FINANCIAL FRAUD LAW REPORT

VOLUME 2 NUMBER 6 JUNE 2010

The FINANCIAL FRAUD LAW REPORT is published 10 times per year by A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207, For subscription information and customer service, call 1-800-572-2797. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 10 Crinkle Court, Northport, NY 11768, smeyerow@optonline.net, 631-261-9476 (phone), 631-261-3847 (fax). Material for publication is welcomed — articles, decisions, or other items of interest.
POSTMASTER: Send address changes to the Financial Fraud Law Report, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207. *ISSN 1936-5586*

United Kingdom Enacts Bribery Act 2010

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The authors explain the U.K. Bribery Act 2010, which will likely have significant ramifications for companies with business interests in the United Kingdom.

On April 8, 2010, the U.K. Bribery Act 2010 (the "Bribery Act" or the "Act") received Royal Assent, the final step in the legislative process in the United Kingdom. The new Bribery Act is the product of years of discussion and debate and replaces the existing anti-bribery legal regime in the United Kingdom that has been described by Transparency International as "ineffective and out-of-date." The Act clarifies and consolidates the United Kingdom's antiquated and disparate anti-bribery laws and more clearly satisfies the United Kingdom's obligations under the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials (the "OECD Convention"). In particular, the Act replaces three overlapping, century-old laws with one comprehensive Act and, among other things, creates a new strict liability offense for corporations or partnerships that fail to prevent bribery. Because the new Bribery Act both simplifies existing bribery offenses, making them easier for prosecutors to apply, and widens the scope and reach of U.K. anti-bribery prohibitions, it is likely to have significant ramifications for companies with business interests in the United Kingdom.

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Published in the June 2010 issue of *The Financial Fraud Law Report*.

BACKGROUND ON THE BRIBERY ACT

The passage of the Bribery Act is the most recent evidence of an increased focus by the U.K. government and enforcement authorities, such as the Serious Fraud Office (the "SFO"), on identifying, investigating, and prosecuting acts of overseas bribery involving U.K. companies or individuals. Regarding recent U.K. anti-bribery enforcement actions and the introduction of the Bribery Bill, this trend is, at least in part, a reaction to the criticism the U.K. government received as a result of the 2006 decision to close the high profile inquiry into allegedly improper payments made by BAE Systems plc ("BAE") to secure arms contracts in Saudi Arabia. In 2008, the OECD publicly expressed "serious concerns" as to whether the decision to close the BAE inquiry was consistent with the U.K.'s obligations under the OECD Convention. The OECD Working Group on Bribery stated that it was "extremely disappointed and gravely concerned by the continuing lack of implementation of previous Working Group recommendations…that the UK enact [modern] foreign bribery legislation at the 'earliest possible date.'" Since that time, the SFO has brought a number of prosecutions against U.K. companies and individuals based on allegations of overseas bribery. Moreover, in February 2010, BAE agreed to pay £30 million (approximately $47 million) in fines to U.K. authorities in connection with allegations of improper payments made in Tanzania.

PROVISIONS OF THE U.K. BRIBERY ACT

The Bribery Act creates two general bribery offenses — bribery of another person and receiving or accepting a bribe — as well as two specific bribery offenses — bribery of a foreign public official and failure of a commercial organization to prevent bribery.

Under the general bribery provisions, a person is guilty of bribing another person where he or she offers, promises or gives, directly or indirectly, a financial or other advantage intending to induce or reward "improper performance" of a "relevant function or activity" or knowing or believing that "the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity." According to the Act, a relevant function or activity is performed "improperly" if it is performed in breach of an expectation that it will be carried out in good faith, impartially or in keeping with a position of trust. The Act criminalizes not only the payment of bribes under these circumstances, but the receipt or acceptance of bribes as well. Thus, both the person who pays the bribe and the person who receives the bribe can be criminally liable under the Act. Further, the general bribery provisions apply to instances of both public and private, or commercial, bribery.

