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Briefing note October 2012

SFO muddies the waters on self-reporting, facilitation payments and hospitality

The UK Serious Fraud Office ("SFO") has published revised policies on self-reporting, facilitation payments and business expenditure. The new policies do not rule out the use of alternatives to prosecution in some cases. However, they re-affirm the message projected by David Green since he took control of the SFO that the scope for negotiated settlements has been significantly reduced.

What has changed?

The SFO's new policy in relation to self-reporting, facilitation payments and business expenditure on corporate hospitality and gifts, which took effect on 9 October 2012, is now set out in three short statements.

Decisions as to whether to prosecute will be taken under the "Full Code Test" in the Code for Crown Prosecutors ("the Code") and, where a company is the target of an investigation, the joint prosecution Guidance on Corporate Prosecutions ("the Corporate Guidance") and Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010 ("the JP Bribery Act Guidance").

The SFO has always been bound by the Code for Crown Prosecutors, and the Corporate Guidance and the JP Bribery Act Guidance have been in place for some time. However, they have until now been supplemented by other guidance providing more detail as to how, in practice, the SFO would exercise its discretion as to whether to prosecute. In effect, the SFO has withdrawn all its own guidance on bribery.

The key changes under the revised policies are set out below.

Self-reporting

The SFO's previous guidance stated that, by self-reporting at an early stage, companies may be able to avoid prosecution. This has been demonstrated by a number of civil settlements.

The SFO has now retreated from this previous policy position. Whilst, in a statement accompanying the new policy, it makes clear that it "will always listen to what a corporate body has to say about its past conduct", the new policy on self-reporting does not provide for dialogue between the SFO and self-reporting organisations. Instead, it simply sets out its powers to prosecute and the tests which it will apply when deciding whether to do so.

Self-reporting will now be just one of the factors which it will take into account. Under the new guidance, when considering the fact that an organisation has self-reported, the SFO must be persuaded that it is part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice". The SFO is careful to state that it will provide "no guarantee that prosecution will not follow" where a company has self-reported.

Facilitation payments

The SFO's previous guidance on facilitation payments set out six criteria the SFO would consider in deciding whether to prosecute, such as whether the company had a clear policy on facilitation payments and whether it was taking practical steps to curtail any such payments. Now, the SFO simply re-states that all facilitation payments are illegal.

Some, very limited, clarification is provided to organisations in the SFO's statement accompanying the new policy. In that statement, it indicates that some flexibility remains as, in addition to applying the Code, the Corporate Guidance and the JP Bribery Act Guidance, it will consider

whether cases involving facilitation payments are sufficiently "serious or complex" to pass its case acceptance criteria. By way of example, cases will usually satisfy these criteria where they involve significant international elements and/or where complex legal or accountancy analysis is likely to be required.

Companies may wish to consider in particular the JP Bribery Act Guidance, which indicates that prosecution will be less likely where a single, isolated payment is made and where the organisation had a clear and appropriate policy in place, with procedures which were correctly followed.

Business expenditure (corporate hospitality and gifts)

The SFO's previous guidance on corporate hospitality and gifts also contained a six point list of circumstances where companies' business expenditure would be less likely to lead to prosecution.

The new policy simply refers to the Code, the Corporate Guidance and the JP Bribery Act Guidance. Beyond high-level indications that factors including lavishness and closeness of connection to a company's business activities will bear upon the likelihood of prosecution, these sets of guidance do not provide any applied examples of which business expenditure is likely to be regarded as reasonable. However, it emphasises that the relevant legal tests for the purposes of sections 1 (bribing another person) and 6 (bribing a foreign public official) are whether there is an element of "improper performance" by the recipient of hospitality and whether the hospitality was intended to influence the foreign public official so as to obtain or retain business or to obtain an advantage in the conduct of business.

Use of civil recovery orders

In all three areas, the new policies state that, where the requirements of the Code, the Corporate Guidance and/or the JP Bribery Act Guidance are not made out, the SFO may consider using its power to apply for civil recovery orders under the Proceeds of Crime Act 2002 ("POCA") as an alternative to prosecution. It has taken this course in recent years in action taken against De Puy International, Macmillan Publishers Limited, M W Kellogg Limited and, most recently, Oxford Publishing Limited, where it has decided that there has been insufficient evidence to sustain a prosecution, or that it has not been in the public interest to do so.

Its new policy in this area is an important change from previous indications that the SFO would work with self-reporting organisations towards civil settlements. It is now clear that the SFO will only consider using its civil recovery powers as an alternative to prosecution where it decides that the requirements of the Code, the Corporate Guidance and/or the JP Bribery Act Guidance are not met.

Importantly, it has also explicitly reserved its right to take action using its powers under POCA in addition to pursuing criminal proceedings. It has taken this course recently by taking action to recover sums from the shareholders of the parent company of Mabey & Johnson Limited, which was prosecuted for bribery offences.

Why has the SFO revised its policies?

The policy revisions are significant, but not unexpected. Since David Green assumed control of the SFO in April 2012, he has been clear about his wish to re-balance its priorities by placing greater emphasis on deterring misconduct through prosecution of high-profile corruption than on encouraging compliance through engaging with corporate organisations.

The changes also respond to recommendations made in a report issued by the Organisation for Economic Co-operation and Development ("OECD") in March 2012 on the implementation of its anti-bribery convention in the UK. The report criticised the SFO's previous practices of pursuing civil settlements where criminal sanctions have been available (such as the action taken against Balfour Beatty in 2008) and of giving advice on specific transactions and procedures.

What will the changes mean for companies?

The changes leave organisations with less clarity as to how to avoid committing offences, particularly that of failing to prevent bribery under section 7 of the Bribery Act 2010. Organisations still need to maintain "adequate procedures" to prevent bribery, they may wish to review their policies and procedures to ensure that they are not continuing to place reliance on the SFO's previous guidance on facilitation payments and business expenditure, and to make changes where necessary.

Organisations authorised by the Financial Services Authority may, in some circumstances, look to some specific guidance on anti-bribery practices and procedures (such as that set out in its *Financial Crime Guide*). However, such guidance does not cover the entirety of many organisations' operations, and equivalent guidance does not exist in many other sectors.

Organisations considering self-reporting are similarly left with less comfort that approaches to the SFO will be favourably received. The SFO has confirmed that cases where organisations have self-reported in reliance upon the SFO's previous guidance will be dealt with under those policies. In future cases, the benefits to an organisation of bringing details of historic misconduct to the SFO's attention are still likely to outweigh the risks of doing so. However, it appears inevitable that directors will hesitate before approaching the SFO in the light of the less compromising approach it is now formally adopting.

In a statement accompanying the new policy, the SFO also makes clear that it will not advise organisations which approach it with details of particular issues (such as may arise during the due diligence process in corporate transactions) on their future conduct.

To the extent that organisations have to date approached the SFO for specific guidance on their future conduct (for example in the context of acquisition clearance in corporate transactions) it is now unlikely that they will do so. This may have a collateral effect on the detail which parties may wish to include in contractual documentation, and may impact on the numbers of suspicious activity reports submitted by or on behalf of organisations involved in such transactions.

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