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UK Bribery Act Guidance Sheds Little Light On FCPA

By **Max Stendahl**

Law360, New York (October 10, 2012, 7:35 PM ET) -- When U.K. regulators tweaked the country's anti-bribery law Tuesday, it fueled additional speculation over a long-awaited guidance on the U.S. Foreign Corrupt Practices Act, but attorneys cautioned against reading too far into the policy revision.

The U.K. Serious Fraud Office said in a policy guidance that it would take a tougher stance on prosecuting companies even if they self-report illegal activity. The SFO also vowed to increase scrutiny of bribes offered in the form of hospitality expenses and facilitation payments, which are unofficial payments made to public officials to secure or expedite routine business actions.

The guidance underscores a renewed effort by the SFO to shed its reputation as a lax watchdog ill equipped to fight large-scale bribery. The announcement gained heavy media attention, as attorneys and compliance experts on both sides of the Atlantic brace for the DOJ to release a guidance of their own on FCPA enforcement.

But while the SFO guidance was noteworthy, it sheds no light on what the FCPA release will look like, according to Rita Glavin, a partner at Seward & Kissel LLP and the former head of the U.S. Department of Justice's Criminal Division.

"As for whether you can read the tea leaves on what the DOJ might do, I don't think this helps," she said. "This isn't going to give any insight."

That's cold comfort for anti-bribery attorneys and compliance experts, who are growing impatient with the DOJ as it prepares to release a guidance it first announced in November.

The SFO statement provoked more than a few client alerts from attorneys eager to cash in on the anti-bribery hype, according to Southern Illinois University law professor Mike Koehler, who writes the popular FCPA Professor blog. But much of the chatter Tuesday seemed unwarranted, given the lack of any groundbreaking policy pronouncements by the U.K. watchdog, Koehler said.

"I think people who use yawner events like this to market their services look foolish," he said. "All the SFO did here was make a minor tweak — a very reasonable tweak — to how they're going to handle self-reporting and voluntary disclosure."

Indeed, the SFO's shift on self-reporting is not terribly surprising, according to Dorsey & Whitney LLP partner Thomas Gorman. The SFO and DOJ have long refused to offer a broad exemption to companies that voluntarily disclose bribery violations, preferring instead to

take a case-by-case approach, he said.

"That simply isn't a position that the Department of Justice or the SFO will ever take or be able to take," Gorman said. "There are too many factors in play to ever be able to issue some sort of blanket guarantee that if you self-report, the worst you will get is some sort of civil penalty."

The SFO appeared to recognize that conundrum Tuesday, issuing a guidance that struck a balancing act between encouraging self-reporting and maintaining the flexibility to punish blatant Bribery Act violations.

"The SFO encourages corporate self-reporting, and will always listen to what a corporate body has to say about its past conduct," the watchdog wrote. "But the SFO offers no guarantee that a prosecution will not follow any such report."

"Each case will turn on its own facts," the SFO added.

That language avoided any clear policy shifts, allowing the SFO to keep its options open, according to Paul Pelletier of Mintz Levin Cohn Ferris Glovsky & Popeo PC.

"Getting people to self report has always been a carrot-and-stick thing," he said. "This is just one of those statements that reminds everybody of what the stick is, and what the carrots are."

For some corporations, however, the carrot remains somewhat of a mystery. Tuesday's guidance will only add to the uncertainty U.K. companies feel when weighing the relative costs and benefits of self-reporting, according to Greg Esslinger, a senior managing director at global business advisory firm FTI Consulting Inc.

"Companies now know prosecution is a real possibility even if they do self report," he said.

That uncertainty is already being felt in the U.S. In a recent study, two New York University law professors found no evidence that companies that voluntarily self-report FCPA violations receive any significant break in sanctions from the U.S. Securities and Exchange Commission and the DOJ.

Until the department releases its own guidance, speculation in anti-bribery enforcement circles is sure to continue, experts say. But commentators should hesitate to sound alarms over minor policy clarifications like the SFO's, according to Raymond L. Sweigart of Pillsbury Winthrop Shaw Pittman LLP.

"When you want to grab peoples' attention," he said, "the tendency for all of us is to say the sky is falling."

--Editing by John Quinn.

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