

foreign corrupt practices act lawflash

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Serious Fraud Office Gets Tough in UK Bribery Act Enforcement Guidelines

Self-reported Bribery Act violations will no longer be resolved “civilly whenever possible,” while facilitation and hospitality payment violations become subject to the Full Code Test.

On October 9, the UK Serious Fraud Office (SFO) published revised policies for the Bribery Act of 2010 (Revised Policies), toughening its positions on self-reporting, facilitation payments, and hospitality expenditures.¹ The revisions, which take “immediate effect” and “supersede[] any [previous] statement of policy or practice,” appear to be a direct response to the Organisation for Economic Co-operation and Development’s (OECD’s) recent criticism of UK authorities for “increasingly relying on civil recovery orders which require less judicial oversight and are less transparent than criminal plea agreements.”² Companies should note that the Revised Policies affect decisions regarding self-reporting, as they can no longer rely on self-reported violations being resolved civilly, and subject facilitation and hospitality payment violations to the Full Code Test.

Self-Reporting

Revised Policies

The Revised Policies on self-reporting contrast sharply with guidelines from the SFO’s July 2009 “Approach to Dealing with Overseas Corruption,” which signaled preferential treatment for companies that reported their own wrongdoing.³ Whereas the former guidelines claimed that the SFO “want[ed] to settle self referral cases . . . civilly wherever possible,” the Revised Policies state that self-reporting may be taken into consideration as a “public interest factor” against prosecution where the report “form[s] part of a ‘genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice.’”⁴

This mention of a “public interest factor” is a reference to the second part of the UK Crown Prosecution Service’s two-pronged “Full Code Test,” which is used in determining whether authorities should prosecute a corporation for Bribery Act violations. The SFO reaffirmed its endorsement of the Full Code Test—outlined in the Code for Crown Prosecutors⁵—in its Revised Policies. The test first requires that authorities “be satisfied that there is sufficient

1. Serious Fraud Office, “Revised policies” (Oct. 9, 2012), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>.

2. Org. for Econ. Co-operation & Dev., “Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom,” at 5 (Mar. 2012), available at <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/50026751.pdf>. The SFO provided the following three purposes for issuing the Revised Policies: (1) to “restate the SFO’s primary role as an investigator and prosecutor of serious or complex fraud, including corruption”; (2) to “ensure there is consistency with other prosecuting bodies”; and (3) to “meet certain OECD recommendations.”

3. Serious Fraud Office, “The Serious Fraud Office’s Approach to Dealing with Overseas Corruption” (July 2009).

4. Revised Policies (quoting “Guidance on Corporate Prosecutions,” available at http://www.sfo.gov.uk/media/65217/joint_guidance_on_corporate_prosecutions.pdf).

5. See UK Crown Prosecution Service, Code for Crown Prosecutors (Feb. 2010), available at <http://www.cps.gov.uk/publications/docs/code2010english.pdf>; see also “Bribery Act 2010: Joint Prosecution Guidance of the Director of the

evidence to provide a realistic prospect of conviction against each suspect on each charge.” If such evidence exists, authorities then must assess whether the prosecution is in the “public interest.” As explained in the Code for Crown Prosecutors, “A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal.” With this revision, the SFO has relegated self-reporting to one consideration in a multifactor “public interest” analysis for determining whether to prosecute a Bribery Act violation. As stated in the Revised Policies, “Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.”

Implications

The Revised Policies change the equation for potential self-reporters because they can no longer expect voluntarily disclosed Bribery Act violations to be resolved “civilly whenever possible.” Potential self-reporters must also weigh the risk of UK authorities reporting their conduct to foreign regulators. In the Revised Policies, “the SFO [expressly] reserves the right . . . [to] lawfully . . . provide information on the reported violation to other bodies (such as foreign police forces).”

