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## UK Bribery Act: Serious Fraud Office Publishes Revised Rules

By Raymond L. Sweigart

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*As noted in our Alert on Oct. 1, 2012 and presaged by the withdrawal of previous guidance, new rules published Oct. 9 by the UK Serious Fraud Office (SFO) have opted for stricter language. The SFO now says that it will prosecute under the Bribery Act based primarily on the statute itself rather than on previous, more lenient and somewhat subjective guidance principles issued after the new law was introduced in July 2011. The newly announced policy had been predicted by many observers based on promises to tighten up enforcement made by the current director, David Green QC, on his appointment this past May. The new rules cover the SFO's approach to corporate hospitality, facilitation payments and self-reporting.*

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In its revised guidance, rather than attempting to delineate or offer examples of what might be acceptable corporate hospitality and what might not be, the SFO says it will prosecute corporate hospitality and facilitation payments “if there is a realistic prospect of conviction.” This statement marks a major departure from the previous guidance, adopted after lengthy consultations, which had stated that the SFO would take into account various factors before deciding whether to prosecute, such as the existence of a company policy covering such matters and the scale of payments. The SFO had also previously acknowledged that small payments to ensure that public officials carry out normal functions, called facilitation payments, were unfortunately endemic in many countries and would take time to eradicate. The new guidance simply states: “A facilitation payment is a type of bribe and should be seen as such.”

The new test for whether or not a company will face prosecution for corporate hospitality will now simply be based on whether or not there is “a realistic prospect of conviction” and “it is in the public interest to do so.” Previously the SFO had attempted to provide companies with assurance that ordinary and customary hospitality would not be prosecuted and that it would take into account a number of factors such as whether a company had rules about entertaining, whether the expenditure was proportionate and how the expenditure was recorded by the company in its books and records. Despite this apparent change in the stated ground rules, the SFO has once again attempted to reassure companies that while it has dropped

guidance to that effect under its new policy, “bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business.” While there may never have been a bright line test in this area, it now appears to leave much more to be determined in the eye of the SFO beholder.

The final area affected is the approach the SFO will take to companies that self-report corruption. Under the previous director, Richard Alderman, the SFO had reassured companies they would normally face only civil law sanctions if they uncovered and reported their own wrongdoing. The new rules are far less comforting, with this plain statement: “If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so.... Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.”

As we also previously noted, the move toward the adoption of a deferred prosecution model in the UK may yet ameliorate what might otherwise be considered a rather more harsh approach to those companies that are trying to do right. Nevertheless, the new guidance and an “all of nothing” prosecution policy highlights again the sweeping breadth of the Bribery Act as written, the weakness of any guidance that attempts to interpret or limit that breadth, and the importance that all covered companies exercise caution and due diligence in their affairs. Whether to self-report if that due diligence should turn up evidence of problematic behavior will now surely require more careful consideration and counsel.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author.

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