

APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION

INTRODUCTION

The SFO is the lead agency in England, Wales and Northern Ireland for investigating and prosecuting cases of overseas corruption. We are responsible for enforcing the current law and will be responsible for enforcing the provisions of the Bribery Bill in respect of overseas corruption if the Bill is enacted.

We have set up a separate work area, the Anti-Corruption Domain, and the Head of this is now Robert Amaee who reports to our Chief Investigator, Keith McCarthy (previously Head of the Anti-Corruption Domain) We are moving significant skills into this area (both from within the SFO and recruited externally) and are investing heavily in training. Ultimately, we intend to have 100 staff working in this area.

So far the SFO has convicted one UK lawyer in respect of overseas corruption. Pleas from a corporate to overseas corruption have also recently been obtained. More will follow. We shall be using all of the tools at our disposal in identifying and prosecuting cases of corruption that we find.

Discussions with business and professional advisers have revealed a lot of interest in a system of self reporting cases of overseas corruption to us. We have been asked for any additional guidance we can give with respect to our policies on this and in particular on the benefits to be obtained from self reporting. As will be seen from this Guide, the benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with us, the issues and any publicity proactively. The corporate will be seen to have acted responsibly by the wider community in taking action to remedy what has happened in the past and to have moved on to a new and better corporate culture. Furthermore, a negotiated settlement rather than a criminal prosecution means that the mandatory debarment provisions under Article 45 of the EU Public Sector Procurement Directive in 2004 will not apply.

For the SFO, such a system would have the effect of crafting effective and proportionate sanctions for this type of case and of helping to produce a new corporate culture. This will bring about behavioural change within businesses themselves and will create corporate cultures in which no form of corruption is tolerated (see Jack Straw's speech to the 5th European Forum on Anti-Corruption on 23 June 2009). This is the key to the outcome we are set on achieving. Self referral under this guide leading to a civil outcome in appropriate cases is one tool for this: criminal prosecution and confiscation in other cases is another vital tool we shall be using. We expect to conduct more criminal investigations and prosecutions in the future (particularly if the Bribery Bill becomes law). This tough approach is needed as part of the SFO toolkit to ensure that appropriate cases are brought before the Criminal Courts.

Many corporates have welcomed what they have heard about self reporting at conferences. They have asked for a document setting out the issues covered in speeches and the approach we are likely to take. This Guide is a first attempt to set this out. It will be revised following feedback and in the light of experience.

We welcome comments that corporates and their advisers may have on this Guide. Meanwhile the Guide can be used as the basis of approaches to us.

The term 'corporate' is used in this Guide for convenience. As the context requires, it can refer to the group, a UK company or an overseas subsidiary. It is not to be construed restrictively.

APPROACHING THE SFO

1. We appreciate that a decision to approach us is not easy for a corporate when it discovers a problem concerning overseas corruption. Professional advisers accustomed to this area of work will be in the best position to offer advice on the merits of this decision. Our preferred approach is set out in the following paragraphs.
2. A key question for the corporate and its advisers will be the timing of an approach to us. We appreciate that a corporate will not want to approach us unless it had decided, following advice and a degree of investigation by its professional advisers, that there is a real issue and that remedial action is necessary. There may also be earlier engagement between the advisers and us in order to obtain

an early indication where appropriate (and subject to a detailed review of the facts) of our approach. We would find that helpful but we appreciate that this is for the corporate and its advisers to consider. We would also take the view that the timing of an approach to the US Department of Justice is also relevant. If the case is also within our jurisdiction we would expect to be notified at the same time as the Department of Justice.

