

## What are the differences in the FCPA and Bribery Act?

Yesterday in a post entitled, “*The Shrinking UK Bribery Act*” the FCPA Professor discussed some of the information coming out of the UK regarding how the Bribery Act may be interpreted. He stated that it appears that the SFO will not implement the full ban on facilitation payments and will apply a reasonableness standard for gifts, entertainment and travel expenses, although no such standard is built into the Bribery Act itself. New Ministry of Justice guidance may also give a company some protection against corrupt acts by a joint venture partner. He stated that he believes at the end of the day, “the Bribery Act will look very much like the FCPA. In fact, because of the Bribery Act's adequate procedures defense and other hinted at limitations, the Bribery Act may turn out to be more lenient than the FCPA.”

With the recent information coming out, largely from reports by the UK Telegraph, we thought it might a propitious time to review the differences in the Bribery Act and the Foreign Corrupt Practices Act (FCPA) so that US companies might begin to plan to acclimate their FCPA based compliance program to one which includes concepts found in the Bribery Act, if such action is appropriate.

With that in mind we were pleased when we saw that our colleague, Michael Whitener of Vista Law had put together a handy chart comparing the two laws. With Michael’s permission we reprint his summary comparison below.

### U.S. FCPA vs. UK BRIBERY ACT

Provision	FCPA	Bribery Act
Who is being bribed	Only bribes (“anything of value”) paid or offered to a “foreign official” are prohibited	Prohibits bribes paid to <i>any person</i> to induce them to act “improperly” (not limited to foreign officials)
Nature of advantage obtained	Payment must be “to obtain or retain business”	Focus is on improper action rather than business nexus (except in case of strict corporate liability)
“Active offense” vs. “passive offense”	Only the act of payment, rather than the receipt/acceptance of payment, is prohibited	Creates two offenses: (1) offense of bribing another (“active offense”) and (2) offense of being bribed (“passive offense”)
Corporate strict liability	Strict liability only under accounting provisions for public companies (failure to maintain adequate systems of internal controls)	Creates a new strict liability corporate offense for the failure of a commercial organization to prevent bribery (subject to defense of having “adequate procedures” in place designed to prevent bribery)
Jurisdiction	U.S. companies and citizens, foreign companies listed on U.S. stock	Individuals who are UK nationals or are ordinarily resident in the UK and

	exchange, or any person acting while in the U.S.	organizations that are either established in the UK or conduct some part of their business in the UK
Business promotion expenditures	Affirmative defense for reasonable and bona fide expenditure directly related to the business promotion or contract performance	No similar defense (but arguably such expenditures are not “improper” and therefore not a Bribery Act violation)
Allowable under local law	Affirmative defense if payment is lawful under written laws/regulations of foreign country	No violation if permissible under written laws of foreign country (applies only in case of bribery of foreign public official; otherwise a factor to be considered)
Facilitating payments	Exception for payment to a foreign official to expedite or secure the performance of a routine (non-discretionary) government action	No facilitating payments exception, although guidance is likely to provide that payments of small amounts of money are unlikely to be prosecuted
Civil/criminal enforcement	Both civil and criminal proceedings can be brought by DOJ and SEC	Criminal enforcement only by the UK Serious Fraud Office (SFO)
Potential penalties	Bribery: for individuals, up to five years’ imprisonment and fines of up to \$250,000; for entities, fines of up to \$2 million Books and records/internal control violations: for individuals, up to 20 year’s imprisonment and fines of up to \$5 million; for entities, fines of up to \$25 million	For individuals, up to 10 years’ imprisonment and potentially unlimited fines; for entities, potentially unlimited fines

We still believe that all us companies which have a UK subsidiary or do business in the UK need to be cognizant of the requirements of the Bribery Act. Each company should review its own compliance policy to determine if changes need to be made to bring their compliance program into compliance with the Bribery Act. This summary chart is an excellent tool for setting out the differences and allowing a US company to more easily assess where it may need to make changes. We commend Michael for putting this chart together and for making it available to us for this post.

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