UK SERIOUS FRAUD OFFICE RELEASES GUIDELINES ON SELF-REPORTING OF OVERSEAS CORRUPTION

10 August, 2009

To Our Clients and Friends:

On 21 July, 2009, as part of its renewed efforts to combat overseas corruption, the UK Serious Fraud Office (SFO) published a document called *Approach of the Serious Fraud Office to Dealing with Overseas Corruption,* located at http://www.sfo.gov.uk/news/downloads/SFO-COP-dealing-with-overseas-corruption.pdf.

This document constitutes a highly significant change of direction by the SFO: previously the SFO saw its role essentially as an after-the-event investigator and prosecutor with whom it would be very difficult for a company to engage except in the context of a formal investigation. The new policy statement shows a very different approach in which the SFO is offering to work with a company and look for, and indeed negotiate, solutions to avoid prosecution. The changes result, in part, from a determination by the SFO to be more effective in dealing with overseas corruption by British companies but also from the existence of new powers, such as civil sanctions and an ability to plea bargain, which the SFO did not previously have. These changes followed a major review of fraud which was concluded in 2007.[1]

Overall, these guidelines indicate a move to an American-style model by providing clear carrots and sticks designed to induce corporations to self-report incidents of international corruption. Since the guidelines are quite specific in detailing how the SFO intends to proceed, they are worth reviewing.

THE CARROT: WHY SHOULD A COMPANY SELF-REPORT?

Many of the guidelines consist of the benefits that companies can expect from disclosure of incidents of international corruption and good-faith implementation of efforts to address them. The guidelines point to the following:

- an increased likelihood, in appropriate cases, of a civil rather than a criminal outcome;

[1] *The Fraud Review:* http://www.attorneygeneral.gov.uk/the_fraud_review_page.html

- a suggestion of greater flexibility to reach a negotiated settlement, thereby avoiding mandatory debarment from government contracts under EU requirements that result from a criminal conviction for corruption;
- a commitment by the SFO to manage with the company both the issues in the case and any publicity;
- an offer by the SFO of an opportunity for a reporting company to be seen by the wider community as having acted responsibly.

THE STICK: CRIMINAL ENFORCEMENT

The guidelines make equally clear that, if a company fails to report a violation of which it is aware, and the SFO subsequently discovers the violation, this will be treated as a significant negative factor by the SFO. Were this to occur, the prospects of a criminal investigation (potentially followed by prosecution and a confiscation order, as well as debarment proceedings) are much higher. The tone of the guidelines, and common sense, suggest that the SFO is likely to be particularly aggressive in pursuing companies which it concludes were aware of international corruption and did not accept the invitation to self-report.

The SFO guidelines are generally similar to procedures that have been followed by American authorities, particularly the U.S. Department of Justice (DOJ), for many years. It is clear that the SFO has drawn from that experience and will likely do so in implementation of this new approach. This will be a very different approach to the traditional manner of dealing with UK law enforcement officials and, so, experience with dealing with US authorities is likely to be relevant. Experience with American authorities has taught that considerable care must be followed in reaching any decision whether, when and how to self-report. The guidelines anticipate and address some of these issues. Others will need to be explored with the SFO as the guidelines are implemented.

WHEN SHOULD A CORPORATION SELF-REPORT?

The SFO notes the difficulty that a company will face in deciding to approach them and points out that it is not necessary to make a report immediately after discovering a problem. Instead, it anticipates that a company generally will approach its professional advisers and carry out "a degree of investigation" before concluding that there is a real issue and that a report ought to be made. The guidelines also suggest a compromise measure, stating that the SFO would welcome informal contact, prior to potentially making a report, in order to determine what the SFO's likely approach would be if a report were made.

There is one cautionary note: to the extent that a case falls within the potential jurisdiction of both the DOJ and the SFO, the guidelines provide that the SFO would expect to be notified at the same time as the DOJ.

WHAT WILL THE SFO DO AFTER A CORPORATION MAKES A REPORT?

After a report is received, the SFO will move quickly to determine preliminary answers to the following questions before authorizing further self-investigation by the reporting company:

- whether the board of the corporation is genuinely committed to resolving the issue and moving to a new corporate culture;
- whether the company is prepared to work with the SFO on the scope and handling of any additional investigation considered to be necessary;
- whether the company would ultimately be prepared to resolve the issues on the basis of, for example, payment of restitution, training programmes, appropriate action against individuals and (at least in some cases) external monitoring;
- whether the company understands that any resolution must satisfy the public interest and be transparent;
- whether the company will want the SFO, when possible, to work with regulators and criminal enforcement authorities in order to reach a global settlement.

