

Global Anti-Corruption Team
Bryan Cave, London

To: Our Clients and Friends

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SFO launches new initiative to encourage whistle-blowing

On November 1, 2011, the Serious Fraud Office (“SFO”) launched a new service, “SFO Confidential”, for company insiders to report in confidence suspected serious or complex fraud or corruption. The service launched a telephone hot-line providing access to a dedicated team of SFO operatives, as well as an on-line reporting system.

SFO Confidential is aimed at individuals who have gained knowledge of suspected fraud or corruption through their professional activities, and is intended to supplement the existing national fraud reporting service for victims or those directly affected by fraud. SFO Director, Richard Alderman, encouraged “Company executives, staff, professional advisors, business associates of various kinds or trade competitors” to talk to the SFO in confidence. SFO Confidential promises to protect the identity of whistle-blowers. It states that it will reveal a whistle-blower’s identity only on a “strictly need-to-know basis” or if ordered by a judge, and whilst information provided to SFO Confidential may be shared with other law enforcement agencies, details that might reveal the identity of the source of the information will be removed prior to sharing. Alternatively, a whistle-blower can choose to remain anonymous - calls to SFO Confidential are not recorded or traced. Whether in practice however, the identity of whistle-blowers can be protected remains to be seen.

The new service bears some similarity to the whistle-blowing program implemented in the United States by the SEC in June 2011. A key difference however, between the two regimes is that SFO Confidential does not offer any financial incentive to whistle-blowers. SFO Confidential appeals instead to the individual’s civic duty and/or self interest in preventing fraud and corruption (for example, promising to “level the commercial playing field” where a competitor is gaining business unfairly through fraud or corruption).

By comparison, under the US whistle-blower rules, an individual who voluntarily provides the SEC with original information that leads to a successful enforcement action resulting in a monetary sanction of more than US\$1 million is entitled to receive an award of between 10% and 30% of the total sanction. Clearly the possibility of receiving such an award will prove a substantial incentive to whistle-blowers, particularly in actions under the Foreign Corrupt Practices Act (“FCPA”) where sanctions can be very high, sometimes hundreds of millions of dollars. An interesting consequent development in the US is the cottage industry of lawyers and others who solicit potential whistle-blowers and who package their complaints for presentation to the SEC and other authorities. For further information on the US whistle-blowing regime, please see our Alert [“The Implications for FCPA Enforcement of the SEC’s New Whistleblower Rules”](#) dated June 22, 2011.

The SFO's powers expanded significantly in July this year when the Bribery Act came into force. The Bribery Act is robust new legislation that goes beyond the FCPA and the OECD Bribery Convention in that:

- it includes both foreign bribery as well as domestic (i.e., UK) bribery
- it makes acceptance of a bribe an offence
- it includes "private to private" bribery as well as bribery of public officials (including foreign officials)
- there is no "improper performance" element required for bribery of a foreign official, just intent to obtain business or a business advantage
- there is no statutory carve-out for facilitation payments or for reasonable and bona fide promotional expenses

Critically, the Bribery Act also introduced a new strict liability criminal offence for commercial organisations that fail to prevent bribery anywhere in the world by "associated persons" intending to obtain a business advantage for the organisation, unless the organisation has implemented "adequate procedures" to prevent bribery. "Associated persons" are persons anywhere who perform services anywhere for or on behalf of a relevant commercial organisation, including non-UK organisations that do business in the UK. For more information on the Bribery Act, please see our International Regulatory Bulletin "[UK Bribery Act Comes into Force](#)" dated July 1, 2011.

The SFO is the principal prosecutorial authority for the Bribery Act, and it has stated that it takes a wide view of its powers to prosecute companies. Commentators however, have questioned whether the SFO has the resources to enforce the Bribery Act, in light of its already tight budget and resources. As a result, it seems likely the SFO will need to rely heavily on information provided by whistle-blowers, hence the introduction of the new service.

As a result of the US whistle-blowing regime, SEC officials report a dramatic improvement in the quality of whistle-blowing, providing the US government with a better chance of securing convictions. It is unclear at this early stage whether SFO Confidential will prove equally successful, particularly in the absence of monetary incentives. Clearly, where whistle-blowers have knowledge of fraud or corruption subject to both the US and UK jurisdictions, the greater incentive will be to report under the US regime. Early commentators have also expressed some concern that the SFO's statements to the effect that business competitors could whistle-blow on each other under the protection of anonymity, may result in the SFO receiving a host of poorly founded allegations.

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