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# The Bribery Act 2010 Raising the Bar above the US Foreign Corrupt Practices Act

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The UK Bribery Act 2010 (“Bribery Act”) has been described as the toughest anti-corruption legislation in the world. It was enacted in April 2010 and will come into force in April 2011. Until now, the US Foreign Corrupt Practices Act (FCPA) has been, in practice, the predominant force in setting compliance standards for international businesses, but the Bribery Act has raised the bar in this respect. Businesses with a presence in the United Kingdom must now get to grips with the offences prohibited by the Bribery Act and consider what changes to their policies, procedures and training programmes may be required. Companies and their officers will be anxious to avoid the reputational risk, criminal liability and commercial cost that may flow from bribery and corruption enforcement action in the United Kingdom. Of particular concern is the risk of being barred from tendering for government contracts and the potential for alienating future investors. In addition, executives and employees risk significant prison terms for breach of the Bribery Act’s provisions.

This *White Paper* examines some key differences between the Bribery Act and the FCPA, highlights key areas in which to commence updating compliance programmes in advance of the issuance of official guidance by the UK Government, and compares the operation of self-reporting to and co-operation with enforcement agencies in the United Kingdom to that in the United States.

## Distinguishing the Bribery Act from the FCPA

The key differences<sup>1</sup> between the FCPA and the Bribery Act include the following:

### 1. A STRICT LIABILITY CORPORATE OFFENCE

The Bribery Act introduces a new strict liability corporate offence of failing to prevent bribery by a person “associated” with the organization, where that person intends to obtain or retain business for the organization or to obtain or retain an advantage in the conduct of business for the organization. This is the biggest change to the current position in the United Kingdom and will have the greatest impact on compliance programmes.

An “associated” person is one who performs services for or on behalf of the organization. The Bribery Act indicates that it may include employees, agents or subsidiaries. This is not, however, an exhaustive list – it could also include self-employed persons, consortia and joint ventures which provide services for or on behalf of the organization. It should be borne in mind that there is no test of “control” or “influence” under the Bribery Act. It does not matter if senior management of the corporate did not know that bribery was taking place. The only defence to a charge under this offence is that the organization had put in place “adequate procedures” to prevent bribery. Accordingly, having in place appropriate compliance procedures and ensuring that employees and other providers of services to the business adhere to these will be critical to protect businesses from enforcement action in respect of this new offence.

UK Government guidance on what constitutes “adequate procedures” is expected to be published in early 2011. It is anticipated that the chief prosecutors of offences under the Bribery Act (the Serious Fraud Office<sup>2</sup> (SFO), the Director of Public Prosecutions (DPP) and the Director of Revenue and Customs Prosecutions (DRCP)) will issue their own guidance. In addition, it is expected that professional bodies such as the Solicitors Regulation Authority and the Bar Council will issue guidance for their members.

Draft explanatory notes produced by the Ministry of Justice before the Bribery Act was enacted suggested that the defendant could adduce evidence which showed that, for example, given the size of the organization, the particular sector or country in which it operated and the foreseeable risks, the procedures employed by the defendant to prevent bribery being committed on behalf of the organization were adequate despite the fact of the bribe. It is not expected to be an easy task to prove that procedures were adequate when bribery has nonetheless been proven to have occurred. Key questions in any particular case will include why procedures failed to stop or inhibit the act of bribery and whether the failings were systemic.

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<sup>1</sup> A detailed comparison of the elements of the main offences under the Bribery Act and the FCPA is set out in Table 1.

<sup>2</sup> In this regard, it should be noted however that the UK Government has announced that the SFO is to be replaced by a new Serious Economic Crime Agency.

There is no similar strict liability offence of failing to prevent bribery under the FCPA, although a person may be liable for violating the FCPA where he or she has knowledge that an improper payment is made on his or her behalf by another person. Under the FCPA, “knowledge” is defined very broadly so as to include conscious disregard or deliberate ignorance, so that “turning a blind eye” to corruption can constitute knowledge.

## 2. SCOPE

The FCPA applies to the bribery of public officials outside the United States only (corruption of US public officials and corruption in the private sector are governed by separate federal and state statutes, in particular those relating to tax fraud, mail fraud and wire fraud). The Bribery Act is wider in scope. It applies to bribery of both UK and non-UK public officials and also applies to bribery in the private sector.

