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Client Alert

Signs of Spring at the U.K.'s Serious Fraud Office: Challenges, Changes, and the Impact on Global Anti-Corruption Compliance

March 2013

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Despite regular criticism over the past several years from commentators in both the U.K. and the U.S. with respect to its core competency and commitment to adequate resourcing of its enforcement efforts, the U.K.'s white-collar prosecuting agency, the Serious Fraud Office ("SFO"), is showing signs of having turned a key enforcement corner. In this client alert, we survey the relevant criticism of the agency, provide an update on enforcement of the U.K. Bribery Act -- including the outlook for 2013 -- and underscore the implications of changes at the SFO for multinational corporate compliance programs.

Recent Criticism Over Historic Problems

The SFO, the U.K. agency responsible for investigating and prosecuting serious or complex fraud and corruption, continues to receive criticism in relation to its historic internal management practices and enforcement matter oversight. Earlier this month, the current and former directors of the SFO were subjected to a robust interrogation at the hands of the U.K. Public Accounts Committee ("UKPAC"). The UKPAC is appointed by the U.K. House of Commons to oversee and examine the use of public funds -- funds that some believe the SFO has failed to provide sufficient value for in recent years.

Under particular scrutiny at the UKPAC hearing were two internal reports at the SFO, neither of which is particularly new. The first related to the handling of the departure of SFO senior executives in early 2012 (and their previously-agreed remuneration). The second report considered, and largely dismissed, allegations made by a whistleblower that SFO staff had accepted gifts and hospitality in connection with the use of consultants and engaged

Additional Materials

> U.K. Bribery Act 2010
> U.K. Bribery Act 2010: One Year On
> Deferred prosecution agreements in practice
> Is the Serious Fraud Office Getting Serious?
> Inside the U.S. Government's Highly-Anticipated FCPA Resource Guide.

in nepotism at the agency. That report was completed at the end of 2011. Ahead of the UKPAC's hearing, the SFO was required by the U.K. Attorney General to publish both reports in full on the SFO's website for the first time. This is the latest in a series of negative publicity that continues to overshadow the SFO's current enforcement efforts.

In addition, the SFO continues to feel repercussions from its failed prosecution of the Tchenguiz brothers. The brothers are property tycoons who were wrongfully arrested in 2011 in connection with the SFO's investigation into the collapse of the Icelandic bank Kaupthing. The case was abandoned by the SFO in October 2012. The Tchenguiz brothers, Vincent and Robert, have now issued their own civil suits against the SFO, claiming damages in the region of £200M ($300M), and £100M ($150M) respectively, and alleging that the SFO overreached its powers in its conduct of the prosecution.

Moreover, in November 2012, a report conducted by the Crown Prosecution Services Inspectorate concluded that widespread changes were needed within the SFO to ensure that cases were managed competently and consistently.

Lastly, the SFO has received public censure for its delay in initiating an investigation of banks and individuals involved in a high-profile scandal relating to the alleged rigging of interbank lending rates in London. The agency eventually agreed to accept the case in July 2012.

U.K. Bribery Act Enforcement

It is within the context of these significant (and very public) challenges for the SFO that we must consider enforcement of the U.K. Bribery Act in 2013. The statute, enacted with much fanfare in 2010 and brought into full force in July 2011, has not yet given rise to a single corporate prosecution by the SFO or any other U.K. prosecutorial body. The two prosecutions brought under the Act thus far both involved individuals and, with the minimal amounts of money involved and peculiarly local facts, are more worthy of the inner pages of a small town newspaper than the boardrooms of multinational companies.

The first conviction came in October 2011 when a court clerk from Redbridge Magistrates' Court in East London was found guilty of accepting bribes in return for failing to file speeding offences. The going rate for this service by the clerk was £500 ($750), and it earned him a four year prison sentence. The second conviction came in December 2012, when a would-be taxi driver in the northern English town of Oldham was found guilty of attempting to pay a driving test assessor £200 ($300) to reverse the result of his failed test. He was sentenced to a two-month suspended prison sentence.

(For detailed information about the specific provisions of the U.K. Bribery Act, please see the following previous Baker & McKenzie Client Alerts: U.K. Bribery Act 2010; and U.K. Bribery Act 2010: One Year On.)

