

# Client Alert

Latham & Watkins Litigation Department

## Britain Issues Guidance to Corporations Regarding Overseas Corruption Disclosures

### Executive Summary

Britain's Serious Fraud Office (SFO) has continued its commitment to radically transforming its approach to overseas corporate corruption, borrowing practices and principles from the United States Department of Justice's "Principles of Federal Prosecution of Business Organizations" (Corporate Charging Guidelines). The new approach brings opportunities and risks for corporations subject to British enforcement actions.

Central to the SFO's new guidance for British corporations is the desire to provide increased certainty through self-reporting of alleged misconduct. When corporations self-report instances of overseas corruption, the SFO asserts that it will now presume to handle their cases civilly rather than criminally (except if a corporation's Board members personally engaged in the corrupt activities). In contrast, the SFO warns corporations failing to self-report misconduct that if the SFO discovers the misconduct, the certainty corporations face is a much higher risk of criminal prosecution.

The articulated goals of Britain's new approach include encouraging a culture of responsibility within British corporations, which will create incentives for corporations to avoid

corrupt behavior proactively and to respond quickly and effectively when a corporation discovers it may have acted corruptly.

### Background

Britain's Serious Fraud Office, established in 1988, is an independent government department investigating and prosecuting serious or complex fraud. Its director reports to Britain's Attorney General. The SFO's jurisdiction includes England, Wales and Northern Ireland, but not Scotland, the Isle of Man or the Channel Islands.

The SFO has previously experienced significant public criticism suggesting that it was inadequately policing overseas corporate corruption and, indeed, it had never brought a single such case to court until this year. Following a review of the SFO by a former American prosecutor, the SFO has undergone significant changes. The SFO's new director, Richard Alderman, has pledged to improve staff training and the caliber of the department's leadership, and is planning to increase the number of anti-corruption investigators to approximately 100.

The SFO's first-ever case of overseas corporate corruption was brought to court on July 10. Mabey & Johnson Ltd., a supplier of steel bridging, voluntarily

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disclosed that it had sought to influence decision-makers in public contracts in Jamaica and Ghana between 1993 and 2001. The corporation has indicated it would plead guilty to charges involving corruption and breaches of UN sanctions.

United States enforcement authorities have had critics accuse them of overreaching when prosecuting overseas corporate corruption premised upon an expansive assertion of extraterritorial jurisdiction. But US and British authorities have worked, and continue to work, closely on cases with concurrent jurisdiction. Prosecutors in England, Wales and Northern Ireland with a case involving US interests are directed to report that fact to their headquarters, which will liaise with their US counterparts. A Memorandum of Understanding entered into by the US and Britain in 2007 provides a formal written framework for coordinating significant enforcement matters that may involve equities of both countries.

## Britain's New Approach

The nine-page "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" (the Guide) (found at <http://www.sfo.gov.uk/news/downloads/SFO-COP-dealing-with-overseas-corruption.pdf>), released July 21, describes the changes. It suggests that corporations communicate with the SFO through professional advisers. The SFO stresses that early disclosure is important, but understands that an investigation has to identify a real issue before corporations should communicate with the government. The SFO invites corporate advisors to enter into a dialogue with the SFO in a timely manner in order to obtain a sense of the SFO's likely handling of a particular factual situation. The Guide emphasizes that discussions with the SFO will be treated as confidential.

The SFO notes that self-reporting does not remove the obligation of

a corporation to make any reports required by law in the UK or elsewhere. The SFO wants corporations to self-report misconduct to British authorities at the same time they notify the US Department of Justice. And the SFO warns that corporations that fail to self-report may have their misdeeds discovered through other means (including Suspicious Activity Reports, which are ordinarily used to report money-laundering), and promises high rates of criminal prosecution in such cases.

The SFO also provides factors governing whether it will consider a civil outcome rather than a criminal one:

- Is the corporation's board of directors committed to resolving the issue and repairing its corporate culture?
- Will the corporation cooperate with further investigations?
- Is the corporation open to such remedial actions as civil restitution, training, taking action against individuals and external monitoring, where appropriate?
- Is the corporation committed to transparency, and willing to make a public statement about the matter?
- Is the corporation willing to reach a global settlement with other regulators?
- Were board members personally involved in the corrupt activities?

Regarding possible criminal investigations of individuals, the SFO will ask:

- How involved were the individuals in the corrupt activity?
- Did they and do they benefit personally from the misconduct?
- What action has the corporation taken?
- Did the individuals benefit personally from the corrupt activity?
- Should those involved be professionally sanctioned or disqualified from serving as directors?

Once a corporation has self-reported, the SFO will discuss with the corporation

the scope of any further investigations. The cost of such investigations will be borne by the corporation, but the SFO will, when possible, take into account their impact on the corporation's business.

The SFO has been asked about an opinion procedure along the lines of what the United States provides to companies in the Foreign Corrupt Practices Act (FCPA) context. It is open to the idea generally; it notes that one occasion such an opinion would be appropriate is when an acquiring corporation discovers through due diligence that its proposed acquiree may have committed corruption overseas. If the acquirer is committed to remedying the situation, the SFO will provide assurances about the actions it will take.