Accordingly, businesses within the territorial application of the Bribery Act (see below) who have FCPA compliance procedures already in place will need to focus on revising existing procedures and implementing additional procedures, in particular in respect of private sector bribery.

Separately, the FCPA contains accounting provisions that generally require companies with securities listed in the United States to keep books and records which accurately reflect transactions and to maintain an adequate system of internal accounting controls. While the Bribery Act does not specifically address accounting concerns, a UK company’s failure to keep adequate accounting records may trigger criminal liability for its officers under Section 387 of the Companies Act 2006. Moreover, the Bribery Act’s inclusion of an “adequate procedures” defence for corporates parallels the FCPA’s concern with adequate accounting controls, although the Bribery Act places the burden of proving adequacy on companies rather than placing the burden on government authorities to prove inadequacy.

## 3. EXTRA TERRITORIAL APPLICATION

The FCPA applies to US nationals, US firms and foreign firms who have issued securities in the United States or have a place of business there and persons acting within the United States. However, companies operating in the United States that do not have securities listed in the United States or otherwise make public securities filings in the United States generally can be liable under the FCPA only if conduct related to a bribery scheme occurred in the United States (such as meetings, telephone calls, banking activity, *etc.*)

The first three offences under the Bribery Act (bribing, accepting a bribe and bribing a foreign official<sup>3</sup>), will apply to:

- Persons committing an act in the United Kingdom
- Persons committing an act outside the United Kingdom where the act or omission would have been an offence if carried out in the United Kingdom, provided the defendant has a close connection with the United Kingdom (such as a British citizen or British overseas territories citizen, a UK resident or UK body corporate)

The fourth offence under the Bribery Act (the new corporate offence of failing to prevent bribery) applies to corporate bodies or partnerships either incorporated or formed in the United Kingdom or else carrying on business or part of a business in the United Kingdom. The corporate will be liable where the bribe is made or accepted by any person performing services for or on behalf of the corporate. That person’s actions need not occur in the United Kingdom and need have no connection with the United Kingdom. Accordingly, a non-UK corporate which carries on business in the United Kingdom may fall foul of this provision even where all activities relating to the bribe occur outside the United Kingdom, and even if the corporate does not have securities listed in the United Kingdom, unless it has in place adequate procedures to prevent bribery.

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<sup>3</sup> It should be noted that the defence of “adequate procedures” does not apply to any of these three offences.

#### 4. FACILITATION PAYMENTS AND HOSPITALITY

The new specific offence of bribing a foreign public official is designed to track the requirements of the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and is similar to the FCPA bribery offence, but lacks certain defences available in the United States relating to facilitation payments and bona fide expenses. Accordingly, payments that are legitimate under the FCPA may be prohibited under the Bribery Act and corporates should review and, if necessary, modify their existing policies on hospitality and facilitation payments accordingly.

- Facilitation Payments

Excluded from the scope of the FCPA anti-bribery provisions are payments made to facilitate or expedite routine governmental action by a foreign official, such as the issuing of licences or permits, installation of utilities, *etc.* US enforcement agencies appear, however, to have taken an increasingly narrow construction of this exception. The accounting provisions of the FCPA also require that facilitation payments be reflected accurately in an issuer's books and records (even if not prohibited by the anti-bribery provisions).

There appears to be an emerging trend against the acceptability of facilitation payments. On 9 December 2009 the OECD issued a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business, which called on the Convention States, including the United States, to review their policies and approach to small facilitation payments. Due to the desirability of firmwide consistency in corporate compliance programmes, the enactment of the Bribery Act may accelerate the process of raising the bar in this respect.

Facilitation payments are (and will continue under the Bribery Act to be) illegal under English law. The prosecutor has discretion, however, as to whether to prosecute in any particular case. For example, persistent offenders will more likely attract prosecution. On the other hand, an employee who is subjected to a threat of physical harm if he does not make a facilitation payment may potentially be less likely to suffer prosecution.

