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CEO of Compliance Wave  
Red Bank, New Jersey

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by Robin Singh, MSc-Law, MSc-IT, LPEC, CFE

# Foreign Corrupt Practices Act and UK Bribery Act in developing countries

- » All the major world powers, such as China, U.S., UK, or India, have anti-bribery laws/provisions or penalties for misconduct that are embedded in their prevailing laws.
- » A proactive compliance review can only be undertaken if the compliance officers can understand and widely interpret the key terms embedded in the Foreign Corrupt Practices Act (FCPA) and UK Bribery Act.
- » FCPA has evolved and grown into a web to prosecute a conglomerate for the wrong doings of its child entity, even though minimal practical (or impractical) connections may exist between the two.
- » Deferred prosecution agreements (DPA) are widely used to give compliance officers time to put in place the controls embedded in U.S. Sentencing Guidelines.
- » Compliance officers should develop hypothetical scenarios to help employees understand the effect of FCPA and UK Bribery Act.

**U**S companies enforced the Foreign Corrupt Practices Act (FCPA) of 1977 as an action against revelations of widespread incidents of bribery by foreign officials attempting to win business. The Act has an impact on all US companies that are doing business outside the United States of America. US companies can be held liable for acts of their joint venture partners, foreign subsidiaries, and all other parties that are deemed to be acting in the capacity of their agents. A foreign company that has its presence in the United States and all those foreign entities and non-residents that either use or act upon U.S. wires or mails when in the United States also fall under the scope of the Act.



Singh

## FCPA keywords

To understand the FCPA of 1977, we must understand how it defines certain key terms.

**Facilitation payments:** In United States, a “grease payment” or a facilitating payment refers to a payment made to a foreign party official, foreign official, or a political party for performance of routine government actions to expedite or speed up performance of those duties that are non-discretionary in nature.

**Foreign official:** The term “foreign official” refers to leaders of foreign governments, such as a Prime Minister, president, and other heads of state. The term also includes employees of different “agencies” and departments in the offices of foreign governments (e.g., customs officials, tax officials). A foreign official is thus an officer or

employee of a foreign government. He/she can also be part of a department or an agency of a public international organization. A foreign official can also act in an official capacity on behalf of a public international organization or a foreign government. Companies must be particularly cautious when dealing with nations in which many of the organizations are state-owned, for instance, organizations in China or Russia (Section 78dd-1).

**Gain in the future:** Under the Foreign Corrupt Practices Act, gifts given to foreign officials can be also regarded as violations of the FCPA if the intention for giving them is to gain favors of a general nature for future prospects of the said company.

**Statute of limitation:** The FCPA does not include the definition of a specific statute of limitations. Rather, the five-year “catch-all” provisions in 18 USC 3282 (for criminal actions) and 28 USC 2462 (for civil actions) apply. Moreover, under 18 USC 3292, in a criminal case the DOJ can seek, before return of an indictment, to suspend the limitations period if seeking evidence located in a foreign country. In one case, *SEC v. Straub*,<sup>1</sup> the court ruled in an issue of first impression concerning 28 USC 2462 (Time for Commencing Proceedings<sup>2</sup>) that the limitations period did not begin to run, because the foreign national defendants were not physically present in the U.S.

### The UK Bribery Act keywords

The UK Bribery Act of 2010 was enforced on July 1, 2011. The Act applies to incidents of bribery happening in both private and public sectors, and applies to not only any act of bribery that is committed in the United Kingdom, but also in countries where there is adequate connection with the United Kingdom.

**Bribe:** A bribe is defined as a financial or other advantage with regard to improper performance of a function or a position of trust that should have otherwise been performed in good faith or without any type of partiality.

**Facilitation payments:** A facilitation payment is a kind of bribe and should be regarded as such. For example, when money or other goods are offered to a government official to either ensure speedy performance or perform an existing duty.

**Foreign official:** Section 6(4) of the Act defines a foreign public official as an individual who holds judicial, administrative, or legislative positions. It also refers to all those individuals who may carry out a public function for the public agencies of the country or for a foreign nation or an agent or an official of an international public organization.

