

## The UK's SFO Provides Additional Guidance on its Approach to Investigating Allegations of Overseas Corruption

*Marcus Asner, Drew Harker, Keith Korenchuk, and Jennifer Hogan, Arnold & Porter LLP*

In July of last year, the UK's Serious Fraud Office (SFO) released guidance<sup>1</sup> (the Guidance) on its approach to investigating allegations of corruption overseas. Although the Guidance provided valuable insight into the SFO's approach to enforcement, it nevertheless left open some unanswered questions. In December, the Director of the SFO, Richard Alderman, clarified the SFO's new approach in an open letter to Arnold & Porter LLP (the Alderman Open Letter).<sup>2</sup> Taken together, the Guidance and the Alderman Open Letter establish a framework by which companies can evaluate the benefits and risks of self-reporting. The Guidance and the Alderman Open Letter also address specific enforcement questions, making plain that the SFO, in making charging decisions, will place heavy emphasis on whether a company has an effective compliance program.

The SFO is the UK's primary enforcer of the UK's current anti-bribery laws and will continue to serve that role under the proposed Bribery Bill<sup>3</sup> now being considered by Parliament, if and when that bill becomes law. The SFO has significantly increased its anti-corruption presence by establishing a dedicated anti-corruption work area—the Anti-Corruption Domain—and announcing its intention eventually to have 100 staff members working in the area. In its 2008 – 2009 Annual Report, the SFO reports that it worked on 112 cases, and accepted 18 new cases for investigation in the year ending March 31, 2009.<sup>4</sup> The SFO issued the Guidance and the Alderman Open Letter on the heels of the SFO's first successful prosecution of a major British company for overseas corruption, signaling an increased vigilance in enforcing anti-corruption laws.<sup>5</sup>

The SFO's approach, as outlined in the Guidance and in the Alderman Open Letter, appears to be modeled on the approach adopted by the United States Department of Justice (DOJ) in recent years. Like the US model, the SFO approach places a heavy emphasis on requiring companies to establish effective compliance programs and relies significantly on companies detecting, investigating and self reporting incidents of overseas bribery.

### *The Anti-Bribery Legal Framework in the UK*

Corruption offenses in the UK traditionally have been prosecuted using a mixture of legal statutes and the common law. In 2005, the Organisation for Economic Cooperation and Development (OECD) issued a report criticizing the UK's approach to corruption offenses, arguing that too little had been done to update the legal framework.<sup>6</sup> The UK government has prepared new legislation in the form of the

Bribery Bill (Draft Bill or Bill) partly in response to those criticisms and partially to bring the laws dealing with corruption under one statute.

The Draft Bill was released in March 2009. 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<sup>7</sup> and the Government's response to the Joint Committee's Report was issued in November 2009.<sup>8</sup>

The Bill includes several new offenses that have drawn particular interest. In particular, following the OECD recommendations, the Bill includes a specific offence for the bribery of a public official. The Bill also includes a new offence for the failure by commercial organizations to prevent bribery. This offence provides a stick to force companies to improve their internal compliance procedures.

Although the Committee report and the draft bill provide some guidance on what can be expected from the final Bill, the legislation is still in draft form and subject to change. The Bill is scheduled to be debated further in early 2010.

#### *SFO Guidance: The Importance of Self Reporting*

The Guidance anticipates that companies will detect and investigate evidence of wrongdoing themselves and self report violations to the SFO. The benefits of self reporting are plain. Companies that self report will increase the likelihood of having their cases disposed of civilly rather than criminally—a benefit that means, among other things, "that the mandatory debarment provisions under Article 45 of the EU Public Sector Procurement Directive in 2004 will not apply." That said, while the SFO wants to settle self referral cases civilly "whenever possible," it has made plain that self reporting alone is not tantamount to a get-of-jail-free card: The Guidance cautions, as an example, that the SFO would be likely to launch criminal investigations in cases where members of a company's Board had personally engaged in the corruption and had personally benefitted from it.

