MARSH INSIGHTS:

BRIBERY AND CORRUPTION UPDATE

The first Deferred Prosecution Agreement (DPA) in the United Kingdom highlights the Serious Fraud Office's "no tolerance approach" to bribery and corruption.

Three years of investigations by the Serious Fraud Office (SFO) into ICBC Standard Bank plc and its Tanzanian unit, Stanbic Bank Tanzania Ltd, culminated in the UK's first Deferred Prosecution Agreement (DPA) in November 2015. The process began with Standard Bank self-reporting to the SFO in relation to an offence under section 7 of the UK Bribery Act 2010.

While the offence took place in Tanzania and was therefore not in scope for the UK Bribery Act, section 7 of the Act allows for a "relevant commercial organisation" to be convicted where it fails to prevent an associated person bribing another to obtain or retain business for the company. This allows the SFO to hold organisations to account, even if there is a lack of jurisdiction where the bribery took place. In this case, the SFO alleged that Standard Bank did not have sufficient bribery and corruption training in place around its policies and procedures, and, consequently, Stanbic Bank was unaware of the anti-corruption procedures that should have been followed for the transaction in question. The offence under section 7 can only be committed by a company and not by individuals; however, individuals may be investigated separately as a result of information that comes to light during prosecution proceedings.

WHAT ARE DEFERRED PROSECUTION AGREEMENTS?

In this case, the SFO chose to hold Standard Bank to account with a DPA instead of prosecuting fully, an option that has only been available since early 2014. DPAs are agreements between prosecutors and corporates when an organisation is allegedly guilty of a corporate offence. The corporate will be charged with the offence, but any prosecution is suspended and conditional upon the corporate agreeing to a number of imposed conditions. Standard Bank's agreement is subject to conditions including the payment of a significant fine, agreeing to enhance its anti-corruption policies and procedures, and the provision of appropriate training to associated entities such as Stanbic Bank. DPAs may also include conditions such as confiscation of the profits of wrongdoing, co-operation with the future prosecutions of individuals, and agreeing to external monitoring. While the threshold to qualify for a DPA is high, it can provide more certainty for a company over its rights and obligations, potentially be less damaging to its reputation, and enable companies who compete for government tenders to still do so.

SELF-REPORTING AND COOPERATION

Organisations that have entered into a DPA can further limit the adverse effects of bribery proceedings by fully cooperating from the earliest engagement. Standard Bank self-reported to the SFO within days of the transaction in question coming to its attention and this was given significant weight in the court's judgement, particularly in light of the bank's continuing cooperation thereafter. A self-report can include any voluntary disclosure to any governmental, regulatory, or judicial agency, particularly where a delay or failure to do so could give rise to enforcement consequences. Typically, regulators respond favourably in their charging decisions where a company has self-reported. Following their self-report, Standard Bank showed full cooperation with the SFO, including the prompt provision of all requested information, facilitating interviews and providing access to internal systems, which resulted in a reduction of their penalty by one third.

POTENTIAL CONSEQUENCES FOR MANAGEMENT

While self-reporting and entering into a DPA can have significant advantages for a company over traditional prosecution, it is worth considering the potential disadvantageous consequences for both the company and its senior individuals. Firstly, a DPA agreement where the conditions have been met does not guarantee that the company will not be subject to enforcement action for the same conduct. If information comes to light that was not provided before the date of agreement, or if any information provided was incorrect, misleading, or incomplete, then the company may still be prosecuted. In addition, a DPA entails the provision of documentation from a company's global offices, particularly with regard to an offence under section 7, where the offence was committed overseas. This could put the company at risk of multijurisdictional enforcement proceedings and may trigger investigations into the conduct of individuals as a result of admissions within the documentation.

HOW WILL A TYPICAL DIRECTORS AND OFFICERS (D&O) POLICY RESPOND?

It is important to note that a typical public company directors and officers (D&O) policy does not provide cover for the costs incurred by an organisation facing bribery allegations, such as the recent enforcement under section 7 of the UK Bribery Act 2010, although it may be possible to obtain cover in certain circumstances. However, a director may be faced with allegations of bribery and corruption as a result of the information disclosed in the enforcement potentially resulting in a prosecution being commenced against them. In order to provide maximum protection to these directors and officers, a policy should provide the following:

- Cover for all directors and senior managers of the holding company and its subsidiaries.
- Cover for formal investigations commenced by a regulator or government body.
- Pre-claim inquiry cover.
- Cover for costs of defending regulatory inquiries.
- A broad definition of "claim" to include criminal prosecutions.
- A "final adjudication" provision for the criminal or fraudulent conduct exclusion, so that the exclusion can only be triggered once there is a final, non-appealable finding of liability by a court of law. The exclusion should be fully severable also, so that if one director is found liable, their actions will not invalidate cover for the other innocent directors.
- A condition that any admission of wrongdoing by a company or an executive in the course of cooperating with a regulator does not invalidate cover for any subsequent related claim.
- Asset and liberty costs.
- Extradition costs.
- Cover for system-related allegations that may be triggered as a result of information and/or system access provided. Policies should not contain a cyber exclusion and the definition of "insured person" should include persons who are involved in significant cyber-related decisions.

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SUMMARY

The Standard Bank case serves as a reminder that multinational corporations face a real risk of prosecution for engaging in bribery in instances where they have no direct control over a company and are merely "associated" with it. As such, companies must ensure that appropriate policies, procedures, and conduct codes are in place and communicated to colleagues worldwide with a consistent and demonstrable approach.

While the UK's first DPA and the first offence under section 7 of the UK Bribery Act has confirmed the SFO's likely hard-line approach to bribery, further clarification is needed on how far an organisation has to go to implement and communicate bribery procedures to associated entities over which they have no direct control to avoid prosecution. Senior executives should take a proactive approach to their insurance arrangements, ensuring they have adequate cover should they face a regulatory investigation, and that cooperating with regulators, including self-reporting breaches, does not invalidate their cover. They should also check how to access their D&O policy directly in the event of a crisis.

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