3. Corporates wishing to contact us about these issues should contact Anne-Marie Ottaway on +44(0)20 7084 7061 or at Anne-Marie.Ottaway@sfo.gsi.gov.uk, and she will be happy to help. They will assume that the corporates professional advisers are familiar with this Guide and our approach.
4. Very soon after the self report and the acknowledgement of a problem we will want to establish the following:
 - is the Board of the corporate genuinely committed to resolving the issue and moving to a better corporate culture?
 - is the corporate prepared to work with us on the scope and handling of any additional investigation we consider to be necessary?
 - at the end of the investigation (and assuming acknowledgement of a problem) will the corporate be prepared to discuss resolution of the issue on the basis, for example, of restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and at least in some cases external monitoring in a proportionate manner?
 - does the corporate understand that any resolution must satisfy the public interest and must be transparent? This will almost invariably involve a public statement although the terms of this will be discussed and agreed by the corporate and us.
 - will the corporate want us, where possible, to work with regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global settlement?
5. A very important issue for the corporate will be whether the SFO would be looking for a criminal or a civil outcome. Without knowing the facts, no prosecutor can ever give an unconditional guarantee that there will not be a prosecution of the corporate. Nevertheless, we want to settle self referral cases that satisfy paragraph 4 civilly wherever possible. An exception to this would be if Board members of the corporate had engaged personally in the corrupt activities,

particularly if they had derived personal benefit from this. In those cases we would, in fact, be likely to commence our own criminal investigation. Professional advisers will have a key role here because of their knowledge of our approach. We shall look at the public interest in each case. We would in those circumstances be looking for co-operation from the corporate and would be prepared to enter into plea negotiation discussions within the context of the [Attorney General's Framework for Plea Negotiations](#).

6. Corporates may also want to know about criminal investigations of individuals. There are no guarantees here. We would assess the position of individuals on their merits. Examples of the questions we would ask are:
 - how involved were the individuals in the corruption (whether actively or through failure of oversight)?
 - what action has the company taken?
 - did the individuals benefit financially and, if so, do they still enjoy the benefit?
 - if they are professionals should we be working with the appropriate Disciplinary Bodies?
 - should we be looking for Directors' Disqualification Orders?
 - should we think about a Serious Crime Prevention Order?
7. The interaction between the corporate investigation and any investigation of individuals gives rise to many issues. There are potentially many different sets of proceedings whether in the UK or elsewhere. We can discuss these issues with the corporate and its advisers so far as it is appropriate for us to do so.
8. Self reporting to the SFO does not remove the liability of a corporate or a professional adviser to make any report required by law whether within the UK or in another jurisdiction and whether at the time of self referral or later. 9. The SFO will want to work with the corporate on any statements that need to be made. If we decide that we need to make a statement, we shall want to discuss and agree this in advance.
10. Subject to what has been said in paragraphs 8 and 9, the discussions with the SFO will be confidential. Any information received by us will be regarded as information acquired for the purposes of our powers under the Criminal Justice Act 1987 and therefore only to be used in accordance with that Act.

THE INVESTIGATION

11. If both sides are satisfied with the answers to the issues in paragraph 4 above, then we will discuss the scope of any further investigation needed. Wherever possible, this investigation will be carried out by the corporate's professional advisers. This will be at the expense of the corporate. We undertake to look at this in a proportionate manner and to have regard, where appropriate, to the cost to the corporate and the impact on the corporate's business.
12. We appreciate that document recovery and analysis will be a very significant issue in any investigation. Electronic searches will be needed. We are able to discuss the methodology for this with the corporate and its advisers to ensure that the cost is proportionate to the amount and seriousness of the issues reported. We shall also be prepared to discuss the steps taken by the corporate and its advisers to ensure that material (and, in particular, electronic material) is preserved.
13. We will also want to be involved in regular update discussions concerning the progress of any further investigation.

SETTLEMENT DISCUSSIONS

14. We will expect to discuss the results of the investigation with the corporate and its professional advisers. In discussing settlement terms, once we are satisfied with the conclusion of the investigation, we shall be looking at the following:
 - restitution by way of civil recovery to include the amount of the unlawful property, interest and our costs
 - in some cases monitoring by an independent, well qualified individual nominated by the corporate and accepted by us. The scope of the monitoring will be agreed with us. We undertake that if monitoring is going to be needed, it will be proportionate to the issues involved.
 - a programme of culture change and training agreed with us.
 - discussion, where necessary, and to the extent appropriate, about individuals.
15. In addition, a public statement agreed by the corporate and the SFO will be needed so as to provide transparency so far as possible for the public.