The downsides to not self reporting are equally clear. The Guidance states that a company that becomes aware of a bribery issue but nevertheless elects not to self report it will face a "much greater" prospect "of a criminal investigation followed by prosecution and a confiscation order." Adding considerable punch to the risks involved in not self reporting, the Guidance advises that, if a case falls within its jurisdiction, the SFO "would expect to be notified at the same time as the DOJ"—a significant threat in light of the SFO and the DOJ's longstanding practice of sharing information about cases.<sup>9</sup>

The Guidance sets out factors the SFO will use in determining how to dispose of the case including:

- Whether the company's Board is genuinely committed to resolving the issue and changing its corporate culture accordingly;
- Whether the company is willing to work with the SFO on the "scope and the handling" of additional investigation into the wrong-doing;
- Whether the company is willing to resolve the case through paying restitution,

implementing new training and changes to the corporate culture, assisting the SFO in taking appropriate action against individuals and, in some cases, submitting to outside monitoring;

- Whether the company is willing to submit to an outcome that is in the public interest and transparent, including a public statement of the terms of the settlement; and
- Whether the company would allow the SFO to work with regulators in the UK and abroad to reach a global settlement.

### *The Importance of A Robust Compliance Program*

Under the current version of the Draft Bill, a company may be held criminally liable if one of its employees is found to have committed bribery unless the company can establish it had adequate procedures in place to prevent bribery. While the Draft Bill does not explain what will constitute "adequate procedures," the SFO Guidance suggests that a company's procedures to prevent bribery should resemble in large part the seven elements of an effective compliance program set forth in the US Sentencing Guidelines. When evaluating a compliance program, the SFO will consider:

- Whether the corporation had "a clear statement of 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 an appropriate 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
- "[W]hether 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 views the absence of an appropriate compliance program or modern corporate culture as a problem that must be remedied, and will rely on its criminal enforcement power as possible tool to enforce such a 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.

### *Individual Liability*

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

- "[H]ow 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.<sup>10</sup>

### *The SFO Opinion Procedure*

The Guidance also indicates that the SFO is working toward implementing an opinion procedure covering future enforcement activity. This process would be similar in scope to the procedure offered by the DOJ.<sup>11</sup> The opinion procedure should prove particularly useful to practitioners handling mergers and acquisitions. The SFO will permit an acquiring company to disclose to the SFO violations it discovers during its due diligence of the target company, and contemplates working with the acquiring company to develop non-criminal remedial measures that would protect both the acquiring corporation and the transaction. The SFO advised that it nevertheless will consider criminal enforcement against companies in cases where the SFO considers the disclosed corruption to be "long lasting and systematic."

### *Form of Investigation Under the Self Reporting Regime*

The SFO expects that companies that investigate and self report wrongdoing will use "professional advisors" to carry out the investigation, and that such efforts will be conducted at the company's expense. The SFO is willing to work with companies to discuss the scope of such an investigation and "to have regard, where appropriate, to the cost to the corporate and the impact on the corporate's business." The SFO expects that document recovery and analysis will play a key role of any company's investigative process, but it is willing to work with the company and its professional advisors to help ensure the burden to the company is proportionate to the amount and seriousness of the suspected conduct. The SFO expects that self reporting companies will provide regular updates on the status and progress of their investigations.

### *The Alderman Open Letter Provides Additional Guidance on the SFO's Approach*

In August 2009, US-based law firm Arnold & Porter LLP issued an advisory which asked five questions left unanswered by the original Guidance. Mr. Alderman addressed these questions in a December 7, 2009 open letter to Arnold & Porter partner, Marcus Asner. While Mr. Alderman's "open letter" approach may seem unusual to companies used to dealing with the DOJ, it underscores the SFO's stated commitment to transparency and dialogue in its communications with companies.<sup>12</sup> The open letter to Arnold & Porter also demonstrates the SFO's effort to reach out to "professional advisors" who advise their corporate clients on all aspects of corruption

investigations, and can encourage their clients to take part in the self-reporting process.

In his letter, Mr. Alderman reinforced the SFO's policy to treat the majority of self-reported cases civilly rather than criminally. The SFO expects that professional advisors to companies will develop an understanding of the SFO's approach to enforcement and advise their clients accordingly.

Mr. Alderman then provided answers to Arnold & Porter's five additional enforcement questions.

1. WHAT CRITERIA WILL THE SFO APPLY IN DECIDING WHETHER TO GRANT A CIVIL REMEDY FOR SELF-REPORTED VIOLATIONS?

The Alderman Open Letter enumerated the criteria that the SFO will consider when deciding whether to treat a self reported matter criminally or civilly. These criteria include:

- The seriousness of the wrongdoing;
- Whether the matter is an isolated incident or whether the company has uncovered other examples of this type of misconduct;
- Whether the wrongdoing is systematic and part of the company's established practice;
- Whether the affected group within the company was warned that its processes were inadequate;
- Whether the company reported the matter to the SFO within a reasonable time of discovering the incident; and
- Whether the report provided to the SFO is detailed and complete.

