THE NATIONAL LAW JOURNAL
MARCH 8, 2010
Web Only

WHITE-COLLAR CRIME

U.K. escalates anti-corruption efforts

Serious Fraud Office steps up enforcement of existing laws, and new 'Bribery Bill' is pending in Parliament.

BY ASHEESH GOEL AND NICHOLAS M. BERG

During the past few years, foreign companies increasingly have become the targets of bribery investigations and enforcement actions brought by the U.S. Department of Justice and the U.S. Securities and Exchange Commission. Indeed, the biggest anti-corruption enforcement action in history was brought under the Foreign Corrupt Practices Act (FCPA) against Siemens A.G., a German corporation with its main offices in Munich.

In response to the increased focus on anti-corruption in the United States, E.U. member countries such as the United Kingdom have begun to step up their own enforcement efforts. Specifically, the U.K. Serious Fraud Office (SFO) has recently increased its efforts to enforce existing laws in the United Kingdom. In addition, there is a "Bribery Bill" pending in the U.K. Parliament that is similar to the FCPA in some ways and different in others. U.S. corporations would do well to pay attention to this emerging focus on bribery in the United Kingdom.

Since it was enacted in 1977, the FCPA has been a concern both for U.S. companies and foreign companies with ties to the United States. In general, the anti-bribery provisions of the FCPA make it unlawful for a person or entity to make a corrupt payment to a foreign official to obtain or retain business. The anti-bribery provisions of the FCPA generally apply to companies that are either "issuers" under U.S. securities laws or "domestic concerns."

In contrast, the United Kingdom operates under an amalgam of anti-bribery laws, most dating from the very early 20th century, that generally apply only to companies organized under the laws of the United Kingdom — not to unincorporated bodies or overseas subsidiaries. Enforcement of U.K. bribery laws against corporations is difficult because the government must prove that person(s) constituting the "controlling mind" of the corporation had the requisite mental state to commit bribery.

THE U.K. GETS SERIOUS

Until very recently, the United Kingdom simply had no record of enforcing its anti-bribery statutes. The tipping point for the SFO came when the agency was roundly criticized for dropping its investigation into BAE Systems PLC's alleged 1 billion pound (roughly $1.9 billion) bribery of Saudi officials in late 2006 after the Blair government declared that the investigation threatened national security. Following the scandal, the U.K. government hired former American prosecutor Jessica de Grazia to review the SFO. De Grazia promptly issued a report excoriating the SFO for its poor prosecution record. See Jessica de Grazia, Review of the Serious Fraud Office, Final Report, www.sfo.gov.uk/media/34318/de grazia review of sfo.pdf.

As a result of the de Grazia report, the SFO has dramatically stepped up enforcement of overseas bribery offenses. A review of a recent enforcement action illustrates the SFO's new approach.

According to SFO press releases, the steel-bridge manufacturer Mabey & Johnson Ltd. in 2009 became the first company to be prosecuted in the United Kingdom for corrupt practices in overseas contracts. Interestingly, Mabey & Johnson voluntarily reported to the SFO in 2008 that it had made corrupt payments to officials in Jamaica and Ghana on supply contracts with the governments in those countries. In addition, in negotiations with the SFO, the current management of Mabey & Johnson admitted not only the Jamaica and Ghana payments but also similar practices in Bangladesh, Mozambique, Angola and Madagascar.

The company agreed to plead guilty to the Jamaica and Ghana offenses and agreed that it would be subject to financial penalties and to an independent monitoring regime reporting to the SFO. In total, the financial penalty amounts to around 6.6 million pounds, or roughly $10.5 million.

In bringing this case, the SFO indicated that it was adopting a style of prosecution more familiar to U.S. companies: It fully expects companies to self-report potential conduct issues in order to get the benefits of cooperation such as reduced charges and flexibility on other remedies.

Reading the Mabey action together with other recent matters (such as the one recently announced against BAE systems), one can reasonably conclude that the SFO has heard the criticism levied against it and has responded by sending a message that is both "carrot and stick."

THE 'BRIBERY BILL'

In addition to the SFO's stepped-up enforcement efforts and in response to international criticism, the U.K. government announced the Bribery Bill in the Queen's Speech of Nov. 18, 2009 — prepared by the ruling government and given by Queen Elizabeth — and the government immediately introduced the bill into Parliament.

Although the final form of the bill is yet unclear, what is clear is that the Bribery Bill marks a sea change in U.K. bribery law.

The current version of the Bribery Bill, like the FCPA, creates a specific offense of bribing a foreign public official and includes penalties for a corporation's failure to have adequate controls in place to detect and remediate the bribery of foreign officials. The Bribery Bill increases the penalty for a bribery conviction to a maximum of 10 years in prison, and creates an offense for senior corporate officials when a corporation violates the Bribery Bill and the offense was committed with the "consent or connivance" of those officials. The SFO will assume primary responsibility for prosecuting offenses under the Bribery Bill; the agency will no longer need to obtain the consent of the U.K. attorney general to institute a bribery prosecution and will function much like its U.S. counterparts: the Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC).

Unlike the FCPA, the Bribery Bill prohibits covered persons and entities from committing bribery of almost any type, whether governmental or purely commercial, both inside and outside the United Kingdom. Consistent with current U.K. law, the Bribery Bill does not contain an exception for facilitation payments, as the FCPA does.

THE STRICT LIABILITY OFFENSE

Most significant among the provisions in the Bribery Bill are those that create a new strict liability offense for a company doing business in the United Kingdom that "fails to prevent" an employee or an agent from paying a bribe. As it is currently written, the sole defense to the strict liability charge is that the corporation had adequate compliance procedures in place to prevent persons associated with it from paying bribes.

The Bribery Bill's strict liability regime is a significant departure from the FCPA. Under the FCPA, in order to hold a corporation responsible for bribes paid by its low-level employees or third parties, the government must prove that the corporation transmitted a payment to that third party "knowing" that the payment will be given to a foreign official in return for influencing that official. DOJ and the SEC have construed this "knowing" requirement to include "conscious disregard" or "deliberate ignorance" of those bribes. Under the Bribery Bill as it now stands, a corporation will be automatically exposed to liability if its agents or others performing services for it pay a bribe, even if the corporation was completely unaware of those bribes.

Although the Bribery Bill's use of strict liability would have game-changing implications for companies doing business in the United Kingdom, its implementation is not a certainty. The U.K. Parliament continues to consider the bill, and, in fact, an earlier version of the bill required the SFO to prove negligence to convict a corporation.

Heightened enforcement of anti-bribery laws by the SFO and the potential passage of the Bribery Bill mean that the rules of the game for companies "doing business" in the United Kingdom have changed and will continue to change. Companies operating in the United Kingdom need to react now to the potential for a new U.K. enforcement paradigm by adopting serious anti-corruption policies and procedures, training their employees and implementing rigorous compliance programs that include substantial monitoring elements. If the Bribery Bill passes, a company's compliance program will likely be its last, best defense.

Asheesh Goel is a partner resident in the Washington and Chicago offices of Boston-based Ropes & Gray. He focuses his practice on securities enforcement and litigation, including internal investigations, U.S. Securities and Exchange Commission investigations and enforcement actions, Foreign Corrupt Practices Act matters, corporate law counseling and financial crisis litigation. He previously served as a branch chief with the SEC's Division of Enforcement. Nicholas M. Berg is an associate in the firm's Chicago office, practicing in the areas of complex business litigation and securities litigation and enforcement.