

FOREIGN CORRUPT PRACTICES ACT, UK BRIBERY ACT, AND INDONESIAN ANTI CORRUPTION LEGISLATION: A BRIEF SUMMARY AND COMPARISON

I. FCPA

1. FCPA Overview

The Foreign Corrupt Practices Act of 1977 (“FCPA”) has an extraterritorial jurisdiction and therefore applies to U.S. persons or business entities anywhere in the world, to “issuers” of securities regulated by the U.S. Securities and Exchange Commission, and to any person who performs a prohibited act in the U.S. Nationals and residents of U.S. remains subject to the FCPA regardless of where they are employed or with whom they are working. Such employees associated with non-U.S. companies – either through temporary assignment, secondment, by serving on the boards of directors of such non-U.S. companies, or otherwise – remain individually subject to the FCPA even if the non-U.S. companies are not.

The FCPA has two primary sections. The first section stipulates the illegality to bribe foreign officials, and the second section imposes record keeping and internal accounting requirements upon publicly listed U.S. companies and their subsidiaries.

The scope of the law concerning corruption of public officials is very broad. The law prohibits not only payments to public officials, but also any offer, promise (even if never fulfilled) or merely an authorization to pay a public official. Such payment, offer, promise or authorization may be direct or indirect. Thus, a company and its agents will be liable under the laws even if they attempt to “funnel” a payment indirectly to a public official by using an unrelated third party as a conduit. For example, if a payment is made to a person who is not in any manner connected with a governmental body or political party, and the company or its agents are aware (or should be aware with the exercise of reasonable due diligence) that the payment will eventually find its way into the hands of a public official, payment with such knowledge will constitute a violation of the FCPA.

“Payment” under the law is not limited to money. Payment includes “anything of value” including non-monetary gifts, free trips and other forms of non-cash favors. The following list includes some examples of payments that constitutes a violation to the FCPA:

- Money or property passed through an agent or consultant to a foreign official or his/her representative in order to obtain business or secure an advantage, including consulting or management contracts, or to obtain certain action on legislation, regulations or other government activity;
- Gifts to foreign charities that are outside the company’s overall pattern of charitable contributions, and are given to obtain business or secure an advantage;
- Gifts to foreign charities that are illegal under the applicable local law;

- Employment of consultants or agents who are also connected with a foreign government or agency for the purpose of influencing that government's or agency's decision;
- Excessive gifts or entertainment of foreign officials or their representatives.

The types of public officials who are covered by the law are also quite broad. A public official includes any agent or official of any foreign or domestic governmental body or of any political party, or any candidate for political office or any person acting in an official capacity on behalf of a foreign government or an instrumentality thereof.

Payment of any money or giving anything of value, directly or indirectly, to a foreign official for the purpose of:

- influencing any act or decision of the official; or
- inducing the official to use his influence to assist in obtaining or retaining business or directing business to any person; or
- to secure an advantage

are also prohibited.

2. Permissible payments under FCPA

The FCPA contains certain limited exception and defenses to the prohibitions set forth above, which are as follows:

a. Facilitating Payments

The FCPA allows certain types of payment to foreign officials under limited circumstances. For example, the FCPA allows certain "facilitating" or "expediting" payments to foreign officials in order to expedite or secure non-discretionary, "routine governmental action."

Examples of such routine governmental actions include actions ordinarily and commonly performed by a foreign official in:

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- Processing governmental papers such as visas and work orders;
- Providing police protection, mail pick-up and delivery, or scheduling inspections;
- Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- Actions of a similar nature.

The term "routine governmental action" does not include any decision by a foreign official on whether, to award new business to or continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business or to continue business with a particular party.

b. Promotional Expenses

Various types of "promotional or marketing payments" may also be permissible under the FCPA in certain circumstances. For example, certain reasonable, bona fide expenses incurred while promoting the Company to foreign officials, hosting a tour of foreign public officials at a Company

facility or entertaining employees of a foreign state-owned firm (such as a state-owned oil company) may also be legitimate expenses under the FCPA.

c. Actions in Accordance with Local Law

The FCPA also contains an affirmative defense for payments to foreign officials that are lawful under the written laws and regulations of the foreign official's country. However, most countries have laws prohibiting the payment of bribes to government officials.

