

Managing Risk - Bribery, Corruption, Money Laundering and Compliance

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Presenters:

Brian L. Whisler
Baker & McKenzie LLP

David B. Chenkin
Zeichner, Ellman & Krause LLP

Outline

- US FCPA Overview and Enforcement Trends
- UK Bribery Act Overview
- UK SFO Enforcement Trends
- Corporate Compliance

Overview of the Foreign Corrupt Practices Act (FCPA)

What is the FCPA?

- U.S. federal securities statute (15 U.S.C. § 78dd-1 et. seq.)
- Main U.S. government bodies in enforcement: Department of Justice (“DOJ”); Securities and Exchange Commission (“SEC”)
- Enacted in 1977 to prevent corporate bribery of foreign officials by US companies
- Anti-bribery provision is main focus
 - The FCPA prohibits issuers, domestic concerns, and “other persons” (their officers, directors, employees, agents, etc.) from corruptly offering, authorizing or giving “anything of value” to foreign officials, political parties or their officials, or candidates for public office for the purpose of obtaining or retaining business for or with, or directing business to, any company.

Who Do the Provisions Apply To?

- Provisions apply broadly to:
 - “Issuers” ~ publicly-held companies considered “issuers” under the Exchange Act, including companies that hold American Depository Receipts.
 - “Domestic concerns” ~ citizen, national, or resident of the US, or entity with principal place of business in US or organized under US law.
 - “Other persons” ~ includes US nationals who commit bribery anywhere, and non-US nationals who commit bribery in the US.
- A foreign company (or person) is subject to liability if it causes, directly or indirectly, an act in furtherance of a corrupt payment occurring within the US.

The Elements of the Bribery Offense

Elements of the FCPA anti-bribery provisions

- A payment, offer, or promise to pay anything of value directly or indirectly
- To any foreign official
- Made with a corrupt intent
 - Induce misuse of public position to direct business wrongfully, that is, for purpose of obtaining or retaining business
 - Intent does not need to be realized

What Constitutes a Payment?

- Payment, or promise of payment, of money or anything of value
- Gifts, charitable contributions, donations
- Lavish hospitality
- In-kind services
- Travel expenses can be a problem

Who is a Foreign Official?

- Any officer or employee of:
 - Any non-U.S. government (e.g., tribal head, mayor, governor, legislator)
 - Any department, instrumentality, or agency of a non-U.S. government (e.g., *M.D. at public hospital, director of Institute*)
 - *A foreign state-owned or controlled entity*
 - Any non-U.S. political party
 - Any public international organization (e.g., UNESCO, WHO)
- Any person acting in any official capacity for such organization
- Candidates for foreign political office
- Influential member of royal family
- Note: Foreign companies often have ties to foreign officials (e.g., airlines and oil companies often have government involvement)

Accounting Aspects of the FCPA

- Books and records
 - Issuers, etc., are required to make and keep detailed books, records, and accounts that fairly and accurately reflect transactions and dispositions of assets.
- Internal accounting controls
 - Issuers must devise and maintain internal accounting controls to ensure that financial records and accounts are accurate for external reporting, that access to assets is permitted only in accordance with management instructions, and that the books are audited at reasonable intervals.
- Importance of these two aspects of the FCPA:
 - More readily established than the payment of a bribe
 - Sarbanes-Oxley requires disclosure of deficiencies in internal controls and fraud, audit committee oversight, and increased legal scrutiny all triggered by corrupt payments

FCPA – Affirmative Defenses

- Payment is lawful under the written laws and regulations of the country
 - Very limited in practice

- Payment is a reasonable and bona fide expenditure directly related to
 - (i) The promotion of products or services OR
 - (ii) The execution of a contract with a foreign government or agency

FCPA – Exception

- Facilitating or “Grease” Payments
 - Gratuities given to government officials for performing essentially clerical activities not involving discretion to expedite service
 - Examples include customs clearance, vehicle registration, visa renewal, police protection, and utilities service
 - US DOJ has referred to \$100 as general guide, although this is merely indicative
 - Caution: might breach local law

Special Concern – Intermediaries

- A company may be liable for the actions of an intermediary if the latter makes illegal payments even if company had no actual knowledge of payments.
- Recent cases reveal risks of dealing with intermediaries in emerging markets: appearances can be deceiving and focused due diligence is critical.
- To avoid responsibility for intermediary actions, set high standards and consistently adhere to protective measures.
- Undertake due diligence on intermediaries.

Special Concern – Hospitality Payments

- “Hospitalities” include meals, travel, lodging, entertainment, modest gifts, provided to foreign government officials -- may give rise to liability under the FCPA
- “Reasonable and bona fide” expenses include expenses directly related to the promotion or demonstration of products or services, or the execution or performance of a contract with a foreign government or its agency
- Lavish hospitalities typically viewed as improper payments under the FCPA
- Repeated instances of meals and entertainment of lesser value suggestive of improper payments

FCPA Enforcement and Prosecutions

Enforcement Trends

- DOJ enforcement actions: 2004 = 2; 2010 = 48
- Increased resources (prosecutors, FBI agents), but still heavily dependent on self-disclosure
- Remains sector-oriented
 - Note SEC issuance of letters of inquiry into possible FCPA violations in the US banking and private-equity industries early this year
- Increased emphasis on individual prosecutions
- Strong interest in willful blindness and third parties
- Growing international cooperation

Enforcement Trends (cont.)

