



# **Northern Exposure:** Contrasting Canada's *Corruption of Foreign Public Officials Act* with Anti-Corruption Legislation in the United States of America and the United Kingdom

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# Northern Exposure: Contrasting Canada's Corruption of Foreign Public Officials Act with Anti-Corruption Legislation in the United States of America and the United Kingdom

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## INTRODUCTION

The *Corruption of Foreign Public Officials Act* ("CFPOA"), Canada's equivalent to the U.S. *Foreign Corrupt Practices Act* ("FCPA") and the U.K.'s *Bribery Act 2010* ("U.K. Bribery Act"), reflects a global trend to toughen anti-bribery and corruption enforcement laws. The CFPOA prohibits Canadian companies and individuals from giving or offering, directly or indirectly, a benefit of any kind to a foreign public official with the ultimate purpose of obtaining or retaining a business advantage. The CFPOA has been in effect since 1999, but amendments which came into force on June 19, 2013 expand its jurisdictional scope and increase its penal sting. Of significance, the amendments repeal the facilitation payment exception, rendering this portion of the CFPOA consistent with the U.K. Bribery Act, but inconsistent with the FCPA.

Canada's inexperience in enforcing anti-corruption legislation is not unique. Until 1997, in fact, the United States was the only member country of the OECD that had legislation prohibiting bribery of foreign officials.<sup>1</sup> The U.K. Bribery Act came into force in 2011, replacing a number of offences at common law and under various statutory regimes.<sup>2</sup> Dovetailing the recent global trend to toughen anti-bribery and corruption enforcement laws is a significant amount of uncertainty over how anti-corruption legislation in Canada will be applied against individuals and companies captured by multiple anti-corruption regimes.

This article provides an overview of the landscape in Canada under the CFPOA, followed by a comparison of the salient legislative differences between the CFPOA, the FCPA and the U.K. Bribery Act. The article then outlines how the jurisdictional reach of the CFPOA, the FCPA and the U.K. Bribery Act can create liability for individuals and corporations in more than one jurisdiction. This article concludes by commenting on the inconsistency between the CFPOA and the FCPA regarding facilitation payments, and in so doing, concludes that multi-national and U.S. companies and individuals cannot take refuge in the FCPA's exception for facilitation payments.

## LANDSCAPE IN CANADA

Up until the 1990s, bribes were tax deductible in Canada.<sup>3</sup> Much has obviously changed. In 1999, the CFPOA came into force, bringing Canada into compliance with the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>4</sup>

Section 3 of the CFPOA creates the broad general offence of bribing a foreign public official. It prohibits Canadian companies and individuals from giving or offering, directly or indirectly, a benefit of any kind to a foreign public official with the ultimate purpose of obtaining or retaining a business advantage. Accordingly, the CFPOA applies to individuals and corporations whether acting directly or indirectly through an agent or third party. Unlike the FCPA and the U.K. Bribery Act, the CFPOA is only enforceable under the criminal law. Civil liability is not available under the CFPOA.

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<sup>1</sup> Global Advice Network, "The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions," Business Anti-Corruption Portal.

<sup>2</sup> U.K. Ministry of Justice, "Bribery Act 2010: Explanatory Notes," page 1 [U.K. Explanatory Notes].

<sup>3</sup> See Hogg, Magee and Li, *Principles of Canadian Income Tax Law*, 8th ed (Toronto, Ontario: Thomson Carswell, 2013), s 8.3, page 224; *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)), ss 67.5(1) and 18(1)(a).

<sup>4</sup> Foreign Affairs, Trade and Development Canada, "Strengthening Canada's Fight Against Foreign Bribery," February 5, 2013 [Foreign Affairs Canada].

There are two statutory defences available to individuals or corporations accused of contravening the CFPOA:

1. payments required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions; or
2. payments made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to:
  - (i) the promotion, demonstration or explanation of the person's products and services; or
  - (ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.<sup>5</sup>

As described more fully below, a third statutory defence, facilitation payments, is being phased out of the CFPOA.<sup>6</sup>

The CFPOA has been criticized for being inadequate, including recently by the OECD's Working Group on Bribery.<sup>7</sup> These criticisms led to the above noted amendments in June, 2013, which in summary include the following:

- Creating a "nationality jurisdiction" mechanism that deems a bribe made by a Canadian national or Canadian corporation outside of Canada to have been made within Canada. This renders it considerably easier to lay charges and prosecute cases in Canada;
- Eliminating in due course the facilitation payment exception;
- Creating a new books and records offence that prohibits certain bookkeeping practices. As described more fully below, this amendment harmonizes the CFPOA and the FCPA;
- Expanding the application of the CFPOA to all business activities, including those of non-for-profit corporations; and
- Increasing the maximum term for imprisonment (from 5 to 14 years of imprisonment). Fines continue to be unlimited.

These and other salient changes are described more fully below.

PRIOR TO JUNE 19, 2013	POST JUNE 19, 2013
The CFPOA originally only targeted business activities that were "for profit" (potentially creating a loophole for not-for-profit work, or business transactions that did not turn a profit).	The current version of the CFPOA has <b>removed the "for profit" requirement</b> . Now, business is defined simply as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere." <sup>8</sup>
The CFPOA previously had a maximum penalty of imprisonment for a term of 5 years.	The recent amendments to the CFPOA <b>increased the maximum individual penalty</b> to 14 years. <sup>9</sup>
No previous provision	The current version of the CFPOA <b>implements record keeping requirements</b> , creating an indictable offence for anyone who: <ol style="list-style-type: none"> <li>(a) establishes or maintains accounts which do not appear in any of the books and records that he/she/it is required to keep in accordance with applicable accounting and auditing standards;</li> <li>(b) makes transactions that are not recorded in those books and records;</li> <li>(c) records non-existent expenditures;</li> <li>(d) enters liabilities with incorrect identification;</li> <li>(e) knowingly uses false documents; or</li> <li>(f) intentionally destroys accounting books and records (earlier than permitted by law).<sup>10</sup></li> </ol>
The "real and substantial" connection test for asserting jurisdiction.	<b>Jurisdiction has been expanded to include the "nationality jurisdiction" approach</b> . Now, individuals can be charged where there is a real and substantial connection <b>or</b> on the basis that acts committed by Canadian citizens, permanent residents or Canadian companies will be deemed to have been committed in Canada. <sup>11</sup>
No previous provision	An amendment to the CFPOA confirms that officers of the Royal Canadian Mounted Police (or a person designated as a peace officer under the <i>Royal Canadian Mounted Police Act</i> ) have the exclusive jurisdiction to lay criminal charges under the CFPOA. <sup>12</sup>

These amendments have been accompanied by government promises to step up enforcement.<sup>13</sup> While there have only been four convictions under the CFPOA, we understand there are currently over 30 ongoing RCMP investigations.<sup>14</sup>

<sup>5</sup> *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34, s 3(3) [CFPOA] (Attached as Appendix A).

