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ADVISORY

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THE UK GETS SERIOUS ABOUT OVERSEAS CORRUPTION: THE BRIBERY BILL AND SFO GUIDANCE

INTRODUCTION

The UK's Serious Fraud Office (SFO) has recently released guidance[1] on its approach to investigating allegations of corruption overseas. The SFO will continue to be the primary enforcer under a proposed Bribery Bill, now being considered by Parliament, if and when it becomes law.

The SFO recently ramped up its anti-corruption presence though the establishment of a dedicated anti-corruption work area, the Anti-Corruption Domain, and its announced intention to eventually have 100 staff working in the area. The SFO guidance establishes procedures for self-reporting by companies and the consequential effects on liability; additionally, it addresses specific enforcement questions. Although it is both non-binding and in some parts quite vague, the guidance does provide valuable insight to the general approach the SFO intends to take toward enforcement. That approach appears to be modelled on that adopted by the United States Department of Justice (DOJ) in recent years: there is a heavy emphasis on requiring companies to establish effective compliance programs and significant reliance by the authorities on self-reporting. The guidance comes on the heels of the first successful prosecution[2] of a major British company for overseas corruption,[3] signalling an increased vigilance by the SFO in enforcing anti-corruption laws.

THE DRAFT BRIBERY BILL

To date, corruption offences in the UK have been located in a mixture of legal statutes and the common law. In 2005, the Organisation for Economic Co-operation and Development (OECD) criticised the UK's approach to corruption offences in a report that argued too little had been done to update the legal framework.[4] The UK government has prepared new legislation in the form of the Bribery Bill partly in response to those criticisms and partly to bring the laws dealing with corruption under one statute.

The draft bill was released in March 2009.[5] A Joint Committee, made up of Members of Parliament and the House of Lords, was appointed to examine the bill and report back to Parliament. Their report was issued in July 2009[6] and the bill must be debated in Parliament and passed in both Houses before it becomes law.

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While it is expected this will be some months away yet, interest to date has focused on the new offences specified in the draft bill. As well as a new specific offence for the bribery of a foreign public official (in line with OECD recommendations), the draft bill also introduced a new offence of negligent failure by commercial organisations to prevent bribery.[7] This offence is seen as the stick to force companies to improve their internal compliance procedures.

Though the Committee report and the draft bill give some guidance on what can be expected from the final legislation, the legislation remains in draft form and subject to debate. Further debate on the draft is scheduled for late 2009.

SFO GUIDANCE: THE IMPORTANCE OF A COMPLIANCE PROGRAM

Pursuant to the negligent failure to prevent bribery provision of the draft bill, a corporation could be criminally liable for bribery by its employee unless the corporation can establish it had adequate procedures in place to prevent bribery. The draft bill does not elaborate on what constitute "adequate procedures."

The SFO guidance does elaborate and it suggests that adequate procedures to prevent bribery should look similar to the seven elements of an effective compliance program set forth in the US Sentencing Guidelines.[8] The SFO will consider:

- whether the corporation had "a clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate," "a Code of Ethics," "principles that are applicable regardless of local laws or culture," "a policy on gifts and hospitality and facilitation payments," "a policy on outside advisers/third parties including vetting and due diligence," and "a policy concerning political contributions and lobbying activities";
- whether the corporation made "it explicit that the anti-bribery code applies to business partners";
- whether the corporation provided for "individual accountability" as well as "appropriate and consistent disciplinary processes";
- whether the corporation exercised "diligence and appropriate risk assessments," and conducted "regular checks and auditing in a proportionate manner";
- whether the corporation provided "training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporate";
- whether the corporation maintained "a helpline within the corporate which enables employees to report concerns"; and
- "whether there have been previous cases of corruption within the corporate and, if so, the effect of any remedial action."

More generally, the SFO will "also be looking closely at the culture within the corporate to see how well the processes really reflect what is happening in the corporate." The SFO's emphasis will be on "helping corporates to develop [a modern corporate culture] and to use enforcement action only where this is necessary and proportionate." The SFO will consider the absence of an appropriate compliance program or modern corporate culture to be a problem that must be remedied. And, it holds criminal enforcement power as a potential tool to impose such remedy. The approach set forth in the guidance is therefore broadly consistent with an emerging global trend that regulators perceive an effective compliance program to be an essential part of corporate governance.