- Hospitality/Bona Fide Expenses

Under the FCPA, it is an explicit defence that the relevant payment represented reasonable and bona fide expenditure (such as travel and lodging expenses) directly related to the promotion, demonstration or explanation of products or services or the execution or performance of a contract with a foreign government or its agencies.

There is no such specific defence under the Bribery Act.

It should also be borne in mind that, under the Bribery Act, certain cases of the offence of accepting bribes may be prosecuted without proof of intent. For example, accepting lavish hospitality from a supplier may lead to a conviction without the prosecution having to prove intention to perform a function improperly – it will suffice if a reasonable person in the United Kingdom would consider that in accepting the hospitality, the function was performed improperly or that it was accepted in anticipation of or as a reward for improper performance. The recipient of the hospitality can be guilty without knowing that his performance is improper.

Similarly, to commit the offence of bribing a foreign official, it is not necessary for the person offering the advantage to intend that the official act improperly. It suffices that he intends to influence him and that there is no applicable written local law permitting the official to be so influenced. By way of example, a corporate bidding for a state contract to build an energy plant in a foreign country invites a foreign official on a trip to the United Kingdom to show him examples of previous work carried out by the corporate. His flights and hotel are paid for by the corporate. There is no intention that the official act improperly but it is intended to influence the official to award a contract to the corporate. Whether the hospitality given is an illegitimate “advantage” under the Bribery Act may depend upon how lavish it is. If the flight was economy class, the hotel a modest hotel and only basic expenses are reimbursed, it would appear difficult to fault the hospitality under the Bribery Act. If the flight is first class, the hotel a five star and generous expenses are paid, the perception of the “reasonable person” may be different. It may also differ depending on the status of the official (perhaps the more high-ranking, the more appropriate that that official be accommodated in the manner to which he is accustomed, in the eyes of the reasonable person).

Ultimately it appears likely that the question will turn on whether the reasonable person would perceive that what is received by the foreign official is an “advantage” or a luxury as opposed to a necessity. There will, however, be a spectrum in this regard and differentiating with certainty between legitimate and non-legitimate corporate hospitality is likely to prove problematic in practice. Transparency International UK’s<sup>4</sup> view is that good practice permits such expenditure where it is transparent, proportionate, reasonable and bona fide. Companies providing hospitality may, however, find themselves in the uncertain position of having to rely upon prosecutorial discretion.

## 5. PROHIBITION OF PASSIVE AS WELL AS ACTIVE BRIBERY

Unlike the FCPA, the Bribery Act contains a specific offence of accepting a bribe.

## 6. HARSHER PRISON SENTENCES

The maximum prison sentence for bribery under the FCPA is five years. In contrast the maximum sentence under the Bribery Act will be 10 years (it is currently seven years in the United Kingdom). In addition, if any of the offences of offering a bribe, accepting a bribe or bribing a foreign official is committed by a body corporate with the connivance of a senior officer, the officer is also liable to be prosecuted and may also face up to 10 years’ imprisonment.

## 7. OPINION PROCEDURE

Under the FCPA, a request can be made by issuers and domestic concerns from the US Department of Justice (DoJ) for an FCPA opinion as to whether certain specified prospective conduct conforms with the DoJ’s enforcement policy regarding the antibribery provisions of the FCPA. The request can be made in anticipation of a proposed transaction.

There is no similar provision under the Bribery Act, however the SFO has indicated that it may be sympathetic to this approach where overseas corruption is discovered in the context of due diligence carried out in an M&A transaction.

## Compliance Programmes

Corporates with a UK presence will be wondering what modifications will be needed to their compliance programmes in order to meet the demands of the Bribery Act.

Although corporates may be awaiting publication of government guidelines in respect of what constitutes adequate procedures in connection with the strict liability corporate offence of failing to prevent bribery before incurring the expense of altering their procedures, it should be borne in mind that no government guidance is expected in respect of the other three offences under the Bribery Act (bribing, accepting a bribe and bribing a foreign official). Moreover, the guidelines will likely be general and not contain a “one size fits all” compliance solution. “Adequate procedures” will vary from one corporate to another and will need to be tailored to accommodate the corporate’s size, business sector, geographic scope of operations, and industry regulations and practices, among other concerns.

