

BRIBERY AND CORRUPTION: SELF-REPORTING UNDER THE BRIBERY ACT 2010

We provide guidance on why a commercial organisation needs to understand the dynamics of self-reporting, the benefit of doing so and the likely severe consequences of not doing so.

The Serious Fraud Office (SFO) is in the process of updating its guidance about self-reporting instances of bribery. A commercial organisation not reporting an instance of bribery under the present law, which is subsequently discovered by the criminal authorities, will lead to the imposition of large fines, the risk of imprisonment and potentially serious damage to reputation.

Background

The Bribery Act 2010 comes into force on 1 July 2011. Under the terms of the Act, it is a criminal offence:

- to bribe another person or to be bribed (sections 1 and 2);
- to bribe a foreign public official (section 6);
- for a commercial organisation to fail to prevent bribery by persons associated with them (section 7);
- the only defence for commercial organisations to the section 7 offence is to show that it had adequate procedures in place to prevent bribery. On 31 March 2011, the Ministry of Justice published guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing.

Self-reporting

Prior to the implementation of the Act, in relation to what is, up to 1 July 2011, a criminal offence to bribe a foreign official, the Serious Fraud Office issued, in July 2009, guidance which incorporated its approach to self-reporting such offences. This guidance is due to be updated in light of the consolidation of bribery law under the Act. What is clear, however, is that the issue of self-reporting is set to be one that will be crucial in a commercial organisation's management of risk under the Act.

Commercial organisations are going to be naturally reluctant to make a report of bribery or corruption. Seldom will they welcome advice from their lawyers that such activity should be reported. The consequences, however, of not reporting an offence that is later discovered by, or reported to, the criminal authorities are potentially severe. It would effectively fix the directors with knowledge of the offence and make them complicit in an attempt to cover it up and, thus, pervert the course of justice. It may give rise to additional charges under sections 1, 2 and 6 (as appropriate) in addition to the section 7 offence. Criminal charges also risk blighting the corporate's business.

The SFO recognises the delicacy of self-

reporting. The existing guidance stands as a good indicator of how the SFO will approach instances of self-reporting under the Act, and most importantly, what the advantages may be for the commercial organisation that follows it.

It is important for commercial organisations to realise that self-reporting will not remove the risk of criminal charges being brought. Where directors are involved in the offence, criminal charges are likely no matter how the matter is brought to the SFO's attention.

The potential benefits to the commercial organisation of self-reporting are that it may:

- be able to avoid criminal charges and instead be subject to civil recovery;
- retain an element of control on the investigation and its outcomes;
- have a say in how the offence is remedied internally; and
- retain an element of control over publicity and any external announcements.

The SFO has been very clear in expressing what level of co-operation it would expect in order for these benefits to be potentially available to the commercial organisation. The SFO will expect:

- the directors/board to be genuinely committed to resolving the issue and moving to a better corporate culture;
- the commercial organisation to be prepared to work with the SFO on the scope and handling of any additional investigation considered necessary;
- that at the end of the investigation (assuming the problem is acknowledged) the commercial organisation is prepared to discuss resolution through, for example, civil recoveries, training programmes, culture change, action against individuals and external monitoring;
- agreement to a public statement; and
- where appropriate, allow the SFO to work with regulators and enforcement authorities in the UK and abroad in order to reach a global settlement.

If the SFO requires further investigation to be carried out, this will need to be done by the commercial organisation's professional advisers and be at the commercial organisation's expense. Commercial organisations will need to be advised of appropriate forensic investigation processes and techniques. In the ever increasing electronic world, methodology and analysis of search results will be key. The SFO will expect to be regularly updated and receive copies of the resulting reports.

During any investigation, the SFO will put the commercial organisation's anti-bribery policies and procedures under scrutiny. As explained above, the commercial organisation only has one defence to the corporate offence, namely to prove it has adequate procedures in place to prevent it. The SFO will look very closely at the commercial organisation's policies and procedures and take its own view as to whether adequate procedures are in place.

In terms of settlement, the best that the commercial organisation can hope for, on the basis that an offence is established, is a civil recovery. This would likely mean a payment equivalent to the amount of the benefit derived, together with interest and

costs. The commercial organisation may be expected to take appropriate disciplinary action against individuals involved. Culture change and training may be required. In some cases, external monitoring may also be required. A public statement concerning the investigation and the offence, its outcome and remedy is likely to be unavoidable.

Prosecution guidance issued jointly by the SFO and the Director of Public Prosecutions on 31 March 2011 clearly references self-reporting as a factor that will tend against prosecution when considering the public interest.

Conclusion

There is no doubt that the decision to self-report is a decision not taken lightly. In doing so the commercial organisation already recognises it faces potentially serious criminal sanction. The consequences of taking a positive decision not to report an offence can be dire. The SFO recognises the seriousness of the decision by acknowledging and, indeed, encouraging corporates to take professional advice before a decision to self-report is made. The revised guidance on self-reporting is not anticipated to be any less stringent and will, at least, bring about a detailed review, in any self-report process, of the commercial organisation's anti-bribery policies and procedures to test whether they meet the 'adequate procedures' required. We will report further once the updated self-reporting guidance is issued.

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