

E-ALERT | Anti-Corruption

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SFO REVISES ITS POLICIES ON CORPORATE SELF-REPORTING, HOSPITALITY AND FACILITATION PAYMENTS

“The SFO’s primary role is to investigate and prosecute. The revised policies make it clear that there will be no presumption in favour of civil settlements in any circumstances.”

SFO Policy Q&A Statement

The UK Serious Fraud Office (“SFO”) has revised its policies on corporate self-reporting, hospitality and facilitation payments following the completion of a policy review. The new policies, published on 9 October 2012, are the latest manifestation of the more hard-edged prosecutorial approach that SFO Director David Green QC has promised since taking office in April 2012.

Corporate Self-Reporting

The SFO’s July 2009 guidance on self-reporting (“2009 guidance”) had encouraged companies to self-report to the SFO instances of overseas bribery, emphasizing that by virtue doing so they would increase their chances of facing civil rather than criminal penalties. The SFO’s revised policy statement replaces the 2009 guidance and provides that the fact that a company has self-reported will be only one of several “public interest factors” that the SFO will consider in deciding whether to prosecute.

The SFO’s revised policy statement refers in the foregoing connection to the Joint Prosecution Guidance on Corporate Prosecutions, which states that to act as mitigation a self-report “must form part of a genuinely proactive approach adopted by the [members of the] corporate management team when the offending is brought to their notice.” Unlike the prior SFO guidance, the revised policy statement does not express any predisposition toward a civil settlement following self-reporting. It also states that, even when the SFO decides not to prosecute conduct that a company has self-reported, the SFO reserves the right to prosecute any unreported violations and provide information on violations to other bodies (e.g., overseas police forces).

The revised SFO policy on self-reporting may have been prompted, at least in part, by comments of the OECD’s Working Group on Bribery concerning the 2009 guidance as well as wider developments in the UK anti-corruption enforcement landscape. In March 2012, the OECD’s Working Group reported that, amongst other things, the definition of “self-reporting” used in the 2009 guidance “may be overly generous.” There also have been a number of significant changes to the enforcement landscape since issuance of the 2009 guidance, not least the coming into force of the Bribery Act 2010 (“Bribery Act”), issuance of the UK Ministry of Justice’s March 2011 Guidance on procedures that companies can put in place to prevent bribery (“UK Ministry of Justice Guidance”) and the Joint Prosecution Guidance on the factors that prosecutors will take into account when deciding whether to bring charges under the Bribery Act (Joint Prosecution Guidance on the Bribery Act”).

Hospitality

The UK Ministry of Justice Guidance assured companies that the intention of the Bribery Act is not to prohibit all corporate hospitality but to clamp down on those who use excessive hospitality to bribe government officials as well as individuals in the private sector. Assurance that “reasonable and proportionate” hospitality would not lead to prosecution has been reiterated by senior personnel at the SFO, including Director Green, who recently indicated that “[t]he sort of bribery [the SFO] would be investigating would not be tickets to Wimbledon or bottles of champagne. We are not the ‘serious champagne office.’”

The SFO’s revised policy statement reiterates that *bona fide* hospitality is an established and accepted part of doing business. It also signals, however, an intention to prosecute bribes that are disguised as hospitality when there is a realistic prospect of conviction and it is in the public interest to do so. According to the Joint Prosecution Guidance on the Bribery Act, the circumstances in which prosecution is more likely to be in the public interest include when a conviction for providing excessive hospitality would attract a significant sentence and/or the bribe may involve corruption of the recipient.

Facilitation Payments

Prior to last week’s announcement, the SFO had not published formal guidance on facilitation payments, although Director Green’s predecessor had set out a six step plan that he expected companies to follow if they encountered demands for such payments. That plan was grounded in recognition that – for many companies operating in certain countries and/or sectors – the immediate eradication of all facilitation payments might not be possible.

The SFO’s revised policy statement declares the SFO’s intention to prosecute any facilitation payment that falls within its remit provided there is a realistic prospect of conviction and the SFO deems prosecution to be in the public interest. The Joint Prosecution Guidance on the Bribery Act suggests that prosecution is more likely when the payments (1) are large or repeated; (2) are part of a standard way of conducting business; (3) are made in a manner that indicates an intent to corrupt the recipient and/or (4) are made in violation of the company’s “clear and appropriate policy” for handling such payments.