As mentioned above, it is clear at this stage that companies with FCPA compliance programmes already in place should be giving particular consideration to addressing private sector corruption, facilitation payments and hospitality.

Additionally, because strict liability for failing to prevent bribery may attach for third party acts, relevant corporates need to ensure compliance throughout the supply chain, with particular attention to distributor agreements, employment agreements, agency agreements, joint venture agreements and such like. There should be a policy and procedure for due diligence to be carried out before entering into a business relationship, and for this procedure to be repeated periodically. In-depth due diligence should be carried out on all agents being appointed in countries prone to corruption and fees should be benchmarked.

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<sup>4</sup> The 2010 UK Bribery Act Adequate Procedures: Guidance on good practice procedures for corporate anti-bribery programmes (Transparency International UK, July 2010)

Risk assessments should be carried out, with a focus on high risk sectors of the business, high risk countries and high risk activities. Transparency International UK has recommended that risk assessment be a continuous process and focus on: local conditions and customs; business sector including competitors' practices; dependence on critical licences; business practices of the corporate; employees (*e.g.*, untrained employees or a large number of new hires); operational functions of the business (*e.g.*, marketing and sales); processes (*e.g.*, time pressures, contract variations); the form and nature of the corporate's local business relationships with agents, distributors, suppliers, joint venture and consortia partners and the extent of interaction with public officials; the organizational structure of the corporate (centralised or decentralised); and the political structure of the country (the networks between politicians and business people).

It is also worth noting the guidance that has been issued by the SFO as to what it will be looking for in a compliance programme. The guidance is summarised in Table 2 below, together with general recommended minimum requirements for an effective FCPA compliance programme for the purpose of comparison. It will be noted that these are broadly comparable but that the SFO has, in addition, specifically suggested including principles that are applicable regardless of local laws or culture; a policy on gifts, hospitality and facilitation payments; and a policy concerning political contributions and lobbying activities. As part of their hospitality policy, corporates should consider maintaining a register of gifts, which should be made available for reporting to the board of directors.

Written procedures alone are unlikely to be regarded as adequate. They should be supported by in-person training across the organization, together with monitoring, reporting, improvement and enforcement. The chief compliance officer should report to board level on (at a minimum) the compliance programme, the risk assessment, issues arising from the risk assessment and breaches of the procedures. Transparency International UK has recommended that countering bribery should be a standing item on the board agenda.

## Self-Reporting, Co-operation and Global Settlements

### US ENFORCEMENT AGENCIES

US enforcement agencies have been leaders in engendering a culture of self-reporting of corruption. The Principles of Federal Prosecution of Business Organizations issued by the DoJ on 28 August 2008 highlights a corporation's timely and voluntary disclosure of wrongdoing and its willingness to co-operate in the investigation of its agents as factors to be considered in deciding whether to bring charges and negotiating plea agreements. The DoJ encourages corporations, as part of their compliance programmes, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities. In addition, the SEC has a voluntary disclosure programme, under which self-reporting, coupled with remediation and additional criteria, may lead to an amnesty or reduced sanctions.

### ENFORCEMENT IN THE UNITED KINGDOM

The Guidance on Corporate Prosecutions setting out the common approach of the SFO, DPP and DRCP to the prosecution of general corporate offending includes self-reporting as a public interest factor weighing against prosecution.

On 21 July 2009 the SFO published the "Approach of the SFO to Dealing with Overseas Corruption" in anticipation of the enactment of the Bribery Act. This likewise endorses self-reporting and indicates that the benefit to the corporate will be the prospect (in appropriate cases) of a civil rather than a criminal outcome, as well as the opportunity to manage any publicity proactively with the SFO. Failure to do so promptly weighs in favour of prosecution. It warns that the SFO may learn about the corruption from another agency in the United Kingdom or elsewhere, a whistleblower, or a statutory report such as a suspicious activity report. The SFO's commendable recent emphasis on plea bargaining or alternatives to prosecution (such as civil recovery orders, independent monitoring, agreements to implement proper procedures and global settlements with regulators and criminal enforcement authorities in the United Kingdom and abroad) is perceived to be more likely to bring about behavioural change within businesses and thereby achieve the objective of reducing corruption. However, two recent cases in the United Kingdom appear to have highlighted a deficiency in UK procedural rules and sentencing guidelines which may limit the effectiveness of this approach.