2. WHAT SCOPE OF INVESTIGATION WILL SATISFY THE SFO AND AVOID THE NEED FOR ADDITIONAL, SFO DIRECTED INVESTIGATION?

The SFO's strong preference is that all investigative work on the facts surrounding the wrongdoing be carried out by the company's professional advisors and not by the SFO itself. The SFO expects self-reporting companies to present the SFO with reports that allow the SFO (1) to determine whether the company has fully investigated the issues; and (2) to discuss remediation measures with the company. The SFO recognizes that the scope of an investigation involving one incident of wrongdoing that occurred in the past will be less broad than the scope of an investigation that involves a number of recent instances of misconduct and that implicate systematic or routine business practices. Helpfully, Mr. Alderman recognized that the cost of investigations can become unwieldy and suggested a rule of reason will apply, noting: "we are anxious not to put disproportionate cost on the corporates."

3. UNDER WHAT CIRCUMSTANCES WOULD MONITORS BE APPOINTED?

The SFO is taking a nuanced approach to monitoring. Mr. Alderman stated that the SFO's goal with monitorships will be to achieve balance, assuring the public that the company is genuinely committed to anti-corruption measures while not

imposing disproportionate burdens on the company. Not all cases will require a monitor. Specifically, the SFO will not appoint a monitor in cases where a company's board proves that it is committed to enforcing an anti-corruption corporate culture. In cases involving more serious violations of anti-corruption laws, the SFO will implement some "light touch," on-going monitoring. In those cases, the SFO will expect a company to propose monitors in the first instance. The SFO will not impose a specific monitor against the wishes of a company's Board. Finally, the SFO will work with its international counterparts in assigning monitors in cases where the conduct at issue involves other jurisdictions.

#### 4. WHAT POSITION WILL THE SFO TAKE ON ATTORNEY CLIENT PRIVILEGE?

Mr. Alderman acknowledged that the concept of the waiver of attorney client privilege differs under UK and US law. The SFO will not expect companies to provide documents reflecting legal advice the company received on how to conduct the investigation, the types of remediation to be discussed with the SFO or issues relating to conducting negotiations with the SFO. However, the SFO does expect to be provided a full factual report on the investigation, including *any relevant interview notes from the investigation*. Mr. Alderman stated that the SFO expects companies to waive any privilege with respect to these materials. The SFO is primarily interested in factual reports and suggests that legal advisors seeking to protect the companies' privileges could separate the fact issues from legal advice when preparing the materials to share with the SFO. As has been discussed following the issuance of the Filip Memo by the DOJ,<sup>13</sup> even a requirement that lawyer-discovered facts be disclosed raises genuine concerns about preservation of the attorney-client privilege. The SFO appears to go even a step further, suggesting it will require the production of actual interview notes. As a company approaches a voluntary disclosure, methods of preserving the privilege will merit significant consideration. It may be advisable to approach the SFO initially with a proposal about a more limited set of materials that could be produced in hopes of avoiding waiver of the privilege as to the broader scope of matters covered in attorney interview notes.

#### 5. WILL THE SFO EVER CLOSE A VOLUNTARY DISCLOSURE CASE WITHOUT ANY ACTION?

In limited cases, the SFO could terminate its involvement in a matter (1) if special circumstances apply and the company offers to pay suitable remediation; or (2) if after the company self-reported to the SFO at an early stage of the investigation, the ultimate report on the investigation provided to the SFO does not support the initial suspicions of corruption. Due to the strong public interest in publically announcing these settlements, the SFO expects that these instances will be comparatively rare.<sup>14</sup> Mr. Alderman did not explain what special circumstances would lead to the SFO's terminating its investigation, but he noted that the SFO has done this in "a few cases at present."

It is plain that there is a new enforcement environment in the UK and that the SFO will be at the forefront of that effort. Companies with UK ties will be well advised to review, and if necessary update, their anti-corruption compliance measures to assure alignment with the new emphasis on enforcement at the SFO.