The revised policy statement goes on to advise that prosecution is less likely when (1) a single small payment has been made and only a nominal penalty is likely to be imposed in the event of prosecution and conviction, (2) the payment(s) came to light as a result of a “genuinely proactive approach” involving self-reporting and remedial action, (3) a company has a “clear and appropriate policy” setting out procedures an individual should follow if facilitation payments are demanded and these have been correctly followed and (4) the company was in a “vulnerable position” arising from the circumstances in which the payment was demanded.

Comment

Although involving a significant change of tone, it is unclear at this stage whether the SFO's revised policies on self-reporting, hospitality and facilitation payments reflect a significant change in substance. If a change in substance was intended, it most likely relates to self-reporting and facilitation payments.

In deciding whether to bring criminal charges against a company, prosecutors in the UK always have been obliged to take into account the Code for Crown Prosecutors. Further, even under the prior SFO guidance, self-reporting did not guarantee non-prosecution by the SFO. Whether a company has taken remedial action and brought the matter to the SFO always have been powerful factors weighing toward non-prosecution. Those factors remain relevant under the new guidance.

What certainly has changed is that Director Green has ended the SFO's efforts to engage with and guide companies that have been grappling with the realities of doing business in difficult countries. He has made it clear his intention to instill a more hard-edged prosecutorial approach at the SFO and does not see it as the SFO's remit as "provid[ing] corporate bodies with advice on their future conduct."

The effect that the SFO's revised policy on self-reporting will have on the frequency of self-reporting remains, of course, to be seen. That may depend in part upon the decisions that the SFO makes in future cases, which may provide additional insights concerning the SFO's charging decisions. It also may depend in part upon whether the SFO acquires over the coming months authority to enter into deferred prosecution agreements and how the SFO actually uses any such authority.

The implications of the SFO's revised policy on facilitation payments may spur more uncertainty than the revised policies on self-reporting and hospitality, with the SFO asserting with respect to hospitality that no change in substance over the SFO's prior policy was intended. The SFO did not make that claim so far as self-reporting and facilitation payments are concerned.

The SFO's revised policy on facilitation payments appears to assume that most facilitation payments are demanded and made on a one-off basis, even though experience suggests the contrary. Further, the revised policy does not promise any credit to companies operating in countries in which demands for facilitation payments are ubiquitous that have been making good faith efforts to reduce and ultimately eliminate such payments. On both grounds, the revised SFO policy on facilitation payments appears to signal a change of direction much more than a change of tone.

In addition to suggesting that the SFO may be especially concerned about "repeated" facilitation payments, even in countries in which demands for such payments are ubiquitous, the SFO's revised policy statement calls upon companies to adopt a "clear and appropriate policy" on facilitation payments. The only "clear and appropriate" policy under the revised SFO policy is, we suspect, one that completely prohibits such payments. The revised policy then calls upon companies to self-report to the SFO, and take remedial action, if any facilitation payments are discovered despite the "clear and appropriate policy" on facilitation payments that the company has adopted.

What remedial action a company should consider taking if it finds that a facilitation payment has been made on its behalf is not described in the revised policy. Neither does the revised policy explain what the SFO has in mind in offering credit to companies that were "in a vulnerable position" when one or more facilitation payments were demanded. Believing that the latter statement could be relied upon to justify any facilitation payment that is made to deal with economic extortion is, we suspect, unduly optimistic.

Although Director Green has referred to “oodles” of guidance on the UK Bribery Act and the SFO’s prosecutorial posture that have not been affected by the revised policies discussed above, the revised SFO policies on self-reporting, hospitality and facilitation payments raise a number of important questions. The impact that those policies will have on the core objective of the Bribery Act, which is to reduce the incidence of bribery involving individuals who and businesses that are subject to the SFO’s jurisdiction, is certainly open to debate.

If you have questions concerning the material discussed in this client alert, please contact the following members of our Anti-Corruption Practice Group:

Robert Amaee, Partner	+44.(0)20.7067.2139	ramaee@cov.com
Casey Cooper, Partner	+44.(0)20.7067.2035	ccooper@cov.com
David Lorello, Partner	+44.(0)20.7067.2012	dlorello@cov.com
John Rupp, Partner	+44.(0)20.7067.2009	jrupp@cov.com
Alexandra Melia, Associate	+44.(0)20.7067.2393	amelia@cov.com

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