## INNOSPEC

In March 2010, in the case *R v Innospec Limited*<sup>5</sup>, Innospec Limited, a subsidiary of US NASDAQ listed Innospec, Inc., pleaded guilty to a charge of conspiracy to corrupt senior government officials in Indonesia with approximately US\$8 million. Investigations were carried out by US enforcement agencies in relation to corruption in Iraq and trading with Cuba and by the SFO in relation to corruption in Indonesia. A global settlement was reached which was subject to approval by US and English courts. In view of Innospec's admission of guilt and co-operation (and limited resources) a settlement of approximately US\$40 million was agreed, of which Innospec Limited would be obliged to pay US\$12.7 million to the SFO (the split being approximately one third of the overall sum to be paid to the SFO, one third to the DoJ and one third to the SEC and US Office of Foreign Assets Control). Of the US\$12.7 million to be paid to the SFO, US\$6.7 million would be allocated to a fine or confiscation to be imposed in the Crown Court with the balance being the subject of a civil settlement.

The proposed settlement was duly approved in the United States, but in England, Lord Justice Thomas was highly critical of it. He indicated that it would rarely be appropriate for criminal conduct by a company to be addressed by a civil recovery order and he ordered that the entire sterling equivalent of the US\$12.7 million be payable as a criminal fine. He considered that corruption of foreign government officials or ministers was at the top end of serious corporate offending both in terms of culpability and harm. He expressed the view that the fine should have been comparable to that imposed in the United States and should have been in addition to depriving Innospec of the benefits it obtained through its corruption. Importantly, he stated that the sentencing submissions of the prosecutor should not include a specific sentence or an agreed range. This was a matter for existing sentencing guidelines and authorities – crucially, the judge reiterated the principle that in the United Kingdom only the court can decide on the appropriate sentence.

With reluctance, the judge agreed to the amount of the fine as per the terms of the proposed settlement, but made it clear that this was due to a set of circumstances unique to Innospec and that no judge's hands should be regarded as tied in the future as result. In particular, he was influenced by the fact that Innospec had already publicly announced the settlement to the markets and it could not pay the level of fine that the judge felt appropriate without becoming insolvent, which would lead to many job losses.

## ROBERT DOUGALL

In the separate case of *R v Dougall* heard by Southwark Crown Court in April 2010, an employee of a company which manufactured orthopaedic devices who pleaded guilty to conspiracy with his employer and others to make corrupt payments of US\$4.5 million to medical professionals in the public healthcare system in the Hellenic Republic was sentenced to 12 months' imprisonment, notwithstanding the SFO's recommendation of a suspended sentence in light of his co-operation. Dougall was the first co-operating defendant in a major SFO corruption investigation. He was party to an agreement with the SFO subject to Section 73 of the Serious Organized Crime and Police Act 2005 (SOCPA), which provides that the Crown Court may take into account the extent and nature of the assistance given or offered by a defendant on the offence for which he is being sentenced or any other offence. The plea agreement in this case had been entered into prior to the handing down of the judgment in Innospec.

Although the sentence was subsequently reduced by the Court of Appeal<sup>6</sup> in May 2010 to a suspended sentence, the Lord Chief Justice took pains to emphasize that this was due the Court's own analysis of mitigating factors rather than any sentencing agreement between the prosecution and the defence. The joint submission as to sentence presented to the Court by the SFO and the defence had highlighted that, in the case of a white-collar defendant, it is the fact of being sent to prison that matters, not the length of the sentence. The use of advocacy by the SFO in favour of the appellant in the joint submission (as opposed to "simply and objectively draw[ing] the attention of the court to matters of potential mitigation") was itself criticized. The Court drew attention to the problem that the appellant had developed the inevitable impression that arguments advanced by the Director of the SFO would carry far more weight than if they had come from his own advocate and therefore he had formed an expectation that the Court would likely accept them.

