of a local Brazilian or foreign (non-Brazilian) public administration. These acts include bribery, corruption, and improper conduct related to public tenders and contracting. The Act is a critical part of the current global trend towards robust and expansive anti-corruption regimes and heightened levels of enforcement.

This article sets out the main features of the Anti-Bribery Law, which collectively have important ramifications for the anti-corruption compliance programs and potential liability of companies that conduct business in Brazil. The next few months will be a critical time for companies doing business in Brazil to review their existing internal policies and procedures to meet the Act's requirements. Therefore, we also spotlight, below, those compliance areas to which companies should be paying particular attention.

With respect to multinationals already subject to the U.S. Foreign Corrupt Practices Act ("FCPA"), the U.K. Bribery Act, and the anti-corruption laws and regulations of other jurisdictions, the Anti-Bribery Law has the potential to

create a more level playing field. For example, Brazilian companies not previously subject to the FCPA's extraterritorial reach must now implement rigorous anti-corruption compliance controls, upgrade compliance resources, and enhance anti-corruption programs to meet the Act's requirements.

Key Features of the Anti-Bribery Law

(i) Subjected Persons

The Anti-Bribery Law will apply to:

1. Business organizations in Brazil (whether incorporated or not);

2. Any Brazilian foundation or association; and

3. Foreign (non-Brazilian) companies with any presence in Brazil (even if temporary).

Such entities will be strictly liable for prohibited acts committed in their interest or for their benefit. To demonstrate strict liability under the Act, the authorities need only show that a prohibited act occurred -- there is no requirement to prove the intent of the company or any individual officer. The Act also provides for possible successor liability in the event of restructuring, transformation, merger, acquisition, or the spin-off of a company.

(ii) Prohibited Acts

The Anti-Bribery law applies to more than just bribery. It also regulates other illegal acts committed against a local Brazilian or a foreign public government administration, particularly in the context of public tenders. The following conduct is prohibited by the Act:

- To promise, offer, or give, directly or indirectly, an undue advantage to a public agent or a related third person;

- To finance, pay, sponsor, or in any way subsidize the performance of a prohibited act;

- To make use of any individual or legal entity to conceal or disguise real interests or the identity of the beneficiaries of acts performed; or

- To hinder an investigation or audit by a public agency, or to interfere with their work.

With specific respect to public procurement and contracts, it is impermissible under the Act:

1. To thwart or disturb the competitive character of a public tender procedure;

2. To prevent, disturb, or defraud the performance of any act of a public tender procedure;

3. To remove or try to remove a bidder by fraudulent means or by the offering of any type of advantage;

4. To defraud a public tender or a contract arising therefrom;

5. To create, in a fraudulent or irregular manner, a legal entity to participate in a public tender or enter into an administrative contract;

6. To gain an undue advantage or benefit, in a fraudulent way, from modifications or extensions to contracts entered into with the public administration; and

7. To manipulate or defraud the economic and financial terms of contracts entered into with the public administration.

(iii) Sanctions

The potential sanctions for breach of the Anti-Bribery Law are significant and include the following:

Administrative Sanctions

1. A fine of between 0.1% and 20% of the gross revenue of the company in the fiscal year prior to initiation of proceedings. The fine is not to be lower than the advantage obtained by the company as a result of the prohibited act, where it is possible to estimate the advantage. If it is not possible to use the company's revenue to determine the fine, the alternative fine will range from R$ 6,000.00 (around USD $3,000.00) to R$ 60,000,000.00 (around USD $30,000,000.00); and

2. Publication of the decision (i.e., public censure of the company for its actions).

Judicial Sanctions

1. Disgorgement of the assets, rights, or income representing, directly or indirectly, the advantage or benefit gained from the infringement;

2. Suspension of the company's activities;

3. Compulsory dissolution of the company; and

4. Disbarment from public work for between one and five years.

Enforcement of the Anti-Bribery Law

The Anti-Bribery Law brings significant new provisions to the Brazilian legal regime, and companies are eager to learn how the Act will be enforced. For the time being -- while we wait for clear guidance from Brazilian authorities -- there are certain enforcement factors companies should be mindful of.

(i) Factors to be Taken into Consideration in Applying Sanctions

The Act indicates that a company with an effective compliance program in place (notwithstanding that a breach of the law occurred) will receive credit for the program. The criteria for evaluating compliance programs will be established by specific regulations to be issued by Brazil's Federal Executive Branch (in due course).

