

# Lawyer Insights

April 23, 2017

## **Reducing the risk of liability, fines and penalties under the FCPA and the Bribery Act**

*by Ryan T. Ketchum*

*published on LinkedIn*

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'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 article 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 US citizens, nationals, and residents, (b) corporations and other business entities (Issuers) that have issued securities that are registered in the US 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 US law or have their principal place of business in the US. 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 US or any territory or possession of the US. An act in furtherance of a corrupt act can be deemed to have taken place in the US if it involves any means or instrumentality of interstate commerce (which includes the US postal service, any means of telecommunications (including the processing of an email by a server located in the US) that touches the US or any US territory or possession and the use of any US-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

Reducing the risk of liability, fines and penalties under the FCPA and the Bribery Act  
by Ryan T. Ketchum  
LinkedIn | April 23, 2017

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,

Reducing the risk of liability, fines and penalties under the FCPA and the Bribery Act

by Ryan T. Ketchum

LinkedIn | April 23, 2017

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 noncompliance 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 noncompliance 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 percent 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 UK, (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 UK. These rules effectively mean that a non-UK business that conducts any business in the UK can be convicted of violating the Bribery Act for acts that occur outside the UK and are wholly unrelated to the business of the company that is conducted in the UK. 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 other person to "perform improperly" a "relevant function or activity"); (b) bribe a "foreign public official" intending to (i) influence the foreign public official in the official's official capacity, and (ii) thereby obtain or retain business or an improper advantage in the conduct of business. Note that (a) above applies to any person. The Bribery Act is broader than the FCPA in that it makes the commission of commercial bribery a crime in addition to the bribery of foreign government officials.

A "foreign public official" is defined as an individual who (i) holds a legislative, administrative or judicial position of any kind outside the UK, (ii) exercises a public function for or on behalf of a country or territory outside the UK, or for any public agency or public enterprise of that country, or (iii) is an official or agent of a public international organization.

Reducing the risk of liability, fines and penalties under the FCPA and the Bribery Act

by Ryan T. Ketchum

LinkedIn | April 23, 2017

## Offences Related to a Failure to Prevent Bribery

A commercial organization is guilty of bribery if a person associated with that organization bribes another person (as defined above) intending to (i) obtain or retain business for the commercial organization, or (ii) obtain or retain an advantage in the conduct of business for the commercial organization. A person “associated” with a commercial organization includes any person that performs services for or on behalf of the commercial organization, including employees, agents, and subsidiaries.

The offense of failure to prevent bribery is a strict liability offense, and commercial organizations can be held liable for acts committed anywhere in the world. It is an affirmative defense for the commercial organization to prove that it had in place adequate procedures designed to prevent persons associated with the commercial organization from undertaking conduct in violation of the Bribery Act. See more on the topic of effective compliance plans below.

## Recent enforcement examples under the Bribery Act

The SFO secured its first conviction for failure to prevent bribery against Sweett Group PLC in 2016 in relation to a failure by the company to prevent bribery in its business activities in the UAE. The company was ordered to pay a financial penalty of £2.25 million. It is worth noting that the company argued that it was not aware of its subsidiary’s actions but was liable nonetheless because the “whole point of section 71 is to impose a duty on those running... companies throughout the world properly to supervise them.” Two other notable SFO actions have since followed, one of which resulted in overall costs of approximately US \$800 million.

## The Importance of Effective Compliance Programs

Fortunately, businesses can take practical steps to reduce the potential for liability under both the FCPA and the Bribery Act. Chapter 8 of the United States Sentencing Guidelines (which applies to the sentencing of organizations) provides for significantly lighter fines and penalties if the company (a) has effective internal mechanisms for “preventing, detecting, and reporting criminal conduct” in place, or (b) self-reports crimes that it becomes aware of, cooperates with the ensuing investigations, and accepts responsibility. Likewise, the Bribery Act provides an affirmative defense to companies that have in place “adequate procedures designed to prevent persons associated with a company” from undertaking conduct prohibited by the act. The Secretary of State issued guidance in 2011 on the types of procedures designed to prevent persons from undertaking conduct that violates the Bribery Act that should be employed by business organizations.

Although no single compliance program fits all organizations, common themes of compliance programs include: (i) an assessment of the risks faced by the organization, (ii) the involvement of senior management, (iii) training programs and the availability of policies to employees and potential intermediaries, (iv) appropriate diligence on business partners, (v) the inclusion of bribery-related provisions in contracts with business partners and (vi) proportionate procedures in relation to the bribery risk (these themes are officially sanctioned in the Secretary of State’s guidance mentioned above).

*Ryan Ketchum is a partner at Hunton & Williams. He focuses on the development and financing of energy and infrastructure projects in emerging and frontier markets and has advised on energy and infrastructure projects in over 30 countries. He may be reached at +44 (0)20 7220 5766 and rketchum@hunton.com.*