The Court rejected the implied submission that unless the appellant's sentence was suspended, co-operation from criminal defendants in the SOCPA process would diminish virtually to extinction, and that therefore in a case where a sentence of 12 months' imprisonment would otherwise be appropriate, the sentence must be suspended. The Lord Chief

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<sup>5</sup> [2010] EW Misc7 (EWCC)

<sup>6</sup> [2010] EWCA Crim 1048

Justice made it clear that even in similar circumstances to this case, where the defendant had fully co-operated, it should not be assumed that a suspended sentence would always be ordered. The Lord Chief Justice added, by way of contrast to the position in the United States, “in our jurisdiction there is no principle of any legitimate expectation to be enjoyed by the first person to co-operate with an investigating authority, that he (or she) will be the beneficiary of the most favourable sentencing outcome” (although he said that such conduct would normally provide substantial mitigation).

## COMMENTARY

These cases, and in particular the comments of Lord Justice Thomas, call into question (a) the likelihood that the self-reporting of corruption and co-operation on the part of the offender in the United Kingdom will prevent a criminal prosecution and instead result solely in civil penalties or suspended sentences; (b) the ability of the SFO to engage in meaningful plea-bargaining or influence the sentence in the case of a criminal prosecution, in light of the fact that it cannot enter into an agreement with an offender as to the penalty in respect of an offence charged; and (c) whether the SFO will continue to participate in global settlements and plea bargains of the type seen in the case of *Innospec* and also *BAE Systems* (which agreed a global settlement with the DoJ and the SFO in February 2010 for failing to keep reasonably accurate accounting records regarding commission payments made to a former marketing adviser in Tanzania. This settlement is currently awaiting UK court approval).

Indeed, it is clear that UK court approval of global settlements of violations of anti-corruption and accounting laws is by no means a foregone conclusion. Lord Justice Thomas emphasized in *Innospec*:

“Agreements and submissions of the type put forward in this case can have no effect... the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again.... This applies as much to companies as to individual defendants; and the case of individual defendants, a suggested agreed sentence is not only impermissible, it can raise false hopes.”

The resulting uncertainty surrounding the benefits of self-disclosure is likely to impact willingness to self-report to the SFO (or its future successor, the Serious Economic Crime Agency) going forward, absent more extensive powers being given to that body in respect of plea bargaining or future practice directions or guidelines being issued in respect of sentencing in this area. In some circumstances, however, companies may nevertheless be obliged to report to the Serious Organized Crime Agency under the Proceeds of Crime Act 2002 in order to avoid committing money laundering offences. Under Section 328 of that Act, it is an offence to enter into an arrangement that one knows or suspects facilitates the acquisition of criminal property by another (which would include the proceeds and benefits flowing from the payment of a bribe) but it is a defence if an appropriate disclosure is made in accordance with the provisions of the Act. The maximum penalty for failing to comply with that provision is 14 years’ imprisonment. In addition, tenderers who have been (or whose director(s) or other persons having powers of representation, decision or control have been) convicted of corruption or money laundering offences are excluded from participation in public contracts within the European Union<sup>7</sup>.

## Conclusion

For the past 30 years, the FCPA has set the standard for anti-corruption legislation, with a noted upsurge in enforcement activities over the last few years by US enforcement agencies. The enactment in the United Kingdom of the Bribery Act, which is wider in scope, and has stiffer penalties and fewer defences is, however, likely to set the new minimum standard of conduct for international businesses in the prevention of corruption. Implementing changes to compliance programmes in readiness for the Bribery Act and the enforcement activity that will follow is now an imperative for international businesses and may save considerable cost in the long term.

For more information, please contact your regular McDermott lawyer or:

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<sup>7</sup> Article 45 of Directive 2004/18/EC of the European Parliament and of the Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts. See also Regulation 23 of the UK Public Contracts Regulations 2006 pursuant to which a company is automatically debarred from competing for public contracts if it has been convicted of a corruption offence.



