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The UK Bribery Act, Three Years On: Can We Relax Yet?

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The Bribery Act 2010 has now been in force for three years. Despite the announcements and commentary that it heralded a new and aggressive face toward corporate corruption, there have as yet been no corporate prosecutions brought under the Act. Was it all sound and fury signifying nothing? Or should all involved remain cautious and focused on compliance?

The Bribery Act 2010 came into force on 1 July 2011. Under its provisions, commercial organisations operating in the UK are exposed to potential, strict criminal liability, punishable by an unlimited fine, for failing to prevent bribery (the Corporate Offence). The Corporate Offence is committed by a "relevant commercial organisation" if a "person associated with [the organisation]" bribes another with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation (Section 7 of the Act).

Enforcement of the Act, including the strict liability corporate offence in Section 7, has primarily been entrusted to the Serious Fraud Office (SFO), while the police and Crown Prosecution Service also retain central roles. In addition, the Financial Services Authority (FSA), now split into the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) have also been active on the regulatory side.

Despite the breadth of the Act and the *in terrorem* effect its introduction initially had, the lack of any prosecution of the "big fish" in the corporate sea now has some suggesting publicly, or at least thinking privately, that this is just more "business as usual" with a governmental blind eye to bad acts by the large corporates of this world.

To counter this, David Green CB QC, the SFO's Director, has announced several high-profile investigations of a significant number of major "name brand" companies, some under prior law but several understood to be under the Bribery Act. The lack of prosecutions to date can in part be explained by the fact that complex criminal investigations are by their nature expensive and time consuming, and that, because the Bribery Act is not retrospective, a prosecution thereunder can only be brought for offences that took place since the Act became effective. Only time will tell whether these investigations will result in prosecution. It must also be kept in mind that being subject to an SFO investigation, even if the targeted company is never prosecuted, is not welcomed in any company board room, as the implications for stock

price, distraction and expense can be enormous. In addition, the FCA does not need a criminal predicate for regulatory action and can sanction "systems and controls" shortfalls, even where no illicit or corrupt payments can be proven.

Other possible explanations for the apparent delay in criminal prosecution can be attributed to the recent addition, as of February 2014, of Deferred Prosecution Agreements to the prosecutorial arsenal, and the new corporate sentencing guidelines taking effect in October 2014. Waiting for these new tools to come into force can only strengthen the SFO's hand.

Budgetary issues also have to be considered. The SFO's budget, which stood at around £52 million in 2008, has dropped by 2014 to around £37 million. Whilst another £19 million in emergency funding has been provided to the SFO, there clearly appears to be a need for an increase in the annual budget, and signals coming from the Government suggest that this is recognized and will be remedied.

At the same time, it is becoming apparent that although it is not yet a perfect or completely harmonious relationship, the SFO is certainly cooperating with the foreign anti-corruption agencies, including very active and aggressive ones like the Department of Justice and the Securities & Exchange Commission in the United States.

Therefore, it would be perilous in the extreme to think it is "blind eye" or "business as usual" when it comes to prosecuting corruption, and anyone inclined to ignore the Bribery Act does so at considerable risk. Indeed, far from a time for complacency, the Act's third anniversary is a good time to refresh Bribery Act awareness across the organization, to test existing policies for adequacy, to go beyond the written word to implementation and inculcation, and to make sure internal investigation procedures and whistle blower protections are appropriately adopted.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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