Another important factor to be taken into consideration by Brazilian law enforcement when applying sanctions will be "the cooperation of the company with the investigation of the offense." Such recognition is in line with anti-corruption guidance provided by regulators in other countries, such as the U.S. Department of Justice and the U.K. Serious Fraud Office. Both incentivize proactive anti-corruption compliance, including comprehensive internal investigations and cooperation with prosecuting authorities.

(ii) Leniency Agreements

The Anti-Bribery Law also allows Brazilian prosecutors to enter into leniency agreements with companies, provided that the company has cooperated with the investigation, resulting in (i) the identification of those involved in the violation and (ii) the exchange of information and documents relating to the matters under investigation. The Act provides other detailed requirements and conditions for leniency agreements, beyond the scope of this overview.

Importantly, a leniency agreement will not exempt a company from its obligation to pay damages relating to the offense committed. But it can reduce the amount of the applicable fines (by up to two-thirds) and exempt the company from other administrative and judicial sanctions.

How to Prepare for the Anti-Bribery Law

As we get closer to January 2014, it will be important for companies to consider the impact that the Anti-Bribery Law will have on global anti-corruption compliance. In order to mitigate the risk of liability under the Act, companies should give consideration to the following compliance areas.

(i) Compliance Programs

Effective compliance programs will play a key role in enabling companies to prevent and detect wrongdoing, decide when it is appropriate to make voluntary disclosures to local authorities, and seek credit in cases where wrongdoing is discovered (despite the company's best compliance efforts).

The guidance for programs seeking compliance with the Act parallels best practices for complying with the FCPA, the U.K. Bribery Act, and related anti-corruption laws. Compliance programs should be implemented, reviewed, monitored, and revised on a regular basis, taking into consideration the key risk factors of the company's specific business. A compliance program should vary according to the company's size and the nature of its operations – including geographic location and associated risk perception. Moreover, the mere creation of, and periodic updates to, an anti-corruption program will not be sufficient. It is important to regularly disseminate communications relating to the program, apply standards and protocols across the company's operations, and enforce program adherence throughout the company.

For companies that already have an anti-corruption compliance program in place, it is imperative to review existing policies and procedures to ensure compliance with the terms of the Anti-Bribery Law, particularly in light of the Act's strict liability and public procurement provisions.

(ii) Training

In preparation for January 2014, when the Act is expected to come into full force, companies should invest in training for employees and third parties (who might act on their behalf). In addition to helping prevent wrongdoing, training is one of the mandatory pillars of an effective compliance program. Furthermore, considering that a substantial proportion of the prohibited acts set forth in the Act relate to public tenders and public contracts, companies should intensify training in those areas as well. In our experience, effective training is interactive, conducted in the local language, and incorporates practical examples relevant to the specific audience's work.

(iii) Due Diligence of Third Parties and Corporate Transactions

Because companies can be liable for prohibited acts committed by third parties (i.e., when such third parties are acting on the company's behalf or where the company derives a benefit from such third parties), it is essential for

companies to take precautions to ensure that they interact with reputable partners. In this context, the implementation of an effective anti-corruption due diligence screening process is an important factor to reduce risk.

Likewise, because mergers and acquisitions do not extinguish liability for acts committed by the acquired company, acquiring companies must be aware of the implications of the Anti-Bribery Law in the context of entering into corporate affiliations (including joint ventures). In addition to the usual financial due diligence conducted in the course of such transactions, companies must also undertake specific compliance due diligence, with a focus on corruption risks.

(iv) Internal Investigations

Finally, when a company receives allegations or becomes aware of conduct that may violate the Anti-Bribery Law, it should act quickly to investigate the facts and seek resolution. We expect that the incorporation of an effective oversight mechanism that ensures an adequate response to corruption-related improprieties or other prohibited acts will be an essential element of an effective program under the Act.

In some cases, the appropriate response may be to initiate an internal investigation. In such circumstances, by conducting a thorough and proportionate internal investigation, as circumstances dictate, companies will be better positioned to control and determine the benefits of making a voluntary disclosure or negotiating leniency agreements. Indeed, if such a response is required, it is important that companies conduct credible and independent investigations. To maximize the benefit of such investigations (and minimize risks and investigative mishaps), it is advisable to develop well-considered and established protocols as part of your program.

