



CORPORATE CRIME & INVESTIGATIONS ALERT

22 July 2009

Opportunities to negotiate settlement

The Serious Fraud Office ("SFO") issued guidelines on 21 July outlining its approach towards businesses that come forward and self-report overseas bribery and corruption issues. This is the first time that the SFO has issued formal guidelines.

[Link to the guidelines:](#)

The guidelines confirm that the SFO is moving more towards a US-style system where businesses can self-report in order to negotiate a settlement. Although self-reporting has become commonplace in the US, with well established practice and procedures, this is new territory for the SFO. As part of the incentive for self-reporting, the SFO says it will use civil penalties such as fines "wherever possible" instead of criminal sanctions.

This initiative follows on from the first ground breaking negotiated settlement case earlier in the year involving Balfour Beatty which saw the company enter into civil settlement, paying £2.25m together with a contribution towards the costs of the Civil Recovery Order proceedings. At the conclusion of this case the SFO press release stated:

"The outcome signals the SFO's continuing determination to deal with unlawful conduct wherever it occurs. The SFO has concluded in the circumstances of this case that the prosecution of any individual or corporate entity is not merited. By proceeding in this way the SFO has been able to impose a significant sanction on a major UK company whilst avoiding the extensive cost to the public purse of lengthy court proceedings."

The SFO has also been trying to encourage companies to self-report through a recent advertising campaign, although it has admitted that this has not been as successful as it hoped. This was perhaps because companies did not know what to expect when they self-reported, or what the advantages might be as against sitting back and doing nothing until the SFO came knocking. The guidelines help to clarify the trade-off between the possible gain of coming clean to the authorities against what a company might lose by keeping quiet about past behaviour.

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New guidelines - more corporate confessions?

The civil settlement route will be undoubtedly more attractive to companies as they will not face exclusion from public contracts which a conviction would bring. Keith McCarthy the SFO's head of corruption and proceeds of crime recently stated that he suspected that this was playing a significant part in deterring companies from self-reporting saying that, *"That is something that is cropping up more and more when we talk to the corporate world."*

The rules to which he refers contain a mandatory exclusion of companies or other bodies where the company, its current directors or other decision makers have been convicted of the following offences

– participation in a criminal organisation, corruption, bribery and fraud (as stated defined in the EU Procurement Rules and UK legislation - *The Public Contracts Regulations 2006 (SI 2006/5)*).

However, it is still important that companies take specialist legal advice before self-reporting. The SFO recognises that the decision to self-report is not an easy one and that, "Professional advisers accustomed to this area of work will be in the best position to offer advice on the merits of this decision". The SFO reserves the right to prosecute where appropriate, as indicated by the case of Mabey and Johnson which is expected to plead guilty to corruption offences at Southwark Crown Court in due course. The guidelines are a step in the right direction but it remains to be seen how they will work in practice - no doubt they will evolve as more experience is gained. Indeed the SFO has said that it welcomes comment from corporates and their legal advisers.

Breathing space for M & A due diligence

Another important development included in the guidelines is a new procedure for businesses that discover corruption issues during due diligence before a takeover (similar to the Opinion Procedure in the US). If the acquirer can demonstrate its own good record and a commitment to eradicating the problem at the target company, it can approach the SFO and negotiate an amnesty period to make changes free of prosecution.

How can DLA Piper help you?

DLA Piper's Corporate Crime & Investigations team aims to help our clients avoid regulatory intervention wherever possible. But if your business does come to the attention of the SFO, or you wish to self-report an issue, we can provide valuable advice and assistance on all fraud and corruption matters and help you to achieve the best possible outcome. We have extensive experience in managing self-reporting and plea negotiations, providing advice and assistance during raids, and defending clients in court. We are able to give our clients a unique insight into the way the SFO investigates and prosecutes its cases because we employ a number of lawyers who have worked in senior positions for the organisation. One of our most recent joiners is the former director of the SFO, Robert Wardle.

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