WHAT TO DO IF A VIOLATION IS DETECTED

The SFO guidance comments extensively on the benefits of self-reporting violations. There are potential benefits, and there are risks and costs as well. The decision to self-report is a significant one, but it is not the first order of business on discovering a violation.

When a violation of the Bribery Bill (or its US analogue, the Foreign Corrupt Practices Act (FCPA)) is detected, the first step is to stop any ongoing violations. Once this is done, the corporation can turn to the question of assessing the extent of the problem and identifying appropriate remedial actions that may or may not include self-reporting. For the assessment, or investigation, stage, it will be important to preserve records to the extent possible. The corporation should consider issuing document hold notices to likely custodians (although in some cases the benefits to the investigation of keeping

the investigation itself confidential will counsel against this step) and discussing technological approaches to data preservation. Through the review of documents and financial records and conducting employee interviews, the corporation should try to assess the scope, severity, and cause of the violation.

Often, the need to investigate and the decision to self-report pose a chicken and egg problem. Enforcement authorities would like to help define the method and scope of investigation. However, it would be the rare case (if there even is one) where it would be prudent to self-report before conducting any internal investigation to assess what exactly is being reported. The SFO guidance appears to recognize this challenge:

> A key question for the corporate and its advisers will be the timing of an approach to us. We appreciate that a corporate will not want to approach us unless it had decided, following advice and a degree of investigation by its professional advisers, that there is a real issue and that remedial action is necessary. There may also be earlier engagement between the advisers and us in order to obtain an early indication where appropriate (and subject to a detailed review of the facts) of our approach. We would find that helpful but we appreciate that this is for the corporate and its advisers to consider.

Since the investigation will generally be designed without the involvement of SFO or DOJ, it is important to design it in a manner that can be defended to the relevant authority should the corporation eventually decide to self-report. Too narrow an investigation serves little purpose should there eventually be a disclosure that causes the enforcement authority to mandate a broader investigation. On this point, the SFO has signalled that it expects that the investigation will include electronic searches which can drive the cost of investigations up.

Once the corporation understands the extent of the violation, remedial measures must be imposed. These range from revising the compliance policy, to supplementing anti-corruption training, to disciplinary actions against employees or officers involved in the violation, to self-reporting.

THE POTENTIAL BENEFITS OF SELF-REPORTING

The main benefit of self-reporting is increasing the chance of avoiding criminal liability. The SFO expresses a plain preference to resolve self-reported violations civilly rather than criminally. It does not offer any guarantee, but it expresses its strong inclination to proceed civilly in those cases where (a) the board is committed to remedying the cause of the violation and improving corporate culture; (b) the corporation is willing to conduct additional investigation should the SFO deem it necessary; (c) the corporation cooperates in accepting remedies in the form of fines, restitution, improved compliance programs and, in some cases, monitors; (d) the corporation is prepared to accept a public and transparent remedy; and (e) the corporation is willing to work abroad as well to reach a global settlement. The SFO further notes that a civil remedy would likely not be available in any case where the board members were involved in the corruption or benefitted personally therefrom.

The advantages of a civil resolution over a criminal resolution would be difficult to overstate. For example, Article 45 of the EU Public Sector Procurement Directive 2004 includes provisions barring companies found guilty of corruption offences from public procurement contracts[9]. A civil penalty from the SFO would not appear to bar a company from such contracts.

In addition to the incentive of trying to secure a civil remedy, the SFO has also clarified its views on any failure to self report. This will lead to greater liability, most likely criminal, and a more in-depth approach to investigations.

There is little doubt that a corporation would be better off for having self-reported than having an enforcement authority learn of a violation otherwise. And, with increased staffing at SFO and DOJ to investigate overseas corruption, there is always a risk that violations will be detected by the enforcement authorities. Additionally, employees may independently decide to report a violation for a number of reasons, including the hope of gaining the benefit of cooperation if that employee is concerned about his/her personal exposure.