Contrast to U.S. Enforcement

In contrast, during the two year period since the Bribery Act officially came into force, U.S. enforcement continued at a brisk pace. The U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC"), for example, initiated about 50 Foreign Corrupt Practices Act ("FCPA") investigations combined during this time and resolved approximately 60 ongoing FCPA enforcement actions. Among the resolutions were several high-profile, high-penalty matters, most notably with the following companies:

- JGC Corporation ($219M - 2011);
- Deutsch / Magyar Telekom ($95M - 2011);
- Johnson & Johnson ($70M - 2011);
- Pfizer / Wyeth ($60M - 2012);
- Marubeni Corporation ($54M - 2012); and
- Eli Lilly ($29M - 2012)

Although interesting, it is overly simplistic to compare the anti-corruption enforcement regimes of the two countries strictly by numbers. U.S. agencies have logged many years of FCPA enforcement and negotiating experience, and maintain a long pipeline of cases, partially due to the emphasis that the DOJ and SEC put on voluntary disclosure and the corresponding potential for significant mitigation in fines and penalties. The facts that give rise to a significant percentage of recent U.S. FCPA settlements date back years and sometimes decades - often long before the Bribery Act came into force in the U.K.

For their part, during the time since the Bribery Act came into full force, U.K. prosecutors have continued to consider and finalize bribery and corruption investigations involving facts that pre-date the Bribery Act, including under rules allowing for the civil recovery of the proceeds of crime, legislation requiring companies to keep adequate financial records, and specific enforcement powers granted to the U.K.'s financial services regulator, the Financial Services Authority ("FSA"). Notable U.K. enforcement actions during this period involved the following companies:

- Willis - July 2011, £6.9M ($10.4M) FSA fine;
- Macmillan Publishers - July 2011, £11.3M ($17M) civil recovery;

- Oxford University Press - July 2012, £1.9M ($2.9M) civil recovery; and
- Abbot Group - November 2012, £5.6M ($8.4M) civil recovery (Abbot had self-reported this matter to Scottish prosecutors under the regime established in conjunction with the Bribery Act).

Some commentators point out, however, that the longer U.K. enforcement of corruption cases continues without a Bribery Act conviction, the more compelling the enforcement contrast with the U.S. becomes.

From a comparative standpoint, it is also worth noting that the sheer volume of potential cases in the U.K. is considerably lower than in the U.S. For example, although the number of self disclosures of corruption-related offenses by corporations in the U.K. increased in 2012 (twelve, up from seven in 2011), this is far below the numbers seen in the U.S., where a significant majority of the 50 or so FCPA investigations initiated by the DOJ and SEC in the past two years were the result of voluntary disclosures.

Importantly, however, the SFO will soon have an enhanced armory of enforcement tools at its disposal, more commensurate in some ways with its U.S. counterparts. For instance, pursuant to a Bill currently before the U.K. Parliament, within the next year, Deferred Prosecution Agreements ("DPAs") will likely be available for the first time in the U.K. These agreements will be used in some cases in lieu of corporate court prosecutions and designed, as in the U.S., to expedite settlement.

DPAs have been available to U.S. prosecutors since 1999, allowing DOJ, for example, to impose fines and other conditions on companies in return for an agreement not to prosecute an offense. Many would argue that DPAs have functioned in the U.S. as a particularly efficient, effective, and -- in some cases -- lower-cost enforcement option for U.S. prosecutors. In addition to their widespread use in FCPA matters, U.S. prosecutors negotiated a landmark $1.9B settlement with the U.K.-headquartered HSBC Bank in December 2012. The case against HSBC related to, among other things, serious deficiencies in the Bank's anti money laundering processes in Mexico and a failure to comply with U.S. trade sanctions. Reports indicate that the SFO hopes that DPAs will be equally effective for enforcement in the U.K.

(For more information on the U.K. Government's proposals on DPAs and a comparison with practice and application in the U.S., see Baker & McKenzie's recent article for MLex: Deferred prosecution agreements in practice.)

Signs of Change at the SFO?

