OCTOBER 2012

SERIOUS FRAUD OFFICE'S REVISED GUIDANCE ON THE UK BRIBERY ACT

Without prior notice, in September the UK's Serious Fraud Office withdrew its existing guidance on the Bribery Act 2010 and self-reporting. On 9 October 2012, the SFO issued three new policies on Facilitation Payments, Business Expenditure (corporate hospitality), and Self-Reporting.

WHAT HAS CHANGED?

The revised policies are, for the most part, a change of tone or emphasis rather than a substantive shift in the SFO's approach. The SFO is no longer actively encouraging self-reporting, but self-reporting remains *the key factor* in determining whether or not a corporation facing bribery charges might avoid prosecution.

The SFO is stepping back from its commitment to engage with corporations and help them devise robust anti-corruption strategies. It is anticipated that, as part of this process, the SFO will be less inclined to enter into speculative discussions about possible self-reports. Companies self-reporting bribery will most likely have to be ready at an initial meeting with the SFO to give a reasonably accurate report of the precise scope and nature of the issues and present a plan setting out investigative steps and remedial actions.

Where civil recovery is used as a disposal, corporations will have to accept that far more information about their wrongdoing will enter the public domain than has been the case to date.

It remains to be seen whether, in practice, the SFO will be less likely to negotiate nonprosecution outcomes as a result of these new policies, but the tone set by this revised guidance will make corporations and their advisors more wary about self-reporting until such time as the SFO's appetite for prosecution can be properly gauged.

WHAT HAS NOT CHANGED?

Compliance programmes need not be revised as a result of anything contained in this guidance, if they were adequately established under the previous guidelines.

It has been suggested that the new policy on self-reporting means that corporations facing corruption issues can no longer expect to avoid prosecution if they self-report. In truth, it was never the case that a self-report guaranteed that a corporation would avoid prosecution. However, self-reporting remains the most important factor in determining whether or not a corporation can expect a non-prosecution outcome.

The SFO will continue to use its civil recovery powers. This tool remains a vital weapon in the SFO armoury and will continue to do so until such time as deferred prosecution agreements are introduced.

The public interest factors for not prosecuting corporations are unchanged and, in many cases, will remain compelling.

The SFO's new guidance is available in full on the SFO web site, but the key points are summarised below.

FACILITATION PAYMENTS

Facilitation payments are illegal. The decision as to whether or not the SFO will prosecute cases where facilitation payments have been made will be governed by the principles set out in the Code for Crown Prosecutors, the Bribery Act: Joint Prosecution Guidance issued by the Director of Public Prosecutions and the Director of the SFO (Joint Prosecution Guidance), and the Joint Guidance on Corporate Prosecutions.

If there is sufficient evidence to provide a realistic prospect of conviction, the SFO will prosecute *if it is in the public interest to do so*. In deciding whether or not it is in the public interest to prosecute a case of facilitation payments, the SFO will consider as a factor tending against prosecution a corporation's "genuinely proactive approach involving self-reporting and remedial action." (Joint Prosecution Guidance). In appropriate cases, the SFO will continue to use its civil recovery powers under Part 5 of the Proceeds of Crime Act 2002 ("POCA").

BUSINESS EXPENDITURE (CORPORATE HOSPITALITY)

Corporate hospitality is legitimate and an important part of doing business, *but* in certain instances a bribe may be disguised as a legitimate business expenditure.

The decision as to whether or not the SFO will prosecute cases where hospitality or gifts are considered to constitute bribes will be governed by the principles set out in the Code for Crown Prosecutors, the Bribery Act: Joint Prosecution Guidance, and the Joint Guidance on Corporate Prosecutions.

If there is sufficient evidence to provide a realistic prospect of conviction, the SFO will prosecute *if it is in the public interest to do so*. In deciding whether or not it is in the public interest to prosecute a case where corporate hospitality constitutes bribery, the SFO will consider as a factor tending against prosecution a corporation's "genuinely proactive approach involving self-reporting and remedial action." (Joint Prosecution Guidance). The SFO will in appropriate cases continue to use its civil recovery powers under Part 5 of the POCA.

SELF-REPORTING

The SFO's decision whether or not to prosecute any given case of suspected bribery will be governed by the principles set out in the Code for Crown Prosecutors, the Bribery Act: Joint Prosecution Guidance, and the Joint Guidance on Corporate Prosecutions.

If there is sufficient evidence to provide a realistic prospect of conviction, the SFO will prosecute *if it is in the public interest to do so*.

The fact of self-reporting will be relevant to the SFO's prosecution decision to the extent set out in the Joint Guidance on Corporate Prosecutions. The full list of public interest factors weighing against prosecution is set out below:

a. A genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice, involving self-reporting and remedial actions, including the compensation of victims:

   In applying this factor the prosecutor needs to establish whether sufficient information about the operation of the company in its entirety has been supplied in order to assess whether the company has been proactively compliant. This will include making witnesses available and disclosure of the details of any internal investigation.

b. A lack of a history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the company; contact should be made with the relevant regulatory departments to ascertain whether investigations are being conducted in relation to the due diligence of the company.

c. The existence of a genuinely proactive and effective corporate compliance programme.

d. The availability of civil or regulatory remedies that are likely to be effective and more proportionate:

   Appropriate alternatives to prosecution may include civil recovery orders combined with a range of agreed regulatory measures. However, the totality of the offending needs to have been identified. A fine after conviction may not be the most effective and just outcome if the company cannot pay. The prosecutor should refer to the Attorney's Guidance on Civil Recovery (*see* "Proceeds of Crime Act 2002: Section 2A [Contribution to the reduction of crime] Joint Guidance given by the Secretary of State and Her Majesty's Attorney General") and on the appropriate use of Serious Crime Prevention Orders.

e. The offending represents isolated actions by individuals, for example by a rogue director.

f. The offending is not recent in nature, and the company in its current form is effectively a different body to that which committed the offences—for example, it has been taken over by another company, it no longer operates in the relevant industry or market, all of the culpable individuals have left or been dismissed, or corporate structures or processes have been changed in such a way as to make a repetition of the offending impossible.

g. A conviction is likely to have adverse consequences for the company under European Law, always bearing in mind the seriousness of the offence and any other relevant public interest factors.

   Any candidate or tenderer (including company directors and any person having powers of representation, decision or control) who has been convicted of fraud relating to the protection of the financial interests of the European Communities, corruption, or a money laundering offence is excluded from participation in public contracts within the EU. (Article 45 of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts). The Directive is intended to be draconian in its effect, and companies can be assumed to have been aware of the potential consequences at the time when they embarked on the offending. Prosecutors should bear in mind that a decision not to prosecute because the Directive is engaged will tend to undermine its deterrent effect.

h. The company is in the process of being wound up.

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A prosecutor should take into account the commercial consequences of a relevant conviction under European law, particularly for self-referring companies, in ensuring that any outcome is proportionate.

The SFO may still, in appropriate cases, use the civil recovery powers granted by Part 5 of the POCA, but when it does, it will publish its reasons, the details of the illegal conduct, and the disposal.

CONCLUSION

The revised Bribery Act policies represent not so much a change of approach as a change of tone. In part, this reflects the SFO's appreciation of the fact that it could no longer justify devoting precious resources to its role as a thought-leader on issues such as corporate governance and ethics. The new policies offer little that is new but ensure that the SFO is focused on its core objective, namely investigating and prosecuting the most serious and complex cases of economic crime.

FURTHER INFORMATION

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

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