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## Table 1

### Comparison of FCPA and Bribery Act Offences

|   | FCPA   |   | Bribery Act   |  |  |   |
|---|--|---|---|--|--|---|
| 1. Key offences                           | Bribery of a foreign official  | Failure to maintain books, records and accounts                           | Offering a bribe  | Accepting a bribe  | Bribing a foreign official   | Failure by a corporate to prevent bribery   |
| 2. Who is liable/ territorial application | <ul style="list-style-type: none"> <li>Issuers (and their officers, directors, agents and employees)</li> <li>US domestic concerns (US citizens, US corporates and businesses with a place of business in the United States)</li> <li>Persons acting within the United States</li> </ul> | Issuers with securities listed in the United States (enforced by the SEC) | <ul style="list-style-type: none"> <li>A person committing the relevant act or omission in the United Kingdom</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>A person committing the act or omission overseas where the person has a <b>"close connection to the UK"</b> (see definition below)</li> </ul> | <ul style="list-style-type: none"> <li>A person committing the relevant act or omission in the United Kingdom</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>A person committing the act or omission overseas where the person has a <b>"close connection to the UK"</b></li> </ul> <p>Note: If the offence is committed by a</p> | <ul style="list-style-type: none"> <li>A person committing the relevant act or omission in the United Kingdom</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>A person committing the act or omission overseas where the person has a <b>"close connection to the UK"</b></li> </ul> <p>Note: If the offence is committed by a</p> | Any UK corporate or partnership (or foreign corporate or partnership which carries on a business or part of a business in the United Kingdom) in respect of acts or omissions taking place in the United Kingdom or elsewhere |

|   |  |  |   |  |  |   |
|---|--|--|---|--|--|---|
|   |  |  | Note: If the offence is committed by a body corporate with the connivance of a senior officer, he is also liable  | body corporate with the connivance of a senior officer, he is also liable  | body corporate with the connivance of a senior officer, he is also liable  |   |
| <b>3. What is prohibited</b>                | Offering or making a payment of money or anything of value directly or indirectly to a foreign official, international organization official, political party or party official or candidate for public office | Failure to keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer and to maintain an adequate system of internal accounting controls (and to use good faith efforts to the extent reasonable to influence its foreign or domestic subsidiaries also to do so) | Offering, promising or giving a financial or other advantage  | Requesting, agreeing to receive or accepting a financial or other advantage  | Offering, promising or giving a financial or other advantage   | Bribery of another person by a person “associated” with the corporate   |
| <b>4. Requisite proof of intent/purpose</b> | The payment is made for the purpose of influencing that official to assist in obtaining or retaining business or in directing business to a particular person to secure an improper advantage                  | Knowingly falsifying any book, record or account<br><br>OR<br><br>Knowingly circumventing or failing to implement an internal system of accounting controls  | Intention to induce a person to perform improperly a “ <b>relevant function or activity</b> ” (see definition below) or reward them for doing so<br><br>OR<br><br>Knowing or believing that the acceptance of the advantage itself constitutes improper performance of a “ <b>relevant function or activity</b> ” | Intention that a “ <b>relevant function or activity</b> ” should be performed improperly<br><br>Note: No proof of intention is required where:<br><br>▪ The request, agreement or acceptance is itself improper performance by the recipient<br><br>OR | Intention to obtain or retain business or an advantage in the conduct of business<br><br>It is not necessary for the briber to intend that the official act improperly. It suffices that he intends to influence him | The “associated” person intends to obtain or retain business for the corporate or to obtain or retain an advantage in the conduct of business for the corporate<br><br>Note: It is not necessary for the associate to be prosecuted for bribery in order for the corporate to be liable |

|                     |  |  |  |  |   |   |
|---------------------|--|--|--|--|---|---|
|                     |  |  |  | <ul style="list-style-type: none"> <li>The request, agreement or acceptance is a reward for or in anticipation of the relevant improper performance</li> </ul> |   |   |
| <b>5. Defences</b>  | <ul style="list-style-type: none"> <li>It was reasonable and bona fide expenditure (such as travel and lodging expenses) directly related to the promotion, demonstration or explanation of products or services or the execution or performance of a contract with a foreign government or its agency</li> <li>It was facilitating or expediting routine governmental action</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>It was permitted by local written law</li> </ul> |  | None   | None   | The foreign official is permitted by the written law applicable to him to be influenced by the offer, promise or gift | The corporate is able to prove that it had adequate procedures designed to prevent persons associated with it from undertaking such conduct |
| <b>6. Penalties</b> | <p>In summary:</p> <p>Criminal fine for entities up to US\$2 million and for individuals up to US\$250,000 and up to five years' imprisonment</p> <p>Civil penalties up to</p>   | <p>Criminal fine for entities up to US\$25 million and for individuals up to US\$5 million and up to 20 years' imprisonment</p> <p>Civil penalties up to US\$500,000</p> | Unlimited fine and/or maximum 10 years' imprisonment | Unlimited fine and/or maximum 10 years' imprisonment   | Unlimited fine and/or maximum 10 years' imprisonment  | Unlimited fine  |

