

Litigation Alert

New SFO Director Updates Bribery Act Guidance

October 16, 2012

On October 9, 2012, the Serious Fraud Office (SFO), the enforcement agency for the UK Bribery Act, revised its guidance in relation to three aspects of the Act: self-reporting, facilitation payments and hospitality expenditure. These revisions have been flagged as a priority by the SFO's new Director, David Green QC (who took up the role in April this year) and a key aim of the new guidance is to *"restate the SFO's primary role as an investigator and prosecutor of serious and/or complex fraud"* rather than being seen as a regulator of or an advisor to businesses. To read the SFO press release that includes full details on the revised policies, click [here](#).

In taking a somewhat tougher line, the new Director may be seeking to counter recent criticisms of the SFO, in particular in relation to the troubled investigation into the Tchenguiz brothers and Kaupthing Bank, which was finally dropped by the SFO late yesterday.

The three key aspects of the revised guidance are discussed in turn below.

Self-Reporting

The previous guidance, and various statements by the previous SFO Director, actively encouraged self-reporting and indicated that such action would make it more likely that any subsequent sanctions would be in the form of civil settlements or civil recovery orders, rather than criminal prosecutions.

However, the revised guidance appears to take a more stringent approach. While acknowledging that self-reporting may *"be taken into consideration as a public interest factor tending against prosecution"* the revised guidance also makes clear that *"Self-reporting is no guarantee that a prosecution will not follow [and that] Each case will turn on its own facts"*.

There is no longer any indication that the SFO has a preference for self-reporting, nor that such actions might assist offending companies in avoiding criminal prosecution. While it was always the case under the previous guidance that any prosecution following self-reporting was ultimately a matter for the SFO's discretion, this change in emphasis indicates a tougher stance from the new Director, with the new guidance stating expressly that these *"revised policies make it clear that there will be no presumption in favour of civil settlements in any circumstances."*

Meanwhile, the Ministry of Justice is in the process of drafting proposals on Deferred Prosecution Agreements. It is not currently clear when those proposals will be published, but plainly they could be of some importance in the context of the Bribery Act generally and, specifically, in the context of self-reporting.



Facilitation Payments

The revised guidance reiterates the position that “a facilitation payment is a type of bribe and should be seen as such” and that such payments “were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency”. While these statements are in line with the previous guidance, what has been removed are previous references to the fact that facilitation payments are endemic in some countries and that eradication of such payments would inevitably take some time.

The previous Director of the SFO had indicated in public statements that he would wish to see companies were “moving in the right direction” as to facilitation payments. The new Director, in removing references to eradication over time, is perhaps signalling a tougher line. However, the revised guidance also reiterates that a prosecution based on facilitation payments, as with hospitality, would only be pursued where there is both a realistic prospect of obtaining a conviction and where it is in the public interest that the case be prosecuted. In that context, it appears that the revised guidance provides a change in emphasis rather than a change in substance in the SFO’s position on facilitation payments.

Hospitality Expenditure

The SFO has confirmed its previous position that “Bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business” while also noting that “bribes are sometimes disguised as legitimate business expenditure.”

In a statement accompanying the publication of the revisions, the SFO clarifies that a prosecution in relation to bribes disguised as hospitality expenditure will only occur “if (a) the case is a serious or complex one that falls within the SFO’s remit and (b) the SFO concludes, applying the [relevant prosecutorial guidance], that there is an alleged offender that should be prosecuted”. Effectively, the standard in the relevant prosecutorial guidance is (a) whether the prosecution is overall in the public interest and (b) whether there is a realistic prospect of obtaining a conviction.

The accompanying statement also expressly states that companies should not be any more nervous regarding corporate hospitality as a result of the revised guidance. In short, it again appears that the revised guidance represents a change in emphasis rather than a change in substance in the SFO’s position – and this is consistent both with the SFO’s statements about being focused on serious and complex fraud, and with recent comments by Green in which he made clear that the SFO is not interested in ordinary, run-of-the-mill corporate hospitality, emphasising that the SFO is “not the Serious Champagne Office”.

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