In addition, the Act creates a new, specific offense for the bribery of foreign public officials. This is in contrast to the current U.K. anti-bribery laws, which originally were enacted as domestic bribery statutes nearly a century ago and were then amended in 2001 to apply to bribes paid to officials outside the United Kingdom. This new, specific offense may significantly overlap with the general offenses, but is distinguishable in that it does not require enforcement officials to show that the financial or other advantage was intended to induce or reward "improper conduct." Rather, a person can be convicted of the offense of bribery of a foreign public official if he or she offers, promises or gives, directly or indirectly, a financial or other advantage to a foreign public official, or to any other person at the request or with the assent of a foreign public official, with the intent to influence that foreign public official in his or her official capacity and to obtain or retain business or a business advantage. In this case, only the payment, and not the receipt, of the bribe is criminalized. The Act defines "foreign public official" to include any individual who holds a governmental position of any kind outside of the United Kingdom, exercises a public function, or is an official or agent of a public international organization.

U.K. enforcement authorities have jurisdiction over offenses committed under the general bribery provisions or the bribery of foreign public officials provision of the Act where (1) any act or omission which formed part of the offense took place in the United Kingdom, or (2) the offense was committed by a U.K. citizen or resident or an entity incorporated under the laws of any part of the United Kingdom.[1] Moreover, under both the general bribery provisions and the provision establishing a specific offense for bribery of foreign public officials, local practice and custom will not be considered except where the offer, promise or payment is permitted or required under written law applicable to the country or territory concerned.

Moreover, the Bribery Act includes a new strict liability offense for the failure of a commercial organization to prevent bribery. The offense is applicable to "commercial organizations" that are (a) corporations or partnerships incorporated or formed under the laws of any part of the United Kingdom, or (b) corporations or partnerships incorporated or formed outside of the United Kingdom which carry on a business, or part of a business, in any part of the United Kingdom. A commercial organization is guilty of failure to prevent bribery where a person "associated with" the organization bribes another person intending to obtain or retain business or a business advantage for the organization. Because it is a strict liability offense, the U.K. enforcement authorities will not have to demonstrate any knowledge or intent on the part of the management of the commercial organization. Under the Act, an "associated person" means a person who performs services for or on behalf of the commercial organization, including, but not limited to, employees, agents, and subsidiaries. The commercial organization can avoid liability only where it can show that it had in place "adequate procedures" designed to prevent such conduct at the time the bribery occurred. The Act requires the U.K. Secretary of State to publish guidance regarding the procedures that will satisfy this defense. Such guidance has not yet been issued, but, according to public statements by a senior policy advisor at the SFO, the guidance probably will be finished by early July, before the Act goes into effect.

Finally, the Act increases potential penalties for bribery, authorizing unlimited fines for entities on criminal indictment and a maximum 10 year prison sentence for individuals.

SIGNIFICANCE OF THE BRIBERY ACT

The enactment of the U.K. Bribery Act likely will fundamentally change anti-bribery enforcement in the United Kingdom in several ways. First, it will make it easier for the SFO and other U.K. enforcement authorities to prosecute acts of overseas bribery. The law under the previous legal regime was difficult for prosecutors to interpret and apply, particularly where the alleged bribery occurred outside the United Kingdom. By updating the general bribery offenses and creating a separate offense for the bribery of a foreign public official, the new Bribery Act is more clearly applicable to such conduct. Second, the Act expands the potential legal exposure of entities that do business in the United Kingdom by creating potential strict criminal liability for failing to prevent bribery. This new offense has no counterpart under the previous U.K. legal regime or under analogous anti-bribery laws in other countries, such as the U.S. Foreign Corrupt Practices Act ("FCPA"). It creates potentially broad reaching liability for any entity that is incorporated or established in the United Kingdom or does business in the United Kingdom based on the conduct of employees, subsidiaries, agents, representatives or other third parties who perform services on behalf of the entity.

In light of these developments, entities with significant ties to the United Kingdom should take steps to put in place a robust anti-bribery compliance program and/or to assess the adequacy of their existing anti-bribery compliance program. Although the U.K. Secretary of State has not yet published guidance on the meaning of "adequate procedures" under the Act, Lord Bach, the Parliamentary Under Secretary of State, has indicated that the guidance will not create prescriptive standards, but will allow entities to develop procedures appropriate to their size and the particular anti-bribery risks they face and will draw from the guidance already available from organizations such as the OECD, Transparency International, and the Global Infrastructure Anti-Corruption Centre.

NOTE

[1] The bribery provisions cover the conduct of a body incorporated under the law of any part of the United Kingdom, which is made up of England, Scotland, Wales, and Northern Ireland. It also specifically covers the conduct of Scottish partnerships.