

# THE BRIBERY ACT 2010

## HAS IT MADE A DIFFERENCE?



# One year on, is the REAL IMPACT COMING?

## THE UK BRIBERY ACT – A REFRESHER

- Provides a more effective legal framework to combat bribery and corruption in public or private sectors
- Replaces the fragmented and complex offences in the Prevention of Corruption Acts 1889-1916
- Creates two general offences regarding the offering, promising or giving of an advantage; and requesting, agreeing or accepting an advantage
- Creates a discrete offence of bribery of a foreign public official
- Creates a new corporate offence of failure by a commercial organisation to prevent a bribe being paid on its behalf
- Requires the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent bribery on their behalf

### Penalties

Committing an offence can result in severe penalties.



- An individual guilty of bribing another person, receiving a bribe or found to be bribing a foreign official faces a maximum prison sentence of 10 years and/or an unlimited fine.
- A company found guilty of failing to prevent bribery will be subject to an unlimited fine. Directors and senior executives will also be personally liable if it is found that they were directly associated with an offence committed by their company. Where a director is convicted of bribery, they may also be disqualified from holding a director position for up to 15 years.
- Companies may also find themselves debarred from EU, US and other government procurement lists. The defence for a company is being able to demonstrate that adequate procedures are in place to prevent bribery.



The Government considers that procedures put in place by companies wishing to prevent bribery being committed on their behalf should be informed by six principles. These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in.

The detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

## PRINCIPLE 1.

### Proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

## PRINCIPLE 4.

### Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

## PRINCIPLE 2.

### Top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

## PRINCIPLE 5.

### Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

## PRINCIPLE 3.

### Risk Assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

## PRINCIPLE 6.

### Monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.



Speaking in November 2011, the then SFO Director - Richard Alderman - confirmed SFO Bribery Act enforcement activity has already begun.

“

...there is already Bribery Act activity by the SFO. It is not out there in the public domain because our approach is the work we are doing at this stage must inevitably remain confidential. ... Some people have said that the SFO will be going for low hanging fruit. I know what the low hanging fruit are and I'm sure that in a week or so we could find half a dozen cases or more. But that is not our approach. We are looking for the more difficult cases and I'm under no illusions about this. A number of the cases that we need to deal with are going to be amongst the most challenging that the UK criminal justice system will have seen.

”

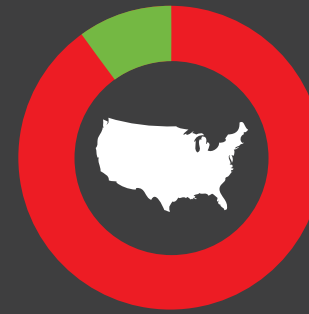
**9 OF 10**  
LARGEST FOREIGN CORRUPT PRACTICES ACT (FCPA) FINES  
have been with non-US based companies

## APPLYING LESSONS FROM THE FCPA

The extraterritorial reach of the US FCPA has led to a significant increase in enforcement activity in recent years and signals the likely regime to be followed by the UK Bribery Act:

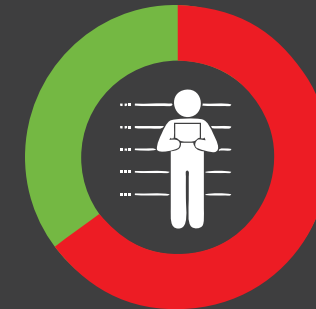
“ Rather than the Bribery Act spurring firms into action, the lack of a major prosecution may have lulled firms into a false sense of security. The level of US enforcement action against companies employing third parties to make inappropriate payments may point to the route UK authorities may take. More than 90% of reported FCPA cases have involved third-party intermediaries. ”

John Smart Partner  
Fraud Investigation and Dispute Services,  
Ernst & Young



**90%**

of FCPA prosecutions have involved non-US companies. Bribery is not only likely to be prosecuted in the United States



**65%**

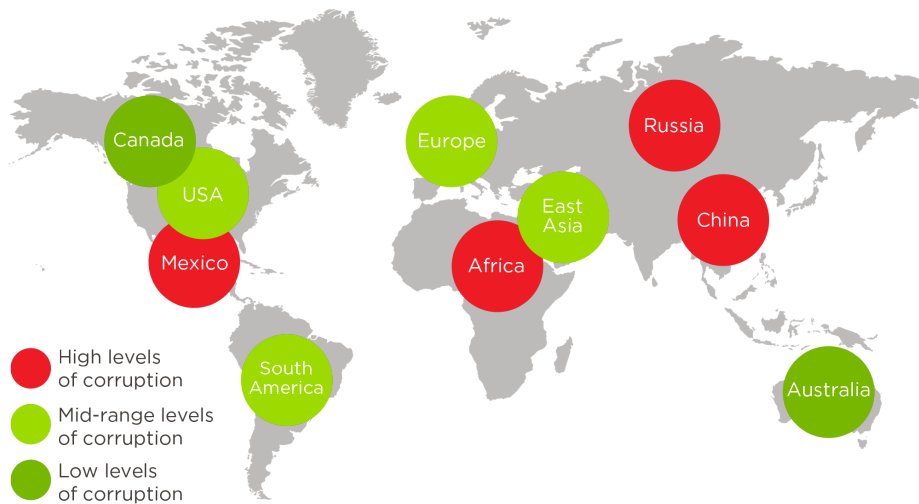
of defendants in FCPA prosecutions over the past six years have been at senior level. Senior executives are the individuals facing prison and fines in relation to fraud

