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ADVISORY

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NEW UK BRIBERY BILL BECOMES LAW AND SFO RECEIVES JUDICIAL GUIDANCE ON SETTLEMENT POWERS

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Two recent major developments regarding anti-corruption enforcement in the United Kingdom promise to affect companies incorporated in the United Kingdom, as well as foreign companies that carry on business in the United Kingdom.

First, late last week, Parliament passed comprehensive bribery legislation designed to modernize and replace the patchwork of common and statutory law that made it difficult for UK authorities to prosecute overseas corruption. Most significantly, the new law creates a separate offence for a company's failure to prevent bribery by "a person who performs services" for or on behalf of the company. This failure to prevent bribery offence applies not only to UK companies, but also to companies incorporated in other countries that carry on business in the United Kingdom. The new Bribery Act is expected to go into effect sometime over the summer or early fall 2010, following the upcoming Parliamentary elections.

Second, in remarks approving the recent settlement between Innospec and the Serious Fraud Office (SFO) as part of a larger global settlement with US authorities in connection with corruption in Indonesia and the UN Oil-for-Food Program, Lord Justice Thomas in the Southwark Crown Court remarked that the SFO did not have the power to enter into a binding plea agreement with a negotiated monetary penalty. While the court ultimately approved the US$12.7 million negotiated settlement, it cautioned that in the future it will not be bound by penalties negotiated by the parties. It also questioned the use of civil recovery orders for criminal conduct by a company. This could complicate the nascent SFO initiative to establish a US style voluntary disclosure regime.

I. NEW BRIBERY ACT[1]

The Bribery Act brings the United Kingdom into full compliance with the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention). For the most part, the Bribery Act tracks the language of the US Foreign Corrupt Practices Act (FCPA) and OECD Convention. It prohibits persons from directly or indirectly offering, promising,

1 http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100023_en.pdf.

or providing any financial or other advantage to a foreign official, or to another person at the request of a foreign official, for the purpose of influencing a foreign official in order to obtain or retain business, or an advantage in the conduct of business. Unlike the FCPA, however, the Bribery Act does not contain a "facilitating payments" exception, meaning that payments made to expedite routine non-discretionary governmental action will not be exempt from prosecution.

Most importantly, the Bribery Act holds companies liable for bribes paid by those providing services for or on behalf of the company, although there is an affirmative defence if the company can prove it has "adequate procedures" in place designed to prevent such persons from engaging in bribery. The definition of those "providing services" is broad enough to include everyone from employees to agents, and possibly even subcontractors and vendors.

This provision applies not only to companies incorporated in the UK, but also companies that carry on business, or part of a business, in the United Kingdom. It applies to acts or omissions that occur within the United Kingdom or elsewhere. Richard Alderman, Director of the SFO, commented in February 2010 that "in certain circumstances the SFO will have jurisdiction in respect of corruption by those corporates anywhere in the world" and "[t]his means a twofold approach; first supporting ethical corporates who want to get it right, and secondly, coming down hard on those whether here or outside the UK who undercut those businesses."[2] The broad extra-territorial reach of the Bribery Act means that companies doing business in the United Kingdom need to take steps to ensure that they have adequate compliance procedures in place to guard against liability. Any company with a UK branch, subsidiary, parent, or affiliate should review their procedures. If they do not, they could find themselves criminally charged in the United Kingdom even if they are a non-UK company and the conduct in question occurred outside the United Kingdom.

2 http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2010/the--corporate-investigations-group-seminar.aspx.

The Bribery Act does not define "adequate procedures," although it requires Her Majesty's Government (HM Government) to promulgate guidance to industry. It will likely be several months before guidance is issued. When the guidance is issued, it is unlikely to be a checklist instructing how to avoid a criminal charge, but rather "guidance on how to go about establishing a true anti-corruption culture."[3] In the interim, companies should be able to rely on guidance from nongovernmental organizations such as the OECD to develop their own compliance programs. A key piece of guidance that is likely to influence HM Government is the recently issued best practices guide from the OECD.

On February 18, 2010, the OECD issued its Good Practice Guidance on Internal Controls, Ethics, and Compliance.[4] The OECD guidance provides that companies should consider the following when enacting a corporate compliance regime:

- Strong support and commitment from senior management;
- Clearly articulated and visible anti-corruption policies;
- Autonomous ethics and compliance programs with the authority to report corruption issues to independent auditors and boards of directors;
- Ethics and compliance programs designed to prevent and detect foreign bribery;
- Risk based due diligence of business partners;
- A system of internal controls designed to ensure the maintenance of fair and accurate books, records, and accounts;
- Periodic anti-corruption training at all levels of the company;
- Appropriate disciplinary measures for violations; and
- Periodic reviews to evaluate and improve the effectiveness of the compliance measures in place to prevent and detect foreign bribery.

3 *Id.*
4 http://www.oecd.org/dataoecd/5/51/44884389.pdf.

