

CLIENT UPDATE

SERIOUS FRAUD OFFICE ISSUES NEW POLICIES ON SELF REPORTING, FACILITATION PAYMENTS AND BUSINESS EXPENDITURES

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The Serious Fraud Office (the “SFO”) has announced changes to its policies and guidance concerning its enforcement of the Bribery Act. The new policies, which came into force on 9 October 2012, mark a change in the SFO’s approach toward corporate self reporting and settlement of corruption offences, and clarify the agency’s positions on facilitation payments and business expenditures (hospitality and gifts).

The SFO explained that the policy revisions were intended to:

- “1. restate the SFO’s primary role as an investigator and prosecutor of serious or complex fraud, including corruption;
2. ensure there is consistency with other prosecuting bodies; and
3. meet certain OECD recommendations”¹

¹ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>

Emphasising that the SFO is first and foremost a prosecutorial body, the new policies indicate that the agency will base decisions whether to prosecute corporates on the application of the Full Code Test in the Code for Crown Prosecutors, as well as the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010 (“Joint Bribery Act Guidance”)² and the Joint Guidance on Corporate Prosecutions. The Full Code Test requires that there must be “sufficient evidence to provide a realistic prospect of conviction” and “a prosecution [must be] required in the public interest”.³

- **Self Reporting.** Restating the Full Code Test, the SFO’s new policy statement on corporate self reporting states, “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 noting that, under the Joint Guidance on Corporate Prosecutions, a self-report may “be taken into consideration as a public interest factor tending against prosecution [if it] form[s] part of a ‘genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice’”, and whilst the SFO restates that it “encourages” corporate self-reporting, the new policy makes clear that “[s]elf-reporting is no guarantee that a prosecution will not follow”.⁴

The new policy replaces the SFO’s July 2009 guidance titled “The Serious Fraud Office’s Approach To Dealing With Overseas Corruption” (the “*Approach*”)⁵, which explicitly encouraged businesses to self-report as a route to civil outcomes. In fact, the *Approach* indicated an express desire “to settle self referral cases . . . civilly wherever possible”.⁶ Stepping away from that prior policy, the SFO’s website confirms that “[t]he revised policies make it clear that there will be no presumption in favour of civil settlements in any circumstances”.⁷ However, the SFO states that, in appropriate circumstances, it will continue to use its civil recovery powers under the Proceeds of Crime Act 2002 (“POCA”), either as an alternative or in addition to criminal prosecution.⁸

² The Joint Bribery Act Guidance was released on 30 March 2011 alongside separate Bribery Act Guidance issued by the Ministry of Justice in advance of the Bribery Act becoming effective on 1 July 2011.

³ The Code For Crown Prosecutors (2010), at ¶¶ 4.1, 4.5, 4.11.

⁴ <http://www.sfo.gov.uk/bribery--corruption/self-reporting-corruption.aspx>

⁵ Note that the reference to the *Approach* has been removed from the Joint Bribery Act Guidance.

⁶ *Approach*, at ¶ 5.

⁷ <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx>

⁸ <http://www.sfo.gov.uk/bribery--corruption/self-reporting-corruption.aspx>

The new policy also indicates that when the SFO does enter into civil settlements with corporates, they can no longer expect the details of the settlements to remain confidential. The *Approach* had assured self-reporting corporates some degree of confidentiality in their communications with the SFO and indicated that the parties would work together on any public statements relating to settlements.⁹ The new policy, however, states, “If the SFO uses its [civil recovery] powers under the proceeds of crime legislation, it will publish its reasons, the details of the illegal conduct and the details of the disposal.” This change appears to have been made, at least in part, in response to a report issued earlier this year by the OECD Working Group on Bribery, which criticised the lack of transparency in the SFO’s civil settlements.¹⁰

Importantly, and in addition to its policy change regarding the reporting of past improper conduct, the SFO has signalled a reduced willingness to discuss prospective conduct with corporates. The agency stated, “It is not the role of the SFO to provide corporate bodies with advice on their future conduct.”¹¹

- **Facilitation Payments.** The new policy regarding facilitation payments emphasises that the SFO’s prosecutorial decisions regarding the Bribery Act will be governed by the Full Code Test, the Joint Bribery Act Guidance and the Joint Guidance on Corporate Prosecutions. This policy replaces prior indications from the SFO that businesses may be shielded from prosecution for facilitation payments so long as: (1) they had issued a clear policy regarding such payments; (2) they had written guidance available to employees on the procedures for handling requests for such payments; (3) employees followed those procedures; (4) evidence existed that the company recorded all such payments; (5) evidence existed that proper action was taken to inform the appropriate authorities in the countries concerned that such payments were being demanded; and (6) that the business was taking what practical steps it could to curtail the making of such payments.¹² Whilst some of these considerations are identified in the Joint Bribery Act Guidance as public interest factors tending against prosecution,¹³ the SFO’s

⁹ *Approach*, at ¶¶ 9, 10, 15.

¹⁰ The OECD Working Group’s report is discussed in our Client Update dated 5 April 2012.

A recent example of the SFO’s move toward greater transparency when settling matters through POCA civil recovery orders can be found in the Oxford Publishing Ltd. settlement, which was the subject of an article in the July 2012 issue of our FCPA Update.

¹¹ <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx>

¹² See <http://thebriberyact.com/2011/06/09/exclusive-facilitation-payments-after-july-1st-a-six-step-solution/>

¹³ Joint Bribery Act Guidance, at pp. 8-9.

new policy clarifies that they do not represent exemptions to prosecution. The new policy states, "Facilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency."¹⁴ There has not yet been a prosecution in the UK for facilitation payments.

- **Business Expenditures.** In line with the other revisions, the new policy on business expenditures states that prosecutorial decisions with respect to bribes disguised as hospitality expenses will be based on the Full Code Test, the Joint Bribery Act Guidance and the Joint Guidance on Corporate Prosecutions.¹⁵ The policy provides reassurance, however, that "[b]ona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business", which echoes the discussion of such payments in the Joint Bribery Act Guidance.¹⁶

The SFO's policy revisions further heighten the need for businesses to ensure that they have effective anti-corruption compliance programmes in place to prevent violations of the Bribery Act. The new policies also reinforce the importance of careful consideration with counsel about how appropriately to address violations when they are detected.

For more on the Bribery Act and anti-corruption, including all our previous client updates, please see our website at www.debevoise.com/thebriberyact.

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Please do not hesitate to contact us with any questions.

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¹⁴ <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx>

¹⁵ <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/business-expenditure.aspx>

¹⁶ Joint Bribery Act Guidance, at p. 10.