The FCPA and the UK Bribery Act and the Rising Tide of Anti-Corruption

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The Facts About The FCPA

- Passed by Congress in 1977.
- An anti-bribery statute.
- A books and records statute.
- Enforceable by DOJ and SEC
The Anti-Bribery Provisions

Make it unlawful to

• Directly make (or offer to promise to make) a payment of gift or money or anything of value to:
  – Non U.S. government officials
  – Foreign political parties, candidates or officials
  – Officials of public international organizations (e.g., U.N.).

• Indirectly to such persons through an intermediary while “knowing” the payment or gift will be passed on.
  – If the purpose is to influence an official act or decision or to induce an official to act or not to act.
  – In order to obtain, retain, direct business or “Secure an improper advantage”.

Bottom Line: Avoid giving benefits that may have the appearance of impropriety.
Books and Records Provisions

• Make and keep books, records and accounts which, *in reasonable detail*, accurately and fairly reflect the transactions of the corporation.

• Maintain an adequate system of internal accounting controls.

• No “scienter” requirement

• Requires issuer to exercise control over books and records of foreign subs and other controlled entities.
Who is a Foreign Official?

- Foreign government officials
  - Very broadly defined and/or a member of a “political party”
  - Not limited to high level officials
  - Not limited to “federal” employees – state, provincial employees
  - Employees of government owned or controlled entities
  - Persons acting officially on behalf of a government entity
  - Can include private persons who are “advisors”
  - Can include, as a practical matter, relatives of officials
  - Includes employees of 75+ international organizations, including EU entities, UN entities, World Bank, Asian and African development banks.
The UK Bribery Act came into effect in July 2011.

- More encompassing than the FCPA.
- Covers all commercial bribery, (not just payments to foreign political officials).
- Prohibits the receipt of bribes as well as bribe-paying.
What is Covered by the Act?

Bribery - Giving someone a financial or other advantage to encourage that person:

- To perform their functions or activities improperly.
- To reward that person for having already done so.

Seeking to influence a decision-maker by giving them some kind of extra benefit.
What is Covered by the Act? (Con’t)

Establishes a statutory defense:

Organizations which have ADEQUATE PROCEDURES in place to prevent bribery are in a stronger position if isolated incidents have occurred in spite of their efforts.

Show that your organization had ‘adequate procedures’ in place to prevent bribery.

- Adequate depends on-the bribery risks you face and
- The nature, size and complexity of your business.
Six Principles

• Proportionality
• Top Level Commitment
• Risk Assessment
• Due Diligence
• Communication
• Monitoring and Review
Principle 1: Proportionate Procedures

Procedures should be

- clear
- practical
- accessible
- effectively implemented
- enforced

An organization’s procedures should be proportionate to its risks. Elements should include:

- a clear commitment
- a strategy
Proportionate Procedures (continued)

• Policies designed to mitigate identified risks as well as prevent deliberate unethical conduct.

• Topics might include:
  – Gift policy
  – Hospitality and promotional expenses
  – Charitable and political contributions
  – Facilitation payments
  – Transparency of transactions
Principle 2: Top-Level Commitment

• Top-level management fosters a culture within the organization in which bribery is never acceptable.

• Company should deliver statements reflecting:
  – A commitment to carry out business fairly, honestly and openly
  – A commitment to zero tolerance towards bribery
  – The consequences of breaching the policy for employees and managers
Top-Level Commitment (con’t)

• In a large multi-national organization the board should be responsible for:
  – Setting bribery prevention policies
  – Tasking management to design, operate and monitor bribery prevention procedures
  – Keeping these policies and procedures under regular review
Principal 3: Risk Assessment

- The organization periodically assesses the nature and extent of its exposure to potential external and internal risks of bribery.

- The assessment is periodic, informed and documented.
  - Oversight by top level management
  - Document the assessment and its conclusions
Risk Assessment (con’t)

• Commonly encountered risks
  – External risks
    » Geography/Country
    » Business sector
    » Transaction risk
    » Business partnership risk
Risk Assessment (con’t)

• Commonly encountered risks
  – Internal factors
    » deficiencies in employee training, skills and knowledge
    » bonus culture that rewards excessive risk taking
    » lack of clarity in the organization’s policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
    » lack of clear financial controls
    » lack of a clear anti-bribery message from the top-level management.
Risk Assessment (con’t)

• Other risk factors:
  – The value and duration of your project
  – The kind of business you want to do
  – The people you engage to do your business
Principle 4: Due Diligence

- The organization should apply procedures using a proportionate and risk based approach.
Principle 5: Communication

• Communication will vary enormously between organizations in accordance with the different bribery risks faced, size of the organization and the scale and nature of its activities.

• Training should be proportionate to the risk faced and tailored to responsibilities.
Principle 6: Monitoring and Review

- The organization should regularly analyze procedures to check effectiveness and make necessary improvements.
Top Trends in (FCPA) Enforcement

• Penalties continue to escalate.
• Individual prosecutions on the rise.
• Non-U.S. Companies and individuals continue to be a target.
• The extractive industries sector a focus.
• Continuing upswing in FCPA activity.
Individuals in Focus

- Eighteen individuals charged.
- Twelve of the eighteen charges were non U.S. Citizens and three more held dual U.S. /foreign citizenship.
- Five defendants were sentenced.
- 15 year sentence.
Albert 'Jack' Stanley, 69, sentenced in February, 2012 to 30 months in prison and three years’ probation following his release.