The news stories, cases, and reports referred to above primarily stem from an earlier era at the SFO under the directorship of Richard Alderman. Mr. Alderman retired as Director of the SFO in April 2012 and David Green was appointed as his successor. In the time since his appointment, Mr. Green has issued clear and direct statements about his intentions for enforcement at the SFO. For example:

"The SFO is here to stay. It is and will remain a key crime fighting agency targeting top-end fraud, bribery and corruption. We will play our part in maintaining in the national interest a level playing field for investors and the business community. We will work cooperatively with others in the emerging counter-fraud landscape. We will press for all the tools necessary to maximize our impact. The SFO will be tough but approachable. I am delighted to take on the leadership of the agency at this exciting and challenging time. There is much to be done." (On taking office in April 2012.)

"It is probably inevitable that there will be more prosecutions, and hopefully we will have other tools in our toolbox to deal with our cases, such as deferred prosecution agreements. Our turnover will be greater, but that is as far as I would go at the moment- although certainly no one would be happier than I would be if we had more prosecutions." (In oral evidence before the House of Commons Justice Select Committee, November 13, 2012.)

Mr. Green has also restructured the management and operations of the SFO and, in October 2012, the SFO issued new guidance on its approach to key topics under the Bribery Act – namely with respect to gifts and hospitality, facilitation payments, and the SFO's attitude to companies that voluntarily disclose corruption matters. (For more detail on this guidance, please see Baker & McKenzie's Client Alert, Is the Serious Fraud Office Getting Serious?) The SFO, and Mr. Green as its new Director, still have a lot to prove through their actions, however, if they want be taken more seriously both in the U.K. and on the global stage as an influential prosecutor of complex multinational fraud and corruption cases.

It is under this significant level of scrutiny that the SFO is currently investigating a number of high profile cases. Most notably, perhaps, is an inquiry into allegations that the U.K.-based jet-engine manufacturer Rolls Royce paid multi-million dollar bribes in Indonesia and elsewhere in Asia to secure contracts for the inclusion of its engines in aircraft. The case was brought to the SFO's attention by a whistleblowing former employee of Rolls Royce. Because of the apparent date of the alleged conduct, however, the offenses will likely be prosecuted under pre-Bribery Act laws.

Finally, although the SFO faces continued budgetary and resource constraints -- the SFO's typical annual budget is only around £30M ($45M) -- there are also signs of improvement with respect to this concern. The U.K. Government recently demonstrated its willingness to allocate additional money to certain higher-profile investigations. This has been the case with the inquiry into the alleged rigging of lending rates by banks in London, as mentioned above, to which the U.K. Treasury specifically allocated extra funding. Separately, the U.K. Department for International Development, as part of its ongoing initiative to tackle corruption in developing countries, recently announced that it will apportion some of its own funds to U.K. prosecutors investigating international corruption. Notably, however, for the time being, there is no indication that any of the enhanced funding will be earmarked for the SFO.

Impact for Multinational Compliance Programs

In this enforcement environment, it is not surprising that many multinational companies continue to model anti-corruption compliance initiatives first and foremost around the FCPA standards established by the DOJ and the SEC in the U.S. The latest FCPA Resource Guide, issued jointly by the DOJ and SEC in November 2012, reinforces the U.S. government's impressive body of anti-corruption investigations, resolved enforcement matters, and corresponding compliance program recommendations. (For more detail on this latest guidance, please see Baker & McKenzie's Client Alert: Inside the U.S. Government's Highly-Anticipated FCPA Resource Guide.)

Nonetheless, subject to consideration of the specific scope of a company's business, a robust compliance program should give proper attention to the U.K. Bribery Act. Indeed, for the reasons discussed above, U.K. Bribery Act enforcement is likely to escalate in volume. In any case, the Bribery Act and its accompanying guidance contain much in terms of advice and counsel that can be considered current best practices for anti-corruption compliance programs. In particular, the following features of the Bribery Act merit careful deliberation by corporate legal and compliance departments:

- Consideration of bribery of private individuals (and businesses) in *commercial* conduct, as well as bribery of public officials;
- A prohibition on the *receipt* of, as well as the making of, inappropriate payments;
- Consideration of *domestic* (U.K.) as well as foreign corruption;
- A focus on companies having proportionate and *adequate procedures* in place to prevent the paying of

bribes on a company's behalf;

- An absolute *prohibition* on the making of *facilitation payments*.

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