

White Collar Defense and Investigations Client Alert

New UK Bribery Act Guidance Covers Facilitation Payments, Self-Reporting and Hospitality

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On October 9, 2012, the United Kingdom's Serious Fraud Office ("SFO") issued revisions to its official Guidance for the Bribery Act of 2010 ("Revisions"). While lacking the force of law, the Guidance provides insight on how the SFO intends to interpret and implement the Bribery Act.^[i] The UK Bribery Act itself has been described as "the toughest anti-corruption legislation in the world." With respect to bribery of foreign officials, it largely mirrors the United States Foreign Corrupt Practices Act ("FCPA").^[ii] Unlike the FCPA, however, the UK Bribery Act does not provide for an express exception or defense for facilitation payments or for reasonable and bona fide gifts and hospitality for government officials. The UK Bribery Act also purports to have a very broad extraterritorial reach, governing all companies doing business in the UK, whether or not they are UK companies and regardless of whether there is any nexus between the conduct that allegedly violates the Act and the UK.

The Revisions address three areas:

- Self-reporting (voluntary disclosure). While the SFO had previously indicated a willingness to settle most matters that are self-reported, it has now stressed that self-reporting will be only one of several factors it will consider in determining whether to prosecute a matter criminally or settle it civilly.

- Facilitation payments. The Revisions stress that there is no exception to the UK Bribery Act for facilitation payments, although such payments will be prosecuted only if the evidence and the public interest weigh in favor of doing so.
- Hospitality. The Revisions clarify that hospitality expenditures are acceptable, provided that they do not reach the level of bribes.

Effects of Self-Reporting

In prior statements, the SFO had taken the position that self-reported cases would be resolved with a civil resolution rather than a criminal one "wherever possible." The SFO had also stated that it would generally encourage the company to investigate the issue itself, apparently in lieu of an SFO investigation.^[iii] Observers such as the Organisation on Economic Co-operation and Development ("OECD") took issue with that position, referring to it as potentially "overly generous."

In the Revisions, the SFO attempts to address those concerns and explains that self-reporting will only be one factor in determining whether a matter will be subject to criminal prosecution. The SFO's decision on whether or not to prosecute will depend on the criteria set forth in the UK's Full Code Test, which contains standards for the exercise of prosecutorial discretion, and other applicable prosecution

guidance. Under the Full Code Test, prosecutors must weigh the strength of the evidence and the public interest in determining whether to prosecute an offense. The Revisions also indicate that, to be effective, the self-reporting must “form part of a genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.” The Revisions also provide that even if the SFO decides not to prosecute, it may still attempt to recover the proceeds of the improper activity through a civil proceeding.

The SFO takes the position that the Revisions are a clarification rather than a change in approach from its prior statements on the subject. Whether the Revisions are a departure or just a clarification is difficult to say, as there have been no enforcement cases under the Bribery Act to date testing these provisions. Be that as it may, it is fair to say that the Revisions are consistent with the U.S. Department of Justice’s approach on voluntary disclosure insofar as they view self-reporting as only one factor among many to be considered in determining how to approach dealing with a company in a foreign bribery matter.

Facilitation Payments

Unlike the FCPA, The Bribery Act contains no exception for facilitation payments. The Revisions confirm that all facilitation payments are considered bribes, regardless of size or frequency. However, the Revisions point out that such payments will not necessarily be prosecuted if they do not rise to a certain level. This is consistent with the prior Guidance, which indicated that there is no exception to the Bribery Act for facilitation payments. But the Revisions, unlike the original Guidance, anchor this principle in the Full Code Test, stating that prosecution for facilitation payments will occur only if “there is a realistic prospect of prosecution” and “it is in the public interest to do so.” For

example, the SFO’s Q&A explains that if the matter is a “serious or complex case” involving facilitation payments, that fact will weigh in favor of prosecution.

Hospitality Expenditures

The FCPA contains an affirmative defense for reasonable and bona fide hospitality provided to government officials, such as travel and lodging expenses directly related to the promotion, demonstration or explanation of products or services or to the execution or performance of a contract. The Bribery Act contains no such defense. The Guidance, however, states that hospitality payments are acceptable, provided that they are reasonable, proportionate, and made in good faith. The Revisions further clarify that point, stating that “[b]ona fide hospitality or promotional or other legitimate business expenditure is recognized as an established and important part of doing business,” and will not be prosecuted if it does not rise to the level of a bribe. Again, the Full Code Test is cited as the touchstone upon which the decision whether to prosecute will be based.

Conclusion

The Revisions reconfirm the broad reach of the UK Bribery Act. A payment to a government official, however small, may be prosecuted under the Act, and reporting such a payment to the authorities will not necessarily enable a company to avoid criminal prosecution. The Revisions thus provide yet another reason why it is imperative for companies to implement strong compliance programs to prevent violations and to discover, investigate and remediate any violations that do occur.^[iv]

The full text of the Serious Fraud Office’s revisions can be found here: <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>

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- [i] Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, March 30, 2011.
- [ii] The UK Bribery Act also covers bribery of domestic officials and private sector bribery. That type of conduct is also criminalized by U.S. law but under separate statutes.
- [iii] OECD, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom, March 2012 at 31, citing SFO's Approach to Dealing with Overseas Corruption, paras 11-13; see also Feb. 15, 2011 Speech by Chris Walker, SFO Head of Policy (indicating that many self-reported cases can be handled civilly and, after self-reporting, a company will likely be able to carry out its own investigation and then sit down with the SFO to decide how to handle the matter).
- [iv] For additional explanation of the Bribery Act, its Guidance and a comparison with the FCPA, see the Jenner & Block advisories. [U.K. Enacts Bribery Act 2010 as a Major Foreign Bribery Legislative Reform](#); [U.K. Ministry of Justice Proposes Guidance on Implementation of the 2010 Bribery Act's "Adequate Procedures Defense"](#); and [U.K. Publishes Official Guidance for Bribery Act of 2010](#)

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