**Foreign national:** Refers to a citizen of a foreign country who can be held liable for violating the UK Bribery Act if such an incident occurs within United Kingdom.

**Gain in the future:** No acts of bribery should be entertained for favorable future prospects of a company.

**Statute of limitations:** There is no statute of limitations defined by the Act as opposed to the FCPA that clearly defines the same.

### What is the difference between a bribe and a gift?

In countries like Japan and the Middle East, it is quite customary for a participant to carry along small gifts for the other attendees in the meeting. So should this also be regarded as a bribe under the Act? If the answer is no, then what is the difference between a gift and

a bribe? If a visitor is offering a coffee mug as a gift, will that be tantamount to a bribe or a gift? Similarly, if the client gifts an official with two tickets for the Super Bowl, how should that be treated under the purview of this Act?

Whether an item is a bribe or a gift would depend on how expensive the entertainment or the gift is. There are several organizations that specify in their code of conduct a particular amount beyond which the officials of that company cannot exceed to prevent the appearance of bribery for the company. For instance, Nike has specified a Code of Conduct according to which its officials are forbidden to accept entertainment or gifts costing \$200 or more.

### Key trends of FCPA & UK Bribery Act

The enforcement of the FCPA has been hugely impacted with the passage of Sarbanes Oxley in 2002. The issuers are required to assess, as well as report on, how effective their internal controls are over the subject of financial reporting according to Section 404 of SOX. This particular requirement mentioned in SOX has resulted in issuers being more active for investigating all the questionable transactions, especially in all those foreign subsidiaries whose records and books have been consolidated with that of the issuers with an objective of financial reporting.

Another reason for increase in the FCPA enforcement is due to the way actions related to FCPA enforcement are resolved, primarily through deferred prosecution agreement (DPA) or non-prosecution agreement (NPA).

The Corruption Perceptions Index Report<sup>3</sup> (Table 1) shows the countries in ascending order of their rank and is based on how corrupt the public sector in that country is perceived to be, according to Transparency International. A score of 100 means that the nation is very clean, 0 indicates that it is highly corrupt.

**Table 1: Transparency International Corruption Perceptions Index**

Rank	Country	2015 Score	2014 Score	2013 Score	2012 Score
1	Denmark	91	92	91	90
2	New Zealand	88	91	91	90
3	Finland	90	89	89	90
4	Sweden	89	87	89	88
5	Norway	87	86	86	85
6	Switzerland	86	86	85	88
7	Singapore	84	84	86	87
8	Netherlands	87	83	83	84
9	Luxembourg	81	82	80	80
10	Canada	83	81	81	84
11	Australia	79	80	81	85
12	Germany	81	79	78	79
13	Iceland	79	79	78	82
14	United Kingdom	81	78	76	74
15	Belgium	77	76	75	75
15	Japan	75	76	74	74

### How have they affected the current policies across the globe?

Healthcare companies have been globally susceptible to FCPA violations due to their large number of customers and their business partners, namely physicians who are working in public healthcare systems in other nations. Any payments made to these “public officials” (who are non-residents of the U.S.) for influencing their decisions with respect to existing or new businesses

are regarded as violations of FCPA, because they qualify as illegal bribes. In 2007, a Dutch pharmaceutical company called Akzo Nobel N.V. was traded on a U.S. exchange and declared that it had entered into a settlement with Department of Justice (DOJ) and Securities and Exchange Commission (SEC) for improper payments that were made by two of its subsidiaries to some officials in the Iraqi government under a United Nations program called Oil-for-Food. It has been alleged that these subsidiaries made about \$280,000 as improper payments.

Examples of some orthopedic implant producers that have been subjected to thorough investigations by U.S. authorities for possible violations of FCPA in the recent past are Zimmer Holding Inc., Stryker Corp, Smith & Nephew plc, Medtronic Inc., and Biomet Inc.

