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Betreff: [New post] More Wisdom from the Bribery Act Guys

New post on **FCPA Compliance and Ethics Blog**



More Wisdom from the Bribery Act Guys

by [tfoxlaw](#)



Ed. Note-today we host our colleague Matt Ellis who reports on the recent World Compliance event where the Bribery Act guys spoke. This article originally appeared on Matt's blog, FCPAméricas Blog, which we reprint, in its entirety with his permission.

In FCPAméricas's [last post](#), it gave highlights from Tom Fox at the World Compliance Summit 2011 in Houston, TX. At the same seminar, [the Bribery Act Guys](#) (attorneys Barry Vitou and Richard Kovalevsky QC) offered their own wisdom.

Transitioning Away from Facilitating Payments

While it is commonly known that, unlike the FCPA, the UK Bribery Act prohibits facilitating payments, the Bribery Act Guys offered insight into how the Serious Fraud Office will give companies time to bring their practices into compliance. The SFO has issued 6-step guidance. [The Bribery Act Guys explain](#) that, "If the answers to these questions are satisfactory then the corporate should be shielded from prosecution":

Whether the company has a clear issued policy regarding such payments;

1. Whether written guidance is available to relevant employees as to the procedure should follow when asked to make such payments;
2. Whether such procedures are being followed by employees;
3. If there is evidence that all such payments are being recorded by the company;
4. If there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded;
5. Whether the company is taking what practical steps it can to curtail the making of such payments.

Corporate Hospitality under the UK Bribery Act

The [Bribery Act Guys report](#) that, when deciding whether a specific corporate expenditure falls outside of the bounds of reasonable and proportionate hospitality, the SFO will see whether:

the company has a clear issued policy regarding gifts and hospitality;

1. 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 organization;
2. the expenditure was proportionate with regard to the recipient;
3. there is evidence that such expenditure had been recorded by the company;

4. the recipient was entitled to receive the hospitality under the law of the recipient's country.

Predictions on UK Bribery Act Enforcement in Coming Months

The Bribery Act Guys have built a good track record with their predictions. They correctly predicted the [delay on UK Bribery Act guidance](#), [dismissed suggestions that the Bribery Act would be canned](#) and [said that the SFO would survive](#) when others thought it would not.

They have now offered their predictions on enforcement activity. These predictions are timely since the UK Bribery Act just went into force on July 1, 2011 and applies only to conduct occurring after that date (although enforcement may incorporate prior activity if it is part of an ongoing "system" of wrongdoing). Will they get these ones right too?

Proceedings against Foreign Companies. The Director of the SFO, Richard Alderman, has a personal commitment to enforcement similar to that of U.S. Department of Justice Assistant Attorney General Lanny Breuer. Both regulators see their jobs as crusades. As such, Alderman is concerned less with proceeding against "low hanging fruit" and more in pursuing the harder cases that test the limits of the UK Bribery Act, especially with respect to extraterritorial jurisdiction. As a result, the Bribery Act Guys predict several proceedings against foreign companies so that the SFO can "level the playing field," similar to the approach taken by U.S. enforcement.

1. *Alderman's Successor Might Seek to Bring in Money.* After Alderman departs in Spring 2011, his successor might look to bring easier, lucrative cases. The SFO is highly underfunded, a fact that has impeded its ability to fully flex its muscles. Revenue from cases can change that.
2. *Focus on Individuals.* Like U.S. authorities, the SFO will focus on prosecuting individuals. For example, if a company discloses prior bribery of an acquiree discovered in acquisition due diligence, it can obtain a clean bill of health going forward. The individuals authorizing the scheme for the seller, on the other hand, will likely be prosecuted. Likewise, the target may also be subject to enforcement proceedings to recover the benefits of the proceeds of crime.
3. *The Announcement of First Major Cases Will Take Time.* It will likely take at least a year for major SFO prosecutions to be announced. This is because, broadly speaking, the SFO only announces actions at a very advanced stage or after it has concluded the investigation.

When the SFO Can Use UK Subsidiaries to Assert Jurisdiction over U.S. Parents

For the UK Bribery Act offenses of bribing, receiving a bribe, and bribing a foreign public official, it is, generally speaking, harder to assert jurisdiction over an overseas parent (unless the activity takes place in the jurisdiction). But for the offense of failing to prevent bribery, the SFO has more leeway in asserting jurisdiction over the parent through its UK subsidiary, even if the subsidiary is not directly involved in the scheme.

The SFO takes the view that, the less autonomous the UK subsidiary's operations are from those of the U.S. parent, the more authority the SFO has to bring a case, even if the bribe was committed in a third country by an entirely different subsidiary. In other words, the more common the management and services functions between the UK subsidiary and the U.S. parent, the stronger the jurisdictional basis for proceeding against the parent. The extent of the connection will likely be tested in the courts.

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