

Contents

About the Authors	xiii
Vivian Robinson QC	xiii
Stuart H. Deming	xiii
Truman K. Butler	xiv
Preface	xvii
<i>CHAPTER 1</i>	
Introduction	1
<i>CHAPTER 2</i>	
Foreign Corrupt Practices Act	3
A. The Anti-Bribery Provisions	3
1. Scope and Application	4
a. Any Person	4
(1) US Person	4
(2) All Other Individuals or Entities	4
b. Accomplices	5
(1) Aiders and Abettors	5
(2) Conspirators	5
2. Essential Elements	6
a. Payment, Offer or Promise	6
(1) Authorisation	6
(2) Requisite Knowledge	7
b. Anything of Value	8
c. Foreign Public Official ('FPO')	9
(1) Political Parties, Party Officials or Candidates for Public Office	9

iv	Contents	
	(2) <i>De Facto</i> Members of Government	10
	(3) State-Owned or State-Controlled Entities	10
	(4) International Organisations	12
	d. Corrupt Intent	13
	(1) Knowledge and Intent of Inducer is the Sole Consideration	13
	(2) Knowledge and Intent of an Entity	13
	e. Influencing an Official Act	14
	f. To Obtain or Retain Business	14
	3. Exceptions, Affirmative Defences and Related Considerations	15
	a. Statute of Limitations	16
	b. Facilitating Payments	16
	(1) Nondiscretionary Act	16
	(2) Need for Caution	17
	c. <i>Bona Fide</i> Business Expenditures	17
	(1) Whether Permitted by the FPO's Government	18
	(2) Reasonable Business Expenses	18
	d. Local Law	18
	e. Opinion Procedure	19
	f. Duress	20
	4. Sanctions	20
	a. Criminal Sanctions	20
	(1) US Sentencing Guidelines	21
	(2) Critical Components of Effective Compliance Programmes	21
	b. Civil Sanctions	23
	c. Collateral Sanctions	24
	B. The Accounting and Record-Keeping Provisions	25
	1. Scope and Application	25
	a. Subsidiaries of Issuers	25
	(1) Less than 50 Per Cent Ownership	26
	(2) Determining Effective Control	26
	b. Individuals	26
	c. Accomplices	27

	Contents	v
(1) Aiders and Abettors		27
(2) Conspirators		27
2. The Record-Keeping Provisions		28
a. Falsification of Books and Records		28
(1) No Requirement for Materiality		28
(2) Covering Up Misconduct		28
(3) Applicable Records		29
b. Misrepresentations to Auditors		30
3. The Internal Controls Provisions		30
a. Adequate Internal Controls		31
b. Broad Reach of the Internal Controls Provisions		32
3. Statute of Limitations		33
4. Sanctions		33
a. Criminal Sanctions		33
b. Civil Sanctions		34
c. Collateral Sanctions		34
C. Other Applicable Laws		34
1. The Travel Act		34
a. Use of Interstate or Foreign Commerce		35
b. Intent and Affirmative Action to Carry on Unlawful Activity		35
c. Unlawful Activity		35
2. Money Laundering		35
a. Penalties		36
b. Forfeiture		36
3. Mail and Wire Fraud		36
4. Certification and Reporting Violations		36
5. Tax Violations		37
6. Retaliation or Obstructing an Investigation		37
D. Enforcement of the FCPA		38
1. Enforcement Agencies		38
2. Justice Department Enforcement Considerations		38
3. SEC Enforcement Considerations		39
4. Deferred-Prosecution and Non-Prosecution Agreements		40
5. Monitors		41

