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Anti-Corruption and Bribery Regimes

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CRCA Conference 2012
2 March 2012

Anti-Corruption and Bribery Regimes

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Anti-Corruption and Bribery – Global Issue

- *“Bribery has become a \$1 trillion industry.”* [World Bank Report]
 - 15 % of industrialised country companies pay bribes to do business
 - 40% in Asia & 60% in former Soviet Union
 - Over US\$148B/annum paid in bribes in Africa = 25% African GDP
- International Conventions
 - OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)
 - United Nations Convention Against Corruption (2005)
- Global Distrust and Unrest
 - From Arab Spring (uprisings/revolutions/bloodshed) to “Occupy” movement against “Big Money”

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Anti-Corruption and Bribery – Global Issue

- Key industries
 - Arms/military equipment
 - Oil, gas, biofuel contracts
 - Infrastructure projects (roads, pipelines, telecoms)
 - Public and private health and medical (drugs and medical equipment)
 - Administrative/Regulatory/Fiscal/(facilitation payments)
 - Customs breaks
 - Licensing/registration waivers or approvals
 - Government appointments
 - Sports/Business (facilitation payments)
 - Influence decision making (e.g. Jack Warner and FIFA)

Anti-Corruption and Bribery – Global Issue

- Transparency International
 - A global organization (based in Berlin with over 90 chapters worldwide) to raise awareness of corruption and develop counter measures
 - Global Corruption Barometer 2010
 - Survey of more than 91,500 people in 86 countries
 - 8/10 judge political parties as extremely corrupt, followed by the civil service, the judiciary, parliaments and the police
 - Police identified as the most frequent recipient of bribes
 - People in lower income bracket more likely to pay bribes than higher income to avoid issues with authorities
 - 1/2 consider government action to combat corruption is ineffective
 - 7/10 think ordinary people can make a difference in the fight against corruption, while half could imagine themselves getting involved

Anti-Corruption and Bribery – Global Issue

- Transparency International
 - Corruptions Perceptions Index 2011
 - 183 countries rated 0 (bad) to 10 (good)
 - Caribbean Ratings (and rankings out of the 183)
 - Bahamas – 7.3 (21)
 - Barbados – 7.8 (16)
 - Jamaica – 3.3 (86)
 - Trinidad and Tobago – 3.2 (91)

Anti-Corruption/Bribery – Caribbean Case Studies

- Turks and Caicos
 - Corruption/bribery pervasive
 - Constitution partially suspended in August 2009
 - UK government assumed interim executive direction
 - NIS (National Integrity System) assessment report issued 2011
 - Gap between laws and practice, no checks and balances, little experience with governance (and unprecedented economic growth)
 - Social perception, lack of law enforcement, delineate governance
- Trinidad and Jamaica
 - Bribery and facilitation in business commonplace
- Cayman Islands
 - Investigations initiated under old Penal Code and new law

Anti-Corruption Law, 2008 (Cayman Islands)

- Established an Anti-Corruption Commission
- Offences
 - Five broad categories of offences (and penalties)
 - Bribery (local and foreign officials) (14 years)
 - Fraud on the Government (10 Years)
 - Abuses of Public or Elected Offices (2, 5 or 10 years)
 - Secret Commissions (5 years)
 - Reporting offences (\$20k for Official, \$10k for public, or 2 years)
 - Inchoate Offences
 - Attempt, conspiracy or incitement to commit corruption (\$5k/2 years)
 - Aiding, abetting, counseling or procuring commission of corruption (\$5k/2 years)
 - Vicarious Liability
 - Offence committed with consent, connivance or neglect of an officer (or someone purporting to be), both officer and corporate liable

Anti-Corruption Law, 2008 (Cayman Islands)

- Key definitions
 - “Public Officer”
 - Person holding public office, judge, magistrate, arbitrator, umpire, assessor, jury member, JP, member of statutory body, tribunal or commission of enquiry
 - Not LA members (elected/official members), as they are included separately
 - “Foreign Public Officer”
 - Employee/Officer of foreign government body
 - Contract worker for a foreign government body
 - Person appointed under foreign law, custom or convention
 - Member of executive, judiciary, magistracy, legislature
 - Employee/Officer/contractual worker for a public international organisation
 - Authorized intermediary of foreign public officer

Anti-Corruption Law, 2008 (Cayman Islands)

- Key Offences
 - Bribery of public officer/MLA
 - Offence where a person directly/indirectly gives to a public officer/MLA (or any public officer/MLA soliciting, accepting or obtaining or agreeing to accept or obtain, for themselves or another person) any loan, reward, advantage or benefit (“improper payment”) with intent to
 - Interfere with administration of justice
 - Procure or facilitate commission of an offence
 - Protect from detection/punishment an offender

Anti-Corruption Law, 2008 (Cayman Islands)

- Key Offences
 - Bribery of foreign public officer
 - Same principles as bribery of public officer/MLA, but shall not apply where the improper payment was;
 - permitted or required under foreign laws or public international organisation rules for which the foreign public officer works
 - made to pay reasonable expenses in good faith for a foreign public officer relating to promotion of services etc. or performance of a contract with the foreign country
 - in the course of business where the payment value is small, is made to expedite or secure performance by a foreign public officer of a routine act, and the person made/retains a record of the payment
 - i.e. “facilitation payments”

Anti-Corruption Law, 2008 (Cayman Islands)

