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UK SERIOUS FRAUD OFFICE DIRECTOR ALDERMAN VISITS AGAIN WITH GIBSON DUNN, DISCUSSES BRIBERY ACT ENFORCEMENT AND LAYS OUT ENGAGEMENT STRATEGY

To Our Clients and Friends:

On December 6, 2010, Richard Alderman, Director of the UK's Serious Fraud Office (SFO) visited Gibson Dunn's Washington, D.C. offices for an intimate discussion with our attorneys and a small group of clients. In a broad ranging discussion hosted by Gibson Dunn partners, Joel M. Cohen and F. Joseph Warin, Director Alderman offered helpful clarification regarding enforcement of the new UK Bribery Act, which comes into full effect in April 2011, by mapping out the SFO's intended enforcement strategy and trying to engender dialogue with corporations on sticky compliance issues and jurisdictional concerns. This was the second opportunity that the SFO provided to Gibson Dunn to discuss aspects of the Bribery Act,^[1] following an in-depth interview with Director Alderman and his senior staff in July 2010. According to Director Alderman, the SFO wants to engage companies as they enact compliant programs and provide guidance on its interpretation of the Act and its anti-corruption enforcement priorities. Moreover, he confirmed that the SFO sees transformative value in encouraging compliant companies to find ways to operate in the toughest countries. "It's good for ethical companies to do business in those countries. To have a set of rules that stops ethical companies from going in will penalize the people in those countries, and I do not want that to happen." Director Alderman emphasized throughout the discussion that he intends to use a principles-based approach to enforcement by using the Act to change behavior. Director Alderman's guidance on provisions of the Act, as well as his advice to companies that may find themselves under its jurisdiction, is discussed below.

Interpreting Provisions of the UK Bribery Act Gifts and Hospitality

Director Alderman acknowledged that Section 6 of the Act, as it applies to providing gifts and hospitality, was being interpreted by many commentators to mean that any such expenditure, regardless of the purpose or the amount, would run afoul of the Act. Director Alderman sought to clarify this point, stating that such an interpretation in his view is "extreme" and incorrect. He cited the UK Ministry of Justice's draft guidance, which recommends that companies read the provisions "in totality." In an important clarification,^[2] he explained that "sensible [and proportionate] promotional entertaining expenditure is not an offense under the Act." He explained that an offense is committed "when hospitality is done so that people will be induced to act in a certain way--when the expenditure is beyond what is sensible and proportionate."^[3] Rejecting the notion that even such expenses will be considered technical violations of the Act, he nonetheless added that the SFO cannot provide bright line guidance, because the difference between reasonable and violative expenditures is a "judgment call." Mr. Alderman noted that,

while the language of the applicable statutory provisions differs, sensible and proportionate expenditures are also "fine" with respect to entertaining private citizens. This clarification should provide some comfort to companies seeking to draft entertainment and marketing policies that follow the letter as well as the spirit of the Bribery Act.

Facilitating Payments

Director Alderman emphasized that facilitating payments are bribes and that under the Act, they are impermissible. When asked whether an FCPA-compliant program will satisfy the SFO, he emphatically stated, "the FCPA is out of line with respect to what is happening internationally," explaining that bribes are unlawful and that facilitating payments are bribes. According to Director Alderman, the SFO wants to see that companies "are committed to zero tolerance." When asked about particular scenarios, Director Alderman recognized that he was "sympathetic" to certain life and safety situations, but he did not condone carve-outs to a facilitating payments ban. For example, Director Alderman acknowledged that faced with a situation where an individual requiring medical care must accept a used needle, or pay \$10 to an official for a clean needle, the payment will be made. "That is not a problem for me, everyone will do what is sensible," he said. He cautioned, however, that the concept of duress "makes it quite easy for corruption to seep in" and that it could be used pretextually where there is no genuine duress.^[4] Director Alderman noted that companies had recently talked to the SFO about duress scenarios, and he suggested that through direct dialogue, the SFO can help companies work out practical steps with the ultimate objective of rooting out the underlying problem.

