

POLICY

U.S. Foreign Corrupt Practices Act, U.K. Bribery Act and Global Anti-Corruption

Vendor shall not take any action directly or indirectly, that would constitute a violation of the United States Foreign Corrupt Practices Act (the “FCPA”), the U.K. Bribery Act, or any other applicable anti-bribery laws or regulations. Vendor represents and warrants that unless disclosed to the Company in a separate written statement, neither Vendor nor any of its officers, directors, employees, agents, shareholders or owners (“Affiliated Persons”) are government officials nor have they been in the last five years. If at any time, Vendor and/or any Affiliated Person is named, appointed, or otherwise becomes a government official, Vendor will notify the Company in writing within seven (7) business days. Vendor represents and warrants that it has not been convicted of, pleaded guilty to, or charged with any offence involving fraud, corruption or bribery in any jurisdiction or country. At its sole discretion, upon notification to Vendor, the Company may terminate this Agreement effective immediately if: the Company makes a good faith determination that Vendor and/or any Affiliated Person has breached the representations and warranties in this Agreement and/or otherwise has committed a violation of the FCPA, the U.K. Bribery Act and/or any other applicable anti-bribery laws; or Vendor and/or any Affiliated Person has been named, appointed, or otherwise becomes a Government Official. In the event that Vendor breaches its obligations hereunder, Vendor shall indemnify and hold harmless the Company against any and all claims, losses, damages, penalties or fines related to such breach.

ANTI-BRIBERY PROHIBITION OF FOREIGN CORRUPT PRACTICES ACT

The FCPA makes it a felony to offer or pay a bribe to a foreign official for the purpose of obtaining or keeping business of any sort. An American company (or a foreign company with sufficient ties to the United States) or any of its officers, directors, employees or agents, has violated the FCPA if it:

- (1) pays, offers, authorizes, or promises to pay money or anything of value;
- (2) with a corrupt motive;
- (3) to a “foreign official” or to any other person, knowing that part of the payment or promise will be passed on to a “foreign official;”
- (4) for the purpose of (a) influencing any act or decision of the foreign official; (b) inducing the foreign official to do or omit to do any act in violation of the official’s lawful duty; (c) securing any improper advantage; or (d) inducing the foreign official to use his influence with a foreign government or foreign government instrumentality to affect any act or decision; and
- (5) in order to assist in obtaining or retaining business, or in directing business to any person.

See 15 U.S.C. §§ 78dd-1(a) & dd-2(a).

Corporations and other business entities convicted of violating the FCPA anti-bribery provisions may be fined up to \$2 million for each violation, which can be increased to \$2.5 million for certain willful violations. 15 U.S.C. §§ 78dd-1(a) *et seq.* Under the Alternative Fines Act, these criminal fines can be increased to twice the gain by reason of the offense or twice the loss to any other person. *See* 18 U.S.C. § 3571(d).

Individuals (including employees who acted in the course of their employment) face up to five years imprisonment for each violation, which can be increased to ten years for certain willful violations, plus monetary fines. *See* 15 U.S.C. §§ 78dd-1(a) *et seq.*

Who is a “Foreign Official?”

The FCPA defines “foreign official” to mean “any officer or employee of a foreign government or any department, agency, or instrumentality thereof . . . or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.” 15 U.S.C. § 78dd-1(f)(1). This definition is broad enough to include an employee of a government-owned enterprise, although the ultimate conclusion as to whether any given individual is a “foreign official” depends on the facts and circumstances presented.

Payment to Third-Party Intermediary

The FCPA prohibits payments to “any person,” knowing that some part of the payment will be passed along to a foreign official. The statute, however, defines “knowing” broadly to include being “substantially certain,” having a “firm belief” or being “aware of a high probability” that a portion of the money will be passed along to a foreign official. Thus, a company could be found liable for paying an excessive amount of money to an agent or supplier, and turning a blind eye to the possibility that some of the money would be passed along to a foreign official.

Purpose of the Payment

Among other things, as quoted above, the FCPA makes it illegal to pay a foreign official to “secure any improper advantage” for purposes of obtaining or retaining business. The Government takes the position, and at least one appellate court agrees, that under this provision, that it can be an FCPA violation to pay money to a foreign official who has no involvement in actually purchasing the defendant’s goods.