With the threat of enforcement under the FCPA and UK Bribery Act, people have started to follow the basic guidelines, which can be summarized as follows:

- ▶ Implement a whistleblower hotline;
- ▶ Develop a comprehensive compliance and fraud control program;
- ▶ Implement an approved anti-corruption framework, policies, and procedures;
- ▶ Have a strategic position of chief compliance officer with a dotted line reporting to the Board (or Audit Committee) and close, tight interactions with the Legal Affairs department;

- ▶ Establish systems for background checks and declaration forms, such as conflict of interest, gift declarations etc.;
- ▶ Carry out compliance reviews and investigations; and
- ▶ Have a standard of conduct, fraud control policy, whistleblowing policy, etc.

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### Can third parties be subject to anti-bribery violations?

Utilization of third parties is often required in foreign markets with respect to the local law in that particular market, or the third parties are quite aware about the landscape in the local markets and how they should

get their work done. However, if a third party is well-acquainted with the means of getting things done in the local landscape, it also signifies that it can make improper payments on behalf of its company, thus violating the anti-bribery provisions.

For example, in the case of *U.S. v. Bourke*,<sup>4</sup> there was an affirmation by the concerned court for conviction of the defendant for conspiring in the FCPA violation. The court held in this case that even if the defendant had not participated in an act of bribery (which was supported only by circumstantial evidence), he was aware that this particular conduct was meant to influence the privatization of a state-owned oil company. This awareness was adequate to issue charges related to FCPA.

The FCPA has laid down payment provisions for the third parties and thus, it is vital for all such cases where these anti-bribery provisions are applicable to the third-parties, to adopt procedures and policies related to both post-engagement and engagement obligations towards a third-party and conduct pre-engagement with respect to due diligence.

### Stretching the concept of third party

Under 15 USC Section 78m(b)(2)(B), issuers are required to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances of control and authority over the firm's assets. This in turn states that a mother company will be held responsible for mischievous action of its subsidiary, provided they have an equal participation/ reasonable knowledge or, at a minimum, have a practical relationship.

Today companies/organizations can have their subsidiaries or sub-subsidiaries in any part of the world. In the recent past, we have seen the concept of "practical interaction" has been stretched to unimaginable limits by the investigating authorities, such as the SEC and DOJ. The best example that comes to my mind is that of Football Fédération Association's FCPA case (completely EU based) in which jurisdiction was established because of sporting goods being sold in the USA by another company, which had minimal ties to the FIFA.

Under 15 USC Section 78m(b)(2)(B), issuers are required to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances of control and authority over the firm's assets.

Let's not forget that US courts function on the precedence of the previous case. So, if it is established that a mother company has practical ties (even though they might not have a practical working relationship with the bottom-most subsidiary), it can be indicted and tried for crimes for which they might not have a clue.

### Hypothetical situations with the FCPA

- ▶ *Mr. X is a citizen of KLM country who works for an American firm on the sub-continent.*

*In order to secure business in Australia, Mr. X authorized the payment of thousands of dollars to certain government officials. Although Mr. X knows this violates the provisions of the FCPA, he believes this law only applies to American citizens. Is Mr. X subject to the FCPA? Yes! Under the FCPA it is illegal to provide payments*

*to gain an illicit business advantage among foreign citizens employed by or acting as agents for the United States (although the firm operates outside of USA jurisdiction, it is still a USA firm). Mr. X is violating the FCPA.*

- ▶ *A government official of a small tax heaven like Panama wants your company to donate \$5 million to a chosen charity for orphan children in his country, before he'll consent to do business with you. The official will not receive any of the money. Since the money is going to a good cause, is it considered to be a bribe under the FCPA?*

Yes! A charitable contribution of value used to “influence” a business decision is a violation of the FCPA. Just because a bribe is not paid directly to a foreign official does not mean the company offering the bribe is safe from prosecution. New guidance on the FCPA seeks to close loopholes regarding indirect inducements.