Given their recent adoption and Mr. Alderman's support for the OECD's efforts, the OECD recommendations may form the basis for the "adequate procedures" guidance to be issued by HM Government. But the OECD guidance is just one data point to be considered when formulating guidance to industry. The SFO demonstrated a willingness to listen to comments and concerns raised by companies when it issued its self-reporting guidance in summer 2009, and there is nothing to suggest that the SFO will change its approach now. While there is no formal commenting mechanism like in the United States, Mr. Alderman's statements indicate that the SFO is willing to listen to comments and concerns raised by industry[5] and, therefore, interested companies should avail themselves of the opportunity to weigh in on what will likely become the new global standard for what constitutes an effective compliance program.

II. SFO'S POWER TO ENTER BINDING SETTLEMENTS QUESTIONED

On March 26, 2010, Lord Justice Thomas in the Southwark Crown Court questioned whether the SFO had the authority to enter into a US$12.7 million settlement to resolve a case against Innospec.[6] The settlement was part of a global deal between Innospec, the SFO, the US Department of Justice (DOJ), the US Securities and Exchange Commission (SEC), and the US Office of Foreign Assets Control concerning alleged corruption in Indonesia and the UN Oil-for-Food Program. Under the settlement, Innospec and the SFO agreed to a US$6.7 million criminal fine or confiscation and a US$6 million civil settlement. While the court ultimately approved the entire US$12.7 million settlement, it concluded that "the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again." The court expressed concern that such settlements could undercut the sentencing authority of the judiciary. The court further remarked that companies should not be treated differently than individual defendants, and "in the case of individual defendants, a suggested agreed sentence is not only impermissible, it can raise false hopes." The court felt the settlement amount was too low a penalty given the conduct involved, but agreed to approve it because it was part of a carefully constructed global settlement, and because the US portion of the settlement had already been approved by the US federal court.

In addition to the SFO's plea bargain powers, the court also questioned the SFO's use of a civil recovery order in cases of criminal conduct. The use of civil penalties in lieu of criminal prosecution had been one of the cornerstones of the SFO's voluntary disclosure guidance, which we discussed in our August 2009 and December 2009 advisories.[7] Under the approach set out by the SFO in July 2009, companies that self referred themselves to the SFO could, in certain circumstances, settle the matter civilly and thus avoid the mandatory debarment provisions of Article 45 of the European Union Public Sector Procurement Directive.[8] But Lord Justice Thomas cautioned that those who commit serious crimes such as corruption of senior foreign government officials must not be viewed or treated differently than other criminals. As such, it will "rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order" as "[i]t would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction." This opinion by Lord Justice Thomas casts doubt on the SFO's ability to create a US-style voluntary disclosure program because it suggests that in all cases some criminal penalty should be assessed.

The remarks create considerable uncertainty, particularly for companies contemplating a voluntary disclosure to the SFO. They could undercut the ability of the SFO to deliver on the incentives to cooperation it promised in

5 *See e.g.*, http://www.arnoldporter.com/public_document.cfm?id=14970&key=7A2.

6 http://www.judiciary.gov.uk/docs/judgments_guidance/sentencing-remarks-thomas-lj-innospec.pdf.

7 *See* Arnold & Porter LLP Advisories, "The SFO Provides Updated Guidance on Its Approach to Enforcing Allegations of Overseas Corruption," *available at:* http://www.arnoldporter.com/public_document.cfm?id=14976&key=14G0 (December 2009); "The UK Gets Serious About Overseas Corruption: The Bribery Bill and SFO Guidance," *available at:* http://www.arnoldporter.com/public_document.cfm?id=14626&key=2G2 (August 2009).

8 http://www.sfo.gov.uk/bribery--corruption/self-reporting-corruption.aspx.

its July 2009 guidance, and gives a greater role to the judiciary than is customary in the United States. While US courts have the authority to reject plea bargains and settlements, in general they give wide latitude and deference to prosecutors. But Lord Justice Thomas's statements leave open the possibility that despite an agreement with the SFO, a court could impose criminal penalties in conjunction with a civil settlement and higher fines. Because a criminal corruption penalty could lead to EU debarment, companies that otherwise would have made a voluntary disclosure to the SFO may reconsider if it is not possible to negotiate a binding civil settlement.

III. CONCLUSION

The Bribery Act of 2010 is a landmark piece of legislation that provides the SFO with enhanced enforcement tools that in many respects exceed those provided to US law enforcement under the FCPA. Strict liability for failing to prevent bribery by those providing services to a company, the absence of a facilitating payments exception, and extra-territorial reach of the Bribery Act for companies carrying on business in the United Kingdom means that many multinational companies, not just those incorporated in the United Kingdom, will have to take steps to ensure they comply with the Bribery Act. Compliance programs will need to be assessed carefully and potentially enhanced in light of the Bribery Act and the potential liability for not having adequate compliance procedures in place.

But while the Bribery Act provides expanded powers to the SFO to prosecute foreign corruption, the SFO may have trouble establishing a fully functional self reporting system given Lord Justice Thomas's statements about the Innospec settlement. It remains to be seen how his comments will affect the SFO's voluntary disclosure program, but there could be problems if the SFO is found not to have the power to negotiate binding criminal and civil settlements under appropriate circumstances. Because the prospect of EU debarment looms in the event of a criminal conviction, many companies may elect not to self refer, and to fight the charges if corruption is discovered by other means. These two events could expand the ability of the SFO to bring bribery cases, while at the same time limiting its ability to follow the lead of the DOJ and SEC by creating a voluntary disclosure system.

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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