<sup>6</sup> CFPOA, *supra* note 5, s 4; Foreign Affairs Canada, *supra* note 4; See, generally, minutes of the Standing Committee on Foreign Affairs and International Development, June 11 and 13, 2013.

<sup>7</sup> See, for example, the OECD Working Group on Bribery's "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Canada," adopted March 18, 2011, pages 5-6 [OECD Report].

<sup>8</sup> CFPOA, *supra* note 5, s 2.

<sup>9</sup> *Ibid.*, ss 3(2) and 4(2).

<sup>10</sup> *Ibid.*, s 4(1).

<sup>11</sup> *Ibid.*, s 5(1).

<sup>12</sup> *Ibid.*, s 6.

<sup>13</sup> Foreign Affairs Canada, *supra* note 4.

<sup>14</sup> *R v. Watts* [2005] A.J. No. 568 (Alberta Court of Queen's Bench); *R v. Niko Resources Ltd.* [2012] A.W.L.D. 4536, 101 W.C.B. (2d) 118 (Alberta Court of Queen's Bench); *R v. Griffiths Energy International* [2013] A.J. No. 412 (Alberta Court of Queen's Bench); *R v. Karigar* 2013 ONSC 5199, 108 W.C.B. (2d) 210 (Ontario Superior Court of Justice) [Karigar]; Foreign Affairs, *supra* note 4.



## SURVEYING THE FIELD: A COMPARISON OF ANTI-CORRUPTION LEGISLATION IN CANADA, THE U.S. AND THE U.K.

While similar, there are some key legislative differences between the anti-corruption regimes in Canada, the U.S. and the U.K. The following table summarizes these key differentiators.

ISSUE	U.S.	U.K.	CANADA
<b>Governing legislation</b>	The FCPA came into force in 1977 and creates civil and criminal liability for individuals and companies. <sup>15</sup>	The U.K. Bribery Act came into force on July 1, 2011 and creates civil and criminal liability for individuals and companies. <sup>16</sup>	The CFPOA was originally enacted in 1999 and creates criminal liability for individuals and companies. It was amended in June, 2013. <sup>17</sup>
<b>Prohibited activities</b>	The FCPA focuses on <b>acts of bribery relating to foreign government officials</b> . The FCPA prohibits an "offer, gift, promise to give, or authorization of the giving of anything of value" to, among others, any foreign official, any foreign political party, or any candidate for foreign political office for the purpose of influencing that person or entity into using his/her/its influence to secure an improper advantage. <sup>18</sup>	The U.K. Bribery Act creates six offences that <b>prohibit both the making of bribes</b> (including bribes to any other "person") <b>and the receipt of bribes</b> . These offences capture a broad range of relationships and activities. The offences under the U.K. Bribery Act are not restricted to actions taken vis-à-vis public officials. In fact, "functions" or activities that the U.K. Bribery Act targets include bribes "connected with business" and "any activity performed in the course of a person's employment."  The U.K. Bribery Act also creates a <b>strict liability offence</b> for commercial organizations for failing to prevent bribery where an <b>associate person</b> engages in bribery with the intention of obtaining or retaining business for the organization or to obtain and retain an advantage in the conduct of business for the organization. <sup>19</sup>	The CFPOA states that any person "commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind <b>to a foreign public official or to any person for the benefit of a foreign public official</b> " either as "consideration for an act or omission by the official in connection with official duties or functions;" or to "induce the official to use his or her position to influence any acts or decisions of the foreign state... for which the official performs duties or functions." <sup>20</sup>
<b>Accounting/ Book keeping requirements</b>	The FCPA requires issuers to: (a) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and (b) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any difference. <sup>21</sup>	The U.K. Bribery Act does not contain a stand alone provision for record keeping requirements. However, the government has provided some guidance on the adequate procedures that commercial organizations are to follow. Though these procedures will vary depending on the organization and the circumstances, commercial organizations are to maintain "accurate and appropriate documentation" of risk assessments, are required to engage in appropriate levels of due diligence, and must have adequate internal mechanisms set up to deter, detect and investigate bribery and monitor the ethical quality of transactions. <sup>22</sup>	The CFPOA creates an indictable offence for anyone who: (a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards; (b) makes transactions that are not recorded in those books and records; (c) records non-existent expenditures; (d) enters liabilities with incorrect identification; (e) knowingly uses false documents; or (f) intentionally destroys accounting books and records (earlier than permitted by law). <sup>23</sup>

<sup>15</sup> *Foreign Corrupt Practices Act*, 15 U.S.C., effective December 19, 1977 [FCPA] (Attached as Appendix B).

<sup>16</sup> *Bribery Act 2010*, c. 23 [U.K. Bribery Act] (Attached as Appendix C).

<sup>17</sup> CFPOA, *supra* note 5.

<sup>18</sup> FCPA, *supra* note 15, ss 78dd-1, 78dd-2 and 78dd-3.

<sup>19</sup> U.K. Bribery Act, *supra* note 16, ss 1, 2, 6 and 7.

<sup>20</sup> CFPOA, *supra* note 5, s 3(1).

<sup>21</sup> FCPA, *supra* note 15, s 78m(b).

<sup>22</sup> U.K. Ministry of Justice, "Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing," February 11, 2012, pages 20-31 [U.K. Guidance].

<sup>23</sup> CFPOA, *supra* note 5, s 4(1).

