Client Alert

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Scottish Authorities Settle First Corporate Criminal Offence Under the Bribery Act

By Kevin Roberts and Duncan Grieve

INTRODUCTION

On 25 September 2015, prosecutors in Scotland announced the first application of the corporate offence of failing to prevent bribery under section 7 of the Bribery Act 2010. Due to self-reporting and extensive cooperation with the authorities, the case was settled with a civil recovery order under the Proceeds of Crime Act 2002 and the defendant avoided a criminal prosecution.

BACKGROUND

Brand-Rex Limited is a medium-sized Scottish company that develops and supplies cabling systems for network infrastructure and industrial uses. It operated an incentive scheme known as “Brand Breaks” for UK distributors and installers. In return for meeting or exceeding sales targets, installers and distributors were eligible for rewards, including foreign holidays.

Although the scheme itself was not unlawful, an independent installer of the Brand-Rex products offered his travel tickets to a private customer’s decision-maker. This went beyond the intended terms of the Brand-Rex’s sales incentive scheme and was clearly designed to exert improper influence over the decision-making of the targeted customer’s employee.

Brand-Rex engaged external counsel and accountants to conduct a thorough investigation when it became aware of the misconduct. As a result of the findings of the internal investigation, Brand-Rex made a report to the Scottish Crown Office detailing the circumstances and accepting responsibility for a contravention of section 7 of the Bribery Act.

SETTLEMENT

Brand-Rex accepted that it had committed an offence in failing to prevent an associated person from carrying out an act of bribery. The test for a section 7 offence was met because the independent installer was deemed to have been performing services for or behalf of Brand-Rex and offered the incentive to induce the relevant individuals to act improperly in preferring the products of Brand-Rex to alternative products. The company did not seek to deploy the possible defence that it had adequate procedures in place to prevent bribery. Brand-Rex paid £212,800 under the civil settlement, which was based on the gross profit of the company related to the misuse of the internal sales incentive scheme.

ANALYSIS

The case shows that, in certain circumstances, early engagement and co-operation with the UK authorities can result in less severe penalties. Rather than a highly damaging criminal prosecution, Brand-Rex was deemed to be

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suitable for a civil recovery order. It is worth noting that the English authorities may have a different approach than their Scottish counterparts. The Serious Fraud Office is focused on implementing the new Deferred Prosecution Agreement model, which is likely to result in a different process for English organisations involved in corruption offences. Further clarity will emerge when the first Deferred Prosecution Agreement under the new regime is made public. This is widely expected to occur in late 2015 or early 2016.

This case also shows the application of two important tenets of the Bribery Act that warrant consideration when organisations are conducting anti-corruption risk assessments.

- Firstly, although offences involving government and foreign public officials tend to get more media coverage, cases of business-to-business commercial bribery are well within the scope of the Bribery Act. Commercial bribery should not be excluded from consideration when conducting anti-corruption risk assessments and ongoing monitoring.
- Secondly, organisations can be liable for the acts of third-party agents and this is an area which is often overlooked. Third-party agents and resellers can present significant bribery and corruption risks. Anti-corruption due diligence should be a standard part of the initial on-boarding process for agents and consideration should be given to including an affirmation of compliance with relevant anti-corruption legislation into the terms of engagement. Depending on the nature of the relationship, some corporates also provide compliance training to some of their third parties, which may have prevented this violation from occurring. It is also important to retain a level of oversight over third parties during the course of any engagement.

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