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## The American dream?

15 September 2009



By **Hassan Khan**

The SFO's new guidelines for dealing with overseas corruption contain admirable aims, but it remains to be seen how successful implementing an American model will be, says Hassan Khan

On 21 July 2009 the Serious Fraud Office (SFO) issued guidelines setting out its approach to dealing with cases of overseas corruption. The guidelines are timely given that the government is hoping a draft Bribery Bill will be passed before next year's general election.

The guidelines and draft Bill are an attempt to restore the UK's battered reputation in the area of corruption following the SFO's controversial decision to drop its investigation into Saudi arms contracts. Although a challenge to that decision was eventually defeated in the House of Lords, it is widely accepted, not least by the OECD which has publicly castigated the UK's track record, that a proactive approach to corruption is needed to restore the country's image.

The origins of the guidelines can be traced back to a 2008 civil recovery order against Balfour Beatty for £2.25m. The settlement, which was made under the Proceeds of Crime Act 2002, (POCA), followed an SFO investigation into allegations of overseas corruption in connection with a prestigious building project in Egypt. The allegations were brought to the SFO's attention by the company. The corruption allegations were never proved, but Balfour Beatty admitted that there had been financial irregularities.

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It was a satisfactory result for Balfour Beatty. It avoided a prosecution at relatively little cost to itself – a little bruised from having to admit wrong-doing, but its reputation otherwise intact. As for the SFO, perhaps it could have extracted a higher settlement but, given the inherent difficulties in proving overseas corruption, the settlement was no doubt a sensible and pragmatic one. It was heralded by the SFO as a highly significant development in its efforts to reform British corporate behaviour.

More recently, Mabey & Johnson Ltd, having made a voluntary disclosure to the SFO, has pleaded guilty to offences of overseas corruption and is waiting to be sentenced. The SFO has announced that the company will be subject to financial penalties and will submit its internal compliance programme to an SFO-approved independent monitor.

The new guidelines are not an exposition of its powers to seek civil recovery orders under POCA. Instead, they elaborate on what is expected to be an entirely separate procedure for settling overseas corruption cases. Briefly put, companies are advised to self-report overseas corruption if they are to have any chance of avoiding prosecution.

## The US approach

The guidelines are clearly influenced and modelled on the US approach to dealing with corruption. With its much feared Foreign Corrupt Practices Act 1977 (FCPA), the US has a long history of anti-corruption enforcement – and settlement. The prospect of crippling fines and long gaol terms are incentive enough for companies to self-report corruption to the US Department of Justice (DoJ), or the Securities and Exchange Commission (SEC).

The basic premise therefore is that companies who uncover or suspect overseas corruption within their organisation should report this to the SFO at the earliest opportunity. The benefit to the corporate will be the prospect of a civil rather than a criminal outcome, and the opportunity to manage the issues and any publicity actively with the SFO. The SFO says it expects to be contacted at the same time as any contact the corporate might make to the DoJ.

Save for some exceptions, there is no general principle of law which requires a crime to be reported, and, unlike the US, we do not have a culture of self-reporting, mostly because the outcome is generally uncertain. Our legal system's long-held reluctance to grant immunity, except in exceptional circumstances, has been diluted in recent years.

The Enterprise Act 2002 created a new cartel offence and the Office of Fair Trading, following the model, introduced an immunity programme for companies who, having previously engaged in cartel activity, cease to do so and self-report. Further, under the Serious Organised Crime and Police Act 2005, a prosecutor can grant immunity to an offender for the purposes of the investigation and prosecution of any offence. So, the SFO guidelines are not without precedent.

Without a significant track record of settlements having first been established, it will be interesting to see how many companies avail themselves of the opportunity to self-report. The guidelines make clear, however, that if a company does not self-report then a prosecution will follow in appropriate cases; this should be incentive enough, especially once the Bribery Bill is enacted which creates a new corporate offence and imposes criminal liability on company managers in certain circumstances.