Jeffrey Tesler, 63, sentenced in February, 2012 to 21 months in federal prison followed by two years of supervised release for delivering $132 million in bribes for KBR and its partners through his consulting firm. Tesler also forfeited $149 million as part of his plea deal.

Wojciech Chodan, 74, commercial vice-president of KBR company in the U.K., received no jail time and just one year of unsupervised probation.
Joel Esquenazi, 52, President of Terra Telecommunications Corp. was sentenced in 2011 in federal court in Miami to a 15-year prison term -- the longest in an FCPA-related case.

Carlos Rodriguez, 55, Executive Vice President of Terra Telecommunications Corp and Esquenazi's co-defendant, was given an 84-month sentence.
**Jorge Granados**, 55, once head of Latin Node Inc., was sentenced in 2011 to 46 months in prison for bribing government officials connected to the wholly state-owned telecommunications authority in Honduras.

**Antonio Perez**, 52, received two years in prison this year in the Haiti Telco case. He admitted to arranging bribes to Haitian officials of $674,000 and assisting in $36,000 in side payments.

**Ousama Naaman**, 62, Innospec's agent in Iraq, was given 30 months in prison late last year. The DOJ had recommended a 90 month sentence.
2012

**Noble Corporation executives** - SEC charged three oil services executives with bribing customs officials in Nigeria to obtain illicit permits for oil rigs in order to retain business under lucrative drilling contracts. (2/24/12)

**Smith & Nephew** - SEC charged the London-based medical device company with violating the FCPA when its U.S. and German subsidiaries bribed public doctors in Greece for more than a decade to win business. The company and its U.S. subsidiary agreed to pay more than $22 million to settle civil and criminal cases. (2/6/12)
2011

**Magyar Telekom** - SEC charged the largest telecommunications provider in Hungary and three of its former top executives with bribing government and political party officials in Macedonia and Montenegro. The firm and its parent company agreed to pay $95 million to settle civil and criminal charges. (12/29/11)

**Aon Corporation** - SEC charged one of the world's largest insurance brokerage firms with violations of the books and records and internal controls provisions of the FCPA. Aon agreed to pay $14.5 million to settle SEC charges and a $1.7 million criminal fine to the Department of Justice. (12/20/11)
Cases Brought by the SEC (Con’t)

**Siemens Executives** - SEC charged seven former Siemens executives for their involvement in the company's decade-long bribery scheme to retain a $1 billion government contract to produce national identity cards for Argentine citizens. (12/13/11)

**Watts Water Technologies and Leesen Chang** – SEC charged the company and a former vice president of sales for improper payments disguised as sales commissions by its Chinese subsidiary to employees at state-owned design institutes in order to influence design specifications that favored their valve products for infrastructure products in China. (10/13/11)
**Diageo** – SEC charged one of the world’s largest producers of premium alcoholic beverages for making $2.7 million in improper payments to government officials in India, Thailand, and South Korea to obtain lucrative sales and tax benefits. Diageo agreed to pay more than $16 million to settle the case. (7/27/11) [Administrative Proceeding]

**Armor Holdings** – SEC charged the Jacksonville, Fla.-based body armor supplier for illicit payments to United Nations officials to obtain contracts related to U.N. peacekeeping missions. Armor Holdings agreed to an SEC settlement of $5.7 million and a criminal fine of $10.29 million. (7/13/11)
**Tenaris** – SEC sanctioned the global manufacturer of steel pipe products for bribing Uzbekistan government officials during a bidding process to supply pipelines for transporting oil and natural gas. Tenaris agreed to pay $5.4 million under a Deferred Prosecution Agreement, and paid a $3.9 million criminal fine. (5/17/11)

**Rockwell Automation** – SEC charged the Milwaukee-based company for illicit payments made and leisure travel provided by a former subsidiary in China to state-owned enterprises that provided design engineering and technical integration services to influence contract awards. (5/3/11)
Cases Brought by the SEC (Con’t)

**Johnson & Johnson** – SEC charged the New Brunswick, N.J.-based pharmaceutical company for bribing public doctors in several European countries to win contracts for their products and paying kickbacks to Iraq to illegally obtain business. J&J agreed to pay $70 million to settle cases brought by the SEC and criminal authorities. (4/8/11)

**Comverse Technology** – SEC charged the New York-based company for its Israeli subsidiary’s improper offshore payments to government officials in Greece. (4/7/11)
Ball Corporation – SEC charged the Colorado-based manufacturer of metal packaging for beverages, foods and household products for improper payments to employees of Argentina’s government in order to import prohibited used machinery and export raw materials at reduced tariffs. (3/24/11) [Administrative Proceeding]