## THE UK BRIBERY ACT “FCPA ON STEROIDS”

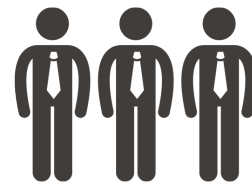
We've yet to see the courts impose penalties on UK registered companies or foreign companies with business operations within the UK. However, to understand the potential magnitude, the UK Bribery Act is wider in scope than the US FCPA in a number of respects. The Act has been called “FCPA on steroids” because it is even stricter than the already stringent

FCPA that is enforced by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) in the US. Reviewing FCPA activity, you don't have to look far to see the impact of fines across borders, 90% of which are non-US corporate defendants.

## 2011 Corruption Perceptions Score



Source: Transparency International Corruption Perceptions Index 2011



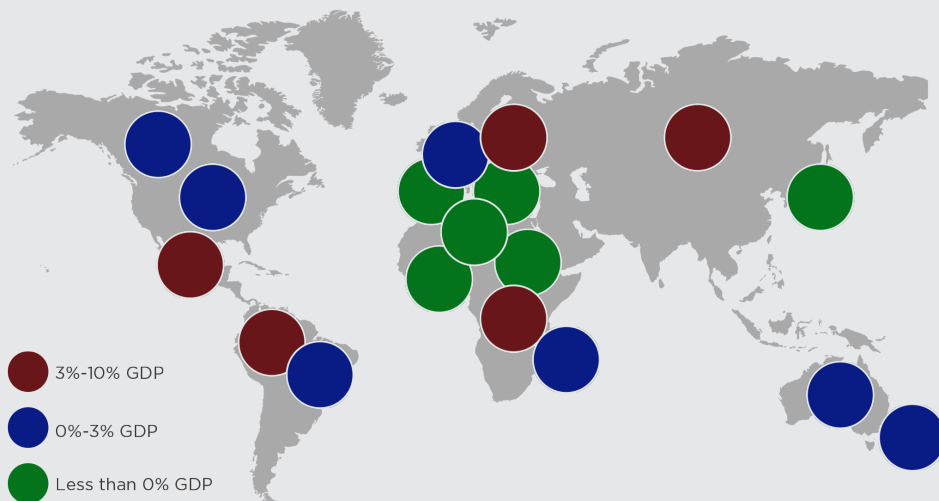
## WATCH YOUR THIRD-PARTY BUSINESS PARTNERS

Most corporate risk management programs don't extend to their third-party business partners despite an increased focus by enforcement agencies on such relationships for violations of the FCPA of 1977, according to a new survey.

Last year was the first year that every corporate enforcement action related to the FCPA, and brought about by the US Department of Justice and the Securities and Exchange Commission, involved bribes

allegedly paid to overseas officials by third-party business partners, rather than by company executives themselves, a Deloitte study found.

## Real GDP Growth / IMF Data Mapper (2011)



Source: World Economic Outlook © 2012

## BRIBERY RISK & HIGH GROWTH OFTEN LINKED

The extraterritorial reach of the Bribery Act 2010 has serious implications for companies. The corporate offence of failing to prevent bribery is applicable across the globe to any UK registered company or equivalent foreign company that has business operations within the UK.

This means that a company may be found guilty of an offence even if the offence was committed by an employee,

foreign subsidiary, joint venture partner, agent or other third party intermediary acting on the company's behalf overseas.