## A better corporate culture

Once the matter has been reported, the guidelines state that the SFO will want to establish that the corporate is genuinely committed to resolving the issue and moving to a better corporate culture. To demonstrate this, the corporate will be expected to work with the SFO on any further investigations which are deemed necessary. Wherever possible, these investigations will be carried out by the corporate's own advisers, at its own expense.

The SFO, in common with other government departments, is facing swingeing budget cuts. Given that fraud generally is on the increase because of the current economic climate, the office is likely to find it difficult to resource an increase in its workload. So, by requiring investigations to be undertaken by the corporate at its own expense, the SFO will in theory be able to release some of its resources for other investigations.

From the corporate's point of view, of course, the purpose of self-reporting is to obtain a civil settlement. In settlement discussions, the SFO will look to the company to make restitution by way of civil recovery which will include the amount of the unlawful property, interest and the SFO's costs. Furthermore, the corporate will be expected to agree a public statement in order to afford the settlement a measure of transparency.

What is equally interesting, however, is the proposal that the SFO will, in appropriate cases, require independent monitoring. According to the SFO's press release in relation to Mabey & Johnson, this is to be a condition of its settlement. The appointment of independent monitors is a novelty and the guidelines provide us with no assistance as to who it would be appropriate to appoint, or what his or her duties should be.

Independent compliance monitoring is yet another concept borrowed from the US, though even there it is still a relatively new concept. In 2008, the DoJ issued this guidance which gives some useful insight as to the function of the monitor: "to assess and monitor a corporation's compliance with [the] terms of the [settlement] agreement that are specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, including, in most cases, evaluating... internal controls and corporate ethics and compliance programs..."

A feature of FCPA compliance monitors is that they are not representatives or advocates of the company and have no prior relationship with it, nor are they employed by the government. It will be interesting to see in future to what extent this provision will be invoked and who are appointed as monitors. There is potential for law and accountancy firms to offer independent monitoring services as a product.

The guidelines also provide that the SFO will provide an opinion procedure concerning future enforcement activity. Where a group (A) proposes to take over another group (B) and, during due diligence, discovers overseas corruption issues in B, the guidelines state that the SFO may give an assurance that no action will be taken provided that A, being "committed to a modern ethical corporate culture", undertakes the necessary remedial action to put matters right.

Additionally, the Bribery Bill creates an offence of negligently failing to prevent bribery and, once enacted, the SFO has said that it would welcome the opportunity to discuss its approach with corporates, and that in its discussions will be "looking to find evidence of adequate procedures to assess how successful the corporate has been in mitigating risk".

## Potential difficulties

All of these provisions potentially change the nature of the SFO as an organisation. In essence, the SFO is seeking to create for itself a regulatory function. This new approach is not surprising; the current director has made no secret of the need to raise public awareness about fraud. That is perfectly admirable, as is the desire to encourage corporate responsibility in the corruption arena.

The problem is the Criminal Justice Act 1987 states that the function of the SFO is to "investigate" and "prosecute" cases of suspected serious or complex fraud. It was never Parliament's intention that the SFO should be a fraud regulator. If the guidelines are as successful as the SFO clearly hopes they will be, can we expect their ambit to be extended to all forms of serious fraud? The advantages to the SFO are obvious – civil settlements will always be preferable to trials which are expensive and uncertain in their outcome. If serious fraud is not prosecuted, however, the SFO loses its *raison d'être*.

What happens if a corporate does not self-report? Clearly, the corporate will be taking the risk that the SFO will uncover the corruption by other means and leave it open to a wide scale and potentially damaging investigation over which it will have no control. Ultimately, of course, the corporate and individuals within it will be at risk of prosecution.

It remains to be seen how successful the guidelines and, in particular, whether an American system can be successfully transposed onto our legal system. As noted above, we do not as yet have a long track record of civil settlements in the area of overseas corruption so there may be some reluctance on the part of corporates to put their head above the parapet. Prevention, of course, is better than a cure. If they have not done so already, companies should be putting into place effective systems to prevent overseas corruption occurring in the first place. Ideally, companies should never need to have recourse to the guidelines.

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### Postscript:

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