

# Foreign Corrupt Practices Act & Bribery Act 2010– A Primer on Compliance

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# Over \$2 billion – the amount of penalties levied in 2016 for FCPA violations

The last decade has seen intense enforcement activity by financial services regulators on both sides of the Atlantic as the fallouts of the global financial crisis still continue to fully unravel.

In lockstep with enforcement action targeted at the financial services sector, a clampdown on international commercial bribery remains a high priority area for enforcement agencies.

The UK Bribery Act of 2010 (“Bribery Act”) only came into force in 2011 but the Serious Fraud Office (SFO) already has an active portfolio of investigations and prosecutions and has registered a number of successful high profile outcomes. On the other side of the Atlantic, the Security and Exchange Commission (“SEC”)’s continued vigorous enforcement of the now 40-year-old Foreign Corrupt Practices Act (“FCPA”) shows no signs of lagging.

The consequences to a business organization of censure under any of these two regimes can be far reaching. Aside from possible penal/financial sanctions, it can render the organization ineligible to tender for contracts under the national procurement laws of various jurisdictions. Organizations should also note the great interest and activism of shareholders, investors, employees, the general public and the media around questions of the integrity of corporate conduct.

In this context business organizations would do well to put bribery prevention and risk management high on the corporate agenda.

This client alert provides a broad overview of the requirements of the FCPA and the Bribery Act, highlights some notable recent enforcement examples and describes the steps companies and other organizations can take to limit their potential liabilities under both acts.

## Overview of the FCPA

The FCPA applies to (a) all U.S. citizens, nationals, and residents, (b) corporations and other business entities (“Issuers”) that have issued securities that are registered in the U.S. or that are required to file periodic reports with

the SEC regardless of where they are organized or have their principal place of business, and (c) corporations and other business entities that are organized under U.S. law or have their principal place of business in the U.S. The FCPA also applies to any individual, corporation, or other business entity, regardless of nationality, that causes, directly or indirectly, an act in furtherance of a corrupt payment to take place within the U.S. or any territory or possession of the U.S. An act in furtherance of a corrupt act can be deemed to have taken place in the U.S. if it involves any means or instrumentality of interstate commerce (which includes the U.S. postal service, any means of telecommunications (including the processing of an email by a server located in the U.S.) that touches the U.S. or any U.S. territory or possession and the use of any U.S.-based bank account).

The FCPA contains two separate and distinct provisions. The anti-bribery provisions make the bribery of foreign public officials a crime. The books, records, and internal controls provisions require Issuers to keep accurate books and records and maintain systems of internal accounting controls. The two provisions are discussed in turn below.

## The Anti-Bribery Provisions

The anti-bribery provisions of the FCPA make it a crime to offer, promise to pay, or authorize any payment of money or anything of value (including such things as travel, jobs for family members and friends, and even charitable contributions) to a foreign official (including any officer or employee of a foreign government, public international organization, or any department or agency thereof), foreign political party or party official, candidate for foreign political office, or any person acting in an official capacity with the intention of obtaining or retaining business, directing business to any person, or securing an improper advantage.

It is unlawful under the FCPA to make a payment to a third party while knowing that all or a portion of the payment will be used to make a payment that would be unlawful if made by the person making the payment to the third party. “Knowing” includes not only actual knowledge, but also conscious disregard and deliberate ignorance. Intermediaries that have often resulted in liability include agents,

consultants, representatives, and joint venture partners. Similarly, Issuers are expected to maintain control over their subsidiaries, and the conduct of subsidiaries can create liability for Issuers.

The FCPA's anti-bribery provisions also apply to state-owned enterprises. Note that in some countries it can be very difficult to determine what constitutes a state-owned enterprise.