|  |   |  |  |  |  |  |
|--|---|--|--|--|--|--|
|  | US\$10,000 per violation. Penalty may also include debarment from contracting with the federal government | for entities and US\$100,000 for individuals<br><br>Bar from serving as officer/director of public company |  |  |  |  |
|--|---|--|--|--|--|--|

Defined Terms:

|                               |   |
|-------------------------------|---|
| Close connection to the UK    | This includes, amongst others, a British citizen, a British overseas territories citizen; a UK resident; and a UK body corporate  |
| Relevant function or activity | This includes functions of a public nature OR activities connected with a business OR performed in the course of employment OR performed by or on behalf of a body corporate or unincorporated body PROVIDED the person is (a) “expected” to perform it in good faith or (b) “expected” to perform it impartially or (c) the person is in a position of trust by virtue of performing that function |
| Expected                      | This is the expectation of a reasonable person in the United Kingdom  |

## Table 2

### Compliance Programmes – Comparative Table

| Recommended FCPA minimum requirements for an effective compliance programme  | Guidance issued by the SFO on its expectations in assessing the adequacy of procedures to deal with overseas corruption   |
|--|---|
| <ul style="list-style-type: none"> <li>The establishment of adequate compliance standards and procedures to reduce the likelihood of criminal conduct</li> </ul>   | <ul style="list-style-type: none"> <li>A code of ethics</li> <li>Principles that are applicable regardless of local laws or culture</li> <li>A policy on gifts, hospitality and facilitation payments</li> <li>A policy concerning political contributions and lobbying activities</li> </ul> |
| <ul style="list-style-type: none"> <li>The assignment of high level personnel to oversee the compliance programme and care to be taken to ensure that responsibility is not delegated to a person with a propensity to engage in illegal acts</li> </ul> | <ul style="list-style-type: none"> <li>A clear statement of anti-corruption culture fully and visibly supported at the highest levels in the corporate</li> </ul>   |
| <ul style="list-style-type: none"> <li>Disseminating the standards and procedures to all employees and other agents through publications and training</li> </ul>   | <ul style="list-style-type: none"> <li>Training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporate</li> <li>A commitment to making it explicit that the antibribery code applies to business partners</li> </ul>                          |
| <ul style="list-style-type: none"> <li>Auditing the compliance programme and maintaining a system for reporting violations</li> </ul>  | <ul style="list-style-type: none"> <li>Regular checks and auditing in a proportionate manner</li> </ul>   |
| <ul style="list-style-type: none"> <li>Enforcing the programme in a consistent and appropriate manner</li> </ul>   | <ul style="list-style-type: none"> <li>Individual accountability</li> <li>Appropriate and consistent disciplinary processes</li> </ul>  |
| <ul style="list-style-type: none"> <li>Responding reasonably to an offence and modifying the programme to prevent future offences</li> </ul>   | <ul style="list-style-type: none"> <li>A helpline within the corporate which enables employees to report concerns</li> <li>If there have been previous cases of corruption with the corporate, what has been the effect of any remedial action</li> </ul>                                     |
| <ul style="list-style-type: none"> <li>Special attention to be given to “red flags” that indicate possible corruption, such as: the reputation of the country and proposed agent; payments made to third parties or in cash</li> </ul>                   |   |
| <ul style="list-style-type: none"> <li>In high risk jurisdictions, due diligence to be carried out on the businesses concerned and precautions to be taken to prevent a breach</li> </ul>  | <ul style="list-style-type: none"> <li>A policy on outside advisers/third parties including vetting and due diligence and appropriate risk assessments</li> </ul>   |

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