GLOBAL SETTLEMENT

16. There will be many occasions when the corruption issue discovered gives rise to potential liability in other jurisdictions as well. We appreciate that corporates in these circumstances want finality at the international as well as domestic level. We shall discuss with the corporate whether they want our assistance and involvement in a settlement with other authorities.

OTHER GUIDANCE

17. A number of corporates and professional advisers have told us that it would be very helpful to them if we were able to offer an opinion procedure concerning future enforcement activity along the lines offered by the US Department of Justice. We are sympathetic to this.
18. The circumstances in which this procedure will be appropriate will need to be discussed but we are ready to offer assistance in one type of case which corporates have mentioned to us. This is where a group (A) is proposing to take over another group (B) and, during due diligence, discovers overseas corruption issues in (B). (A) is committed to a modern ethical corporate culture and, if the transaction goes ahead, would take the necessary remedial action in respect of what has happened. (A) wishes to know what our approach would be.
19. We appreciate the need for help in the circumstances and will give (A) assurances about our action. These assurances could be that no action will take place provided that (A) takes the remedial action it has told us that it will take if the takeover goes ahead. Alternatively, if we find that the corruption is long lasting and systemic, we might say that we would consider a criminal investigation whether at the corporate or individual level.
20. We appreciate that these issues are often likely to be very confidential and price sensitive. We would anticipate that professional advisers would want to discuss a possible approach with the SFO before it was actually made.
21. Corporates have also asked for guidance on how we would apply the offence in the Bribery Bill of negligently failing to prevent bribery. We welcome the opportunity to discuss our approach with corporates. We can discuss our general approach which is to focus

very much on changes of behaviour so far as possible in order to promote a modern corporate culture. Our emphasis is on helping corporates to develop this culture and to use enforcement action only where this is necessary and proportionate.

22. In any discussions about procedures within the corporate we shall be looking to find evidence of adequate procedures to assess how successful the corporate has been in mitigating risk. We shall also be looking closely at the culture within the corporate to see how well the processes really reflect what is happening in the corporate. For example, we shall look for the following:
- a clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate.
 - a Code of Ethics.
 - principles that are applicable regardless of local laws or culture.
 - individual accountability.
 - a policy on gifts and hospitality and facilitation payments.
 - a policy on outside advisers/third parties including vetting and due diligence and appropriate risk assessments.
 - a policy concerning political contributions and lobbying activities.
 - training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporate.
 - regular checks and auditing in a proportionate manner.
 - a helpline within the corporate which enables employees to report concerns.
 - a commitment to making it explicit that the anti-bribery code applies to business partners.
 - appropriate and consistent disciplinary processes.
 - whether there have been previous cases of corruption within the corporate and, if so, the effect of any remedial action.
23. We appreciate as well that guidance and standards will also be given and set by other organisations. We shall take account of this.

What happens if there is no self referral?

24. Self referral together with action by the corporate to remedy the problem of corruption will reduce the likelihood that we may discover the corruption ourselves through other means. If this happens we would regard the failure to self report as a negative factor. The prospects of a criminal investigation followed by

prosecution and a confiscation order are much greater, particularly if the corporate was aware of the problem and had decided not to self report.

25. Corporates will need to be aware of the length and expense of an investigation by the SFO. There will inevitably be considerable publicity and disruption to the business of the corporate. We will be making use of all tools at our disposal such as those under the Regulation of Investigatory Powers Act. Professional advisers will need to advise their corporate clients about the impact of these investigations. There is also a serious prospect that we will learn about the corruption issue from another agency in the UK or elsewhere, a whistleblower or a statutory report such as a Suspicious Activity Report. We will assume in those circumstances that the corporate has chosen not to self report. The chances of a criminal investigation leading to prosecution are therefore high.

General

26. This guidance should deal with the majority of cases where the corporate should self report. We accept however that some cases will present special circumstances. These will need to be discussed on a case by case basis.
27. We welcome feedback on this approach and expect to revise the approach where necessary in the light of experience and feedback. We are also considering setting up a Users' Forum to assist with this and will be interested in feedback on whether this would be helpful.

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