Jurisdiction

To provide some comfort regarding the Act's apparent broad jurisdictional reach, Director Alderman gave an example of the type of case he hopes to bring. He set out a scenario in which two companies, one UK-based and one from the United States, build factories in a remote town in a developing country. A local official tells both companies that it will take four months to activate their telephone service, but for some pocket money, he can do it the next day. Taking advantage of the FCPA's facilitating payments exception, the US company pays the man and gets phone service. The UK company's policy prohibits facilitating payments, in accordance with the Bribery Act, and so the factory remains shut for four months. Director Alderman said that if the US company conducts any business in the United Kingdom (thereby creating jurisdiction), he wants to consider whether to prosecute that company for having made the facilitating payment, because otherwise, the UK company is at a competitive disadvantage for its higher anti-corruption standards. He stressed as well that he wants to prosecute foreign companies that are within his jurisdiction and that use corruption to obtain contracts to the detriment of ethical UK companies. Mr. Alderman concluded, "our goal is to go after those individuals and corporations that have absolutely no intention whatsoever of living up to an anti-corruption culture, and want to use corruption to undercut good, clean companies. We want to identify those undercutting clean companies and have some pretty vigorous enforcement actions against them." He added that "the policy consideration is that I can support UK companies and stop them from being undercut by corrupt activities elsewhere."^[5]

Director Alderman noted, however, that the jurisdictional provisions of the Act have not yet been interpreted by UK courts, which means the SFO's assertions of jurisdiction over foreign companies can be subject to review. Director Alderman said that he wishes to adopt an aggressive interpretation of the Act's jurisdictional reach, but he acknowledged that the SFO will have to think, "can I persuade a judge and jury that you are carrying on business in the UK" in deciding whether to assert jurisdiction over a particular business.

As discussed further below, Director Alderman mentioned avenues for judicial review and seemed to be communicating that parties and non-parties alike might use the courts to constrain overly broad assertions of jurisdiction by the SFO.

Liability of Corporate Officers and Directors

Director Alderman said that senior officers who have "consented or connived in bribery" will be an important target for the SFO, especially if they are in the United Kingdom. Discussing the degree of knowledge required, he explained that if someone were "completely ignorant, [he or she] would not have the requisite mental intent." However, if people "turn a blind eye, that is connivance."

Judicial Review of SFO's Interpretations

Director Alderman told the participants that in the United Kingdom, the SFO's assertion of jurisdiction, or its interpretation of other provisions of the Bribery Act, can be challenged in court even before a resolution is reached, as early as when the SFO notifies a corporation that it wants to begin an investigation. According to Director Alderman, using a mechanism called "judicial review," companies, as well as other third parties, including non-governmental organisations and media outlets, can challenge the SFO's actions by arguing that a prosecutor has acted unlawfully or in a manner that is disproportionate or unreasonable. Recognizing the benefits to this system, Director Alderman said, "that certainly brings about transparency," and he noted that the possibility of having to defend decisions "affects everything [SFO prosecutors] do." While acknowledging the burden of defending such actions, Director Alderman concluded that "ultimately, it is in all our interests to get an opinion from the judge as soon as possible." Director Alderman noted that because there is no equivalent of US standing requirements, non-governmental organisations could also challenge SFO settlements saying that the SFO was not "tough enough" on the company. Determinations from judicial review can be appealed to the UK's highest court.

Implementing UK Bribery Act Controls

Mr. Alderman reassured companies that they "will not lack for guidance," noting the draft guidelines published in September 2010, which will be finalized in the spring, as well as forthcoming guidance to prosecutors on enforcement and to companies on adequate procedures, which is expected in January 2011. Mr. Alderman also encouraged companies with questions on the Act to consult with the SFO and to bring their compliance programs to the SFO for review. "We cannot give you a certificate that what you have done is adequate. But we can say, 'Have you thought about this? Or looked at that?'" Mr.

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Alderman also urged that the SFO will not follow up to ask the company whether it has incorporated its suggestions, and he reassured participants that program consultations were not being used by the government to identify potential new cases. Mr. Alderman said, "It is not our job to try to catch anyone out, and we do not build up a library of areas of concern with which to hit the company later. We just talk through what you are finding." Mr. Alderman also encouraged companies to bring challenging or unclear issues to the SFO for clarification. He noted that doing so demonstrates that the company "want[s] to play with us and build up the anti-corruption culture." Uttering words perhaps not generally heard from US regulators, he added, "When companies approach us, I am very happy to help."