Payments (so-called "facilitation payments") made to facilitate or expedite "routine government action", such as (i) obtaining permits, licenses, or other official documents, (ii) processing governmental papers, such as visas and work orders, (iii) providing police protection, (iv) mail pickup and delivery, (v) the provision of phone service, power and water supply, loading and unloading of cargo, or protecting perishable products, (vi) scheduling inspections associated with contract performance or the transit of goods, and (vii) actions that are "similar" to the foregoing actions are permitted under the FCPA. Note, however, that potential liability under local law, the presence of significant practical problems with facilitation payments, and more recently, the absence of an exception for facilitation payments under the Bribery Act have led many companies to prohibit the making of facilitation payments.

The FCPA contains affirmative defenses for: (a) payments that are explicitly permitted under the written laws of the country concerned; and (b) payments that are reasonable and bona fide expenditures, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official or candidate that are directly related to (i) the promotion, demonstration, or explanation of products or services, or (ii) the execution or performance of a contract with a foreign government or agency thereof. The Department of Justice has published extensive guidance with respect to travel and lodging expenses, and that guidance should be followed to minimize potential liability.

## The Books, Records, and Internal Controls Provisions

The books, records, and internal control provisions require Issuers to (i) make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the Issuer; and (ii) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that (a) transactions are executed in accordance with management's

instructions, and (b) transactions are recorded as necessary to permit the preparation of financial statements and maintain accountability for the Issuer's assets.

An Issuer is civilly liable for non-compliance with the books and records provisions of the FCPA regardless of whether the Issuer's directors or officers had knowledge of the inaccuracies. For this reason, and because the penalties for non-compliance with the books and records provisions are higher, many enforcement actions have been brought in reliance on these provisions without any allegation of violations of the anti-bribery provisions.

Issuers must ensure that their subsidiaries comply with the books, records, and internal control provisions, and must exercise their voting powers to promote compliance by affiliates in which the Issuer holds less than a 50% interest.

## Fines, Sanctions, and Penalties

Fines, sanctions, and penalties for violations under the FCPA can rise to US\$ 25 million or more, plus additional civil fines, plus the disgorgement of ill-gotten gains. Individuals can be subject to criminal penalties of up to US\$ 5 million plus prison sentences of up to 20 years. The United States sentencing guidelines for organizations provide for significant reductions to the fines and penalties that are applied to organizations if the organization has in place effective internal mechanisms for "preventing, detecting, and reporting criminal conduct." The significance of effective compliance programs is discussed in more detail below.

## Overview of the Bribery Act 2010

The Bribery Act applies to (i) citizens, nationals, and residents of the U.K., (ii) any business organization that is organized under the law of any part of the United Kingdom, and (iii) any business organization wherever organized that carries on a business, or part of a business, in the U.K. These rules effectively mean that a non-U.K. business that conducts any business in the U.K. can be convicted of violating the Bribery Act for acts that occur outside the U.K. and are wholly unrelated to the business of the company that is conducted in the U.K. The Serious Fraud Office as indicated that it intends to use the sweeping jurisdiction afforded by the Act.

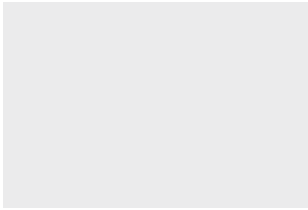
## Offences Related to Bribery

The Bribery Act 2010 makes it a crime to: (a) bribe another person (specifically to offer, promise or give a financial or other advantage to another person intending to induce the



# Key Contacts

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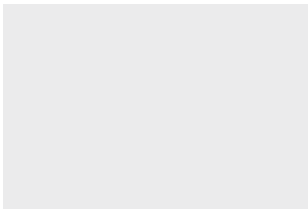
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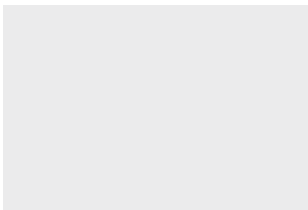
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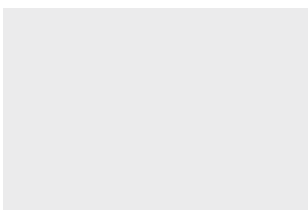
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