The SFO’s Revised Policies also appear to be directed at aligning Bribery Act enforcement more closely with that of the law’s U.S. counterpart, the Foreign Corrupt Practices Act (FCPA). While U.S. Department of Justice (DOJ) officials have repeatedly stated that self-reporting is an important factor in determining how prosecutors resolve a particular action,⁶ recent studies have shown that voluntary FCPA disclosures offer no guarantee of leniency.⁷

Facilitation Payments

Revised Policies

In its Revised Policies for facilitation payments, the SFO noted that such payments are and always have been considered illegal in the United Kingdom. The Revised Policies state, “Facilitation payments were illegal before the Bribery Act came into force and they [remain] illegal under the Bribery Act regardless of their size or frequency.” While this statement is accurate as to the law, a 2011 guidance issued jointly by the SFO and the Crown Prosecution Service contained “factors tending against prosecution,” including a company’s having a clear policy regarding such payments as well as written procedures for handling requests for such payments.⁸ The same guidance observed, moreover, that “[a] single small payment [was] likely to result in only a nominal penalty.”⁹

Under the Revised Policies, prosecution decisions for facilitation payment violations will be governed by the Full Code Test. Thus, as noted above, if there is “sufficient evidence to provide a realistic prospect of conviction” and “public interest factors tending against prosecution” do not “outweigh those tending in favour” of it, authorities will prosecute the violator.

Serious Fraud Office and the Director of Public Prosecutions” (April 2011), *available at* http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/index.html (endorsing the Full Code Test as set out in the Code for Crown Prosecutors).

6. See, e.g., Assistant Attorney Gen. Lanny A. Breuer, U.S. Dep’t of Justice, Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html> (“I can assure you that if you do not voluntarily disclose your organization’s conduct, and we discover it on our own, or through a competitor or a customer of yours, the result will not be the same.”). Commentators expect a forthcoming DOJ FCPA guidance to address more concretely the issue of self-reporting FCPA violations.

7. See Stephen J. Choi & Kevin E. Davis, “Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act” (N.Y.U. L. & Econ. Research Paper No. 12-15, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487.

8. “Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.”

9. *Id.*

Implications

Corporations and individuals should not assume a lack of “public interest” in prosecuting minor bribes. In a 2010 case predating the Bribery Act, UK authorities prosecuted an individual for corruptly giving a county council employee a DVD/VCR player, £100 in PayPal credits, and £100 in cash.¹⁰ In 2011, UK authorities prosecuted a court clerk under the Bribery Act for accepting £500 for removing minor driving offenses from official records.¹¹

The Bribery Act's prohibition of facilitation payments continues to contrast starkly with the FCPA's exception for facilitation payments. The FCPA permits payments “[t]o expedite or to secure the performance of a routine governmental action,” which is defined as “an action which is ordinarily and commonly performed by a foreign official.”

Business Expenditures, Including Hospitality Payments

Revised Policies

While the Revised Policies recognize that bona fide hospitality expenditures are “an established and important part of doing business,” they warn that companies may be prosecuted for bribes disguised as legitimate business expenditures. Whereas previous guidelines accepted hospitality expenditures as long as they were “reasonable, proportionate and made in good faith,” the Revised Policies offer no such guarantee.¹² Any hospitality payment violations, similar to facilitation payment violations, will be subject to the Full Code Test.

Implications

In September 2012, SFO director David Green suggested that his agency was not interested in prosecuting companies for hospitality payments, such as for sporting tickets and alcohol. Green stated, “The sort of bribery we would be investigating would not be tickets to Wimbledon or bottles of champagne. We are not the ‘serious champagne office.’”¹³ The Revised Policies, however, fail to provide companies with any clear guidance about when seemingly bona fide entertainment expenditures may be classified bribes.

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- Tax

10. See *Webster v. Regina*, [2010] EWCA (Crim 2819), Case No. 201003829C1.

11. Press Release, UK Crown Prosecution Service, “Court officer admits taking bribe in first prosecution under Bribery Act” (Oct. 14, 2011), available at http://www.cps.gov.uk/news/press_releases/127_11/.

12. “Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.”

13. Bruce Carton, “SFO: ‘We Are Not the Serious Champagne Office,’” *Compliance Week* (Sept. 5, 2012), available at <http://www.complianceweek.com/sfo-we-are-not-the-serious-champagne-office/article/257668/>.

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