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Anti-Corruption Enforcement

UK's Serious Fraud Office updates guidance on aspects of anti-corruption law and practice

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On October 9, 2012, the Serious Fraud Office ("SFO"), the UK government agency with principal responsibility for prosecutions under the UK Bribery Act 2010 (the "2010 Act"), published revised guidance on certain aspects of its enforcement policies. This guidance supplements and does not replace the guidance issued by the Ministry of Justice on the meaning of "adequate procedures" under the 2010 Act and the general guidance on prosecutions under the 2010 Act issued by the SFO last year.

In general, the new guidance reiterates the two key principles behind the SFO's approach to prosecution – it will prosecute if there is a realistic prospect of conviction and it is in the public interest to do so. The director of the SFO, David Green QC, who has held office since April this year, sees its role primarily as a "crime-fighting agency". The tone of the new guidance aims to dispel any misconception that the SFO will overlook certain types of bribery or do deals which involve prosecutions being dropped or deferred. The SFO expressly states that there is no presumption in favour of civil settlements.

Self-reporting

The new guidance makes it clear that, while companies are encouraged to report wrongdoing which they have discovered, there is no guarantee that prosecution will not follow from such a report. Self-reporting may be taken into account in applying the "public interest" test, but only if it is part of a genuinely pro-active approach by the management of the company concerned. Even then there is no assurance of immunity from prosecution.

This restates the existing position in the UK and seems to discourage self-reporting in nearly all circumstances. However, the interaction between the 2010 Act and the law on money-laundering in the UK means that reports of suspected bribery to the UK authorities are likely to be more frequent than might be expected. Those in regulated industries, such as banks and (subject to a limited privilege defence) lawyers, are under a positive duty to report suspicions of offences such as bribery to their regulators and the UK Serious Organised Crime Agency. In addition, it may wise to consider reporting in other jurisdictions, such as the US, where this may mitigate penalties and even avoid prosecution. Any reports to these other authorities are likely to feed back into the UK as well. Faced with the possibility that the relevant conduct may come to the attention of the UK authorities anyway, companies may prefer the self-reporting route, even though the outcome is increasingly uncertain.

Facilitation payments

The 2010 Act contains no exception for facilitation payments. Many companies have followed this lead and outlawed such payments under their own policies and procedures throughout their worldwide operations.

The Ministry of Justice guidance on "adequate procedures" recognises the prevalence of such payments in some parts of the world.[1] However, the SFO states clearly that such payments are illegal and prosecutions will ensue if the normal prosecution tests are satisfied. It is unclear whether a policy of "staged resistance" to demands for facilitation payments will be acceptable to the SFO.

Business entertainment

The new guidance restates the principle that bona fide hospitality and promotional expenditure is acceptable. It is, however, clear that the SFO will prosecute bribes which are disguised as legitimate business expenditures.

The new guidance does nothing to clarify the grey area that exists around certain types of gifts and entertainment. In fact, it may make this even more confusing for companies seeking to regulate their own gifts and entertainment policies: is the test whether the entertainment is "lavish", or whether it is a disguised bribe? As a practical matter the use of sensible financial limits seems to create the easiest test to apply.

Conclusion

The new guidance does not alter generally accepted views on facilitation payments and business expenditure. It is the tone rather than the content of the guidance which is interesting: particularly in the context of self-reporting, the guidance suggests that out of court settlements with the SFO are going to become more rare in the anti-corruption context rather than, as was once thought, as common as they are in the US.

[1] *See, for example, paragraphs 44-47 and case study 1 in that Guidance.*

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