3. Penalties

The FCPA imposes criminal liability on both individuals and corporations. For individuals who violate the anti-bribery provisions of the FCPA, criminal penalties include fines of up to \$100,000 or twice the amount of the gross pecuniary gain resulting from the improper payment, imprisonment of up to five years, or both. In order to maximize the effectiveness of the penalties, companies are prevented from indemnifying their officers and employees against liability under the Act.. Corporations may be fined up to \$2,000,000, or, alternatively, twice their pecuniary gain, for criminal violations of the FCPA's anti-bribery provisions.

In addition to criminal penalties, the U.S. Department of Justice or the SEC may bring a civil action for a fine up to \$10,000 against any company that violates the anti-bribery provisions, and against any officer, director, employee or agent of a company, or a stockholder acting on behalf of a company who violates the Act. In an SEC enforcement action, the court may impose an additional fine of up to the greater of (i) the gross pecuniary gain that resulted from the violation or, (ii) for individuals, up to \$100,000, and for corporations, up to \$500,000. The U.S. Department of Justice and the U.S. Securities Exchange Commission may also obtain injunctions to prevent FCPA violations.

In addition to civil and criminal penalties, a person or company found in violation of the FCPA may be prohibited from doing business with the U.S. government. Other penalties include denial of export licenses and debarment from procurement or non-procurement activities.

II. UK Bribery Act

1. UK Bribery Act Overview

The UK Bribery Act comes into force on 1 July 2011, and the Government has published its guidance on the Bribery Act 2010. This Act introduces a new strict liability offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf. The defence is by having in place adequate policies and procedures to prevent bribery. The Act, similar to FCPA, have an extraterritorial jurisdiction, which is applied as follows:

- If any part of the bribery offence takes place in the UK, the UK may take jurisdiction;
- British Nationals, UK residents and UK companies/partnerships who commit acts of bribery abroad are subject to prosecution in the UK even if no part of the bribery offence takes place in the UK;
- For the new corporate offence of failing to prevent bribery, the bribery may take place wholly outside the UK.

The Act specifies four offenses:

- Offering, promising or giving a bribe;
- Requesting or agreeing to receive a bribe;
- Bribery of a foreign public official;
- Corporate offense of failing to prevent bribery (applies automatically if anyone associated with the organization has paid a bribe).

Corporate entities can be guilty of an offence of bribery under the Act. They can also be guilty of a failure to prevent bribery offences if an “associated person” carries out an act of bribery on their behalf. Unlike under the FCPA, an “associated person” is not defined by reference to the nature of the relationship with, or control exercised over, the associated person.

In the Act, an “associated person” is one which performs services on behalf of the principal. The definition of performing services is vague; the Act states that it will be determined by reference to all the relevant circumstances. It is far from clear what level of supervision by the principal would be necessary to help satisfy the adequate procedures defence in a case based on the acts of a distributor, sub-contractor or joint venture.

A new strict liability offence for corporates and partnerships are created by the Act if such entity fails to prevent bribery occurring within the organisation. The only defence available to an organization is one of having “adequate procedures” in place to prevent bribery. What constitutes “adequate procedures” is a matter of opinion and has been the subject of extensive discussion and further guidance issued by the Ministry of Justice. The standards that are expected of a small private company will not be the same as those expected of a large multi-national.

2. Facilitation Payment and Hospitality under the UK Bribery Act

Facilitation payments are illegal under the Act. However, the guidance issued by the government (“Guidance”) says that there will be careful consideration before any prosecutions are brought in relation to facilitation payments and, in addition, where there are health and safety situations, the common law defence of duress might be available.

In relation to hospitality, the Guidance states that careful consideration has to be given as to whether any prosecution will be brought in relation to hospitality or promotional expenditure. Where a certain level of hospitality is normal and reasonable then such action may be deemed acceptable.

If a local law allows foreign public officials to be influenced by additional investment or benefits, then there is no breach of the Act. However, it would not be acceptable if (i) there was no legal allowance for such additional benefit; (ii) there is a personal benefit to a foreign public official; or (iii) where the local law is silent on the matter.

And related to hospitality given to foreign public officials, the Guidance makes it clear that there will be no advantage seen to be given where the cost of accommodation and travel have been paid for if the alternative would have been that the relevant foreign official would have had to pay. In addition, where the hospitality is commensurate with the reasonable and proportionate norms of a particular industry then it is not deemed to be bribery. The example given is of dinner and tickets to an event.