### **Hypothetical situations with the UK Bribery Act**

- ▶ *A manufacturing company headquartered in the sub-continent has been charged with violation to the Act for making improper payments/giving bribes to a foreign official in the UK Virgin Islands. The company had no initial ties with UK. Later the company was acquired by a UK-based company. The company inherited this problem, as the alleged case of violation had taken place at a company they acquired many years ago. However, the incident of violation was uncovered recently after the acquisition. Are they still liable for violation of the Bribery Act?*

Yes! Even though the incident occurred before the acquisition, it is tantamount to a violation of the UK Bribery Act, and such an act could be enforced as a violation of the Act. Thus it is sure that a company operating in the sub-continent and having a branch in the UK will be liable.

- ▶ *But what happens in the same case when a Middle Eastern company owns a UK subsidiary? Would the parent company, which is a separate legal entity, be similarly liable?*

Maybe! One would need to evaluate whether the subsidiary’s activities form part of the parent’s business operations, and the degree of ownership and

control exerted. This will determine if the Middle Eastern parent company would be “in essence” carrying out business in the UK.

### **Penalties for violation of FCPA & UKBA**

A violation of FCPA can lead to a penalty of up to twice the amount the payer tried to obtain through making the payment improperly. Although FCPA mentions the civil and criminal penalty and fine amounts, they are not of much importance for arriving at the actual amount of penalty and fine when the enforcement action is assessed.

Table 2 (on page 69) shows some of the biggest settlements made by corporations with respect to violation of FCPA.

### **How are corruption fines, penalties, and sentences calculated?**

It is immaterial whether the bribery acts that are a part of the offense took place in United Kingdom or otherwise. Though FCPA in certain scenarios may permit facilitation, UKBA does not allow making facilitating payments that are unofficial payments given to public nationals for expediting or securing the performance of necessary services. There have been cases of investigations made by United Kingdom Serious Fraud Office (SFO) between the months of July to October 2014, looking into accusations of corrupt practices that were conducted by the representatives or employees of UK companies in the Middle Eastern companies. These investigations are, however, in nascent phases and their final results cannot be predicted at this point, but they are a strong reminder to any UK company that has its commercial operations in the Middle East that it cannot escape the attention of the authorities of United Kingdom where there are sufficient reasons for investigation.

**Table 2: Corporate settlements for FCPA violations**

	Company	Country	Year	Fines (in \$)	Summary
1	Alcoa (U.S.)	US	2014	384 million	Corrupt payments to a royal family from the Middle East via London consultant to remain supplier an aluminium plant in the Middle East
2	Total (France)	France	2013	398 million	Payments to Iranian foreign officials to obtain oil and gas contracts
3	Weatherford International	Switzerland	2013	152.6 million	Bribes for foreign officials to obtain contracts in the Middle East and Africa
4	JGC Corporation	Japan	2011	218.8 million	EPC Contracts, Nigeria liquefied natural gas plant bribes
5	BAE System Plc.	UK	2010	400 million	Defence contractor who paid marketing fees via offshore companies it set up to obtain contracts.
6	Snamprogetti Netherlands B.V. / ENI S.p.A	Holland/Italy	2010	365 million	Paying of bribes through London and Japanese-based intermediaries to obtain Nigerian LNG plant contracts
7	Technip S.A.	France	2010	338 million	Bribes to Nigerian officials to obtain LNG plant construction contracts
8	Daimler AG	Germany	2010	185 million	Corrupt payments to Russian government officials to secure contracts to sell cars

As a strong measure to ensure compliance with the FCPA, the government of the U.S. has given several guidelines to the companies to be followed.<sup>5</sup> Some of them include:

- ▶ Expecting that the compliance programs are not simply left isolated, but are effectively

The United Kingdom is one of the least corrupt nations in the list of 170 nations on the latest Corruption Perceptions Index. The UK has taken several steps to tackle corruption in the recent years. The UK government has

monitored and implemented at the corporate levels on a regular basis.

