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litigation lawflash

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## UK SFO Director Provides Guidance on the Bribery Act

*SFO's director's recent speech outlines enforcement of the Bribery Act and developments related to self-reporting, the possible extension of the corporate offence, and prosecutions.*

On 24 October, David Green, director of the UK's Serious Fraud Office (SFO), delivered a speech that provided further guidance on the SFO's work to enforce The Bribery Act 2010 (the Act).<sup>1</sup> When the Act came into force on 1 July 2011, some organisations were concerned that it not only contained general offences related to bribing others or being bribed but that it also introduced a corporate offence for failing to prevent bribery. Until August 2013, however, the SFO had not brought charges against any company or individual under the Act. As a result, the SFO's ability and willingness to carry out such prosecutions has been questioned.

However, in his speech, Green addressed these questions, reiterating that the SFO is committed to its ongoing work to enforce the Act. He also provided further guidance on current developments relating to self-reporting, the possible extension of the corporate offence under section 7 of the Act, and prosecutions.

### Self-Reporting

In April 2012, Green, who had been recently appointed as SFO director, changed the SFO's guidance on self-reporting<sup>2</sup> because it "contained an implied presumption that self-reported misconduct would be dealt with by civil settlement". Green stated, at the time, that the full test for crown prosecutors should be applied to self-reported breaches of the Act. That test asks (1) whether there is sufficient evidence to prosecute and (2) whether a prosecution is in the public interest. It was widely assumed, based on the revised guidance, that the SFO's use of this test would preclude its taking self-reporting of an offence into account when making a decision as to whether to prosecute an offence under the Act.

However, Green's recent speech clarified that "[i]f a company made a genuine self report . . . [and] they were willing to cooperate in a full investigation and to take steps to prevent recurrence, then . . . it is difficult to see that the public interest would require a prosecution of the [company]." Although this demonstrates how the crown prosecutors' test may still take a self-report into account, it nevertheless leaves open the questions of what would constitute a "genuine self report" and whether a proportionality test applies to the level of cooperation and preventive measures taken by the company. Green also stated that "[a] self-report at the very least mitigates the chances of a [company] being prosecuted." This may create some incentive to self-report, and Green noted that "the SFO continues to receive self-reports". However, given the lack of clarity, it would be advisable to seek legal advice before self-reporting.

### Extension of the Corporate Offence

Green also discussed whether the corporate offence under section 7 of the Act should be extended to cover a failure to prevent acts of fraud by employees, in addition to bribery. Although he stated that this could be a viable solution to what he saw as the current limitations of the section, he added that such a change would depend on whether "the public interest demands more corporate prosecutions". Additionally, it seems unlikely that section 7

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1. View a transcript of the speech at <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference.aspx>.

2. View the current guidance at <http://www.sfo.gov.uk/bribery--corruption/corporate-self-reporting.aspx>.

will be amended in the immediate future, given that the SFO is currently in the process of showing that the Act, in its current form, is effective.

## Prosecutions

Green concluded his speech by addressing “those impatient for the first prosecution” under the Act, noting that the Act is not retrospective and only covers illegal conduct that occurred after its entry into force on 1 July 2011. He drew attention to the fact that the SFO, on 14 August 2013, commenced proceedings against the chief commercial officer, a financial advisor, and a financial controller of Sustainable AgroEnergy plc for making and accepting a financial advantage in violation of sections 1(1) and 2(1) of the Act.<sup>3</sup> These charges are the first to be brought by the SFO under the Act. Given that this case was accepted by the SFO in November 2011 and charges were brought in August 2013, it may be that investigations under the Act are only now beginning to lead to prosecutions. Green further stated that the SFO will only “bring the right cases at the time that is right for [the SFO]”, but he did not provide additional specific guidance.

Green also explained that the delay in prosecutions under the Act is due to the fact that the SFO is still investigating and awaiting trial for cases that fall under legislation predating the Act. Currently, the SFO has 13 such cases awaiting trial in the court system, two of which involve corporations. Green’s point is illustrated by the SFO’s confirmation on 23 October that a printing company and some associated individuals had been charged with violations of the Prevention of Corruption Act 1906 for alleged offences that took place between November 2006 and December 2010.<sup>4</sup>

## Implications

The SFO is keen to demonstrate that it has the resources and capabilities to prosecute organisations and individuals that breach the Act. As a result, notwithstanding the underfunding problems that the SFO has experienced in recent years, it is becoming increasingly important that corporations understand the consequences of breaching the Act. Even if charges are not brought, it can cost time and resources to cooperate with the SFO’s enquiries, and it can be potentially even more costly not to do so. It is important to be aware of the possibility of self-reporting, should the need arise, and to have policies and procedures in place to minimise the risk of bribery offences under the Act by a company, its employees, or other associated persons.

We will continue to monitor developments in relation to the Act and the SFO’s ongoing prosecutions and will issue additional guidance once further details and implementation dates emerge.

## Contacts

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3. View SFO’s press release on the prosecution at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/four-charged-in-'bio-fuel'-investigation.aspx>.

4. View the SFO’s press release on the charges at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/printing-company-corruption-charges.aspx>.

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