Limited Exception for “Facilitating Payments”

In addition to the defenses, the statute expressly allows payments to foreign officials in very limited circumstances for payments to “expedite or secure the performance of a routine governmental action.” 15 U.S.C. §§ 78dd-1(b). (These are often referred to as “facilitating” or “grease” payments.) The statute defines “routine governmental action” to mean “an action which is ordinarily and commonly performed by a foreign official,” such as the issuance of permits or licenses, processing official documents, providing police protection, scheduling inspections, loading or unloading cargo, providing certain utility services “or action of a similar nature.” 15 U.S.C. §§ 78dd-1(f)(3). American companies must take caution when relying on the “grease” payment exception, however, as the DOJ interprets this exception very narrowly. In addition, the U.K. Bribery Act contains no exception for facilitating payments.

Civil Enforcement of the FCPA Books and Records Provision

In addition to the anti-bribery provisions summarized above, the FCPA also imposes an obligation on publicly traded companies to make and keep accurate books and records and to maintain and devise a system of internal accounting controls. *See* 15 U.S.C. § 78m(b)(2)(B). These provisions require that payments to foreign officials be fully and accurately reflected and described in the Company’s books and records (as opposed to describing the payments with innocuous terms, such as “commission payment” or “miscellaneous expense”). Both the DOJ and the SEC rely heavily on the

FCPA books and records provisions when bringing civil enforcement actions, as a low burden of proof is required in a civil case. The SEC can seek disgorgement of profits or can seek steep civil monetary penalties. The DOJ often follows SEC enforcement actions with criminal charges.

UNITED KINGDOM BRIBERY ACT 2011

Scope of the United Kingdom Bribery Act 2011

The Bribery Act creates four new criminal offences which make the following actions liable to criminal investigation and prosecution;

- (i) It is an offence to bribe another person to perform improperly a relevant function or activity or to reward a person for the improper performance of such function or activity. It does not matter if you do this directly or through a third party.
- (ii) It is an offence to receive, request or accept a bribe. Again it does not matter if you do this directly or through a third party.
- (iii) It is an offence to bribe a foreign public official to obtain or retain business or a business advantage.
- (iv) It is an offence for a commercial organisation not to prevent bribery unless the organisation can show that it has adequate procedures to prevent bribery.

Jurisdiction

The Act applies to individuals that are ordinarily resident in the UK and is not limited to UK nationals. It applies to all UK businesses including those that may be deemed to be carrying on a business in the UK. Although the term 'carrying on a business in the UK' has not been strictly defined it should be given its ordinary meaning.

Dealing with Others on behalf of the Organisation, Government Officials, Government Contractors or Subcontractors (All)

No employee may give, offer, request, receive or promise any, financial or other advantage, directly or indirectly, (for example, entertainment, meals, refreshments, gratuities or giftsⁱ) to any person, commercial organizationⁱⁱ and or persons associatedⁱⁱⁱ with the commercial organization, government official, government contractor, subcontractor (or an employee of either) or foreign public official^{iv}, for the purpose of obtaining or retaining business or an advantage in the conduct of business from those individuals or entities or to induce a person to perform improperly any activity related to the business.

ⁱ hospitality promotional and other business expenditure- Bona fide hospitality and promotional, or business expenditure which seeks to improve the image of a commercial organization, better to present products and services, or to establish cordial relations, is recognized as an important part of doing business. It is important to note that the Act is not intended to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes (Ministry of Justice Guidance March 2011).

ⁱⁱ commercial organization means a body or partnership which is incorporated or formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere). It also includes any other body corporate (wherever incorporated) or any other partnership or a firm or entity of a similar character formed under

the law of a country or territory outside the UK which carries on a business, or part of a business, in any part of the United Kingdom.

ⁱⁱⁱ associated person means a person who provides services for or on behalf of the commercial organization.

^{iv} Foreign Public Official means (a) an individual who holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom, (b), exercises a public function for or on behalf of a country or territory outside the United Kingdom, or for any public agency or public enterprise of that country or territory (or sub division), or (c) is an official or agent of a public international organization.

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