*Marcus Asner is a partner at Arnold & Porter LLP's New York office. His practice encompasses international and domestic criminal investigations and prosecutions, including complex business fraud cases, cases involving allegations of bank fraud, money laundering, accounting fraud, and securities fraud, and matters involving alleged violations of the Foreign Corrupt Practices Act. Prior to joining Arnold & Porter, Marcus served as an Assistant United States Attorney for the Southern District of New York (2000–2009), where he was the Chief of the Major Crimes Unit for two years (2007–2009). Marcus may be reached at [Marcus.Asner@Aporter.com](mailto:Marcus.Asner@Aporter.com) or 212.715.1789.*

*Drew Harker is a senior partner in Arnold & Porter LLP's Washington, D.C. office. His practice concentrates on white collar and enforcement matters, including Foreign Corrupt Practices Act internal and government investigations, procurement fraud, environmental, drug pricing and promotion, state Attorney General investigations, and qui tam and government initiated cases under the False Claims Act. He has extensive experience preparing FCPA and global anticorruption compliance programs for companies in many industries. Drew can be reached at [Drew.Harker@aporter.com](mailto:Drew.Harker@aporter.com) or 202.942.5022*

*Keith Korenchuk is a partner at Arnold & Porter LLP's Washington DC office. His practice focuses on US and global compliance systems design, implementation, and ongoing assessment, enterprise-wide risk management systems and programs, global anti-bribery legislation, including the U.S. Foreign Corrupt Practices Act, the Organization for Economic Co-operation and Development (OECD) Anti-bribery Convention, and related national implementing legislation, and internal and government initiated investigations. Keith may be reached at [Keith.Korenchuk@aporter.com](mailto:Keith.Korenchuk@aporter.com) or 202.942.5817.*

*Jennifer Hogan is an associate in Arnold & Porter LLP's New York office. Her practice focuses on white collar and enforcement matters, securities litigation and complex commercial litigation. Jennifer may be reached at [jennifer.hogan@aporter.com](mailto:jennifer.hogan@aporter.com) or 212.715.1040.*

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<sup>1</sup> The Guidance is available at:

<http://www.sfo.gov.uk/media/28313/approach%20of%20the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf>.

<sup>2</sup> A copy of Mr. Alderman's letter can be found at:

[http://www.arnoldporter.com/public\\_document.cfm?id=14970&key=7A2](http://www.arnoldporter.com/public_document.cfm?id=14970&key=7A2).

<sup>3</sup> The latest draft of the Bribery Bill is available at:

<http://www.publications.parliament.uk/pa/ld200910/ldbills/003/10003.i-ii.html>.

<sup>4</sup> See "Serious Fraud Office Annual Report, 2008–2009," available at:

<http://www.sfo.gov.uk/media/18780/sfo%20annual%20report%202008–2009.pdf>.

<sup>5</sup> See <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey-johnson-ltd-sentencing.aspx>.

<sup>6</sup> "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, available at: <http://www.oecd.org/dataoecd/62/32/34599062.pdf>.

<sup>7</sup> "Joint Committee on the Draft Bribery Bill—First Report," July 25, 2009, available at: <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11502.htm>.

<sup>8</sup> "Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill," November 2009, *available at*: <http://www.justice.gov.uk/publications/docs/draft-bribery-joint-cttee-govt-response.pdf>.

<sup>9</sup> Mr. Alderman has discussed the SFO's close working relationship with the DOJ. See Arnold & Porter (UK) LLP: Panel Discussion - The SFO and DOJ 'Special Relationship': The future of UK/US Co-operation against Overseas Corruption and Other Crimes, December 9, 2009, *available at*: <http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2009/the-sfo-and-doj-'special-relationship'-the-future-of-ukus-co-operation-against-overseas-corruption-and-other-crimes.aspx> (A&P Panel Discussion).

<sup>10</sup> In an indication that the SFO intends to focus on prosecution of individuals, similar to DOJ's approach with individuals, it is expected that the SFO will pursue charges against the former head of Mabey & Johnson in connection with improper overseas payments made by the company. Michael Peel, "Ex-Mabey chief to face graft charges," *Fin. Times*, January 14, 2010.

<sup>11</sup> See 28 C.F.R. part 80.

<sup>12</sup> See A&P Panel Discussion, *supra* note 9 (noting that the SFO has been "engaging very much with city practitioners, members of professions, regulators and others in the UK and elsewhere about what is happening in the world of fraud and corruption and how the issues should best be addressed").

<sup>13</sup> See The Principles of Federal Prosecution of Business organizations, *available at*: <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>.

<sup>14</sup> In its 2008 – 2009 Annual Report, the SFO stated that it closed 10 cases without bringing charges in the year ending March 31, 2009. See "Serious Fraud Office Annual Report, 2008–2009," *available at*: <http://www.sfo.gov.uk/media/18780/sfo%20annual%20report%202008–2009.pdf>.