3. Penalties

The Act is designed to have the maximum deterrent effect. The definition of what constitutes a bribe is extremely broad (even broader than FCPA) and covers any financial or other advantage offered (not just given) to someone to induce them to act improperly. Similarly, the penalties for those found guilty of an offense under the Act can be severe, including unlimited fines and up to 10 years' imprisonment.

The corporate offense of failing to prevent bribery also allows for unlimited fines and extends to include the activities of third parties acting on behalf of a company. The Act also penalises those senior officers of the corporate with whose "consent or connivance" the bribery was committed even if the bribery takes place overseas. In addition, failure to maintain "adequate procedures" could render directors vulnerable to civil claims.

III. Indonesian Anti-Corruption Legislation

1. Overview of the Indonesian Anti-Corruption Legislation

The Indonesian Anti Corruption Legislation consists of Law No. 31 of 1999 on the Eradication of Criminal Acts of Corruption, as amended by Law No. 20 of 2001, Law No. 30 of 2002 on the Commission for the Eradication of Corruption which outlines the specific duties and the authority of the KPK, and Law No. 46 of 2009 on the Corruption Tribunal outlining the specific duties and the authority of the Corruption Tribunal (collectively referred to as "Law"). Unlike FCPA and UK Bribery Act, the Law does not have an extraterritorial jurisdiction, save to extent that the consequences of the offence does not cause loss to Indonesia's finance or economy.

Pursuant to the Law the following, among others, constitute a bribery/corruption offence:

- the illegal act of making profit for himself/herself, another person or a corporation which creates loss to the state finance or economy;
- abuse of authority, opportunities or facilities vested in relation to his/her position which can create loss to the state finance or economy; the aim of the abuse is to earn profit for himself/herself, another person or corporation;
- giving or promising something to a civil servant or state apparatus (i) with aim of persuading him/her/it to do something or not to do something which would then violate his/her/its obligations, or (ii) because of or in relation to something in violation of his/her/its obligation, whether or not it is done because of his/her/its position; and
- providing "gratification" to a civil servant or public official in relation to his/her position in return for a favour.

"Gratification" is a gift in a very broad sense and can include money, goods, discounts, interest-free loans, free medical treatment, travel tickets and other benefits. Anti-corruption measures can be related to non-public individuals and/or bodies where there is loss caused to the state finance or economy.

The Law provides that any gift given to a civil servant or state apparatus in relation to its duties and responsibilities which is not disclosed to the Commission for the Eradication of Corruption ("KPK") by

the relevant civil servant or state apparatus is deemed as bribery. The anti-corruption regulations do not provide *de minimis* exception to gifts. The KPK may, however, give permission to the civil servant to accept and/or keep gifts that have already been provided. The KPK alone has the authority to determine whether such gift (at whatever amount) is appropriate or not. There are no permissible payments or hospitality pursuant to the Law, unless otherwise considered appropriate by the KPK as forementioned, and therefore this Law provides the broadest scope of actions that can be deemed to be an offence compared to both FCPA and UK Bribery Act.

2. Enforcement:

The KPK, the Indonesian Police and the Public Prosecutor have the general power to investigate complaints from the public regarding alleged corruption, collusion and nepotism. In doing so, they have power to:

- arrest and detain potential suspect;
- conduct searches and seizure;
- examine assets;
- conduct investigations;
- collect evidence; and
- compel witnesses to be present during investigations.

In addition to this, they also have specific powers to:

- tap telephone conversations;
- order travel bans;
- obtain information from banks and other financial institutions;
- freeze bank accounts where funds are suspected to have derived from corrupt activities;
- obtain financial and tax reports from relevant institutions;
- suspend transactions in which a suspect is involved, or suspend any licences or permits held by such person; and
- instruct the Interpol or a foreign law enforcement institution to search for, detain and seek evidence abroad.

They can take certain measures to force a person to comply with its requests such as appearing before them.

Where corruption is found under the Law, the Court may order:

- fines of between IDR50,000,000 and IDR1,000,000,000 (approximately USD5,675 to USD113,500);
- imprisonment up to a maximum of 20 years; and
- for certain extreme conditions, life imprisonment or death penalty can also be imposed.