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Global Anti-Corruption Enforcement Trends: The U.K. Serious Fraud Office - A Year-End Snapshot

by John P. Cunningham and Geoff Martin, Washington, DC

In this edition of Inside the FCPA, John Cunningham and Geoff Martin revisit the subject of their May 2013 Financial Fraud Law Report article (Signs of Spring at the U.K.'s Serious Fraud Office: Challenges, Changes, and the Impact on Global Anti-Corruption Compliance) and address whether the enforcement trends and initiatives identified there have borne fruit for the Serious Fraud Office ("SFO") during the course of the year.

The SFO has undoubtedly made progress since the Spring, and has consistently reinforced its ambitious objectives and assertive tone for anti-corruption and fraud enforcement in the U.K. However, the agency continues to be beset with criticism about its ability to effectively manage its caseload amidst a dwindling budget.

In the meantime, a number of high-profile international instances of corruption have been exposed, reinforcing the need and opportunity for increased enforcement by the U.K. The manner in which the SFO responds to these matters will be an important barometer of its progress.

Forward Progress

The SFO has taken some important steps forward in 2013, including the following:

- In August, the SFO brought its first charges under the U.K. Bribery Act (the previous three convictions discussed in our May 2013 article were all brought by the U.K.'s general criminal prosecutorial body, the Crown Prosecution Service). Charges of making and accepting a financial advantage contrary to s. 1(1) and s. 2(1) of the Bribery Act (among other fraud charges) were brought against three executives of Sustainable AgroEnergy plc in connection with a £23 million fraud involving sales of biofuel investment products to U.K. investors (between April 2011 and February 2012).

- Although we have yet to see a corporate Bribery Act case, the SFO has shown that it is prepared to take cases against large corporations. For example, in November, the SFO revealed that it had initiated an investigation into the management of government contracts for the electronic tagging of U.K. prisoners by private security firms G4S plc and Serco Group plc.

- The SFO continues to prosecute companies for offenses in which the facts pre-date the coming into force of the Bribery Act (in July 2011), under then-existing legislation. For example, in September, Companies Act charges were brought against the U.K. subsidiary of the Japanese camera company Olympus; and in October, Smith and Ouzman Ltd., a U.K.-based printing company, was charged under s.1 of the Prevention of Corruption Act 1906 in connection with alleged bribes of nearly half a million pounds, which were paid to influence the award of contracts for the printing of ballot papers and examination certificates in Africa.

- Also in August, following the enactment of the Crime and Courts Act 2013, and pending the availability of the deferred prosecution agreements ("DPAs") that this Act will introduce, the SFO issued a draft code of practice and opened a consultation into its proposed use of DPAs. The final guidance on the use of DPAs should be issued in January 2014. This indicates, as expected, that the SFO will be eager to make use of DPAs once they become available to U.K. prosecutors (expected to be in February 2014).

- The SFO has appointed former private practice lawyer Ben Morgan as Joint Head of Bribery and Corruption -- a key new appointment to the agency -- and is making significant recruiting efforts in other areas, particularly with respect to its intelligence function.

Case Management Concerns

The SFO has continued to face sustained criticism over its alleged historic and ongoing shortcomings in case management:

- The former Director of the SFO, Richard Alderman, continues to receive criticism over his tenure at the agency. The criticism has focused primarily on the extent and expense of his overseas travel, the SFO's hiring and remuneration policies, its core case management competency, and Mr. Alderman's personal delegation of powers. Recent revelations seem to have emerged from a string of Freedom of Information requests made of the SFO by journalists and lawyers, as well as repercussions from the U.K. Public Accounts Committee's examination of the SFO discussed in our May article (its critical final report was issued in July 2013). All of this continues to affect the reputation of the agency, now under the leadership of David Green (since April 2012).

- In August of this year, the SFO issued an embarrassing public statement revealing that it had lost a significant amount of confidential data connected to its investigation of BAE Systems (including the identities of key witnesses). The SFO had closed its investigation into BAE in 2010, and the data in question were sent to the wrong address as part of closing out the case between May and October 2012. The resulting questions about the SFO's case management procedures were exacerbated by the fact that it took nearly a year for this error to be recognized.