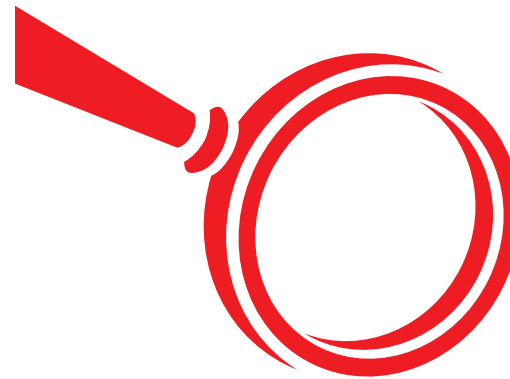
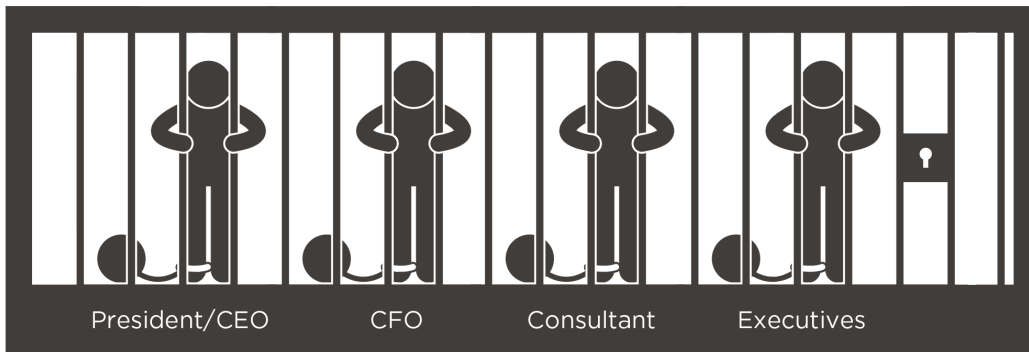
For companies implementing procedures to comply with the Act, this issue becomes even more significant when surveys show countries that attract the greatest investment carry the highest risk increasing the requirement to conduct third-party due diligence checks.

# SENIOR EXECUTIVES ARE IN THE FIRING LINE

Since 2005, dozens of corporate executives have been convicted of violating the FCPA, paid hefty fines from their personal assets, and spent years in prison.

And yet a survey conducted by Ernst & Young LLP revealed that 15% of CFOs around the world are willing to make cash payments to win or retain business. The firm's Global Fraud Survey of 400 finance chiefs found a greater tolerance of bribery compared with the previous year. One of the most troubling findings of the survey is "The widespread acceptance of unethical business practices," it reported. "It is particularly alarming that respondents are increasingly willing to make cash payments" and mis-state results to survive an economic downturn.

Law firm Chadbourne & Parke released a study of the 61 FCPA prosecutions involving individual defendants over the past six years. A surprising number, 35%, of the defendants were the president, chief executive officer, or chief operating officer of their firm. In all, 53 of the individuals charged with violating the FCPA during this period were senior officers — a staggering 87% of all defendants.



## HOW TO SPOT BRIBERY & CORRUPTION

This list (source: Serious Fraud Office) is not exhaustive and the ingenuity of those involved in corruption knows no bounds! You should beware of:

- Abnormal cash payments
- Abnormally high commission percentage being paid to a particular agency. This may be split into 2 accounts for the same agent often in different jurisdictions
- Abusing decision process or delegated powers in specific cases
- Agreeing contracts not favourable to the organization either with terms or time period
- Avoidance of independent checks on tendering or contracting processes
- Bypassing normal tendering / contractors procedure
- Company procedures or guidelines not being followed
- Individual never takes time off even if ill, or holidays, or insists on dealing with specific contractors him/ herself
- Invoices being agreed in excess of contract without reasonable cause
- Lavish gifts being received
- Making unexpected or illogical decisions accepting projects or contracts
- Missing documents or records regarding meetings or decisions
- Payments being made through 3rd party country, e.g. goods or services supplied to country A but payment is being made, usually to shell company in country B
- Pressure exerted for payments to be made urgently or ahead of schedule
- Private meetings with public contractors or companies hoping to tender for contracts
- Raising barriers around specific roles or departments which are key in the tendering / contracting process
- Unexplained preference for certain contractors during tendering period
- Unusually smooth process of cases where individual does not have the expected level of knowledge or expertise
- The payment of - or making funds available for - high value expenses or school fees etc on behalf of others

## PRINCIPLE 4.

### Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Protect your organisation and its corporate reputation with Lexis Diligence. In one search:

- Identify and verify companies in Europe, US and emerging markets with over 200 databases of global public and private company reports and directories, including over 130 million company records
- Conduct negative news checks and enhanced due diligence with comprehensive English and non-English news coverage from 23,000 international news sources

- Identify government officials through an extensive database of politically exposed persons (PEPs)
- Check for high risk companies and individuals with key global sanctions and law enforcement lists
- Highlight risk analysis and political structures using extensive country profiles

Lexis Diligence is simple to use and includes an audit trail so that you can demonstrate you have carried out appropriate due diligence.

## PRINCIPLE 6.

### Monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Track high risk third-parties to ensure you are alerted to any changes. Our diligence, sanctions screening and media monitoring solutions provide the complete third party due diligence solution.

- **Bridger Insight**

Screen as many third-parties as you need to in bulk against sanctions, ID verification data, PEPs and your own internal watch lists to continue to safeguard your corporate reputation. Our superior fuzzy name matching algorithm ensures better matches, saving you valuable time and money.

- **Capital Monitor**

Capital Monitor provides parliamentary, political, legislative, regulatory and judicial news and information almost as soon as it is available. All content is updated on Capital Monitor's comprehensive database which allows you to conduct keyword search anytime, on any jurisdiction and for content from 1996 onwards.

- **Instant ID International**

Confirm the identity of UK, US and international individuals using the most up to date ID verification information available. Sources include electoral roll and passport data. Practical guidance.

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