

KIRKLAND ALERT

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Serious Fraud Office Brings Overseas Corruption Charges Against British Executive

On December 1, 2009, Britain's Serious Fraud Office ("SFO") launched its first prosecution of a British executive for overseas corruption. The SFO is the lead agency in England, Wales, and Northern Ireland responsible for investigating and prosecuting cases of corruption.

The case concerns Robert John Dougall, a former vice-president of DePuy International, a subsidiary of Johnson & Johnson, a U.S. company. Dougall has been charged with conspiring with DePuy between 2002 and 2005 to pay bribes to entice Greek health officials to buy orthopedic equipment and other medical devices. The SFO has not commented on whether similar charges would also be brought against DePuy.

The case against Dougall was referred to the SFO by the United States Department of Justice and stems from a larger U.S. investigation of five healthcare companies — Johnson & Johnson, Biomet, Zimmer, Smith & Nephew, and Stryker — for paying kickbacks to U.S. surgeons as well as giving them trips and expensive perks in exchange for buying the companies' products. In 2007, the five companies agreed to pay fines totaling \$311 million to settle the matter, while continuing to deny any wrongdoing. In February of that same year, Johnson & Johnson voluntarily disclosed to the Justice Department and the U.S. Securities and Exchange Commission that it believed its subsidiaries outside of the United States had made improper payments in connection with the sale of medical devices in two small-market countries.

In the UK, the SFO has recently been under increasing pressure to bring high-profile cases against British executives pursuant to the UK's anti-bribery laws in an effort to deter such behavior by British companies overseas. The SFO's movement towards heightened enforcement parallels trends in the United States, where both the Justice Department and the SEC have stepped up investigations under the Foreign Corrupt Practices Act and now regularly seek dramatically larger fines. For example, in January 2009, KBR reached a \$579 million resolution with DOJ and the SEC for bribing Nigerian officials for contracts. In comparison, prior to 2004, the largest FCPA resolution was a combined settlement in 1994 for \$24.8 million.

The SFO has also been following the lead of governmental authorities in the United States (in particular, the Department of Justice) regarding the issue of self-reporting by corporations of potentially corrupt practices. The SFO's new guidance provides a clear statement on the advantages and disadvantages of self reporting. The advantages include: (i) the availability of a civil sanction rather than a criminal prosecution; (ii) the opportunity to work with the SFO to minimize negative publicity; and (iii) the avoidance of an automatic bar (that is, an exclusion) from involvement in public contracts. On the other hand, an active decision not to self-report would be considered a negative factor that is likely to increase the chance of a criminal prosecution.

The challenges posed to international business by these changes at SFO are compounded by the fact that simultaneous investigations and prosecutions by multiple governments for alleged corrupt activities are not uncommon. The SFO's latest move demonstrates that it will seriously pursue referrals from the Justice Department and work with U.S. officials in investigating and punishing illegal activities on both sides of the Atlantic. Moreover, cooperation among anti-bribery enforcement agencies in different nations has become far more common. As a result, international business entities faced with allegations of improper payments can expect to be investigated and potentially to face criminal or civil proceedings in multiple countries cooperating with each other. Companies should ensure that proper controls are in place to prevent misconduct and should seek outside counsel immediately if they become aware of potential wrongdoing.

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