vi Contents

6. Independent Compliance Consultants 41

CHAPTER 3

UK Bribery Act 43

A. The General Offences 43

1. Bribing another Person ('Active Bribery') – Section 1 44

2. Being Bribed ('Passive Bribery') – Section 2 44

3. Bribing a Foreign Public Official ('FPO') – Section 6 45

a. Foreign Public Official 45

b. Interaction between Sections 1 and 6 46

4. Liability of a Corporation for a General Offence 46

5. Exceptions, Affirmative Defences and Related 46

Considerations 46

a. Statutory Limitations 46

b. Relevance of a Country's Written Law 47

6. The UK Enforcement Approach to Business Expenditure 47

a. Need for Caution 47

b. Basic Safeguards 47

c. Proportionality 48

d. The Approach of the UK Serious Fraud Office ('SFO') 48

7. The UK Enforcement Approach to Facilitating Payments 49

a. The OECD Approach 49

b. The Need for Caution 49

c. Basic Safeguards 50

d. The Approach of the SFO to Facilitating Payments 51

8. Political Contributions 51

9. Charitable Donations 52

10. Sanctions for General Offences 53

B. Liability of Senior Officers 53

C. The Corporate Offence – Failure to Prevent Bribery 54

1. Relevant Commercial Organisations 54

a. Parents and Subsidiaries 55

b. Organisations Pursuing Charitable or Similar Aims 55

c. The Need for Caution 55

2. Associated Persons 55

3. The ‘Absolute’ Nature of the Corporate Offence	56
4. The ‘Adequate Procedures’ Defence	57
5. Sanctions for the Corporate Offence	58
D. Other Applicable Laws	58
1. Bribery and Money Laundering – The Proceeds of Crime Act (‘POCA’)	58
2. Accounting and Bookkeeping	60
a. False Accounting under the Theft Act 1968	60
b. Failing to Keep Accounting Records under the Companies Act 2006	60
3. Company Directors Disqualification	60
4. Aiders and Abettors	60
5. Conspirators	61
a. Statutory Offence of Conspiracy	61
b. Conspiracy to Defraud	61
E. Enforcement of the UK Bribery Act	61
1. Enforcement Agencies	61
2. Acceptance of Cases	61
3. Criminal Proceedings	62
4. Deferred Prosecution Agreements (‘DPAs’)	62
5. Civil Recovery Order (‘CRO’)	63
6. Principles Determining the SFO’s Course of Action	64
7. Self-Referral	64
a. SFO Policy	64
b. The Decision Whether or Not to Self-Report	65
c. Specific Guidance to Corporates	65
8. The Current Direction	66

CHAPTER 4

Compliance Programmes 67

A. Harmonizing FCPA and UK Bribery Act Compliance Programmes	67
1. Reconciling the Key Differences	68
a. Facilitation Payments	68
b. Private Bribery	68

viii Contents

c. Political Parties, Party Officials, or Candidates for Public Office	68
d. Scope of International Organisations	69
2. Incorporating Related Considerations	69
a. Record-Keeping	69
b. Internal Controls	70
B. Critical Components of a Compliance Programme	70
1. Commitment from the Top	71
2. Policies and Proportionate Procedures	72
3. Record-Keeping	73
4. Risk Assessment	73
5. The Compliance Function	75
6. Implementing Policies and Procedures	76
7. Training	77
8. Seeking Guidance and Advice	78
9. Monitoring	78
10. Third Parties	79
11. Mergers and Acquisitions	81

APPENDIX A

Excerpt - A Resource Guide To The U.S. Foreign Corrupt Practices Act ('FCPA Resource Guide')	83
Corporate Compliance Program	83
Hallmarks of Effective Compliance Programs	87
Commitment from Senior Management and a Clearly Articulated Policy Against Corruption	88
Code of Conduct and Compliance Policies and Procedures	89
Oversight, Autonomy, and Resources	90
Risk Assessment	91
Training and Continuing Advice	92
Incentives and Disciplinary Measures	93
Third-Party Due Diligence and Payments	94
Confidential Reporting and Internal Investigation	95
Continuous Improvement: Periodic Testing and Review	96

Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration	97
Other Guidance on Compliance and International Best Practices	98
Compliance Program Case Study	100
Hypothetical: Third-Party Vetting	101
Part 1:	101
Part 2: Distributors and Local Partners	102

APPENDIX B

Excerpt - The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010) ('Government Guidance')

	107
The Six Principles	107
Principle 1	108
Proportionate Procedures	108
Commentary	108
Procedures	110
Principle 2	112
Top-Level Commitment	112
Commentary	112
Procedures	112
Internal and External Communication of the Commitment to Zero Tolerance to Bribery	112
Top-Level Involvement in Bribery Prevention	113
Principle 3	114
Risk Assessment	114
Commentary	114
Procedures	115
Commonly encountered risks	116
Principle 4	117
Due Diligence	117

x	Contents	
	Commentary	117
	Procedures	118
	Principle 5	120
	Communication (including training)	120
	Commentary	120
	Procedures	120
	Communication	120
	Training	121
	Principle 6	122
	Monitoring and Review	122
	Commentary	122
	Procedures	123
	Bribery Act 2010 Case Studies	124
	Introduction	124
	Case Study 1 – Principle 1	125
	Facilitation payments	125
	Case Study 2 – Principle 1	126
	Proportionate procedures	126
	Case Study 3 – Principles 1 and 6	127
	Joint venture	127
	Case Study 4 – Principles 1 and 5	128
	Hospitality and promotional expenditure	128
	Case Study 5 – Principle 3	129
	Assessing risks	129
	Case Study 6 – Principle 4	130
	Due diligence of agents	130
	Case Study 7 – Principle 5	131
	Communicating and training	131
	Case Study 8 – Principle 1, 4 and 6	132
	Community benefits and charitable donations	132
	Case Study 9 – Principle 4	133
	Due diligence of agents	133

Contents **xi**

Case Study 10 – Principle 2	134
Top-level commitment	134
Case Study 11	135
Proportionate procedures	135