Clients&FriendsMemo

The Bribery Act 2010: Are You Ready?

30 June 2011

The Bribery Act 2010 (the "**Act**") enters into force tomorrow and with it comes some of the most far-reaching anti-bribery laws in the world, surpassing the previous benchmark set by the U.S. Foreign Corrupt Practices Act (the "**FCPA**"). The Act will change profoundly the approach to business transactions and internal investigations of public and private companies.

In particular, the Act will have a significant impact on the private equity sector. The new offence of failing to prevent bribery[1] will mean that private equity funds will potentially be liable for acts committed by employees, agents, intermediaries, joint venture partners, subsidiaries or portfolio companies.

Liability of a private equity fund for acts of bribery committed by a portfolio company has been the subject of particular speculation. Recent comments by the director of the UK Serious Fraud Office ("**SFO**") have heightened awareness on this point. The SFO has confirmed that it anticipates private equity firms in the UK could face prosecution or be held liable for bribes paid by officials at portfolio companies. This statement of intent from the SFO is significant, even if, for now, the precise mechanisms that will be employed remain vague.

The new law will create the need for heightened due diligence for private equity funds when acquiring target entities in order to uncover potential corruption issues. Prosecution of a target for offences under the Act (or merely allegations of the same) seems certain to carry reputational risk for both the target itself and its management, and also, significantly, for the fund manager. It also will likely have a negative effect on value. For example, if the target is found to have committed a bribery offence, there is a risk of fines, profitable contracts being terminated, and key management having to leave their posts. Even if a target is not guilty of an offence, there will be significant costs and time involved in defending allegations of bribery.

[1] Bribery Act 2010, section 7

(i) Key Provisions under the Act

- New offences created for giving and accepting bribes, together with a separate offence for bribing foreign officials. Liability for these offences can extend to senior officers of a company if they are found to have consented or participated.
- Liability for companies if they fail to prevent bribery carried out by persons associated with them where there is an intention to obtain or retain business, or an advantage in the conduct of business, for the company.
- A narrow defence to an allegation of failing to prevent bribery if companies prove that 'adequate procedures' were in place to stop instances of bribery occurring.
- An extensive extra-territorial reach that could create criminal exposure for individuals and commercial enterprises based outside the UK.
- Penalties may outstrip those for corruption elsewhere, including potentially unlimited fines for companies and prison sentences for individuals of up to 10 years.

(ii) Who is in the firing line?

Three of the new offences under the Act focus on the actions of individuals or companies. Persons or entities that give[2] or accept[3] bribes will be penalised, while section 6 of the Act creates a separate offence if the target of the bribery is a foreign public official. In addition to this, section 14 of the Act gives the authorities the power to pursue senior officers of a company where that company has been convicted of these offences if the officers have consented to or connived in the guilty act.

A major part of the debate surrounding the Act focused on the treatment of hospitality. Although the latest UK government guidance recognises legitimate hospitality is not intended to be covered by the Act, there nevertheless will be the need to constantly ensure that excessive "hospitality" does not expose an organisation to claims of corruption.

The most discussed provision of the Act is section 7, which establishes a new criminal offence for commercial organisations that fail to prevent acts of bribery committed with the intention of obtaining or retaining business or an advantage for that organisation by any person carrying on business for or on its behalf (described in the Act as an 'associated person'). This section can capture a very wide range of business relationships. Perhaps the most disturbing characteristic of section 7 is that the criminal offence is one of strict liability, meaning that it is of no consequence that the relevant organisation did not know or did not intend for the alleged bribery to occur. Consequently, a company may find itself liable for acts of bribery committed

[2] Bribery Act 2010, section 1

[3] Bribery Act 2010, section 2

by anyone who performs services for or on its behalf, regardless of whether any of its officers had actual knowledge of the corrupt practices.

(iii) Compliance Under the Spotlight

The only way in which an organisation can rebut an allegation of failing to prevent bribery is through demonstrating that it had 'adequate procedures' in place to prevent bribery occurring[4]. The UK government has issued guidance[5] on what it considers constitutes 'adequate procedures', setting out a facts-based approach centred on the need for compliance programmes to satisfy six principles: (i) proportionate procedures, (ii) top-level commitment, (iii) risk assessment, (iv) due diligence, (v) communication, and (vi) monitoring and review.