THE POTENTIAL COSTS OF SELF REPORTING

Self-reporting, however, will carry significant risks and costs. First, self-reporting to any one authority must be viewed in a global context. Increasingly, DOJ, the SFO, and other enforcement authorities are cooperating and sharing information. In late 2007, Akzo Nobel N.V. reached a non-prosecution agreement with DOJ in which the company expressly agreed it would resolve its bribery violations with Dutch authorities for an agreed amount within six months or it would be subject to an agreed fine by the United States Department of the Treasury. Today, there is little chance a company could report to one authority and avoid detection by another. SFO states explicitly that it expects to be notified of any violation over which it has jurisdiction at the same time that a report is made to DOJ. Conversely, a UK company reporting to SFO should expect DOJ will learn of the violation upon reporting to the SFO (if only because the SFO guidance is clear that it expects companies to permit a public and transparent remedy). While DOJ does state that companies will benefit from self-reporting, the benefit is generally something less than the SFO preference for civil resolution. Rather, DOJ has resolved numerous recent violations that were self-reported with deferred prosecution agreements that still resulted in a criminal fine. All risks and costs must therefore be weighed with an eye toward all authorities that might seek to assert jurisdiction.

Self-reporting, and the consequent investigation, negotiation and resolution, can be costly in terms of both time and money. Additionally, it brings negative publicity to the corporation. The investigation will likely disrupt business operations to some degree and may have negative consequences on morale. Moreover, once a disclosure is made, the corporation loses some element of control over the scope of continued investigation. Although it is possible to negotiate these matters with DOJ and the SFO, the enforcement authorities exercise substantial control once disclosure has been made. An investigation could put the corporation at odds with the EU data protection rules, which place certain limits on collection, review, maintenance, and distribution of personal data. Disclosure will put individual employees at risk for prosecution. And, self-reporting does not guarantee a civil resolution or protection from negative collateral consequences such as debarment from government contracting programs.

It is critical that the corporation carefully weigh both the costs and the benefits in making the decision whether to self-report.

INDIVIDUAL LIABILITY

The guidance briefly addresses factors the SFO will consider in deciding whether to charge individuals. These include:

- "how involved were the individuals in the corruption (whether actively or through failure of oversight)?"
- "did the individuals benefit financially and, if so, do they still enjoy the benefit?"
- Potential collateral consequences the individual may face as a result of the violation.

DOJ is increasingly bringing criminal actions against responsible individuals. It remains to be seen whether SFO will do so with similar aggressiveness.

THE SFO OPINION PROCEDURE

The guidance also indicates that the SFO is working toward implementation of an opinion procedure covering future enforcement activity. This would be similar in scope to the procedure offered by DOJ. The opinion would have particular application to any issues uncovered by merger and acquisition work. The SFO will permit an acquiring company "committed to a modern ethical corporate culture" to disclose violations discovered through due diligence at the company to be acquired and develop non-criminal remedial measures in consultation with the SFO that would protect both the acquiring corporation and the transaction. Again, however, there are no guarantees for any particular case, and in a case where the SFO deems the corruption to be "long lasting and systemic," it will consider criminal enforcement. As corporations are aware from the DOJ opinion process, obtaining an opinion within the timeframe allowed by the realities of the business decision at issue can be a challenge. It remains

to be seen what resources SFO will devote to its program and whether they will be sufficient to allow timely and reasonable guidance.

UNANSWERED QUESTIONS

The guidance leaves some critical questions unanswered.