FCPA enforcement is stronger than its ever been- and getting stronger...I continue to believe that prosecuting individuals – and levying substantial criminal fines against corporations – are the best ways to capture the attention of the business community”

- Lanny Breuer, Assistant Attorney General (Nov. 2010), Criminal Division, DOJ

DOJ/SEC Enforcement Actions 2011

Diageo plc	\$16.5 million settlement
Armor Holdings Inc.	\$16 million settlement
Tenaris S.A.	\$8.9 million settlement with deferred prosecution agreement
Rockwell Automation, Inc.	\$2.7 million settlement for alleged violation of accounting provisions
Johnson & Johnson	\$77 million criminal penalty and disgorgement with deferred prosecution agreement
Converse Technology Inc.	\$2.8 million settlement for alleged violation of accounting provisions
JGC Corporation	\$218.8 million criminal penalty with deferred prosecution agreement
Ball Corporation	\$300,000 fine in settlement of alleged violation of accounting provisions
IBM	\$10 million settlement for alleged violation of accounting provisions
Maxwell Technologies, Inc.	\$13.6 million penalties and disgorgement
Alcatel-Lucent S.A	\$137 million settlement
Tyson Foods, Inc.	\$5.2 million criminal penalty and disgorgement

2011 FCPA Prosecutions – Individuals

- Two senior executives of Latin Node, Inc. plead guilty to conspiracy to violate the FCPA
- Former CEO and CFO of Innospec, Inc. pay \$100,00 civil penalty and disgorge \$130,000 to resolve alleged FCPA anti-bribery and accounting violations
- Conviction of two executives of Lindsey Manufacturing Company of FCPA and money laundering violations
- Three of the Shot Show defendants plead guilty in FCPA trial
- Former executive of Rancho Santa Margarita pleads guilty for participation in conspiracy to secure contracts by paying bribes to officials of foreign state-owned companies
- Former consultant to Kellogg, Brown & Root Inc. pleads guilty to conspiring to violate the FCPA for participation in scheme to bribe Nigerian government officials
- Former executives of Terra Telecommunications Corp convicted of conspiracy to violate the FCPA and other substantive FCPA violations.
- Tesler, UK citizen/solicitor, pleads guilty to conspiracy to violate FCPA and forfeits ~\$150,000,000 to US, largest individual FCPA forfeiture in Act's history

Top 20 FCPA Settlements (millions)

Siemens	\$800		2008
KBR/Halliburton	\$579		2009
BAE	\$400		2005
ENI	\$365		2010
Technip	\$338		2006
JGC Corporation	\$219		2011
Daimler	\$185		2007
Alcatel-Lucent	\$137		2008
Panalpina	\$82		2007
Johnson & Johnson	\$70		2011
ABB	\$58		2010
Pride International	\$56		2010
Baker Hughes	\$44		2007
Willbros	\$32		2008
Chevron	\$30		2007
Titan	\$29		2005
Vetco	\$26		2007
York International	\$22		2007
Statoil	\$21		2006
Fiat	\$18		2008

Overview of the UK Bribery Act

Introduction

- Reforms the UK law and repeals current Acts and common law offence of bribery
- Came into force on 1 July 2011
- Public and private sector bribery
- Main offences under the Bribery Act
 - Offences of bribing and being bribed
 - Offence of bribing foreign public officials
 - New corporate offence
- Intended to facilitate greater enforcement against corporations

The General Bribery Offences

- Directly or indirectly, offering, promising or giving or
- Requesting, agreeing to receive or accepting
 - a financial or other advantage, to/from another person, intending the advantage to induce or reward someone for performing a relevant function improperly
- Does not matter whether recipient is person performing the function
- Function need have no connection with the UK

What is a Relevant Function?

- A relevant function is:
 - Activities connected with a business
 - Activities performed during course of employment
 - Activities performed on behalf of corporates
 - Functions of a public nature
- Person performing the function must:
 - Be expected to perform it in good faith or impartially or
 - Be in a position of trust

What is Improper Performance?

- Test is whether it breaches the expectation of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned → for jury to decide
- Where function carried out overseas, local custom or practice disregarded from what a UK person would view as reasonable unless permitted or required by local written law

Offense of Bribing Foreign Public Officials (FPO)

- Directly or indirectly, offering, promising or giving a financial or other advantage, intending to influence an FPO *in his capacity as an FPO*, with the intention of obtaining or retaining business or a business advantage
- Unless FPO is *explicitly* permitted or required to be paid
- FPO covers individuals who:
 - Hold legislative, administrative or judicial positions or
 - Exercise a public function for a foreign country or territory or for a foreign public agency or public enterprise or
 - Are officials or agents of public international organisations

Corporate Offence of Failure to Prevent

- Strict liability offence of failure to prevent bribery
- Offence can be committed by a *relevant commercial organisation* where a *person associated* with the relevant commercial organisation (RCO) bribes another person intending
 - To obtain or retain business for the RCO or
 - To obtain or retain a business advantage in the conduct of business for the RCO
- No requirement that the person who makes the bribe is either prosecuted or subject to the Bribery Act, but other elements of underlying offence must be made out
- Defence for the RCO to prove that it had *adequate procedures* designed to prevent *associated persons* from engaging in bribery

Corporate Offence – What is a RCO?

