

white collar lawflash

26 February 2014

UK's Serious Fraud Office Looks to Pursue More Prosecutions of Corporates

A proposed amendment to the UK Bribery Act would give the SFO greater power to prosecute corporates for financial crimes committed by their employees.

The head of the UK's Serious Fraud Office (SFO), David Green, recently proposed an amendment to Section 7 of the UK Bribery Act (the Act) that would make it easier to prosecute corporates for failing to prevent their employees from committing financial crimes. Mr Green's proposed amendment to the Act would give the SFO greater power to take direct action against companies, by enabling the SFO to levy US-type fines, and to stigmatise corporates for abetting bribery and financial crimes committed by employees. The proposed amendment would also prevent, on a mandatory basis, corporates from bidding for certain public contracts under European public procurement rules following a conviction. This proposed change to the law, if enacted, will have implications not only for UK-registered corporates, but also for those corporates that carry out business activities in or through the UK.

The Proposed Amendment

Mr Green's proposed change would expand Section 7 of the Act to include "a corporate failing to prevent acts of financial crime by its employees". The proposed amendment would provide the SFO with much wider power to prosecute corporates for financial crimes carried out by their employees.

Mr Green told the UK's *The Daily Telegraph* that the power would be used in only "exceptional cases", particularly where a company had made a profit from the criminal behaviour of its employees.¹ However, it is unclear what other circumstances may be considered "exceptional". He added that "[i]f the public interest requires prosecution of more corporates or to make it easier to prosecute more corporates like banks—not the people but the bank itself—then it needs to be somewhat easier than the controlling mind test". He noted that the penalties in respect of the proposed amendment would be both financial and stigmatic. Mr Green's view is that "it's the stigma that is most important. Some say that certain banks had been rotten to the core. Why shouldn't that be marked? Why should a big powerful corporate be able to chuck a few people over the side and just sail blithely on, paying a fine as they go on."

At present, mandatory exclusion under public procurement rules does not apply to offences under Section 7 of the Act (although a discretionary right of debarment exists). Mr Green's proposed amendment would, if enacted, provide a mandatory debarment for corporates convicted of an offence under Section 7. Mr Green has noted the strong deterrent effect of such an amendment.

Commentators have observed that the SFO has a poor record in bringing corporate prosecutions as compared to its US counterparts. Mr Green has made it clear that this is a source of frustration for the SFO, stating that "[w]e are subject to unfavourable comparisons with the US and this small amendment would make it much easier to hold a corporate to account in these circumstances. Obviously it's a matter for ministers and ultimately for parliament". The proposed amendment seeks to change this.

1. View the article at <http://www.telegraph.co.uk/finance/financial-crime/10613645/Firms-face-EU-blacklist-in-bribery-law-change.html>.

As Mr Green has noted, the future of the proposed amendment to Section 7 of the Act lies in the hands of UK ministers and Parliament. The proposed amendment has already been discussed with the UK's Attorney General, Solicitor General, and the Law Commission.

Implications

This latest development further underlines the SFO's increasingly tough approach when investigating corporates implicated in alleged bribery and corruption.² If the proposed amendment makes its way through the UK Parliament, it will be easier for UK prosecutors to succeed in prosecuting corporates. The potential for US-type levels of fines and stigma as well as a mandatory bar in being able to compete for certain public contracts under European public procurement rules emphasises, once again, the absolute need for corporates to fully understand issues of bribery and corruption and to ensure that they have adequate and appropriate safeguards in place to prevent financial crimes by employees.

