Client Alert.

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The Serious Fraud Office releases updated guidance on key aspects of the UK Bribery Act 2010 and self-reporting

By Kevin Roberts and Keily Blair

The Bribery Act 2010 (the **Act**), which came into force in July 2011, created a more robust legislative framework allowing for the prosecution of domestic and international bribery offences in the UK. The Serious Fraud Office (the **SFO**) is the lead agency in England, Wales and Northern Ireland for investigating and prosecuting cases of domestic and overseas corruption.

On 9 October 2012, the SFO published updated statements of policy on certain key issues arising under the Act. These statements of policy deal with the topics of facilitation payments and business expenditure under the Act. In addition, the SFO has updated its general policy on corporate self-reporting of offences.

The statements of policy have been updated in order to:

a) restate the SFO's primary role as an investigator and prosecutor of serious or complex fraud, including corruption;

b) ensure there is consistency with other prosecuting bodies; and

c) meet certain recommendations of the Organisation for Economic Co-operation and Development (OECD).

The revised statements of policy will have immediate effect and supersede any statements of policy or practice previously made by or on behalf of the SFO regarding these issues.

THE STATEMENTS OF POLICY

Facilitation Payments under the Act

The SFO confirms that:

- A facilitation payment is a type of bribe.
- Facilitation payments are illegal under the Act regardless of the size or frequency of the payment.

Business Expenditure (Hospitality) under the Act

The SFO acknowledges that:

- Bona fide hospitality or promotional or other legitimate business expenditure is an established and important part of doing business.
- Bribes are sometimes disguised as legitimate business expenditure.

Self-reporting

The SFO has updated its guidance on corporate self-reporting generally. This guidance will apply to corporate self-reporting on all matters which fall within the remit of the SFO and not just corporate self-reporting in relation to offences under the Act.

The SFO confirms that:

- The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Joint Guidance on Corporate Prosecutions (the **Corporate Prosecution Guidance**).
- The Corporate Prosecution Guidance itself has not been updated or amended. The Corporate Prosecution Guidance explains that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a "*genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.*"
- Self-reporting is no guarantee that a prosecution will not follow, and each case will turn on its own facts.
- Even in cases where the SFO does not prosecute a self-reporting corporate body, the SFO reserves the right (i) to prosecute it for any unreported violations of the law, and (ii) to lawfully provide information on the reported violation to other bodies (such as foreign police forces).

WHEN WILL THE SFO PROSECUTE?

The SFO has reiterated that it will only prosecute if, on the evidence, there is a realistic prospect of conviction and it is in the public interest to do so.

In each of the updated statements of policy, the SFO has reemphasized that all decisions to prosecute unlawful activity will be governed by the Full Code Test in the Code for Crown Prosecutors and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010. Where relevant, the Joint Guidance on Corporate Prosecutions will also be applied.

It is important to note that these policy documents have not changed, save for the reference to the SFO's previous policy on self-reporting.

The impact of the revised statements of policy

The SFO has stated that "*the new approach restates the SFO's primary purpose,*" namely the investigation and prosecution of offences which fall within its remit. As such, the updated statements of policy do not reflect a change in the SFO's position on these issues.

The guidance used to evaluate whether the SFO will bring a prosecution against a corporate entity remains the same. The SFO will continue to review and assess each case according to its own circumstances. Additionally, and of particular importance for corporate entities, the statements of policy have not altered the guidance provided by the Ministry of Justice regarding the procedures that a corporate organization can implement in order to rely on the "adequate procedures" defense under section 9 of the Act. The full text of the Ministry of Justice Guidance on adequate procedures is available at

http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

As such, the practical implications of these updates to SFO policy is minimal. However, the decision by the SFO to issue these updated statements of policy indicates that the Act remains high on its agenda. While critics continue to point to the absence of corporate prosecutions for international corruption offences as an indication of the lack of practical effect of the Act, we believe that the lack of prosecutions has been caused by both the lack of retrospective effect of the Act and the length of time it takes to bring complex actions of this nature. We continue to expect to see an increase in high-profile actions being brought under the Act in the future.

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