IV. Summary and Comparison

Several major multinational corporations operating in Indonesia have parent companies, subsidiaries and affiliations in U.K., U.S., or registered in the U.S. capital market, which among others are oil & gas and mining companies. If the company is alleged to conduct an offence to an anti-corruption law in one of the countries it operates, for example in Indonesia, and subsequently proved to be guilty by the relevant court or authority, then the impact to the company can be very significant as there are possibilities that the subsidiaries or affiliates may also be prosecuted in the U.K. and U.S. due to such

violation. This is a major risk for the entity and its sustainability and therefore compliance with the anti-corruption and anti-bribery legislations should be observed and “adequate measures” to be performed and socialized within the entire organization.

The final section below are the comparison of the FCPA, UK Bribery Act, and the Indonesian Anti-Corruption Law.

- **Anti bribery provisions:**

FCPA: Criminalizes bribery of foreign officials only. Commercial bribery and receipt of bribes are governed by a different US law.

UK BRIBERY ACT: Criminalizes commercial bribery; bribery of domestic officials; bribery of foreign officials; receipt of a bribe; failure to prevent bribery.

INDONESIAN ANTI-CORRUPTION LAW: Criminalizes bribery of domestic officials; receipt of a bribe by domestic officials; actions that causes loss to the state’s finance and economy.

- **Books and records provisions:**

FCPA: Civil liability for failure to accurately and fairly record transactions in books and records of an “issuer”; criminal liability for willful violation of this requirement.

UK BRIBERY ACT: None. Governed by other law.

INDONESIAN ANTI-CORRUPTION LAW: None. Governed by other law.

- **Extraterritorial reach:**

FCPA: U.S. companies and citizens anywhere in the world; any conduct that takes place in part in the U.S.

UK BRIBERY ACT: U.K. companies and citizens anywhere in the world; any conduct that takes place in part in the U.K.; and, for the corporate offense of failing to prevent bribery, any company doing business in the U.K., regardless of where the conduct occurs.

INDONESIAN ANTI-CORRUPTION LAW: None, unless the offence caused loss to Indonesia’s finance and economy.

- **Treatment of expenses in connection with promotional activities:**

FCPA: Affirmative defense available for reasonable and bona fide business. Expenses related to certain promotional activities.

UK BRIBERY ACT: No exception for expenses in connection with promotional activities.

INDONESIAN ANTI-CORRUPTION LAW: No exception for expenses in connection with promotional activities, except considered appropriate by KPK.

- **Treatment of facilitation payments:**

FCPA: Exception for facilitation or “grease” payments to secure or expedite a routine governmental action.

UK BRIBERY ACT: No exception for facilitation or “grease” payments.

INDONESIAN ANTI-CORRUPTION LAW: No exception for facilitation or “grease” payments.

- **Treatment of conduct legal under local law:**

FCPA: Affirmative defense available if payment to foreign official is lawful under written laws and regulations of foreign country.

UK BRIBERY ACT: Offense is not committed if the foreign official is permitted or required under written local law to be influenced in his capacity as a foreign public official by such offer, promise, or gift.

INDONESIAN ANTI-CORRUPTION LAW: None.

- **Treatment of corporate compliance programs:**

FCPA: Compliance programs not a defense to liability.

UK BRIBERY ACT: Entity not liable for failure to prevent bribery if it can show it had adequate procedures in place to promote compliance.

INDONESIAN ANTI-CORRUPTION LAW: None, and therefore is not a defense to liability.

- **Penalties:**

FCPA :Anti- bribery provision: for corporations, a fine per violation of up to \$2M or up to twice the bribe paid or benefit sought or received, whichever is greater; for individuals, a fine of up to \$250,000 or up to twice the bribe paid or benefit sought or received, whichever is greater, and up to 5 years in prison per violation for individuals. Books and records provisions: for civil violations, up to \$150,000 for individuals and up to \$725,000 for corporations, depending on the circumstances, and subject to regulatory inflation factors; for criminal violations, up to \$25 million for corporations, and up to \$5 million and upto 20 years in prison for individuals.

UK BRIBERY ACT: Depending on the circumstances of the conviction, there is no statutory maximum fine amount. Individuals may be imprisoned for up to 10 years

INDONESIAN ANTI-CORRUPTION LAW: fines of between IDR50,000,000 and IDR1,000,000,000 (approximately USD5,675 to USD113,500); imprisonment up to a maximum of 20 years; for certain extreme conditions, life imprisonment or death penalty can also be imposed.

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