In analyzing a corporation's procedures, the SFO focuses on how successfully the corporation has been mitigating its risk of committing overseas corruption. It will also look at a corporation's past history of misdeeds, and at indicators of whether a corporation is really living up to its stated anti-corruption goals.

Both Britain and the United States now focus on having wrongdoers' proceeds confiscated (UK) or forfeited (US). Both stress the need to work across agency lines within their own governments. Both state that they care about the high costs to corporations when investigations against them are initiated and pursued. Both include the possibility of placing monitors within corporations as part of strengthening weak corporate cultures against overseas corruption.

## **Contrasts With the Existing US Approach**

Many of the factors now recognized by the British government have long been embraced by the US Department of Justice in its Corporate Charging Guidelines.

But the US Corporate Charging Guidelines contain several points

not included in the British Guide.

In deciding how to undertake prosecution of a corporation, the US will examine collateral consequences of the corporate wrongdoing, including disproportionate harm to the public and other stakeholders in the corporation (a much more detailed explanation relative to Britain's references to "the public interest"); the adequacy of the prosecution of individuals responsible for the corporation's wrongdoing (Britain's Guide discusses criminal investigations and other appropriate actions against individuals, but does not rely upon it as part of an analytic framework for corporate charging decisions); and the adequacy of civil or regulatory remedies (distinct from Britain's discussion of working with other regulators to reach a global settlement). The US Corporate Charging Guidelines note that prosecuting corporations is not a substitute for holding individuals accountable, as corporations can only act through individuals, and that the US Department of Justice considers individual criminal liability to be an excellent deterrent against future corporate misbehavior.

Differences also exist in how investigations end. The United States uses non-prosecution or deferred-prosecution agreements, often with hefty monetary payments attached, which have the effect of civil settlements, while Britain directly offers cooperating corporations the option of a civil instead of criminal process. A civil outcome has the significant benefit of falling outside Article 45 of the EU's Public Sector Procurement Directive of 2004, which provides for a mandatory bar on government contracts for corporations convicted criminally of corrupt activity (correspondingly, the United States reserves the right to debar or delist government contractors enmeshed in overseas corruption). Looming large as well is Britain's Proceeds of Crimes Act, or POCA, which provides for the confiscation of proceeds of criminal activity. The remedies under POCA have

been called “draconian,” and provide a further reason for companies to take strong measures to avoid a criminal prosecution.

Several legislative measures are also wending their way through the process on either side of the Atlantic. A “Bribery Bill” has been prepared for introduction before the British Parliament. Among its provisions is one that would criminalize a corporation’s negligent failure to prevent bribery. The SFO would like to be proactive on this issue, encouraging companies to promote a corruption-free corporate culture, and, according to the Guide, would only enforce this provision when necessary and proportionate. It is worth noting, in this regard, that one of the proposed defenses to the charge is a company showing that it had in place adequate procedures designed to prevent individuals in its corporation from committing a “corrupt” offense (provided the relevant person was not part of the senior management). This amplifies the importance of establishing good corporate practices in Britain. The British Government is keen to replace the archaic current legislative framework for bribery and corruption offenses with the Bribery Bill’s clarified and consolidated provisions. A related initiative is the “Plea Negotiation Framework” for fraud cases, which seeks to introduce more systematic early plea negotiations to the British justice system.

A bill introduced in the United States House of Representatives (H.R. 2152) would provide for a private right of action available pursuant to the US FCPA, making overseas concerns liable for up to treble damages relating to any issuer, domestic concern or US person. The outlook for this bill is uncertain in this Congress; introduced in late April, it has not had any hearings or markups scheduled.

## Looking Ahead

Clients worldwide should take careful note of Britain’s change in approach to overseas corporate corruption. Companies will want to consider carefully putting strong corporate governance measures in place now. Should a question of overseas corporate corruption ever arise, the SFO will closely examine the corporation’s culture, specifically whether it has:

- a clear statement of an anti-corruption culture supported at the corporation’s highest levels;
- an ethics code;
- stated ethical principles that work across national boundaries;
- individual accountability;
- diligence and appropriate risk assessments;
- explicit statements that its ethics code applies to business partners;
- appropriate and consistent disciplinary processes;
- a helpline enabling employees to report their concerns;
- policies on gifts, hospitality, facilitation payments, outside advisers, third parties, political contributions and lobbying; and
- training on, and checks and audits of, all of the above.

These factors are similar to the considerations that US enforcement authorities take into account in their enforcement determinations. In light of the SFO Guide’s explicit recognition of global settlements, it is recommended that international corporations with potential exposure to allegations of multi-national corruption carefully consider positioning themselves to be able to negotiate with multiple governments simultaneously.

Clients may also want to consider responding through legal counsel to the SFO’s invitation to provide comments on the Guide; the SFO states that the Guide “will be revised following feedback and in the light of experience.”

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