- *Relevant commercial organisation* includes UK corporates AND any other corporate carrying on *a business or part of a business* in the UK
- “...carries on a business, or part of a business...” → potentially very broad application
 - UK sales?
 - UK branch?
 - UK subsidiary?
 - UK sister company?
 - UK listing?
- Business conducted in UK does not need to be connected to act of bribery
- Intended to create a level playing field - prosecutorial discretion

Territorial Application of Offenses

- Main offence and offence of bribing a foreign public official have extra-territorial application
- Offence is committed if either
 - Any act/omission which forms part of the offence takes place in the UK OR
 - No act/omission took place in the UK, but the person has a *close connection* with the UK
- *Close connection* includes British national/corporate or a person who is ordinarily resident in the UK

Corporate Prosecution

- Prosecution of companies subject to application of the “identification principle”
- Lack of clarity regarding application of “identification principle” and availability of corporate offence means corporate prosecutions for general offences likely to be limited
- Senior officers also liable if offence is committed with their consent or connivance
 - *Senior officer* includes partners, directors, managers, company secretaries and other similar officers

FCPA and Bribery Act Comparison

Is it an Offense?	FCPA	Bribery Act
Bribery of FPOs	Yes	Yes
Domestic bribery	No	Yes
Private sector bribery	No	Yes
Facilitation payments	No	Yes
Strict liability	No	Yes
Failure to keep accurate records	Yes	No
Liability for acts of third parties	Yes	Yes

Approach of the SFO

"Don't rely on a very technical approach to the Bribery Act to try and persuade yourself that you're outside the scope of the Act. The safe working assumption is that if you have got a UK presence in one way or another then you are within the scope of the Bribery Act. Don't take the risk of thinking we have this clever interpretation by clever lawyers that tells us we are outside and therefore we are free to carry on bribing. That's very unsafe."

(R.Alderman, Director SFO)

Corporate Compliance

Why is Compliance Important?

- Agencies are better resourced, taking tougher stances
- Greater cooperation between agencies worldwide
- Significant fines
- Personal liability
- Loss of business opportunities / exclusion from public procurement
- Investigation costs
- Negative publicity
- Compliance program may result in reduction of fine levels / mitigation (“adequate procedures” defence under the UK Bribery Act)

What Should Your Business Do?

- Understand the risk factors that your business faces
 - Country risk
 - Sectoral risk
 - Business opportunity or partnership risks
- Establish and implement clear and accessible policies and procedures
 - Gifts/entertainment
 - Political/charitable contributions
 - Third parties
 - Finances and accounting
 - Recruitment
- Training and communication
- Commitment from Board level down

The Essential Elements of Corporate Compliance

USSG's 7 Elements of an Effective Compliance Program	13 Good Practices by the OECD on Internal Controls, Ethics, and Compliance	UK's 6 Principles for "Adequate Procedures"
1. Standards and procedures to prevent and detect criminal conduct	1. Risk assessment as basis for effective internal controls and compliance program	1. Proportionate procedures
2. Leaders understand / oversee the compliance program to verify effectiveness and adequacy of support; specific individuals vested with implementation authority / responsibility	2. Policy that clearly and visibly states bribery is prohibited	2. Top level commitment
3. Deny leadership positions to people who have engaged in misconduct	3. Training – periodic, documented	3. Risk assessment
4. Communicate standards and procedures of compliance program, and conduct effective training	4. Responsibility – individuals at all levels should be responsible for monitoring	4. Due diligence
5. Monitor and audit; maintain reporting mechanism	5. Support from senior management – strong, explicit and visible	5. Communication
6. Provide incentives; discipline misconduct	6. Oversight by senior corporate officers with sufficient resources, authority, and access to Board	6. Monitoring and review
7. Respond quickly to allegations and modify program	7. Specific risk areas – promulgation and implementation programs to address key issues	
NOTE: A general provision requires periodic assessment of risk of criminal conduct and appropriate steps to design, implement, or modify each element to reduce risk	8. Business partners due diligence	
	9. Accounting – effective internal controls for accurate books and records	
	10. Guidance – provision of advice to ensure compliance	
	11. Reporting violations confidentially with no retaliation	
	12. Discipline for violations of policy	
	13. Re-assessment – regular review and necessary revisions	

Questions?

Brian L. Whisler

Partner

Baker & McKenzie, LLP

815 Connecticut Avenue, Northwest

Washington, D.C. 20006

202/452-7019

Brian.whisler@bakermckenzie.com



Questions?

David B. Chenkin

Zeichner Ellman & Krause LLP

575 Lexington Avenue

New York, New York 10022

212/826-5319

Dchenkin@zeklaw.com