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A Year-End Update on the UK Bribery Act

By Raymond L. Sweigart

Although 2012 did not bring a major prosecution, it was not without noteworthy events. The UK Serious Fraud Office (SFO), on top of the withdrawal of previous Bribery Act guidance and the publication of new guidelines in October, has put out new supplemental guidance on self-reporting financial crimes. These new guidelines require companies that self-report to the SFO to submit full details of their internal investigations into any wrongdoing, as well as supporting evidence such as emails, documents, banking or financial evidence, and witness statements. These requirements may appear onerous, but they underscore the significance that the SFO attaches to self-reporting and the detailed focus they expect businesses to display in dealing with compliance and wrongdoing.

Self-reporting to the SFO previously was considered by some as a somewhat benign exercise—perhaps even pro forma—which would guarantee lenient treatment. This is no longer the case. The need to provide a large volume of detailed information from bank statements and emails to witness statements emphasizes the seriousness of this endeavor if that was not previously apparent. It will doubtlessly present a daunting challenge to pull all of this information together to the standard the SFO now expects; and it certainly appears that if a company cannot deliver, it may not be seen as "self-reporting" in the eyes of the SFO. As a result, no "points" will be gained with the SFO and nothing will have been accomplished except for increasing the risk of prosecution.

Therefore, if self-reporting is under consideration, it is critical that it be done right. The new SFO director has made it clear that there will be no upfront or blanket guarantees of non-prosecution for those who self-report under the SFO process, but he has also confirmed that the fact a company properly self-reports will weigh heavily on the scales when prosecutors balance the public interest test in deciding whether to pursue prosecution.

Nevertheless, self-reporting remains something that must be seriously and carefully considered when wrongdoing comes to light internally. The risk of waiting to see whether the SFO is tipped off by a

competitor or a whistle-blower is now only heightened. For example, recent reports indicate that several rather high-profile investigations are now underway that were prompted not by self-reporting but by the SFO's concerns over information it had received from whistle-blowers reporting irregularities in places like Indonesia and China. At least one of the targets has announced it expects to be criminally prosecuted. If nothing else, there certainly appears to be a growing risk in today's climate that wrongdoers will be found out, and if they are, that the SFO will be even tougher on them.

The SFO's new guidance emphasizes that, in determining whether or not to prosecute, the fact that a company has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. For such a self-report to be taken into account, it must be seen as part of a genuinely proactive approach adopted by the company's management when the offense is brought to their notice. In addition to self-reporting, this proactive approach should include remedial actions and the compensation of victims. It will be all the better if the company's own internal mechanisms for ferreting out wrongdoing proved effective. Prosecutors will also consider whether a company has provided sufficient documentation, made witnesses available, and timely disclosed the details of any internal investigation.

Accordingly, in many situations it may still be better to come forward quickly and honestly to the SFO while taking meaningful steps to prevent the problem happening again. This may reduce the risk of prosecution. The "see no evil" or ostrich approach is certainly not a solution anyone can seriously recommend and may more likely tip the public interest scales in favor of criminal prosecution.

At the end of the day, for all the rhetoric of recent announcements, the reality remains that the SFO has limited resources that will be better spent on those who attempt to avoid facing up to their issues of wrongdoing. Companies who are upfront with themselves and the SFO may still be able to limit some of the damage if they act promptly and in good faith. As always, taking proper advice can be critical in coming to the proper decision and in implementation.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author:

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