

## The UK's Serious Fraud Office Announces New Whistleblowing Service

### Introduction

On 1 November 2011, the UK's Serious Fraud Office (the "**SFO**") announced the launch of a new service to allow whistleblowers to report suspected fraud or corruption in confidence. The service is an additional tool in the SFO's armoury in the fight against complex economic crime. The SFO's ability to combat bribery and corruption was also increased in July 2011 with the implementation of the Bribery Act 2010 (the "**Bribery Act**"). The introduction of this new service for whistleblowers could bring us closer to the first corporate prosecution under the Bribery Act.

### The Service

The new whistleblowing service has been named "SFO Confidential" and allows information to be given over the telephone, through a secure web portal, by email or in writing. The service has been set up to be attractive to whistleblowers in that it offers them a degree of anonymity. The SFO's website states:

*"We will not disclose your identity to anyone unless they can show us that they have a genuine need to know it. We may also have to disclose it if a judge orders us to – but those situations are very rare...So that we can offer you the best protection we can, we would prefer to know your full identity, but you are free to remain anonymous if that is what you want."*

The element of anonymity will perhaps attract a broad range of whistleblowers beyond competitors and disgruntled employees. Indeed, Richard Alderman, the Director of the SFO, indicated in the press release launching the service that they hope for reports from a range of individuals when he said:

*"Company executives, staff, professional advisors, business associates of various kinds or trade competitors can talk to us in confidence."*<sup>2</sup>

However, it remains to be seen the extent to which the SFO will be able to maintain the anonymity of a whistleblower if an investigation progresses into a prosecution. Furthermore, if the SFO investigates a complaint from a whistleblower and finds that there are no grounds for prosecution then it would appear that there is no protection for the whistleblower from potential claims for defamation.

<sup>1</sup> <http://www.sfo.gov.uk/fraud/sfo-confidential---giving-us-information-in-confidence.aspx>

<sup>2</sup> <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/blow-the-whistle-new-route-for-insiders-to-unmask-fraud-and-bribery.aspx>

Significantly, this new service also does not provide for rewards for information, in contrast to the whistleblower provisions of the US Dodd-Frank Act. Under the US legislation, a whistleblower is entitled to "not less than 10 percent" and "not more than 30 percent" of the monetary sanctions collected in related enforcement actions resulting in monetary sanctions greater than US\$1,000,000. Accordingly, there is a significant financial incentive for whistleblowers in the US. The lack of similar incentives in the UK may limit the number of people willing to come forward with information.<sup>3</sup>

It should also be noted that the US legislation limits the type of people who can collect a reward to prohibit legal, audit and compliance personnel from acting as whistleblowers. Although there is no similar exclusion for the SFO's service and it states that even "professional advisors" can use the service, it is probable that professional advisors such as lawyers and accountants will be prevented from using the service due to their respective professional conduct rules.

## What Companies Should Be Doing

Obviously there is no direct action that companies need to take as a result of the announcement of this whistleblowing service. However, it is perhaps a statement of intent from the SFO that, despite its limited budget, it is committed to uncovering fraud and corruption and, accordingly, companies should ensure that they have appropriate policies and procedures in place to prevent such practices in their business activities.

This is particularly relevant for organisations which are either incorporated in the UK or which have a business presence or business activity in the UK and which may fall within the jurisdiction of the "corporate offence" in the Bribery Act. This offence is committed when a person associated with an organisation bribes another person with the intention of obtaining or retaining for the organisation, business or an advantage in the conduct of business. It is a defence if the organisation can demonstrate that it had in place "adequate procedures" designed to prevent associated persons from committing bribery offences.<sup>4</sup>

The announcement of the whistleblowing service is an additional incentive for companies to ensure that they are tackling bribery and corruption and have "adequate procedures" in place. This is because, it is possible, for example, that a company falling within the jurisdiction of the corporate offence of the Bribery Act which operates in a country where bribery is rife and where that company has not tackled the bribery problem, may be the subject of an anonymous tip-off to the new whistleblowing service. The tip-off might even be made by a malicious trade competitor which operates similar business practices but does not fall within the jurisdiction of the Bribery Act.

In devising and implementing their policies and procedures to combat bribery, companies should ensure that there are clear procedures for internal reporting to enable an employee or agent of the company to alert the company to suspicious activities. This will mean that employees are less likely to go to the SFO as a first point of contact and the company will be able to investigate and assess adequately the merits of the complaint and whether it needs to self-report to the SFO.

## Conclusion

It will be interesting to see whether the new service will lead to an increase in prosecutions for fraud and corruption by the SFO or whether the funding problems faced by the SFO will hinder its investigation of any complaints it does receive. Furthermore, given that anonymity cannot be guaranteed, it may be that the only people likely to use the service will be competitors and disgruntled employees. In any event, the announcement of this service is a further

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<sup>3</sup> For more information on the whistleblower provisions adopted by the SEC see: <http://www.sidley.com/sidleyupdates/Detail.aspx?news=4828>

<sup>4</sup> For more information on the implications of the Bribery Act see: <http://www.sidley.com/sidleyupdates/Detail.aspx?news=4780>

reminder to and incentive for companies to ensure that they have their houses in order on these issues. None of them wants to be the subject of the SFO's first corporate prosecution under the Bribery Act.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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