THE INVESTIGATION

Once the SFO has determined answers to these preliminary questions, it will discuss with the company the scope of any further investigation which might be required and indicate whether or not the SFO will be satisfied with a civil outcome. The guidelines stress that "we want to settle self-referral cases… civilly wherever possible." While the guidelines make no ironclad commitment, just as the SFO can be expected to pursue non-reporting companies particularly aggressively, common sense suggests that early reporters, in particular, can expect a civil outcome if they satisfy the SFO on the issues noted above. The guidelines do emphasize one "exception" to the presumption of a civil outcome, namely when "Board members of the [company] had engaged personally in the corrupt activities…."

The guidelines anticipate that any further investigation would be carried out primarily by the company's professional advisers and at the company's expense. However, the SFO would expect to be kept up to date throughout the proceeding. The SFO would seek to ensure that such investigation was carried out in a proportionate manner, with regard to the cost of the investigation for the corporation and the potential impact on the corporation's business.

POTENTIAL CRIMINAL LIABILITY OF COMPANY DIRECTORS, OFFICERS AND EMPLOYEES

Consistent with U.S. practice, the guidelines note that, with respect to the possibility of criminal investigation of individuals, "there are no guarantees here," and that it will "assess the position of individuals on their merits." The guidelines note that "the interaction between the corporate investigation and any individuals gives rise to many issues," which the SFO will discuss with the company and its advisers "so far as it is appropriate…."

SETTLEMENT DISCUSSIONS

Following the completion of an investigation, the SFO will discuss its results with the company and its professional advisers, with an eye to the settlement of the case. The ultimate settlement may include one or more of the following elements:

- restitution by way of civil recovery;
- external monitoring;
- a programme of culture change and training;
- discussion of how to deal with individuals involved in the wrongdoing;
- agreement on a public statement which would provide transparency for the public;
- attention to whether the company desires the assistance of the SFO in reaching a global settlement with other regulators around the world.

ADDITIONAL GUIDANCE

The guidelines also provide some very general statements on two further issues of potential interest to companies involved in international activities.

First, the SFO indicates a general willingness to engage in discussions permitting a company that is contemplating an offer to buy a target company to commit to investigate and report the prior corruption history of the target without being held criminally responsible for it. The guidelines refer to a set of facts identical to those addressed in the June 2008 Opinion Procedure Release of the Department of Justice in the Halliburton case, http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html, and suggest that the SFO will follow procedures similar to those outlined by the DOJ.

Second, the guidelines offer some insight into how the SFO will apply the offence of negligently failing to prevent bribery (together with the associated "adequate procedures" defence) which is currently proposed in the new UK Bribery Bill. This discussion emphasizes that the SFO will look for a demonstration that a company has taken specific and vigorous steps to instill a corporate culture of intolerance to corruption. It is not yet clear that this offence will, in fact, reach the Statute book. In connection with this, it should be noted that the Joint Parliamentary Committee report on the Bribery Bill recently advocated that the negligence requirement in this offence be removed, with companies instead being strictly liable for failing to prevent corruption by their employees. However, the Joint Committee believed that the "adequate procedures" defence ought still to apply. Therefore, the guidance provided here by the SFO will still be very useful.

CONCLUSION

These new SFO guidelines are an important statement of a new approach in the field of overseas corruption. They are the direct result of a thorough review of the approach to fraud, the creation of new powers and procedures and of a new team at the SFO, including a new director appointed in 2008 and a new head of the Anti-Corruption Domain appointed specifically to sharpen the SFO's approach. In general terms, the guidelines adopt a "self-investigate, self-report and negotiate" approach, including the opportunity to avoid crippling criminal penalties, that has long been the hallmark of American efforts in this area, and that was generally embraced by Germany in the December 2008 settlement with Siemens. It remains to be seen, of course, exactly how the SFO will implement these important guidelines, and further, whether investigating authorities elsewhere in Europe will emulate them. The overall message for companies is to see these guidelines as an opportunity to minimise the consequences of historic overseas corruption, including in companies being acquired, by negotiating with the SFO. They should therefore consider with professional advisers how to approach the SFO when such matters are discovered.

We will be monitoring developments in this area over the coming months. Please feel free to contact any of the undersigned if you have any questions.

London

Lord Goldsmith QC
+44 20 7786 9088
phgoldsmith@debevoise.com

Peter J. Rees QC
+44 20 7786 9030
prees@debevoise.com

Karolos Seeger
+44 20 7786 9042
kseeger@debevoise.com

New York

Mary Jo White
+1 212 909 6260
mjwhite@debevoise.com

Bruce E. Yannett
+1 212 909 6495
beyannett@debevoise.com

Nicola C. Port
+1 212 909 6875
ncport@debevoise.com

Washington, D.C.

Paul R. Berger
+1 202 383 8090
prberger@debevoise.com

Jonathan R. Tuttle
+1 202 383 8124
jrtuttle@debevoise.com

Paris

Frederick T. Davis
+33 1 40 73 1310
ftdavis@debevoise.com

Michael M. Ostrove
+33 1 40 73 1251
mmostrove@debevoise.com