ISSUE	U.S.	U.K.	CANADA
<b>Defences</b>	The FCPA provides exceptions for payments that are: (a) <b>legal under the relevant foreign law</b> ; or (b) that would qualify as <b>"reasonable and bona fide"</b> payments related directly to the demonstration or explanation of products or services or the execution or performance of a contract. <sup>24</sup>	With respect to the strict liability offence for commercial organizations created by the U.K. Bribery Act, there is an <b>"adequate procedures" defence</b> in place. Under this provision, a company can argue that it had adequate procedures designed to prevent persons associated with the company from undertaking wrongful conduct. <sup>25</sup> The core principles governing the question of whether there were "adequate procedures" are: proportionality, top-level commitment, risk assessment, due diligence, communications, monitoring and review. <sup>26</sup>  A company governed by the U.K. Bribery Act is required to disregard local customs unless a payment is permitted or required by the written law of the country in question. Otherwise, the test for what is proper conduct involves an inquiry into what a reasonable person would expect. <sup>27</sup>	Under the CFPOA, "no person is guilty of an offence... if the loan, reward, advantage or benefit" is either (a) <b>permitted or required under the laws of the foreign state</b> ; or (b) was <b>made to pay the reasonable expenses incurred in good faith</b> by or on behalf of the foreign public official that are directly related to the promotion, demonstration or explanation of the person's products and services or the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions. <sup>28</sup>
<b>Penalties</b>	Under the FCPA, individuals can be subject to jail terms of up to five years and fines of up to \$5 million. Corporations can be fined up to \$25 million. <sup>29</sup>	The U.K. Bribery Act provides for a maximum jail term for individuals of up to 10 years. There are no limits on fines. <sup>30</sup>	The CFPOA provides only for criminal proceedings with a maximum jail term of 14 years. There are no limits on fines. <sup>31</sup>
<b>Jurisdictional issues</b>	The FCPA and U.S. anti-corruption law, generally, give American authorities jurisdiction over: <ul style="list-style-type: none"> <li>• U.S. companies and individuals, irrespective of whether they act within, or wholly outside of, the United States (i.e. "domestic concerns") [nationality jurisdiction];</li> <li>• Any company which has securities listed on a U.S. exchange and any company that is required to file periodic reports with the Securities and Exchange Commission (i.e. "issuers") [capturing both foreign and domestic issuers];</li> <li>• Officers, directors, employees, agents and stockholders of domestic concerns and issuers;</li> <li>• Foreign persons/entities that engage in any act in furtherance of a corrupt payment while in the U.S. [territorial jurisdiction]; or</li> <li>• Any foreign national or company that conspires with, aids or abets, or acts as an agent of an issuer or domestic concern.<sup>32</sup></li> </ul>	The U.K. Bribery Act gives U.K. authorities jurisdiction where: <ul style="list-style-type: none"> <li>• Any act or omission forming part of the offence takes place in the U.K. [territorial jurisdiction];</li> <li>• An act is committed outside of the U.K. that would form part of an offence if that act were committed in the U.K. <b>and</b> the act is committed by a party that has a "close connection" with the U.K. This "close connection" exists where a party is: a British citizen, a British overseas territories citizen, a British National, a British Overseas citizen, a person who under the British Nationality Act was a British citizen, a British "protected person" under the Nationality Act, an individual ordinarily resident in the U.K., a body incorporated under the law of any part of the U.K., or a Scottish partnership [nationality jurisdiction];</li> <li>• In prescribed situations, commercial organizations can also be liable for actions taken by an "associate person" (someone who performs services for or on behalf of one of these actors), regardless of the associate person's nationality;<sup>33</sup> or</li> <li>• Pursuant to the ordinary rules of criminal law, corporations and individuals can also be liable for aiding, abetting, counselling or procuring an impugned activity.<sup>34</sup></li> </ul>	Canadian law and the CFPOA gives Canadian authorities jurisdiction where: <ul style="list-style-type: none"> <li>• There is a "real and substantial" connection between the alleged offence and Canada [territorial jurisdiction];<sup>35</sup></li> <li>• The alleged offence is committed by a Canadian citizen, permanent resident or organization incorporated, formed or otherwise organized under the laws of Canada or a province. In this situation, the offence is deemed to have taken place in Canada [nationality jurisdiction]; or</li> <li>• A party conspires or attempts to commit an impugned activity, is an accessory after the fact, or counsels the commission of an impugned activity. Pursuant to secondary liability in Canadian criminal law, a party could also be liable for aiding or abetting a CFPOA offence.<sup>36</sup></li> </ul>

<sup>24</sup> FCPA, *supra* note 15, ss 78dd-1(c), 78dd-2(c) and 78dd-3(c).

<sup>25</sup> U.K. Bribery Act, *supra* note 16, s 7.

<sup>26</sup> U.K. Guidance, *supra* note 22, pages 20-31.

<sup>27</sup> U.K. Bribery Act, *supra* note 16, s 5.

<sup>28</sup> CFPOA, *supra* note 5, s 3(3).

<sup>29</sup> FCPA, *supra* note 15, s 78ff.

<sup>30</sup> U.K. Bribery Act, *supra* note 16, s 11.

<sup>31</sup> CFPOA, *supra* note 5, ss 3(2) and 4(2).

<sup>32</sup> FCPA, *supra* note 15, ss 78dd-1(g), 78dd-2(i), 78dd-3(a) and 78ff(c).

<sup>33</sup> U.K. Bribery Act, *supra* note 16, ss 8 and 12.

<sup>34</sup> U.K. Explanatory Notes, *supra* note 2, page 8.

<sup>35</sup> See, for example, *R v. Libman* [1985] 2 SCR 178, 21 DLR (4th) 174 (Supreme Court of Canada) [Libman].

<sup>36</sup> CFPOA, *supra* note 5, ss 5 and 6; Criminal Code (R.S.C., 1985, c. C-46), ss 21-24.

ISSUE	U.S.	U.K.	CANADA
Facilitation Payments	The FCPA carves out an exception for “facilitation payments.” The FCPA stipulates that it does not apply to any “facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine government action by a foreign official, political party or party official.” <sup>37</sup>	There is no facilitation payment exception in the U.K. Bribery Act.	While currently provided for in the CFPOA, facilitation payments are being phased out in Canada. <sup>38</sup>

## EXPOSURE UNDER THE DIFFERENT ANTI-CORRUPTION REGIMES

Acts amounting to bribery or corruption may create liability in more than one jurisdiction. Under the current versions of the CFPOA, the FCPA and the U.K. Bribery Act, a single corporation and related individuals and companies could be exposed in Canada, the U.S. and the U.K. For example, it is not unreasonable to envisage situations where:

- A company is incorporated in the U.K., has securities listed on a U.S. exchange and the alleged offence has a “real and substantial” connection with Canada;
- A Canadian company acting as an agent for a U.K. company has a meeting in the U.S. in furtherance of a wrongful activity;
- A U.S., Canadian or U.K. company employs Canadian, British and American individuals who commit wrongful acts; or
- Part or all of the alleged wrongful conduct occurs in any/all of these countries.

