

KIRKLAND ALERT

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New Guidance on the U.K. Bribery Act and Self Reporting Issued by the Serious Fraud Office

The Serious Fraud Office (SFO) published its new guidance on self reporting, facilitation payments and hospitality on October 9, 2012. The guidance follows the arrival of David Green CB QC as the new SFO director. It reiterates that the SFO's primary role is to investigate and prosecute. The revised policies make it clear that there will be no presumption in favour of civil settlements. This is a restatement of the traditional decision-making principles in criminal litigation. The new guidance explicitly retracts guidance on self reporting, facilitation payments and hospitality provided by the SFO in the past.

In particular, the six-step plan for dealing with the thorny issue of facilitation payments has now been removed from the SFO's approach. The statement that conduct, which is the subject of a self report, would be dealt with civilly wherever possible and the provisions relating to hospitality have also been removed. The SFO makes clear that it is not the role of the office to provide corporate bodies with advice on their future conduct and that it will make decisions based on existing general guidance applicable to all prosecuting authorities (The Code for Crown Prosecutors, Joint Prosecution Guidance on Corporate Prosecutions and the Joint Prosecution Guidance of the Director of the SFO and Director of Public Prosecutions on the Bribery Act 2011).

Despite these changes, the SFO maintains that it encourages corporate self reporting, and will always listen to what a corporate body has to say about its past conduct; but importantly, the new guidance makes clear that the SFO offers no guarantee that a criminal prosecution will not follow any such report. The new guidance has immediate effect and supersedes any previous statement of policy or practice made by or on behalf of the SFO.

The SFO states that the revisions to the previous policies have been made so as to restate the SFO's primary role as an investigator and prosecutor of serious crime, ensure consistency with other U.K. prosecuting bodies and take forward the recommendations of the Organisation for Economic Co-operation and Development following the recent review of the U.K.'s approach to bribery enforcement.

Detail

1. Timing

The new guidance is silent on the question of the timing of an approach to the SFO. The Joint Guidance on Corporate Prosecutions (which remains applicable) explains that, for a self report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a "genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice." Accordingly, the SFO will place a premium on an early approach.

2. Process

The old guidance gave indications of the SFO approach to the conduct of internal investigations, electronic document recovery and settlement negotiations. These aspects have all been removed from the new approach.

3. Individuals

The old guidance said that the SFO was willing to discuss the interaction between corporate and individual investigations. The new guidance is silent on this and it is likely that such discussions will not be possible in the future.

4. Press Statements

The old guidance sought to give assurances regarding the manner and timing of press announcements following the conclusion of a case. The new guidance is silent on this and, in accordance with judicial commentary, there is now no prospect of coordinating press statements.

5. Facilitation Payments

The previous guidance made clear that the SFO did not expect to see facilitation payments eradicated overnight. The SFO had said that it would be looking to see:

- Whether the company has a clear-issued policy regarding facilitation payments;
- Whether written guidance is available to relevant employees as to the procedure they should follow when asked to make facilitation payments;
- Whether such procedures are being followed by employees;
- If there is evidence that all facilitation payments are being recorded by the company;
- If there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that facilitation payments are being demanded; and
- Whether the company is taking what practical steps it can to curtail the making of facilitation payments.

The new guidance simply states that a facilitation payment is a type of bribe and should be seen as such. The new guidance states facilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their

size or frequency. The Q&A that accompanies the new guidance suggests that some flexibility in the SFO's approach will remain. It says that whether or not the SFO prosecutes in relation to facilitation payments will always depend on (a) whether it is a serious or complex case that falls within the SFO's remit and, if so, (b) whether the SFO concludes that an offender should be prosecuted following a consideration of the Code for Crown Prosecutors.

6. Hospitality

The previous guidance set out five factors that the SFO would take into account when considering whether any particular case of corporate expenditure appeared to fall outside the bounds of reasonable and proportionate hospitality. The SFO had said that it would be looking to see whether:

- The company has a clear-issued policy regarding gifts and hospitality;
- The scale of the expenditure in question fell within the confines of such policy and, if not, whether special permission for it had been sought at a high level within the organisation;
- The expenditure was proportionate with regard to the recipient;
- There is evidence that such expenditure had been recorded by the company;
- The recipient was entitled to receive the hospitality under the law of the recipient's country.

The inference that the expenditure was intended as a bribe would be strengthened if it should transpire that:

- There had been any unjustifiable 'add-ons,' for example with regard to travel or accommodation; or
- The expenditure in question could be related in time to some actual or anticipated business with the recipient, particularly in a competitive context.

The new SFO position removes reference to the above factors. The new guidance recognises that bona fide hospitality or other legitimate business expenditure is

recognised as an established and important part of doing business. It also states, however, that bribes are sometimes disguised as legitimate business expenditure, and that if the test in the Code for Crown Prosecutors is satisfied then a prosecution will follow.

Conclusion

The decision to self report is not straightforward and involves multiple competing considerations. If a problem has been discovered it will be important to discuss this with external legal advisors as soon as possible. The new guidance places the risk-benefit analysis of

self reporting squarely in the hands of the corporation, with little apparent incentive (until the introduction of Deferred Prosecution Agreements and accompanying guidance) for companies to self report. The new SFO positions on facilitation payments and corporate hospitality are restatements of traditional legal principles on decision making in criminal litigation. The pragmatic aspects of the former guidance have been removed and whilst it is clear that there will be some flexibility in enforcement arising out of the SFO's case acceptance criteria, there is now an increased risk of criminal prosecution for offences arising out of the payment of facilitation payments.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Satnam Tumani
Kirkland & Ellis International LLP
30 St Mary Axe
London, EC3A 8AF
United Kingdom
www.kirkland.com/stumani
+44 20 7469 2390

Harkiran Hothi
Kirkland & Ellis International LLP
30 St Mary Axe
London, EC3A 8AF
United Kingdom
www.kirkland.com/hhothi
+44 20 7469 2315

Chris Colbridge
Kirkland & Ellis International LLP
30 St Mary Axe
London, EC3A 8AF
United Kingdom
www.kirkland.com/ccolbridge
+44 20 7469 2010

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