

**RECENT ENFORCEMENT ACTIONS BY U.K. SERIOUS FRAUD OFFICE AND  
INTRODUCTION OF NEW U.K. BRIBERY BILL IN PARLIAMENT DEMONSTRATE  
INCREASED FOCUS ON CORRUPTION**

In 2009, the Serious Fraud Office (the “SFO”) initiated the United Kingdom’s first overseas bribery cases, one against a company and another against an individual business executive. Further, in 2009 a new comprehensive bribery bill intended to simplify and clarify U.K. antibribery law was introduced before Parliament. These developments indicate an increased focus by the U.K. government and enforcement authorities on identifying, investigating and prosecuting acts of overseas bribery involving U.K. companies and/or individuals.

Most recently, on December 1, 2009, the SFO charged Robert John Dougall, former Vice President of Market Development for DePuy International Limited (“DPI”), a U.K.-based subsidiary of Johnson & Johnson, with conspiracy to corrupt, in violation of the Criminal Law Act 1977. Following the filing of the charges, Dougall appeared before the City of Westminster Magistrates’ Court and was released on bail. He is expected to appear before the Southwark Crown Court in February 2010. Dougall’s case was referred to the SFO by the U.S. Department of Justice (the “DOJ”) in March 2008 and is believed to be the first case in which the SFO has charged an individual business executive based on allegations of overseas bribery.

The SFO case against Dougall is based on allegations that, from February 2002 to December 2005, Dougall conspired to make corrupt payments or to give other inducements to medical professionals in the Greek public healthcare system in connection with the supply of orthopedic products. These allegations appear to arise out of an ongoing investigation by the U.S. Securities and Exchange Commission (the “SEC”) and the DOJ into potential violations of the U.S. Foreign Corrupt Practices Act (the “FCPA”) by leading manufacturers of orthopedic products, including Johnson & Johnson and its affiliates, such as DPI. On February 12, 2007, Johnson & Johnson voluntarily disclosed that “subsidiaries outside the United States are believed to have made improper payments in connection with the sale of medical devices in two small-market countries.” Johnson & Johnson went on to state that the payments may fall within the jurisdiction of the FCPA and that it would cooperate with the DOJ and SEC reviews of these matters.

In July 2009, a U.K. manufacturer of steel bridge equipment, Mabey & Johnson Ltd., pled guilty to corruption charges based on allegations that the company had sought improperly to influence decision-makers on public contracts in Jamaica and Ghana, as well as to charges that the company had breached United Nations sanctions in connection with the Iraq “Oil-for-Food” program. In September 2009, the company was sentenced to pay £6.6 million (\$10.7 million) in fines, confiscations, and reparations and to submit its internal compliance program for review by an SFO-approved independent monitor. This resolution was the result of the company’s voluntary disclosure to the SFO in February 2008 and was the first prosecution brought by the SFO against a company for overseas corruption. Further, prosecutors in the Mabey & Johnson case indicated that “[a] number of individuals are the subjects of investigation with regard to the corrupt business practices.”

The SFO has taken steps in order to encourage voluntary disclosures like the one made by Mabey & Johnson. In July 2009, the SFO issued guidance summarizing its approach to self-reporting. The guidance was intended to demystify the process of self-reporting, which, although increasingly common in the U.S., is unfamiliar in the U.K. The guidance lists various factors that the SFO will consider when it decides how to resolve matters that have been voluntarily reported, including the commitment by a company's board of directors to "resolving the issue and moving to a better corporate culture" and the preparedness of the company to work with the SFO regarding the scope and handling of any additional investigation. Further, the SFO guidance states that the timing of the disclosure will be a consideration in determining how the matter is to be resolved and specifically notes that, in cases potentially within both U.S. and U.K. jurisdiction, it would expect to be notified at the same time as the DOJ. The SFO guidance also describes the potential benefits of self-reporting, such as its preference that self-reported cases be resolved civilly rather than criminally, and states that failure to self-report might be considered as a negative factor if the SFO discovers a potential violation through other means.

In an open letter addressing questions raised since the July 2009 guidance, the Director of the SFO has provided further clarification on certain issues related to the SFO's new enforcement approach, most notably concerning the use of compliance monitors and the waiver of the attorney-client privilege and work product protections. The Director confirmed that the SFO will seek to impose compliance monitors in certain cases but stated that the SFO will seek to reach agreement with companies as to an appropriate monitor and the scope of monitoring. With regard to the attorney-client privilege and work product protections, the SFO expects self-reporting corporations to produce notes of interviews and factual reports, even if such production may waive otherwise applicable legal privileges. In this respect, the SFO appears to be taking a harder-line approach than that associated with current DOJ policy.