There are also instances/circumstances where the differences between the countries may be significant to companies/individuals that fall under the jurisdiction of the U.S., the U.K. and/or Canada:

- Of significance, facilitation payments receive differential treatment, with the U.S. being the most permissive. At a future date, Canada will no longer allow facilitation payments. The U.K. does not allow for facilitation payments;
- Generally, the U.K. legislation captures more activities than its North American counterparts, as it applies to the acts of both giving and receiving bribes and includes bribes to “any person” (as opposed to just public officials). On the other hand, the Canadian and American regimes have more stringent record keeping requirements;
- The length of potential jail time is more significant in Canada (up to 14 years contrasted with up to 5 years in the U.S., and 10 years in the U.K.);
- As a result of its application to all issuers, more actors fall within U.S. jurisdictional reach; and
- Companies and individuals face criminal and civil liability under anti-corruption legislation in the U.S. and U.K. In Canada, they only face criminal liability.

## PARTICULAR LESSONS FOR MULTI-NATIONAL AND U.S. COMPANIES

Multi-national and U.S. companies and individuals must be sensitive to differences in anti-corruption regimes, as they may face exposure to liability in another country for actions that are permitted in the U.S. Of particular importance are facilitation payments. It is not uncommon for companies that operate overseas to rely on facilitation payments to enable government officials to perform official duties that they would otherwise not be able to perform in a timely manner (e.g. providing the Mines Department of an African country with a scanner and a computer so that a company can send plans electronically; providing an inspector with fuel and meals so that he/she can work on site).<sup>39</sup> Indeed, consider the following hypothetical contained in the Resource Guide to the FCPA:

Company A is a large multi-national mining company with operations in Foreign Country, where it recently identified a significant new ore deposit. It has ready buyers for the new ore but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A’s vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this “grease” payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment.<sup>40</sup>

As noted above, facilitation payments are permitted in the U.S. Accordingly, and as noted in the Guide to the FCPA, the aforesaid scenario would not contravene the FCPA.

...Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive (i.e., the stamping and filing of the permit application)...<sup>41</sup>

<sup>37</sup> FCPA, *supra* note 15, ss 78dd-1(b), 78dd-2(b) and 78dd-3(b).

<sup>38</sup> CFPOA, *supra* note 5, s 4; Foreign Affairs Canada, *supra* note 4; See, generally, minutes of the Standing Committee on Foreign Affairs and International Development, June 11 and 13, 2013.

<sup>39</sup> Australia Africa Mining Industry Group, “Public Consultation Paper: Assessing the ‘Facilitation Payments’ Defence to the Foreign Bribery Offence and Other Measures,” November 15, 2011, page 19.

<sup>40</sup> U.S. Department of Justice and U.S. Securities and Exchange Commission, “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” November 14, 2012, page 35.

<sup>41</sup> *Ibid.*



In Canada, there is also currently an exception for facilitation payments. However, this exception is being “phased out” and, at a date to be determined by the Canadian Cabinet, facilitation payments will no longer be legal under Canadian law. In the U.K., there is no exception for facilitation payments. Accordingly, the aforesaid scenario would likely run afoul of the U.K. Bribery Act and will soon likely run afoul of the CFPOA.

The multi-national company is also potentially subject to prosecution in Canada if the facilitation payment has “a real and substantial connection” with Canada.

The multi-national company is also potentially subject to prosecution in Canada if the facilitation payment has “a real and substantial connection” with Canada. The “real and substantial connection” test is discretionary and does not, to date, have the benefit of significant jurisprudence vis à vis the CFPOA. The CFPOA, like the FCPA, applies to both individuals and corporations irrespective of nationality. As noted by the Supreme Court of Canada in *R. v. Libman*, the leading case in Canada on criminal territorial jurisdiction:

I might summarize my approach to the limits of territoriality in this way. As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there by a “real and substantial link” between an offence and this country.<sup>42</sup>

<sup>42</sup> *Libman*, *supra* note 35 at para 74.

<sup>43</sup> *Karigar*, *supra* note 14 at paras 37-40.

<sup>44</sup> OECD Report, *supra* note 7, page 38.

In *R v. Karigar*, Canada’s first conviction of an individual under the CFPOA, Mr. Karigar was charged and convicted of offering bribes to Air India officials and India’s Minister of Civil Aviation in order to secure a major contract. In his reasons regarding jurisdiction and the “real and substantial link” requirement, Justice Hackland rejected the position that, in order for the requisite connection to be made out, the “bulk of the elements of the offence must be grounded in Canada.” Relying on *Libman*, Justice Hackland found that the territorial basis for assuming jurisdiction has never been applied rigidly in Canada. Justice Hackland held that the substantial connection test is “not limited to the essential elements of the offence as submitted by the accused” nor could one “segregate or otherwise deal with bribery as a separate and discrete issue thereby excluding the legitimate aspects of the transaction from consideration in applying the substantial connection test.”<sup>43</sup>

Furthermore, it is also noteworthy that the OECD Report notes the following about Canada:

...it appears from discussions with the RCMP and PPSC during the on-site visit that police and prosecutors are willing to pursue a case of foreign bribery with a broad understanding in mind of what amounts to a “real and substantial link” to the territory of Canada and to do so until... the Canadian courts say this is going too far...<sup>44</sup>

Accordingly, it is not difficult to envisage prosecutorial arguments connecting certain facilitation payments, such as the aforesaid payment, with Canada and for such arguments to form the basis of charges. Canada’s Public Prosecution Service of Canada may elect to be selective and not prosecute individuals or companies that make certain facilitation payments. Such speculation, however, is far from comforting, particularly now that Canada’s maximum prison term for these offences exceed those in the U.S. and the U.K.

Having regard to the foregoing, multi-national companies and U.S. companies would be well advised to review their processes and to implement corporate compliance programs that adequately consider Canada’s CFPOA.



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# APPENDIX A



CANADA

CONSOLIDATION

CODIFICATION

# Corruption of Foreign Public Officials Act

# Loi sur la corruption d'agents publics étrangers

S.C. 1998, c. 34

L.C. 1998, ch. 34

Current to November 26, 2013

À jour au 26 novembre 2013

Last amended on June 19, 2013

Dernière modification le 19 juin 2013

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OFFICIAL STATUS  
OF CONSOLIDATIONS

CARACTÈRE OFFICIEL  
DES CODIFICATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1<sup>er</sup> juin 2009, prévoient ce qui suit :

Published  
consolidation is  
evidence

**31.** (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

**31.** (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Codifications  
comme élément  
de preuve

Inconsistencies  
in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

Incompatibilité  
— lois

NOTE

This consolidation is current to November 26, 2013. The last amendments came into force on June 19, 2013. Any amendments that were not in force as of November 26, 2013 are set out at the end of this document under the heading “Amendments Not in Force”.

NOTE

Cette codification est à jour au 26 novembre 2013. Les dernières modifications sont entrées en vigueur le 19 juin 2013. Toutes modifications qui n'étaient pas en vigueur au 26 novembre 2013 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».