- ▶ Giving more credibility to all those companies that comply with a risk-centric approach for complying with the FCPA.
- ▶ The government has directed the companies to re-evaluate their compliance programs on a regular basis.
- ▶ Coverage of basic trainings such as whistleblowing, fraud and misconduct, conflicts of interest, anti-corruption, etc., and employee track records, attendance, etc.
- ▶ Other factors such as value, proportionality, timing, and appropriateness of the expenditure in each and every situation. None of these factors, alone or combined, will be sufficient without “criminal intent” as required by all jurisdictions.
- ▶ In addition, as a side note, the U.S. Supreme Court’s verdict in *McDonnell v. United States*<sup>6</sup> has tightened the definition of corruption by defining “official act”, which might have a bearing on future cases, if the whole act will be constituted as corruption or not.

established the National Crime Agency and the Serious and Organized Crime Strategy to improve the overall response in the nation to severe crimes related corruption and bribery.

### What are the key defenses in case of FCPA and UKBA?

#### FCPA

In the case of FCPA, there are two available affirmative defenses.

The first defense is paying “anything of value” and “lawful as per the written regulations and laws” in the country of the foreign resident. The second defense is related to payment made with respect to “anything of value” that was a bona fide and reasonable expenditure, such as expenses related to lodging and travel that is incurred on behalf or by a foreign official and is directly associated with either the explanation, demonstration, or promotion of products and/or services or for performance or execution of a contract along with a foreign agency and government.

In the 2012 case of *SEC v. Jackson*,<sup>7</sup> the trial court inferred that the SEC must incur the load of negating the “facilitating payments exception.”

#### UK Bribery Act

An act of paying anything of value is not considered to be a violation against the UK Bribery Act if it is permissible under the written laws of that foreign country where the act has occurred. Other factors highlighting key differences against FCPA have been highlighted in Table 3. \*

**Table 3: Comparison snapshot of the two laws**

	FCPA	UKBA
<b>Bribery of foreign (public) officials</b>	Both the FCPA and Bribery Act make it an offence to bribe foreign (public) officials. Under the Bribery Act a “foreign public official” is defined more narrowly than under the FCPA.	
<b>Private-to-private bribery</b>	Does not cover bribery on a private level	Covered
<b>Active and passive bribery / Scope</b>	Covers active bribery (i.e., giving of bribe)	Covers both active and passive bribery (i.e., the taking or giving of a bribe)
<b>Failure to prevent bribery</b>	The philosophy is that the company is responsible for the acts of employees and agents, so the organization needs to have proactive controls in place	Creates a strict liability corporate offence for failure to prevent bribery. They look if a company has good compliance program/procedures in place
<b>Intent</b>	Person offering the bribe did so with a “corrupt” intent. I believe intent would always exist while bribing.	No written requirement for a “corrupt” or “improper” intent in relation to the bribery of a foreign public official, is implied.
<b>Liability</b>	A company subject to US jurisdiction can be held liable for acts of its employees, agents, and subsidiaries	Section 7 of the Act creates a strict liability for failure to prevent such acts.
<b>Facilitation payments</b>	Exemption for facilitation payments	No exemption
<b>Promotional expenses</b>	Promotional expenses act as a defense	No defense

1. *SEC v. Straub, et al.* Southern District of New York, February 8, 2013. Available at <http://bit.ly/sec-v-straub>
2. Time for Commencing Proceedings. See <http://bit.ly/uscode-cornell>
3. Transparency International. Available at <http://bit.ly/trans-cpi>
4. *United States v. Viktor Kozeny and Frederick Bourke, Jr.* Southern District of New York, 667 F.3d 122 (2d Cir. 2011), Available at <http://bit.ly/us-v-viktor>
5. U.S. Department of Justice: The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance. April 5, 2016. Available at <http://bit.ly/usdod-fraud>
6. *McDonnell v. United States.* October 2015. Syllabus available at <http://bit.ly/mcdonnell-v-us>
7. *SEC v. Mark A. Jackson and James J. Ruehlen.* Enforcement release No. 3564, July 7, 2014. Available at <http://bit.ly/sec-v-mark>

**Robin Singh** ([robinsingh002@yahoo.com](mailto:robinsingh002@yahoo.com)) is a Compliance and Fraud Examiner in the Health Services division of the Abu Dhabi (United Arab Emirates) government. [@drobinsingh](https://twitter.com/drobinsingh) <http://bit.ly/li-RobinSingh>