International Business Machines Corp. – SEC charged IBM for providing improper cash payments, gifts, and travel and entertainment to government officials in China and South Korea in order to secure the sale of IBM products. IBM agreed to pay $10 million to settle the SEC’s charges. (3/18/11)
**Tyson Foods** – SEC charged the worldwide chicken manufacturer for making illicit payments to two Mexican government veterinarians responsible for certifying its Mexican subsidiary’s chicken products for export sales. Tyson Foods agreed to pay $5 million to settle SEC and criminal charges. (2/10/11)

**Maxwell Technologies** – SEC charged the energy-related products manufacturer for making repeated bribes to Chinese government officials to obtain business from several state-owned entities. San Diego-based Maxwell agreed to an SEC settlement of more than $6.3 million as well as an $8 million criminal penalty. (1/31/11)
Paul W. Jennings (Innospec) – SEC charged the CEO of Innospec for approving bribes paid to government officials in Iraq and Indonesia. (1/24/11)
SFO, BAE Help Educate Millions of Kids

As part of BAE's 2010 global settlement of bribery charges, BAE agreed with the SFO to pay nearly £30 million to fund educational projects in Tanzania.

The £30 million will be used to buy textbooks for all 16,000 primary schools in the country, the SFO said, benefiting more than eight million children. Teaching guides and syllabi will be provided to 175,000 primary school teachers.

Up to £5 million will be spent to buy desks for schools in Tanzania’s poorest districts.

The SFO said the U.K. has been helping BAE and the government of Tanzania allocate the money and decide how it will be delivered and monitored.
The Reform Debate In 2012

The U.S. Chamber of Commerce proposes the following changes to the FCPA:

- Clearly define “foreign official”
- Establish a leniency program for companies that self-report.
- Eliminate or reduce successor liability for acts of an acquired company.
- Add an affirmative defense for companies with robust compliance programs.
Additional Guidance on the FCPA due from the DOJ

• DOJ has indicated they are revamping their guidance on the FCPA. Assistant U.S. Attorney Lanny Breuer has rejected requests to “water down” the Act. He did indicate that the updated literature would provide “useful,” “detailed,” and “transparent” guidance on the enforcement issues.
Challenges For the Acts

- The DOJ’s setbacks
- The SFO’s fight for survival
Comparing and Contrasting the FCPA and the U.K. Bribery Act

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<th><strong>FCPA</strong></th>
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<td>The FCPA applies only to bribery of foreign officials.</td>
<td>The Act covers both commercial bribery and bribery of foreign political officials.</td>
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<tr>
<td>The FCPA does not apply to the receipt of a bribe.</td>
<td>The provisions of the Act relating to bribery of foreign political officials apply only to the offer, promise or payment of a bribe.</td>
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<td></td>
<td>However, the commercial bribery provisions of the Act apply to both the offer and acceptance of a bribe.</td>
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<td>The bribery provisions of the FCPA apply to: (i) SEC issuers (U.S. and foreign companies; (ii) “domestic concerns”; (iii) U.S. persons acting outside U.S. in furtherance of a prohibited payment; (iv) foreign nationals and entities that commit an act in the U.S. in furtherance of a prohibited payment; (v) U.S. or foreign agents of any of the foregoing.</td>
<td>The “failure to prevent bribery” provision applies to: (i) U.K. entities that conduct business in the U.K. or elsewhere; and (ii) any corporation, wherever formed, which carries on business or part of a business in the U.K. For other offenses, the act must either be committed in the U.K. or the person committing the act must have a close connection to the U.K.</td>
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### Comparing and Contrasting the FCPA and the U.K. Bribery Act

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<td>The FCPA permits facilitation payments for low-level payments for certain routine government actions.</td>
<td>The Act does not permit an exception for facilitation payments.</td>
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<td>The FCPA contains accounting provisions.</td>
<td>UK Bribery Act does not.</td>
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Company isn’t responsible for third party behavior (agents, subsidiaries).

Third Parties are considered “associated” persons.

If it’s an acceptable cultural practice in the company it’s not a bribe

Only defense is if the inducement is bribery specifically permitted under local law.

We are FCPA compliant

Bribery Act covers private and public bribery.

We are SOX compliant

Materiality does not apply.

We are an FSA regulated entity and our money laundering procedures make us compliant.

Need to consider what the funds used for.
Global Expansions of Anti-Corruption

Per TRACE’s Global Enforcement Report 2011

• 24 countries have pursued enforcement of their foreign bribery laws.

• First-time domestic bribery investigations were initiated in several countries, including Croatia, Cuba, Georgia, Israel, Latvia and Poland.

• The largest number of enforcement actions involves alleged bribe payments to officials in China, Iraq and Nigeria.
• On February 1, 2012, President Medvedev signed the Anti-Bribery Convention of the Organization for Economic Co-operation and Development (OECD).

• Signing is a pre-requisite for joining. Russia has applied for membership.
In 2011 there were six FCPA enforcement actions regarding corrupt activity in China

• One of the strongest deterrents of crime used in China is the death penalty.

• Most common form of corruption
  – customer kickbacks
  – employee fraud
  – granting government tenders

• Most corrupt sectors
  – healthcare
  – energy

• China is seeking OECD membership.
Canada

The Corruption of Foreign Public Officials Act passed in 1999.
Thank you

Any questions?

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