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S.C. 1998, c. 34

L.C. 1998, ch. 34

An Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts

Loi concernant la corruption d'agents publics étrangers et la mise en oeuvre de la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales, et modifiant d'autres lois en conséquence

[Assented to 10th December 1998]

[Sanctionnée le 10 décembre 1998]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Corruption of Foreign Public Officials Act*.

1. *Loi sur la corruption d'agents publics étrangers*.

Titre abrégé

INTERPRETATION

DÉFINITIONS

Definitions

2. The definitions in this section apply in this Act.

2. Les définitions qui suivent s'appliquent à la présente loi.

Définitions

“business”  
« affaires »

“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere.

« affaires » Commerce, métier, profession, industrie ou entreprise de quelque nature que ce soit exploités ou exercés au Canada ou à l'étranger.

« affaires »  
“business”

“foreign public official”  
« agent public étranger »

“foreign public official” means

(a) a person who holds a legislative, administrative or judicial position of a foreign state;

(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and

(c) an official or agent of a public international organization that is formed by two or

« agent de la paix » [Abrogée, 2013, ch. 26, art. 2]

« agent public étranger » Personne qui détient un mandat législatif, administratif ou judiciaire d'un État étranger ou qui exerce une fonction publique d'un État étranger, y compris une personne employée par un conseil, une commission, une société ou un autre organisme établi par l'État étranger pour y exercer une telle fonction ou qui exerce une telle fonction, et un fonctionnaire ou agent d'une organisation internationale publique constituée par des États, des

« agent public étranger »  
“foreign public official”

	more states or governments, or by two or more such public international organizations.	gouvernements ou d'autres organisations internationales publiques.	
"foreign state" « État étranger »	"foreign state" means a country other than Canada, and includes  (a) any political subdivision of that country;  (b) the government, and any department or branch, of that country or of a political subdivision of that country; and  (c) any agency of that country or of a political subdivision of that country.  "peace officer" [Repealed, 2013, c. 26, s. 2]	« État étranger » Pays autre que le Canada. Sont assimilés à un État étranger :  a) ses subdivisions politiques;  b) son gouvernement, ses ministères, ses directions ou ceux de ses subdivisions politiques;  c) ses organismes ou ceux de ses subdivisions politiques.  « quiconque » [Abrogée, 2013, ch. 26, art. 2]	« État étranger » "foreign state"
"person" « quiconque »	"person" means a person as defined in section 2 of the <i>Criminal Code</i> . 1998, c. 34, s. 2; 2013, c. 26, s. 2.	« quiconque » ou « personne » S'entend au sens de l'article 2 du <i>Code criminel</i> . 1998, ch. 34, art. 2; 2013, ch. 26, art. 2.	« quiconque » ou « personne » "person"
	GENERAL	DISPOSITIONS GÉNÉRALES	
Bribing a foreign public official	3. (1) Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official  (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or  (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.	3. (1) Commet une infraction quiconque, directement ou indirectement, dans le but d'obtenir ou de conserver un avantage dans le cours de ses affaires, donne, offre ou convient de donner ou d'offrir à un agent public étranger ou à toute personne au profit d'un agent public étranger un prêt, une récompense ou un avantage de quelque nature que ce soit :  a) en contrepartie d'un acte ou d'une omission dans le cadre de l'exécution des fonctions officielles de cet agent;  b) pour convaincre ce dernier d'utiliser sa position pour influencer les actes ou les décisions de l'État étranger ou de l'organisation internationale publique pour lequel il exerce ses fonctions officielles.	Corruption d'agents publics étrangers
Punishment	(2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.	(2) Quiconque commet une infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans.	Peine
Saving provision	(3) No person is guilty of an offence under subsection (1) if the loan, reward, advantage or benefit  (a) is permitted or required under the laws of the foreign state or public international organization for which the foreign public official performs duties or functions; or  (b) was made to pay the reasonable expenses incurred in good faith by or on behalf of the foreign public official that are directly related to	(3) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) si le prêt, la récompense ou l'avantage :  a) est permis ou exigé par le droit de l'État étranger ou de l'organisation internationale publique pour lequel l'agent public étranger exerce ses fonctions officielles;  b) vise à compenser des frais réels et raisonnables faits par un agent public étranger, ou pour son compte, et liés directement à la promotion, la démonstration ou l'explication des	Défense



(i) the promotion, demonstration or explanation of the person's products and services, or

(ii) the execution or performance of a contract between the person and the foreign state for which the official performs duties or functions.

Facilitation payments

(4) For the purpose of subsection (1), a payment is not a loan, reward, advantage or benefit to obtain or retain an advantage in the course of business, if it is made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions, including

(a) the issuance of a permit, licence or other document to qualify a person to do business;

(b) the processing of official documents, such as visas and work permits;

(c) the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and

(d) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods.

Greater certainty

(5) For greater certainty, an "act of a routine nature" does not include a decision to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.

1998, c. 34, s. 3; 2013, c. 26, s. 3.

Accounting

4. (1) Every person commits an offence who, for the purpose of bribing a foreign public official in order to obtain or retain an advantage in the course of business or for the purpose of hiding that bribery,

(a) establishes or maintains accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards;

produits et services de la personne, ou à l'exécution d'un contrat entre la personne et l'État étranger pour lequel il exerce ses fonctions officielles.

(4) Ne constitue pas un prêt, une récompense ou un avantage visé au paragraphe (1) le paiement visant à hâter ou à garantir l'exécution par un agent public étranger d'un acte de nature courante qui est partie de ses fonctions officielles, notamment :

a) la délivrance d'un permis, d'une licence ou d'un autre document qui habilite la personne à exercer une activité commerciale;

b) la délivrance ou l'obtention d'un document officiel tel un visa ou un permis de travail;

c) la fourniture de services publics tels que la collecte et la livraison du courrier, les services de télécommunication, la fourniture d'électricité et les services d'aqueduc;

d) la fourniture de services occasionnels tels que la protection policière, le débardage, la protection des produits périssables contre la détérioration ou les inspections relatives à l'exécution de contrats ou au transit de marchandises.

Exception

(5) Il est entendu que l'expression « acte de nature courante » ne vise ni une décision d'octroyer de nouvelles affaires ou de reconduire des affaires avec la même partie — notamment ses conditions — ni le fait d'encourager une autre personne à prendre une telle décision.

1998, ch. 34, art. 3; 2013, ch. 26, art. 3.