This lack of hard and fast rules places considerable pressure on businesses to meet the standards set by the guidance, as each case will be decided on its own facts. Companies therefore must ensure that their compliance programmes are sufficiently robust and will need to monitor continuously those compliance programmes to ensure that they satisfy the demands of the Act and any case law that unfolds. Moreover, as mentioned above, if government authorities take a broad view of the Act, private equity funds could face liability for the compliance failures of their targets and portfolio companies. Such potential exposure underscores the importance of conducting anti-bribery due diligence (specific to the Act) before a private equity firm makes an investment.

(iv) An Expansive Global Reach

Section 12 of the Act gives the UK authorities the right to prosecute acts of bribery committed worldwide if the accused is connected to the UK by reason of being a UK national, ordinarily resident in the UK, a UK incorporated body, or a Scottish partnership. For the offence of failing to prevent bribery, any entity with a nexus with the UK may find itself liable for the acts of an associated person or company, regardless of where the alleged bribery occurred and whether that particular individual has a link of any kind with the UK.

As a consequence, the Act is not only relevant to UK-based companies, but also to any organisation with even a small presence in the UK market. Additionally, the Act has the potential to bring any instance of bribery taking place anywhere in the world within the remit of the UK authorities.

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[4] Bribery Act 2010, section 7(2)

[5] *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010),* published 30 March 2011

(v) Above and Beyond the FCPA

Although the FCPA and the OECD Convention on Combating Bribery of Foreign Public Officials historically have set the bar for global anti-corruption laws, several of the Act's provisions appear to go further, particularly with respect to the following:

- The Act criminalises bribery in transactions between purely private parties, whereas the FCPA's prohibitions are limited to corruption of government officials. In this private commercial context, it is important to note that, unlike the FCPA, the Act also criminalises the acceptance of a bribe.
- The FCPA expressly permits 'facilitation payments' to be made; no such carve-out is included in the Act.
- The corporate offence of failing to prevent bribery under the Act is one of strict liability. The FCPA does not have a similar offence, although U.S. regulators may take into consideration whether a company turned a blind eye to culpable behaviour in determining whether to bring a prosecution or recommend a particular sentence.
- Whereas the U.S. Department of Justice has a history of considering the self-disclosure of potential violations as a mitigating factor in connection with settlement agreements, self-reporting is relatively new to the UK and it remains to be seen whether it will be adopted by the SFO as a regular component of their resolutions.

(vi) Checklist for Companies and Private Equity Firms

In the coming weeks, it will be vital for companies and private equity organisations to:

- Conduct a thorough review of their compliance policies and procedures, particularly focusing on identifying gaps between their current FCPA controls and the requirements of the Act;
- Ensure that staff are adequately trained in anti-bribery issues and aware of the need for increased vigilance;
- Establish mechanisms for monitoring developments in the implementation of the Act;
- Implement robust processes for the due diligence of acquisition targets;
- Evaluate their internal investigative units to ensure prompt responsiveness to indications of potential violations of the Act; and
- Identify law firms with sufficient expertise in international investigations relating to anti-bribery laws as potential external counsel to conduct internal investigations if it appears a violation has or may be occurring.

(vii) About Cadwalader

Cadwalader's government investigations and white collar lawyers offer effective, incisive advice in both avoiding government inquiry, and responding to it when necessary. Cadwalader is uniquely situated to handle the most sensitive and sophisticated government investigations emanating from the headquarters of the enforcement agencies that impact leading companies and financial institutions.

We represent corporations, their boards, audit committees, directors and senior officers, law firms, international bodies and individuals in criminal, civil and administrative proceedings and litigation. The group has drafted, implemented and audited numerous compliance programmes, conducted internal investigations and audits of multi-national corporates, advised and defended a large number of enforcement actions, and handled related criminal and civil fraud litigation.

The specific substantive areas in which the group has developed wide expertise include securities, commodities and accounting fraud, antitrust and environmental enforcement, bank and tax fraud, government contracting, health care fraud and abuse, international money laundering, asset forfeiture, foreign bank secrecy and data privacy laws.

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