The SFO's recent enforcement efforts appear to be, at least in part, a reaction to the criticism the SFO and the U.K. government received as a result of their 2006 decision to close a high-profile inquiry into allegedly improper payments made by BAE Systems plc ("BAE") to secure arms contracts in Saudi Arabia. In 2008, the Organisation for Economic Co-operation and Development (the "OECD") publicly expressed "serious concerns" as to whether the decision to close the BAE inquiry was consistent with the U.K.'s obligations under the OECD Convention on Combating Bribery of Foreign Public Officials (the "OECD Convention"). The OECD Working Group on Bribery stated that it was "extremely disappointed and gravely concerned by the continuing lack of implementation of previous Working Group recommendations . . . that the UK enact [modern] foreign bribery legislation at the 'earliest possible date.'" Further, it raised concerns about the SFO's ability to investigate and prosecute cases effectively.

Perhaps prompted in part by this criticism, the U.K. government has recently taken steps to enact comprehensive antibribery legislation. On March 25, 2009, the U.K. Ministry of Justice published a new draft bribery bill for prelegislative scrutiny. The draft bill was aimed at replacing the existing antibribery legal regime, which has been criticized by Transparency International U.K. as "ineffective and out-of-date." Since its publication in March, the bill has been revised by the U.K. government in response to recommendations made by a Joint Committee of Parliament and was introduced in the House of Lords on November 19 as the Bribery Bill (the "Bill").

In addition to clarifying and consolidating U.K. antibribery law, the Bill includes several distinct features that will fundamentally change antibribery enforcement in the U.K.:

- The Bill creates a separate offense of bribery of a foreign public official. This is in contrast to the current antibribery laws, which originally were enacted as domestic bribery statutes nearly a century ago and were then amended in 2001 to apply to bribe recipients outside the U.K. Because of their antiquated origins and *ad hoc* development, these laws are often difficult to interpret and apply in the context of overseas bribery cases. The elements of the new offense, however, are modeled on those outlined in the OECD Convention and more clearly apply to overseas bribery.
- The Bill creates a new corporate offense: “failure of commercial organisations to prevent bribery.” Under this provision of the Bill, a company will be strictly liable for a bribe paid by an employee or agent of the company in order to obtain or retain business or a business advantage for the company, regardless of whether company management knew about or authorized the bribe. However, under the Bill, a company charged with failure to prevent bribery may assert a valid defense if it can prove that it had in place adequate procedures designed to prevent such conduct. The U.K. government has acknowledged that companies will require guidance on key aspects of the Bill, including the “adequate procedures” defense, and has announced that it intends to publish nonstatutory guidance on this and other points before the Bill comes into force.
- Both the Joint Committee and the U.K. government agree that local custom or practice should not be considered when evaluating conduct under the Bill. However, the Bill does create an exception for conduct that is permitted or required under the written law applicable to a foreign public official.
- The Bill increases penalties for bribery, authorizing unlimited fines for companies and a maximum ten-year prison sentence for individuals.
- Finally, it should be noted that, unlike the U.S. Foreign Corrupt Practices Act, neither current U.K. law nor the Bill permits facilitation or “grease” payments. However, both the Joint Committee and the U.K. government stated that in cases where payments are identified that are unlawful but small, they would expect prosecutors to adhere to the “concept of proportionality” in enforcement decisions.

Recent developments in the U.K. indicate an increased focus on the investigation and prosecution of overseas bribery. In addition, they suggest a marked shift toward enforcement procedures and methods typically used by U.S. enforcement authorities in FCPA cases. Specifically, the SFO has expressed a clear preference for self-reporting, internal investigations, and negotiated settlements through its guidance and enforcement decisions. In light of these developments, companies with significant ties to the U.K. should expect to be held to anti-corruption and antibribery standards similar to those applied to their U.S. counterparts. They should make certain that they have antibribery compliance programs in place that will adequately

detect and prevent overseas corruption and bribery. Moreover, where evidence of improper payments is uncovered, companies with a significant U.K. presence will need to consider whether self-reporting in the U.K. is warranted.

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