Précision

4. (1) Commet une infraction quiconque, dans le but de corrompre un agent public étranger afin d'obtenir ou de conserver un avantage dans le cours de ses affaires ou dans le but de dissimuler cette corruption :

a) établit ou tient des comptes qui n'apparaissent pas dans les livres comptables qu'il doit tenir selon les normes de comptabilité et de vérification applicables;

b) effectue des opérations qui ne sont pas enregistrées dans ces livres ou qui y sont insuffisamment identifiées;

Comptabilité

	<p>(b) makes transactions that are not recorded in those books and records or that are inadequately identified in them;</p> <p>(c) records non-existent expenditures in those books and records;</p> <p>(d) enters liabilities with incorrect identification of their object in those books and records;</p> <p>(e) knowingly uses false documents; or</p> <p>(f) intentionally destroys accounting books and records earlier than permitted by law.</p>	<p>c) enregistre dans ceux-ci des dépenses in-existantes;</p> <p>d) enregistre dans ceux-ci des éléments de passif dont l'objet n'est pas correctement identifié;</p> <p>e) utilise sciemment des faux documents;</p> <p>f) détruit intentionnellement des livres comptables plus tôt que ne le prévoit la loi.</p>	
Punishment	<p>(2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.</p> <p>1998, c. 34, s. 4; 2001, c. 32, s. 58; 2013, c. 26, s. 4.</p>	<p>(2) Quiconque commet une infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de quatorze ans.</p> <p>1998, ch. 34, art. 4; 2001, ch. 32, art. 58; 2013, ch. 26, art. 4.</p>	Peine
Offence committed outside Canada	<p>5. (1) Every person who commits an act or omission outside Canada that, if committed in Canada, would constitute an offence under section 3 or 4 — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under that section — is deemed to have committed that act or omission in Canada if the person is</p> <p>(a) a Canadian citizen;</p> <p>(b) a permanent resident as defined in subsection 2(1) of the <i>Immigration and Refugee Protection Act</i> who, after the commission of the act or omission, is present in Canada; or</p> <p>(c) a public body, corporation, society, company, firm or partnership that is incorporated, formed or otherwise organized under the laws of Canada or a province.</p>	<p>5. (1) Quiconque commet à l'étranger tout acte — action ou omission — qui, s'il était commis au Canada, constituerait une infraction prévue aux articles 3 ou 4, un complot en vue de commettre une telle infraction, une tentative de la commettre, une complicité après le fait à son égard ou le fait d'en conseiller la perpétration, est réputé commettre l'acte au Canada si, selon le cas :</p> <p>a) il a la citoyenneté canadienne;</p> <p>b) il est un résident permanent au sens du paragraphe 2(1) de la <i>Loi sur l'immigration et la protection des réfugiés</i> et se trouve au Canada après la commission de l'acte;</p> <p>c) il est un organisme public, une personne morale, une société, une compagnie, une entreprise ou une société de personnes constitués, formés ou autrement organisés au Canada en vertu d'une loi fédérale ou provinciale.</p>	Infraction commise à l'étranger
Jurisdiction	<p>(2) If a person is alleged to have committed an act or omission that is deemed to have been committed in Canada under subsection (1), proceedings for an offence in respect of that act or omission may, whether or not that person is in Canada, be commenced in any territorial division in Canada. The person may be tried and punished for that offence as if the offence had been committed in that territorial division.</p>	<p>(2) Dans le cas où, par application du paragraphe (1), une personne est réputée avoir commis un acte au Canada constituant une infraction, les poursuites peuvent être engagées à l'égard de cette infraction dans toute circonscription territoriale au Canada, que la personne soit ou non présente au Canada. Elle peut subir son procès et être punie comme si l'infraction avait été commise dans cette circonscription territoriale.</p>	Compétence

Appearance of accused at trial	(3) For greater certainty, the provisions of the <i>Criminal Code</i> relating to the requirements that an accused appear at and be present during proceedings and the exceptions to those requirements apply to proceedings commenced in any territorial division under subsection (2).	(3) Il est entendu que les dispositions du <i>Code criminel</i> concernant l'obligation pour un accusé d'être présent et de demeurer présent lors des procédures et les exceptions à cette obligation s'appliquent aux poursuites engagées dans une circonscription territoriale au titre du paragraphe (2).	Comparution de l'accusé lors du procès
Person previously tried outside Canada	(4) If a person is alleged to have committed an act or omission that is deemed to have been committed in Canada under subsection (1) and they have been tried and dealt with outside Canada for an offence in respect of the act or omission so that, if they had been tried and dealt with in Canada, they would be able to plead <i>autrefois acquit</i> , <i>autrefois convict</i> or pardon, they are deemed to have been so tried and dealt with in Canada.	(4) Est réputée avoir été poursuivie et jugée au Canada la personne accusée d'avoir commis un acte réputé avoir été commis au Canada aux termes du paragraphe (1) qui, à cet égard, a été poursuivie et jugée à l'étranger de telle manière que, si elle l'avait été au Canada, elle aurait pu invoquer les moyens de défense d'autrefois acquit, d'autrefois convict ou de pardon.	Jugement antérieur rendu à l'étranger
Exception for foreign trials in <i>absentia</i>	(5) Despite subsection (4), a person may not plead <i>autrefois convict</i> to a count that charges an offence in respect of the act or omission if  (a) the person was not present and was not represented by counsel acting under the person's instructions at the trial outside Canada; and  (b) the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission.  1998, c. 34, s. 5; 2001, c. 32, s. 58; 2013, c. 26, s. 4.	(5) Malgré le paragraphe (4), la personne ne peut invoquer le moyen de défense d'autrefois convict à l'égard d'un chef d'accusation relatif à l'acte si :  (a) d'une part, elle n'était pas présente au procès ni représentée par l'avocat qu'elle avait mandaté;  (b) d'autre part, la peine infligée à l'égard de l'acte n'a pas été purgée.  1998, ch. 34, art. 5; 2001, ch. 32, art. 58; 2013, ch. 26, art. 4.	Exception : procès à l'étranger
Laying an information	6. An information may be laid under section 504 of the <i>Criminal Code</i> in respect of an offence under this Act — or a conspiracy to commit, an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under this Act — only by an officer of the Royal Canadian Mounted Police or any person designated as a peace officer under the <i>Royal Canadian Mounted Police Act</i> .  1998, c. 34, s. 6; 2001, c. 32, s. 58; 2013, c. 26, s. 4.	6. Seuls les officiers de la Gendarmerie royale du Canada ou les personnes désignées comme agent de la paix en vertu de la <i>Loi sur la Gendarmerie royale du Canada</i> sont autorisés à faire une dénonciation en vertu de l'article 504 du <i>Code criminel</i> à l'égard d'une infraction prévue par la présente loi ou à l'égard d'un complot en vue de commettre une telle infraction, d'une tentative de la commettre, d'une complicité après le fait à son égard ou du fait d'en conseiller la perpétration.  1998, ch. 34, art. 6; 2001, ch. 32, art. 58; 2013, ch. 26, art. 4.	Dénonciation
	7. [Repealed, 2001, c. 32, s. 58]	7. [Abrogé, 2001, ch. 32, art. 58]	
	RELATED AMENDMENTS	MODIFICATIONS CORRÉLATIVES	
	8. to 10. [Amendments]	8. à 10. [Modifications]	
	CONDITIONAL AMENDMENT	MODIFICATION CONDITIONNELLE	
	11. [Amendment]	11. [Modification]	