- According to the SFO's annual report published in July 2013, during the one-year period ending March 31, 2013, the SFO brought prosecutions against 20 defendants with a conviction rate of 70 percent. This compares to prosecutions of 54 defendants and a conviction rate of 72 percent the previous year. Although the drop in prosecutions can be explained (at least in part) by the reduction in the agency's budget and Mr. Green's stated objective of taking on fewer, higher-value, and "harder" cases, the raw figures alone have led to questions, including in Parliament, about the overall effectiveness of the SFO.

Determined Leadership

SFO Director David Green has continued to reinforce and reiterate the SFO's commitment, priorities, and areas of progress. For example, in a recent speech this October, Mr. Green emphasized that:

- Direct comparisons with current levels of corporate FCPA enforcement can be misleading;

- There is a pipeline of corruption cases that still include pre-Bribery Act matters;

- There are corporate Bribery Act cases under active investigation by the SFO;

- Once available, the SFO will look to make proactive use of DPAs;

- The SFO encourages self-reporting and will take into account any genuine corporate disclosure in assessing whether or not it would be in the public interest to prosecute a company;

- There will be no guarantees, however, of prosecution declinations (Mr. Green had given this as a reason for repealing the previously-issued SFO guidance on self-reporting, which he believed was too assertive in promising civil rather than criminal remedies in cases that were voluntarily disclosed); and

- The SFO will take any attempt to cover up a violation of applicable law, rather than self-disclose, very seriously -- the consequences will be significant if the SFO becomes aware of the facts by alternative means.

With regard to its funding, Mr. Green has stressed that, despite cuts to the SFO's headline budget, cases will not be refused simply on the grounds of cost and that he will be prepared to request additional funding from the Attorney General (and in turn from the Treasury) if the annual budget proves to be insufficient. In addition, so called "blockbuster funding" can be made available for big ticket matters, the cost of which would otherwise absorb a disproportionate percentage of the SFO's annual budget. The current investigation into the rigging of the LIBOR, which we discussed in our May 2013 article, is being funded in this way.

Tracking an Evolving Landscape

Meanwhile, the SFO is likely to be tested on several significant corruption matters that have gained notoriety over recent months and involve companies headquartered or listed in the U.K., including the following:

- The U.K. pharmaceutical company GlaxoSmithKline ("GSK") has been accused by Chinese authorities of paying bribes through a network of local travel agents in connection with the sale of GSK drugs into the Chinese healthcare market over the last six years. The total payments alleged are said to run into the hundreds of millions of pounds. This case has implications on both sides of the Atlantic and in China for GSK – not to mention, other pharmaceutical companies and multinationals doing business in China.

- The London-listed (FTSE 100) Kazakh mining company Eurasian Natural Resources Corporation PLC is currently under investigation by the SFO (as the SFO disclosed in April 2013). The investigation involves allegations of fraud, bribery, and corruption relating to the activities of the company or its subsidiaries in Kazakhstan and Africa. The announcement appears to mark an escalation of what seems to be a lengthy pre-existing investigation into the company by the SFO.

Eyeing Coordination, Consistency and Collaboration

Finally, there has been a restructuring of the way that serious organized crime is policed, investigated, and prosecuted in the U.K. through the establishment of the National Crime Agency ("NCA") in October of this year. The NCA is an umbrella agency with the aim of ensuring that the various agencies involved in investigating and prosecuting serious organized crime in the U.K. (including the SFO) are more coordinated, consistent, and unified in their approaches. Analogies have been drawn between the construct of this new agency and the Federal Bureau of Investigation in the U.S.. The impact of this change in structure to the effectiveness of investigating and rooting out corruption in the U.K. remains to be seen.

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Our Corporate Compliance Practice Group

Baker & McKenzie's North American Compliance team offers a comprehensive approach to assessing and resolving compliance related issues -- including everything from program building and prevention to investigations and remediation. Our team advises clients on the full range of issues relating to the FCPA, such as structuring transactions and commercial relationships to comply with the FCPA, developing and implementing FCPA compliance programs, establishing and conducting FCPA training programs, conducting internal investigations, advising corporate Audit Committees, and representing corporations and individuals before the Department of Justice, the Securities and Exchange Commission, and international regulatory bodies. The firm's extensive global network allows us to deliver FCPA-related services from offices in the overseas jurisdictions where issues arise, which in turn provides valuable local expertise on laws and culture, along with significant savings to our clients. Our coordinated approach combines a formidable presence in Washington, DC, with a vast network of experienced lawyers throughout the globe.