Mr. Alderman provided some examples of issues that have been discussed with the SFO:

- The "rulebook" on when it is okay to make an approval decision on the local level, versus when it needs to be escalated.
- Particular problems with facilitating payment demands, or other corruption-related challenges, in difficult jurisdictions.
- Whether facilitating payments should be permitted where life, health, and safety are at issue.
- How to best mitigate third-party risks when contractual provisions limit a company's ability to audit or control business partners.
- The level of due diligence appropriate under Section 8 for proposed transactions.
- How to address and ultimately eliminate situations of apparent duress.

Mr. Alderman also acknowledged that companies may require a transition period between the time the Act takes effect and the time they are fully compliant, in particular with respect to ceasing all facilitating payments. Nonetheless, Director Alderman advised that companies should put a "high priority" on stopping facilitating payments. He emphasized that the key will be to demonstrate to the SFO a commitment to full compliance and zero tolerance. He said that once a company explains to the SFO its plan for eliminating facilitating payments, the SFO will be "happy to let you get on with it." He cautioned, however, that if a company is "resolute" on continuing to use facilitating payments, "then, I prosecute."

Mr. Alderman also pledged to assist companies, where possible, in finding leverage in particularly challenging jurisdictions to address the demand side of corruption. He noted examples where companies had approached him with concerns about increasing demands for facilitating payments. Mr. Alderman recalled that, by raising the profile of the issue with the local government and providing advice to the corporations about other tactics they could use to do business cleanly, the SFO helped the companies eventually stamp out the

demand for bribes. Director Alderman said, "we are willing to engage in that level of discussion about facilitating payments."

Finally, Mr. Alderman praised a "risk-based approach" to compliance programs. He said that the "gold standard" corporations he speaks with operate on a risk-basis, although he recognized that companies that have not been "doing anti-corruption for a long time" may not be ready to operate on that model and that the "gold standard" will look different for small- and medium-sized companies. Returning to his engagement strategy, Director Alderman noted that working with companies to evaluate and enhance their compliance programs helps the SFO understand what is pragmatic and practical for companies in different circumstances.

Reporting to the Serious Fraud Office

Director Alderman urged corporations to consider the SFO when they work with their counsel to decide whether to self-report and, if so, to develop a strategy for doing so in multiple jurisdictions where appropriate. He acknowledged that a US corporation may first report to the US government, but if there are "major" UK implications, "we would expect you to come in." Recognizing that global settlements are "an issue" under existing UK legislation, he said that he is committed to making them work "because they are what business wants and needs, and what the SFO wants and needs." Director Alderman also addressed the SFO's view on the appropriate time for reporting and how he views participation from senior company executives in the reporting process to be positive.

Discussing how the SFO learns of possible cases, Director Alderman noted that the SFO and DOJ are in communication with each other "every day," although reporting to the SFO does not necessarily mean the SFO will pick up the phone and call DOJ that same day. He said that it is for the professional advisors to advise their clients on the best way of engaging the SFO and the DOJ as well as other authorities. Director Alderman noted that he has learned of cases from other regulators, as well as from non-governmental organisations and media stories, among other sources.

[1] Gibson Dunn Alert, "UK Serious Fraud Office Discusses Details of UK Bribery Act with Gibson Dunn."

[2] Director Alderman's comments are a helpful corrective to the perception that the SFO viewed many common forms of gifts and hospitality as violation of the Acts, albeit technical ones. *See* Gibson Dunn Alert, September 7, 2010.

[3] In the draft guidance, the Ministry provides that reasonable expenditures are permissible, stating, "reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognized as an established and important part of doing business." UK Ministry of Justice, "Consultation on guidance about

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commercial organisations preventing bribery (Section 9 of the Bribery Act 2010)," CP11/10 (14 Sept. 2010).

[4] Similarly, the draft guidance from the Ministry of Justice says, "[e]xemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and business partners, and have the potential to be abused." UK Ministry of Justice, "Consultation on guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)," CP11/10 (14 Sept. 2010).

[5] The boundaries of how countries should consider domestic economic interests in their enforcement strategy are addressed by the Organisation for Economic Co-operation and Development in its 2009 recommendations. OECD, "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions," Annex 1, Article 5, (26 Nov. 2009).



Gibson Dunn attorneys in the United States and United Kingdom are experienced advisors on the design and implementation of anti-corruption programs, investigating and advising on issues arising under anti-corruption laws, and questions of reporting. If your organisation has experienced potentially problematic conduct, our attorneys can work with you to make the initial determination of whether to self-report and, if so, to devise a coordinated strategy for working with US and UK regulators.

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