ANNUAL REPORT

Annual report

**12.** Within four months of the end of each fiscal year, the Minister of Foreign Affairs, the Minister for International Trade and the Minister of Justice and Attorney General of Canada shall jointly prepare a report on the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and on the enforcement of this Act, and the Minister of Foreign Affairs shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the report is completed.

RAPPORT ANNUEL

Rapport annuel

**12.** Dans les quatre mois suivant la fin de chaque exercice, le ministre des Affaires étrangères, le ministre du Commerce international et le ministre de la Justice et procureur général du Canada préparent conjointement un rapport sur la mise en oeuvre de la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales et sur l'application de la présente loi et le ministre des Affaires étrangères fait déposer une copie de ce rapport devant chacune des chambres du Parlement dans les quinze premiers jours de séance de cette chambre après l'établissement du rapport.

COMING INTO FORCE

Coming into  
force

**\*13.** This Act or any of its provisions comes into force on a day or days to be fixed by order of the Governor in Council.

\* [Note: Act in force February 14, 1999, *see* SI/99-13.]

ENTRÉE EN VIGUEUR

Entrée en  
vigueur

**\*13.** La présente loi ou telle de ses dispositions entre en vigueur à la date ou aux dates fixées par décret.

\* [Note : Loi en vigueur le 14 février 1999, *voir* TR/99-13.]

**AMENDMENTS NOT IN FORCE**

— 2013, c. 26, s. 3(2)

**3. (2) Subsections 3(4) and (5) of the Act are repealed.**

**MODIFICATIONS NON EN VIGUEUR**

— 2013, ch. 26, par. 3(2)

**3. (2) Les paragraphes 3(4) et (5) de la même loi sont abrogés.**

# APPENDIX B

[As of July 22, 2004]

**Anti-Bribery and Books & Records Provisions of**  
**The Foreign Corrupt Practices Act**  
*Current through Pub. L. 105-366 (November 10, 1998)*  
**UNITED STATES CODE**  
**TITLE 15. COMMERCE AND TRADE**  
**CHAPTER 2B--SECURITIES EXCHANGES**

**§ 78m. Periodical and other reports**

**(a) Reports by issuer of security; contents**

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

**(b) Form of report; books, records, and internal accounting; directives**

\* \* \*

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall--

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78I of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

\* \* \*

## **§ 78dd-1 [Section 30A of the Securities & Exchange Act of 1934].**

### **Prohibited foreign trade practices by issuers**

#### **(a) Prohibition**

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78I of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in

furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

### **(b) Exception for routine governmental action**

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

### **(c) Affirmative defenses**

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that--



(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

#### **(d) Guidelines by Attorney General**

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

#### **(e) Opinions of Attorney General**

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney

General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

## **(f) Definitions**

For purposes of this section:

(1) A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means--

- (i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or
- (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
- (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to 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 to or continue business with a particular party.

## **(g) Alternative Jurisdiction**

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

## **§ 78dd-2. Prohibited foreign trade practices by domestic concerns**

### **(a) Prohibition**

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

- (1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

## **(b) Exception for routine governmental action**

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

## **(c) Affirmative defenses**

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

#### **(d) Injunctive relief**

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

#### **(e) Guidelines by Attorney General**

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

#### **(f) Opinions of Attorney General**

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

#### **(g) Penalties**

(1) (A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of



this section shall be fined not more than \$2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

- (2) (A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

## **(h) Definitions**

For purposes of this section:

- (1) The term "domestic concern" means--

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

- (2) (A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means --

(i) an organization that has been designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

- (3) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if--

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to 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 to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of--

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

#### **(i) Alternative Jurisdiction**

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, a "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

#### **§ 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns**

## **(a) Prohibition**

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern, as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

## **(b) Exception for routine governmental action**

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

### **(c) Affirmative defenses**

It shall be an affirmative defense to actions under subsection (a) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

### **(d) Injunctive relief**

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

### **(e) Penalties**

(1) (A) Any juridical person that violates subsection (a) of this section shall be fined not more than

\$2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

- (2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

## **(f) Definitions**

For purposes of this section:

- (1) The term "person," when referring to an offender, means any natural person other than a national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof
- (2) (A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A), the term "public international organization" means --

- (i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or
  - (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.
- (3) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if --
- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
  - (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

- (4) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--
- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
  - (ii) processing governmental papers, such as visas and work orders;

- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to 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 to or continue business with a particular party.

(5) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of —

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

## **§ 78ff. Penalties**

### **(a) Willful violations; false and misleading statements**

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

### **(b) Failure to file information, documents, or reports**

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

### **(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers**

- (1) (A) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than \$2,000,000.



(B) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.

- (2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.

- (3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

# APPENDIX C



# Bribery Act 2010

## CHAPTER 23

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# Bribery Act 2010

## 2010 CHAPTER 23

An Act to make provision about offences relating to bribery; and for connected purposes. [8th April 2010]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### *General bribery offences*

#### **1 Offences of bribing another person**

- (1) A person ("P") is guilty of an offence if either of the following cases applies.
- (2) Case 1 is where—
  - (a) P offers, promises or gives a financial or other advantage to another person, and
  - (b) P intends the advantage—
    - (i) to induce a person to perform improperly a relevant function or activity, or
    - (ii) to reward a person for the improper performance of such a function or activity.
- (3) Case 2 is where—
  - (a) P offers, promises or gives a financial or other advantage to another person, and
  - (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
- (4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

- (5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

## **2 Offences relating to being bribed**

- (1) A person ("R") is guilty of an offence if any of the following cases applies.
- (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
- (3) Case 4 is where —
  - (a) R requests, agrees to receive or accepts a financial or other advantage, and
  - (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
- (4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
- (5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly —
  - (a) by R, or
  - (b) by another person at R's request or with R's assent or acquiescence.
- (6) In cases 3 to 6 it does not matter —
  - (a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
  - (b) whether the advantage is (or is to be) for the benefit of R or another person.
- (7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.
- (8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

## **3 Function or activity to which bribe relates**

- (1) For the purposes of this Act a function or activity is a relevant function or activity if —
  - (a) it falls within subsection (2), and
  - (b) meets one or more of conditions A to C.
- (2) The following functions and activities fall within this subsection —
  - (a) any function of a public nature,
  - (b) any activity connected with a business,
  - (c) any activity performed in the course of a person's employment,
  - (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).
- (3) Condition A is that a person performing the function or activity is expected to perform it in good faith.



