

UK Bribery Act Guidance-Facilitation Payments and Hospitality

For those of you who have not yet done so, you should check out the great resource available on the UK Bribery Act, through a website entitled thebriberyact.com. Hosts Barry Vitou, of the London office of Wiston and Strawn, and Richard Kovalevsky Q.C., from 2 Bedford Row-Offices of William Clegg, Q.C., provide, in one site, one of the best resources that can be found on the UK Bribery Act, all at no cost to the viewer. They also have a newsletter which is distributed through email subscription. Two of the sites more recent postings provide recent guidance and development from the UK Serious Fraud Office (SFO) on two of the most vexing topics for Bribery Act (or the Foreign Corrupt Practices Act (FCPA) for that matter) compliance practitioners, facilitation payments and hospitality under the UK Bribery Act.

Unlike the FCPA, the Bribery Act has no exemption for the payment of facilitation payments. Additionally, there is no affirmative defense or otherwise noted exemption or exception for hospitality, whether bona fide or not, under the Bribery Act. Therefore, under a strict interpretation of the Bribery Act, any facilitation payment or conceivable hospitality granted a customer or client could be a violation of the Bribery Act.

I. Facilitation Payments

In a recent speech before the International Corruption Hunters Alliance Meeting, hosted by The World Bank in Washington, DC, SFO Director Richard Alderman noted that the SFO position is one of zero tolerance for facilitation payments. However, he noted that the focus of discussions in the UK has moved from persuading companies that it is wrong to give bribes to how it is possible to stop the demands for bribes in the first place. Director Alderman believes that both the UK regulators and the businesses subject to the Bribery Act should work together to end such bribes. He said that “What is needed here is international involvement between countries and including institutions such as the World Bank and others. It can also mean companies working together to share their experiences of working in other countries and bringing those experiences to us.”

To this end, Alderman suggested that unlike the Department of Justice (DOJ) or Securities and Exchange Commission (SEC), which jointly enforces the FCPA, the SFO is more than just a prosecutor. The SFO is pursuing a strategy to engage with corporations, NGOs, such as the World Bank, and other governments which support anti-corruption efforts, such as the United States for helping in solving these problems. The authors have previously noted that Director Alderman is on record as saying that he is “not only interested in concentrating on investigations and prosecutions but also, importantly, on prevention.” This prior statement clearly follows one of the points Director Alderman reiterated in his speech that corporations should look to the SFO “for help in solving these problems”.

II. Hospitality

thebriberyact.com has for some time reported that UK companies have voiced various fears which have been widely reported about the “uncertainties” around the application of the Bribery Act to corporate hospitality are overblown. The authors have noted that SFO position on hospitality is that if “hospitality is not lavish and people use their common sense then there should not be a problem” under the Bribery Act.

In today’s online edition of the UK Daily Telegraph newspaper, Director Alderman is reported to have said: "Sensible and proportionate expenditure on hospitality will remain perfectly lawful under the Bribery Act when it comes into force." Further, "I understand that businesses want more detailed guidance before attending major sporting events. We will be happy to help by publishing our views." This guidance is expected to be published in early 2011.

All US companies with UK operations should incorporate the Bribery Act requirements into their FCPA compliance programs. The Bribery Act has become the new gold standard for anti-corruption and anti-bribery compliance programs. As has been noted by the law firm of Fulbright and Jaworski, only 11% of respondent US companies believe that the Bribery Act will impact their compliance programs. From this report, it is clear that most US companies do not understand the differences in the Bribery Act and the FCPA. With the wide extra-territorial reach of the Bribery Act, US companies with UK subsidiaries, UK operations or UK citizens in their employ should assess their FCPA compliance programs to ensure Bribery Act compliance and the website thebriberyact.com is good starting point.

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