

Changes to SFO Bribery Act guidance November 2012

In a review of its policies, the Serious Fraud Office (SFO) has withdrawn its previously issued guidance in respect of facilitation payments and corporate hospitality. Importantly, it has also withdrawn its guidance in respect of corporate self-reporting, where previously it had stated that a civil remedy, as opposed to criminal prosecution, may be likely if a corporate self-reported. The changes came into effect on 9 October 2012.

The changes come following the appointment of David Green CB QC as Director of the SFO (following the retirement of Richard Alderman) and take forward recommendations made by the OECD Working Group on Bribery in its March report. In addition, the SFO points out that the changes have been made to:

- restate the SFO's primary role as an investigator and prosecutor of serious and/or complex fraud, including corruption; and
- ensure there is consistency with the approach of other prosecuting bodies.

In essence, the changes have removed previous SFO guidance and replaced it with existing generic prosecutorial guidance, namely:

- the Code for Crown Prosecutors,
- the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions (DPP) on the Bribery Act 2010; and
- the Joint Guidance on Corporate Prosecutions (which sets out the common approach of the DPP, the Director of the SFO and the Director of the Revenue and Customs Prosecutions Office to the prosecution of corporate offending (other than corporate manslaughter)).

Facilitation payments and business expenditure (corporate hospitality and promotions)

The previous guidance from the SFO in respect of facilitation payments, and the previously stated five factors that the SFO said it would look at when deciding whether or not to prosecute in respect of business expenditure have been removed. As a result, the decision as to whether or not the SFO will prosecute is simply governed by the Full Code Test

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in the Code for Crown Prosecutors, the Joint Prosecution Guidance and, where relevant, the Joint Guidance on Corporate Prosecutions. If, on the evidence, there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so.

Whilst there is, in effect, no additional guidance, in its Q&A section the SFO points out that the decision to prosecute will always depend on

- whether it is a serious or complex case which falls within the SFO's remit and, if so,
- whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be prosecuted.

However, it should be noted that where the requirements of the Full Code Test are not established, the SFO may consider civil recovery as an alternative to a prosecution.

Corporate self-reporting

Perhaps the biggest change is the removal of the SFO's guidance on corporate self reporting. Previously, in an effort to encourage corporates to come forward, the SFO intimated that in such instances, its preference was for a civil outcome, rather than a criminal prosecution. This guidance has now been disappplied, with the SFO making it clear that its primary function is the investigation and prosecution of serious and/or complex fraud, including corruption.

In essence, whilst the SFO says it encourages corporate self-reporting and will always listen to what a corporate body has to say about its past conduct, it offers no guarantee that a prosecution will not follow any such report.

Whether or not the SFO will prosecute a corporate body in a given case will be governed by the Full Code Test in the Code for Crown Prosecutors, the Guidance on Corporate Prosecutions and, where relevant, the Joint Prosecution Guidance on the Bribery Act 2010.

If, on the evidence, there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so. The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. That 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

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"genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice". However, it is made clear that self-reporting is no guarantee that a prosecution will not follow and that each case will turn on its own facts.

In appropriate cases the SFO may use its powers under proceeds of crime legislation as an alternative (or in addition) to prosecution. However, in a move to address concerns that its previous civil actions were not suitably transparent, where the SFO uses its powers under proceeds of crime legislation, it will now publish its reasons, the details of the illegal conduct and the details of the disposal.

Companies which have acted on the old guidance

Where a company has already acted on the previous guidance, each case will be reviewed and assessed according to its own circumstances. If there has been reliance on a previous statement of policy or practice, the SFO will consider such reliance in the context of the Full Code Test. If, before the publication of the revised policy statements, the SFO entered into an agreement with a corporate body based on an earlier SFO statement of policy or practice, and the corporate body has fully complied with the terms of that agreement, then the previous statement of policy or practice will continue to apply.

Comment

It seems that these developments reflect a change in the underlying tone and approach of the new SFO Director; it is clear that the SFO wants to present itself as a prosecutor foremost. The policy developments in relation to facilitation payments and corporate hospitality should not require corporates to amend their compliance policies. However, there does seem to be less tolerance for facilitation payments even where there is a corporate programme to get rid of them. Until there is judicial guidance on the scope of the Act as it affects corporate hospitality and facilitation payments, there will remain a degree of uncertainty as to what constitutes a breach of the Act. As far as self-reporting goes it is clear that the SFO have made a conscious effort to step away from the more approachable stance adopted by Richard Alderman. However, there were always risks associated with self-reporting and there remain potential benefits of doing so, as set out in the Guidance on Corporate Prosecutions.

For further information on the UK Bribery Act, and its implications for your organisation, please contact

Jeremy Cole, Partner

T: +44 20 7296 5107

E: jeremy.cole@hoganlovells.com

Michael Roberts, Partner

T: +44 20 7296 5387

E: michael.roberts@hoganlovells.com