Corporate Compliance Update: U.K. Ministry of Justice Issues Revised Policies Regarding Bribery Prosecutions

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On October 9, 2012, the U.K. Serious Fraud Office ("SFO") issued revised policies (available here) regarding several key aspects of its enforcement of the U.K. Bribery Act of 2010 ("Bribery Act"). The Bribery Act, like the U.S. Foreign Corrupt Practices Act ("FCPA"), outlaws bribery of foreign officials. As we have described in earlier alerts (here and here), the Bribery Act is broader than the FCPA, and can subject a U.S. company that "carries on a . . . part of a business" in the U.K. to corporate criminal liability based on conduct wholly unrelated to its U.K. operations. The SFO's revised policies highlight some of the key distinctions between the Bribery Act and the FCPA about which companies need to be aware in crafting and updating compliance policies.

The relevant revised policies include:

> Self-Reporting. The biggest substantive change to the SFO's policies relates to self-reporting. Previously, the SFO had indicated that companies that self-report violations—and that met certain commitment and cooperation criteria—would be able to avoid criminal prosecution "wherever possible," and resolve the matter civilly. The new policies take a harder line. The SFO has now said that self-reporting is but a "relevant consideration" and that self-reporting "is no guarantee that a prosecution will not follow." Instead, "[e]ach case will turn on its own facts." Or, to put it more bluntly: "The revised policies make it clear that there will be no presumption in favour of civil settlements in any circumstances."
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> No Opinion Procedure. In the United States, companies can request that the Department of Justice issue an opinion on whether certain prospective conduct would result in any enforcement action by the Department. Putting aside the question of whether the lengthy process for obtaining such opinions is practical in the fast-paced world of international trade, on the other side of the Atlantic, the SFO has made clear that it will not offer such prospective guidance. In a series of Q&As regarding its new policies, the SFO has emphatically stated that it "is primarily an investigator and prosecutor of serious and/or complex fraud, including corruption. It is not the role of the SFO
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> Facilitation Payments. Under the FCPA, facilitation payments—that is, payments to a foreign official to secure the performance of ministerial and routine government action—are permitted (though actively discouraged by the Department of Justice and the Securities and Exchange Commission). There is no such exception under the Bribery Act. Previously, all the SFO said about facilitation payments was that they were illegal before the Bribery Act and would remain so under the Bribery Act. The revised policies reiterate that position, but take a stronger tone from the get-go: "A facilitation payment is a type of bribe and should be seen as such." The SFO further makes clear that such payments are illegal "regardless of their size or frequency." The SFO did note, however, that whether it chooses to prosecute a company for a facilitation payment depends on "whether it is a serious or complex case." This suggests that if the only violation is a facilitation payment, prosecution is unlikely. If, however, facilitation payments are part of a larger bribery scheme, companies should expect to be charged and held accountable for any such payments.

These changes likely reflect the change in leadership at the SFO in 2012. The SFO previously waffled between being an enforcement agency focused on investigating and prosecuting, and a regulatory agency focused on working with companies to stay within the bounds of the law. The new SFO administration has clearly chosen the former. Whether it can live up to its new commitment to "investigate and prosecute" significant cases of fraud remains to be seen. Since July 2011, when the Bribery Act officially went into effect, the SFO has brought very few new prosecutions, and it has recently suffered significant budget cuts.

Either way, companies that do any part of their business in the U.K., or are contemplating expanding in some fashion into the U.K., need to be aware of the differences between U.S. and U.K. law, particularly as they review and update their compliance policies. Stoel Rives LLP's experienced White Collar Criminal Law and FCPA practitioners can provide counseling on the adequacy of existing anti-corruption procedures and can provide concrete recommendations for instituting new procedures as appropriate.