WHITE & CASE

Insight: White Collar

October 2012

New SFO Bribery Act policies: What will they mean for corporates in practice?

On 9 October the Serious Fraud Office (SFO) released its revised policies on facilitation payments, corporate hospitality (business expenditure) and corporate self-reporting. The new policies are stated to have immediate effect and supersede any statement of policy or practice previously made by or on behalf of the SFO in these areas.

Most notable are the revisions to the SFO's policy on self-reporting which is where the greatest departure from its previous position appears to lie.

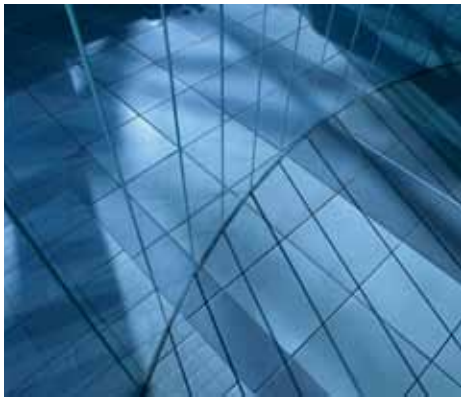
The revision of policies in respect of corporate hospitality and facilitation payments are also notable, particularly given these were areas in relation to which concern was expressed by some corporates when the Bribery Act first came into force and where subsequent guidance and public statements by the SFO had provided some comfort.

Self-reporting

In 2009 the SFO issued guidance which represented, in part, an attempt by the former SFO Director (Richard Alderman) to encourage self-reporting by companies of any wrongdoing they discovered. It incorporated both encouragement (in the form of a promise to use civil redress where possible) and disciplinary (in the form of the threat of a criminal action) elements. The suggestion by the SFO that if corporates self-reported wrongdoing, it would attempt to deal with such wrongdoing by way of civil, rather than criminal, measures was striking. The SFO hoped that such encouragement would prompt many more companies to self-report, but the approach was unfavourably commented on by the judiciary[1] and the lack of clarity meant that the numbers of companies self-reporting remained low.

The 2009 guidance on self-reporting has now been withdrawn and the new policy explicitly supersedes any statement of policy or practice previously made by or on behalf of the SFO. The new policy states that 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 joint prosecution Guidance on Corporate Prosecutions and, where relevant, the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions 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.



Alistair Graham
Partner, London
+ 44 20 7532 1800
agraham@whitecase.com

Clare Semple
Professional Support Lawyer, London
+ 44 20 7532 1700
csemple@whitecase.com

White & Case LLP
5 Old Broad Street
London EC2N 1DW
Tel: + 44 20 7532 1000
Fax: + 44 20 7532 1001

1 See, for example *R* v *Innospec Limited* [2010] EW Misc 7 (EWCC) and *R* v *Dougall* [2010] EWCA Crim 1048

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 "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice". Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.

The position under the new policy contrasts with that under the 2009 guidance and the public stance previously taken by the SFO. It is likely that self-reporting will still have a role to play but the emphasis on civil, rather than criminal, sanctions previously available in this respect is now gone. However, the proposal to introduce deferred prosecution agreements (DPAs), whereby companies can avoid contested criminal proceedings by agreeing fines and taking remedial action on an agreed timeframe, is clearly an alternative strategy. DPAs have been extensively used in the US to deal with bribery and corruption investigations. The avoidance of contested criminal trials would save the SFO precious prosecutorial time and money and companies would be able to avoid a criminal conviction and possible debarment from government contracts. One possible advantage of the proposed 'DPA route' over the previous guidance is the greater certainty which would potentially be available to corporates self-reporting under it. However the arrangements for DPAs have not yet been finalised and, until they are, uncertainty will remain.

Facilitation payments

Unlike in the US (where the anti-corruption legislation includes a specific exception or defence for small facilitation payments) facilitation payments are illegal in the UK. However previous statements by the SFO and the MOJ guidance on the Bribery Act (issued in March 2011) (the "government guidance") gave some comfort in respect of the attitude likely to be taken to them by the SFO. The government guidance refers to the eradication of facilitation payments as a *"long term objective"* and, as referred to in our July alert, in a speech at the Russia Legal Seminar in London on June 2011, Richard Alderman, the Director of the SFO, said:

"Nevertheless, of course, I recognise that these payments will not come to an end, whether in Russia or other countries, on 1 July when the Act comes into force. Our approach in the SFO has been to recognise that this will not happen. What we have said is that our aspiration is that companies generally should move towards zero tolerance over a period of time and that we shall let them do that if they keep us informed about what they are doing. I want to know, in respect of those that still make the payments, what they will be doing after 1 July to bring an end to this practice and over what length of time. I recognise that this may be a process that takes a few years but what matters is the end result."

This comfort is now gone. As referred to above, the new policies explicitly supersede any statement of policy or practice previously made by or on behalf of the SFO. Further, they contain no reference to the government guidance, making it clear that it does not form part of the guidance the SFO will take into account when deciding whether or not to prosecute.

The new policy states that whether or not the SFO will prosecute in respect of a facilitation payment (or payments) will be governed by the Full Code Test in the Code for Crown Prosecutors and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010. Where relevant, the Joint Guidance on Corporate Prosecutions will also be applied.

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.

Corporate hospitality

There is more certainty and reassurance available in respect of corporate hospitality, with the new policy stating that bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business. Although it also recognises that bribes are sometimes disguised as legitimate business expenditure.

The codes and guidance the SFO will look to when deciding whether to prosecute mirror those for facilitation payments and, as is the case for facilitation payments, the policy also points out that in appropriate cases the SFO may use its powers under proceeds of crime legislation.

Practical implications

The changes are consistent with the message coming from the SFO under its new Director, David Green, that it is a prosecutor (not a regulator) and intends to behave like one.

The Director has taken the opportunity to emphasise, that all decisions to prosecute unlawful activity will be governed by the Full Code Test in the Code for Crown Prosecutors and the applicable joint SFO/CPS prosecution guidance, other statements of policy and practice cannot be relied on in the way they may have been in the past.

The most significant change in SFO policy is that in relation to self-reporting. While the SFO will still want to see self-reporting there is no guarantee that for those doing so that they will not face prosecution, putting corporates who discover corruption in an even more difficult position.