- Key Offences
 - Fraud on Government
 - An offence to
 - give or offer an improper payment to a public officer or LA member for Government business, claims or appointment of any person to an office
 - have or pretend to have influence with government, LA or public officer and accept benefit for the above
 - provide benefit to a public officer or LA member, without prior written consent of chief officer of the relevant agency
 - receiving benefit for withdrawal of tender for Government contract
 - Abuse of Public Office
 - Includes Election Funding, Breach of Trust, Abuse of Office and Conflict of Interest

Anti-Corruption Law, 2008 (Cayman Islands)

- Territorial Application
 - Covers
 - Conduct committed wholly or partly outside of the Cayman Islands
 - Status holders, residents and bodies corporate incorporated under CI law
 - Non-Cayman entities where offence occurs wholly or partly on board Cayman Islands ship/aircraft
 - Includes in practice
 - Cross border transactions and/or multi-jurisdictional entities
 - Foreign acts of corruption by Cayman companies

Caribbean AC/Bribery Comparison

Country	Legislation and Date	Bribery of local public officials	Bribery of foreign public officials	Bribery in contracts, commissions etc.	Abuse of Office	Reporting
Bahamas	Prevention of Bribery Act No. 9 of 1976	YES	YES	YES	YES	YES
Barbados	Introducing Prevention of Corruption Act	-	-	-	-	-
Bermuda	Criminal Code Act 1907	YES	YES	YES	YES	YES
BVI	Not finalised	-	-	-	-	-
Cayman Islands	The Anti-Corruption Law 2008	YES	YES	YES	YES	YES
Jamaica	Corruption Prevention Act No. 18 of 2000	YES	YES	YES	YES	YES
Trinidad & Tobago	Prevention of Corruption Act Chapter 11:11 Act 11 of 1987	YES	YES	YES	YES	YES
T & C	To beg drafted	-	-	-	-	-

Extraterritorial Anti Corruption/Bribery Legislation

- Foreign Corrupt Practices Act (US from 1977) as modified by
- International Anti-Bribery Act (US from 1988)
- Bribery Act (UK from 2011)

US Foreign Corrupt Practices Act

- Application
 - An offence for any issuer (US or foreign company whose securities are registered in the US or which reports to the SEC), domestic concern (US resident/citizen/business etc.) or person from offering, or paying, anything of value to a foreign official, political party or candidate, for the purpose of influencing any act of that official, in violation of their duties, or to secure any improper advantage to obtain or retain business
 - Facilitation (grease) payments permitted if permitted under the foreign law
 - Since 2009 (Obama administration)
 - over 40 guilty pleas, non or deferred prosecution agreements
 - over US\$2B in fines

US Foreign Corrupt Practices Act

- Case studies
 - Siemens (German manufacturer, NYSE listed from 2001)
 - Paid near to US\$1.4B in bribes to government officials
 - Siemens plea paid more than US\$800M in fines to US agencies and same to European agencies from 2008 (total, including bribes = US\$3B)
 - BAE (British defence contractor)
 - Violated Arms Export Control Act, International Traffic in Arms Regulations and false statements in relation to FCPA compliance program
 - Paid US\$400M fine in March 2010
 - Panalpina (on behalf of Shell, Transocean etc.)
 - Bribed officials to avoid import rules in oil rich countries from Angola to Russia
 - Penalty fine of \$156M and \$80M reimbursement
 - Hewlett Packard
 - Investigated for \$11M bribes to Russian Prosecutor General for equipping offices

UK Bribery Act

- In force from 2011
- Offences
 - Bribing another person and being bribed (public or private sector)
 - Bribery of foreign public officials
 - Failure of commercial organisations to prevent bribery (strict liability); and
 - Vicarious liability of senior officers (consent or connivance)
- Defences
 - Not a failure to prevent bribery if have adequate procedures (extends to agents/subs)
 - No facilitation payment qualifications or defence
- Extraterritorial effect
 - Bribery offences apply to overseas acts, provided offender had a close connection with the UK (i.e. a UK citizen, OT citizen, UK resident or company)
 - Failure to prevent offence applies to UK companies or those carrying on some UK business (despite where act was committed or whether UK business profits)

UK Bribery Act

- Enforcement
 - Maximum 10 Years imprisonment and/or unlimited fine
 - Criminal matters can become civil if the organisation self reports
 - SFO can use civil recover powers under the POCA and reach plea agreements
 - UK Courts have overturned or queried recent plea agreements
- Case Studies
 - Prior investigations and prosecutions also came under Companies Act and Proceeds of Crime Acts
 - BAE Systems £40B contract to supply jets to Saudi Kingdom with £M bribes to Prince
 - UK Government stopped investigation when Saudi's threatened to pull contract and cooperation in counter-terrorism
 - KPMG (BAE auditors) also being investigated for failure to identify the issues
 - GPT (subsidiary of EADS, another aerospace defence company) paid bribes for a £2B contract to equip Saudi palaces and national guard with telcoms

Measures to Avoid Involvement

- Similar in nature to AML/CFT procedures
- Helpful MOJ/BBA guidance on appropriate controls/procedures
 - Proportionality (to risk/size of organization)
 - Top-level commitment/zero tolerance policy
 - Risk Assessment (identify and assess operations/markets)
 - Due Diligence (who are the business counterparts and agents?)
 - Communication (awareness, training and culture)
 - Monitoring and Assessment
- Just because the transaction involves an official, doesn't mean it isn't wrong and you won't get caught!

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