1. *What criteria will the SFO apply in deciding whether to grant a civil remedy for self-reported violations?* The SFO has stated that there will be cases in which it pursues criminal charges notwithstanding the corporation having self-reported the violation. As described above, it gives the example of cases where "Board members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this." However, this appears to be an illustrative examples and not an exhaustive list. The SFO does note it will "look at the public interest in each case," but provides no further guidance by which a corporations deciding whether to self-report or not can evaluate the likelihood of earning a civil disposition. Until more dispositions are announced, the predictor may be DOJ's approach in comparable cases.
2. *What scope of investigation will satisfy the SFO and avoid the need for additional, SFO-directed investigation?* The SFO guidance does provide that follow-up investigation "will be carried out by the corporate's professional advisers. This will be at the expense of the corporate. We undertake to look at this in a proportionate manner and to have regard, where appropriate, to the cost to the corporate and the impact on the corporate's business." While the recognition of cost and business impact is welcome, it remains unclear what breadth of investigation the SFO will demand in practice. Experience with DOJ suggests that, in many cases, the decision to conduct a broader investigation pre-disclosure can pay off in terms of satisfying the government initially and avoiding the even more wide-ranging inquiry DOJ might demand if it felt the initial investigation were insufficient.
3. *Under what circumstances would monitors be appointed?* The guidance notes that in some cases a monitorship may be appropriate. It does state such appointment would be "proportionate to the issues involved," but provides no further guidance. As many companies in the US have learned, the appointment of a monitor can be a particularly weighty burden. It will be important to watch future cases to discern the criteria used to appoint monitors. How the monitor is selected is another significant issue that has caused considerable controversy in the US. Finally, the scope of authority and jurisdiction granted any monitor is perhaps as significant an issue as whether the monitor is appointed in the first place.
4. *What position will the SFO take on attorney client privilege?* DOJ has recently changed its policy on whether prosecutors may demand that a company waive attorney-client privilege as part of its cooperation.[10] While it seems unlikely SFO would want to re-open this Pandora's box, self-reporting always raises challenges regarding the waiver of privilege. How information gathered by company counsel is reported to the SFO could impact whether the company might later be held to have waived its attorney-client privilege.
5. *Will the SFO ever close a voluntary disclosure case without any action?* The guidance appears to leave the door open to this possibility. There may be cases in which a company can present a violation to the SFO, along with its proposed remedial measures, and by doing so avoid any formal action on the part of the SFO. It remains to be seen how frequent those cases will be and what self-imposed remedial measures might induce SFO to accept the resolution as final.

CONCLUSION

It is clear that the proposed Bribery Bill, the SFO Guidance, and the resolution of the Balfour Beatty investigation and the Mabey & Johnson prosecution indicate that anti-corruption enforcement in the UK has entered a new and important phase. Companies will be well advised to follow these developments while at the same time taking proactive efforts to improve their governance processes with the implementation of enhanced compliance programs that encourage proper employee conduct while managing and mitigating risks. These events in the UK

are in line with the global trends of enhanced anti-bribery enforcement, and increasing regulatory expectations that appropriate controls must be in place to ensure proper conduct of company employees.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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ENDNOTES

1 http://www.sfo.gov.uk/news/downloads/SFO-COP-dealing-with-overseas-corruption.pdf

2 Balfour Beatty also settled an investigation in October 2008; however, it did so by paying a £2.25 million fine and only admitting to improper accounting. The initial allegations of corruption surrounded a £100 million overseas contract. The investigation into actual bribery was terminated once the settlement was reached.

3 Mabey & Johnson Ltd, an international bridge construction company based in the UK, recently pled guilty to charges relating to its conduct in Jamaica, Ghana, and Iraq. In early 2008, the company made a voluntary disclosure to the SFO that it may have engaged in corrupt practices. It had previously been reported that the company had paid bribes to the Iraqi regime under the Oil for Food program between 2001 and 2003. However, the company also admitted to paying bribes in Jamaica and Ghana to influence public contract awards. Eight directors have resigned as a result of the crimes and the company pled guilty to 10 counts of corruption. The fine will be determined at a later sentencing date.

4 "Report On The Application Of The Convention On Combating Bribery Of Foreign Public Officials In International Business Transactions And The 1997 Recommendation On Combating Bribery In International Business Transactions," OECD, 17 March 2005 http://www.oecd.org/dataoecd/62/32/34599062.pdf.

5 For a summary of the bill as originally drafted, *see* "UK Proposes Sweeping New Anti-Bribery Legislation," at http://www.arnoldporter.com/resources/documents/CA_UK-ProposesSweepingNewAnti-BriberyLegislation_042009.pdf.

6 Available at http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11502.htm.

7 Notably, the recent report of the Joint Committee calls into question the negligence aspect of this proposed offence. The Joint Committee report recommends that corporations should be held strictly liable for bribery by employees, subject only to an adequate procedures defence.

8 U.S.S.G. §8B2.1(b).

9 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT

10 *See* "Court Decision and New Department of Justice Guidelines Change the Landscape for Corporate Criminal Investigations," available at http://www.arnoldporter.com/resources/documents/CA_CourtDecisionAndNewDepartmentOfJustice_090908.pdf