No trivial pursuit
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The SFO is engaging in more productive dialogue with companies to resolve problems of corruption, say Nick Gray and Jonathan Cotton

This year has seen increased enforcement activity by the Serious Fraud Office (SFO). Since late 2008, the SFO has publicly announced its investigation and/or disposal of cases ranging from mortgage frauds and boiler rooms to Ponzi schemes and high-value international corruption, including the latest chapter in its long-running scrutiny of BAE Systems.

On 26 October 2009, the SFO announced its use of a consent order to obtain civil recovery of over £5 million from Amec plc, a large international engineering company. Building on the cases of Balfour Beatty (October 2008) and Mabey & Johnson (September 2009), the Amec recovery order suggests that the SFO is increasingly confident and flexible in its approach to corporate liability, both civil and criminal, regarding corruption.

The SFO used its relatively new powers under Part 5 of the Proceeds of Crime Act 2002 (POCA) to obtain civil recovery from Amec regarding the company’s receipt of irregular payments. Amec agreed to pay both a settlement figure of £4,943,648 and the SFO’s costs in the recovery proceedings. Although few details are available publicly, it is possible to comment on some aspects of the case which may interest those advising companies, of whatever size, about corruption-related conduct.

Self-reporting and sufficient repentance

Having identified approximately $9m in “certain irregular receipts” by Amec between late 2005 and early 2007, the company “promptly” instructed external advisers to investigate. In March 2008, Amec reported itself to, and began cooperating with, the SFO.

It appears that the SFO gave at least some credit to Amec for its proactive and co-operative stance. This is similar to the earlier Balfour Beatty case and is in line with the SFO’s subsequent guidance regarding overseas corruption.

Furthermore, Amec also received credit for having improved its internal ethics, compliance and accounting standards and agreeing to appoint, and pay for, an independent monitor to review and report on those standards to the SFO. Remedial action is important to the SFO; its guidance states that a company’s willingness to adopt such measures is one of the first factors considered upon receipt of a self-report.

Setting the above points in the context of recent SFO exhortations, at conferences and in various publications, that companies should self-report, clients should understand the value of early engagement and cooperation. Nevertheless, clients must also appreciate the risks (eg a subsequent SFO prosecution, eventual adverse publicity, etc) and, therefore, carefully plan and manage any such discussions.

The civil recovery

Media reports suggest that Amec received “irregular payments” of some $9m in relation to a $1 billion bridge project in South Korea. However, Amec was not prosecuted for the offence of overseas corruption. As in the Balfour Beatty case, the company was held liable for not maintaining accurate accounting records, which is itself an offence. The United States has long used ‘books and records’ prosecutions against companies breaching the Foreign Corrupt Practices Act. For instance, the US Department of Justice fined Siemens $450m last year; this was part of the total $1.4 billion Siemens settlement with US and German authorities.

By contrast, Amec faced no criminal proceedings but agreed to a civil recovery order. Under Part 5 of POCA, the SFO’s director is able “to recover, in civil proceedings, property (widely defined) which is, or represents, property obtained through unlawful conduct (which must be criminal)”. Importantly, the test here is the civil balance of probabilities and not the criminal standard of proof. The alleged unlawful conduct was a failure to keep adequate accounting records as required by section 221 of the Companies Act 1985. Amec was never charged with any criminal offence. As the recovery process is a freestanding civil claim, the defendant need not be charged with, nor convicted of, any offence.

This article is not intended to provide legal advice, which should be sought on particular matters. If you would like to discuss the issues raised, please speak to Nick Gray or Jonathan Cotton or your usual contact at Slaughter and May.
Furthermore, and emphasising the broad scope of this regime, the respondent need not be the person that carried out the “unlawful conduct”. In contrast to the Amec case, which saw irregular receipts by a division (subsequently sold in mid-2007) of the company itself, Balfour Beatty faced civil recovery despite the fact that the relevant irregularities had occurred in the accounts of a subsidiary in a foreign joint venture. The civil recovery order is, therefore, a flexible and formidable weapon in the SFO’s arsenal.

Implications

The Amec case is the latest indication that the SFO is living up to the rhetoric surrounding its much-vaunted reformation: it is active, it is engaging with companies and it is pursuing alternatives to criminal prosecution.

The civil recovery orders against Balfour Beatty and Amec, the Mabey & Johnson criminal settlement, which was reported in the media as a “plea bargain”, and its publicised interest in a Vodafone acquisition in Ghana, suggest that the SFO is increasingly confident in its own abilities.

That confidence will grow if and when the Bribery Bill, which may impose strict liability on companies for bribery connected with their business, becomes law. In the meantime, it is safe to assume that the SFO will continue using both its carrot of civil resolutions and its various civil and criminal sticks to maximise results while minimising pursuit of lengthy, costly and risky investigations and prosecutions.

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