We will provide an update as developments related the proposed amendment arise.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact the authors, **Kevin Robinson** (+44 (0)20 3201 5672; krobinson@morganlewis.com), **Nick Greenwood** (+44 (0)20 3201 5570; ngreenwood@morganlewis.com), and **Audrey Dwyer** (+44 (0)20 3201 5503; adwyer@morganlewis.com), or any of our white collar practitioners:

London

Nick Greenwood	+44 (0)20 3201 5570	ngreenwood@morganlewis.com
Kevin Robinson	+44 (0)20 3201 5672	krobinson@morganlewis.com
David Waldron	+44 (0)20 3201 5590	dwaldron@morganlewis.com
Iain Wright	+44 (0)20 3201 5630	iwright@morganlewis.com

Chicago

Merri Jo Gillette	312.324.1134	mgillette@morganlewis.com
Tinos Diamantatos	312.324.1145	tdiamantatos@morganlewis.com

New York

Leslie R. Caldwell	212.309.6260	lcaldwell@morganlewis.com
Kelly A. Moore	212.309.6612	kelly.moore@morganlewis.com
Martha B. Stolley	212.309.6858	mstolley@morganlewis.com

Philadelphia

Eric W. Sitarchuk	215.963.5840	esitarchuk@morganlewis.com
John C. Dodds	215.963.4942	jdodds@morganlewis.com
Eric Kraeutler	215.963.4840	ekraeutler@morganlewis.com
Matthew J. Siembieda	215.963.4854	msiembieda@morganlewis.com
Lisa C. Dykstra	215.963.5699	ldykstra@morganlewis.com
Nathan J. Andrisani	215.963.5362	nandrisani@morganlewis.com
Meredith S. Auten	215.963.5860	mauten@morganlewis.com
Alison Tanchyk	215.963.5847	atanchyk@morganlewis.com

San Francisco

Susan D. Resley	415.442.1351	sresley@morganlewis.com
-----------------	--------------	--

² For more information on the SFO's antibribery and anticorruption actions, see our 22 January 2014 LawFlash, "UK Government Steps Up Antibribery Enforcement", available at http://www.morganlewis.com/pubs/WhiteCollar_LF_UKStepsUpAntibriberyEnforcement_22jan14.

Morgan Lewis

Washington, D.C.

George J. Terwilliger III	202.739.5988	gterwilliger@morganlewis.com
Robert J. Bittman	202.739.5989	rbittman@morganlewis.com
Fred F. Fielding	202.739.5560	ffielding@morganlewis.com
Margaret M. Gatti	202.739.5409	mgatti@morganlewis.com
Matthew S. Miner	202.739.5987	mminer@morganlewis.com
Ronald J. Tenpas	202.739.5435	rtenpas@morganlewis.com
Kathleen McDermott	202.739.5458	kmcdermott@morganlewis.com
Scott A. Memmott	202.739.5098	smemmott@morganlewis.com

Wilmington

Colm F. Connolly	302.574.7290	cconnolly@morganlewis.com
------------------	--------------	--

Frankfurt

Jürgen Beninca	+49.69.714.007.19	jbeninca@morganlewis.com
----------------	-------------------	--

Moscow

Vasilisa Strizh	+7 495 212 2540	vstrizh@morganlewis.com
Nane Oganesyanyan	+7 495 212 2575	noganesyan@morganlewis.com

About Morgan Lewis's White Collar Litigation and Government Investigations Practice

With more than 60 lawyers, the firm's White Collar Litigation and Government Investigations Practice is one of the largest in the United States. The group is anchored by former high-level senior government officials, including the former counsel to the President of the United States, a former Deputy and Acting Attorney General of the United States, three former U.S. Attorneys, a dozen assistant U.S. Attorneys, numerous Assistant District Attorneys and Assistant States Attorneys, and alumni of the U.S. Securities and Exchange Commission. We represent companies and individuals across the entire spectrum of government investigations and white collar matters, from anticorruption and the Foreign Corrupt Practices Act to False Claims Act/qui tam litigation and compliance counseling. Our practice has been profiled by *Main Justice* in its "Best FCPA lawyers" directory and includes a number of fellows in the American College of Trial Lawyers. Learn more about the firm's White Collar Litigation and Government Investigations Practice at www.morganlewis.com/whitecollar.

About Morgan, Lewis & Bockius

Founded in 1873, Morgan Lewis offers more than 1,600 legal professionals—including lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—in 25 offices across the United States, Europe, Asia, and the Middle East. The firm provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some jurisdictions. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2014 Morgan, Lewis & Bockius. All Rights Reserved.