- (4) Condition B is that a person performing the function or activity is expected to perform it impartially.
- (5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.
- (6) A function or activity is a relevant function or activity even if it—
  - (a) has no connection with the United Kingdom, and
  - (b) is performed in a country or territory outside the United Kingdom.
- (7) In this section “business” includes trade or profession.

#### **4 Improper performance to which bribe relates**

- (1) For the purposes of this Act a relevant function or activity—
  - (a) is performed improperly if it is performed in breach of a relevant expectation, and
  - (b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.
- (2) In subsection (1) “relevant expectation”—
  - (a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and
  - (b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.
- (3) Anything that a person does (or omits to do) arising from or in connection with that person’s past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

#### **5 Expectation test**

- (1) For the purposes of sections 3 and 4, the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.
- (2) In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.
- (3) In subsection (2) “written law” means law contained in—
  - (a) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
  - (b) any judicial decision which is so applicable and is evidenced in published written sources.

*Bribery of foreign public officials***6 Bribery of foreign public officials**

- (1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
- (2) P must also intend to obtain or retain—
  - (a) business, or
  - (b) an advantage in the conduct of business.
- (3) P bribes F if, and only if—
  - (a) directly or through a third party, P offers, promises or gives any financial or other advantage—
    - (i) to F, or
    - (ii) to another person at F's request or with F's assent or acquiescence, and
  - (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.
- (4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—
  - (a) any omission to exercise those functions, and
  - (b) any use of F's position as such an official, even if not within F's authority.
- (5) "Foreign public official" means an individual who—
  - (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
  - (b) exercises a public function—
    - (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
    - (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
  - (c) is an official or agent of a public international organisation.
- (6) "Public international organisation" means an organisation whose members are any of the following—
  - (a) countries or territories,
  - (b) governments of countries or territories,
  - (c) other public international organisations,
  - (d) a mixture of any of the above.
- (7) For the purposes of subsection (3)(b), the written law applicable to F is—
  - (a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,
  - (b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,

- (c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—
  - (i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
  - (ii) any judicial decision which is so applicable and is evidenced in published written sources.
- (8) For the purposes of this section, a trade or profession is a business.

*Failure of commercial organisations to prevent bribery*

**7 Failure of commercial organisations to prevent bribery**

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
  - (a) to obtain or retain business for C, or
  - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
- (3) For the purposes of this section, A bribes another person if, and only if, A—
  - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
  - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
- (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.
- (5) In this section—
  - “partnership” means—
    - (a) a partnership within the Partnership Act 1890, or
    - (b) a limited partnership registered under the Limited Partnerships Act 1907,
 or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,
  - “relevant commercial organisation” means—
    - (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
    - (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
    - (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
    - (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
 and, for the purposes of this section, a trade or profession is a business.

**8 Meaning of associated person**

- (1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.
- (2) The capacity in which A performs services for or on behalf of C does not matter.
- (3) Accordingly A may (for example) be C's employee, agent or subsidiary.
- (4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.
- (5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.

**9 Guidance about commercial organisations preventing bribery**

- (1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).
- (2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.
- (3) The Secretary of State must consult the Scottish Ministers before publishing anything under this section.
- (4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.
- (5) Expressions used in this section have the same meaning as in section 7.

*Prosecution and penalties***10 Consent to prosecution**

- (1) No proceedings for an offence under this Act may be instituted in England and Wales except by or with the consent of—
  - (a) the Director of Public Prosecutions,
  - (b) the Director of the Serious Fraud Office, or
  - (c) the Director of Revenue and Customs Prosecutions.
- (2) No proceedings for an offence under this Act may be instituted in Northern Ireland except by or with the consent of—
  - (a) the Director of Public Prosecutions for Northern Ireland, or
  - (b) the Director of the Serious Fraud Office.
- (3) No proceedings for an offence under this Act may be instituted in England and Wales or Northern Ireland by a person—
  - (a) who is acting—
    - (i) under the direction or instruction of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions, or
    - (ii) on behalf of such a Director, or

- (b) to whom such a function has been assigned by such a Director, except with the consent of the Director concerned to the institution of the proceedings.
- (4) The Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions must exercise personally any function under subsection (1), (2) or (3) of giving consent.
- (5) The only exception is if —
  - (a) the Director concerned is unavailable, and
  - (b) there is another person who is designated in writing by the Director acting personally as the person who is authorised to exercise any such function when the Director is unavailable.
- (6) In that case, the other person may exercise the function but must do so personally.
- (7) Subsections (4) to (6) apply instead of any other provisions which would otherwise have enabled any function of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions under subsection (1), (2) or (3) of giving consent to be exercised by a person other than the Director concerned.
- (8) No proceedings for an offence under this Act may be instituted in Northern Ireland by virtue of section 36 of the Justice (Northern Ireland) Act 2002 (delegation of the functions of the Director of Public Prosecutions for Northern Ireland to persons other than the Deputy Director) except with the consent of the Director of Public Prosecutions for Northern Ireland to the institution of the proceedings.
- (9) The Director of Public Prosecutions for Northern Ireland must exercise personally any function under subsection (2) or (8) of giving consent unless the function is exercised personally by the Deputy Director of Public Prosecutions for Northern Ireland by virtue of section 30(4) or (7) of the Act of 2002 (powers of Deputy Director to exercise functions of Director).
- (10) Subsection (9) applies instead of section 36 of the Act of 2002 in relation to the functions of the Director of Public Prosecutions for Northern Ireland and the Deputy Director of Public Prosecutions for Northern Ireland under, or (as the case may be) by virtue of, subsections (2) and (8) above of giving consent.

## 11 Penalties

- (1) An individual guilty of an offence under section 1, 2 or 6 is liable—
  - (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
- (2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum,
  - (b) on conviction on indictment, to a fine.
- (3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.

- (4) The reference in subsection (1)(a) to 12 months is to be read —
  - (a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
  - (b) in its application to Northern Ireland,
 as a reference to 6 months.

*Other provisions about offences*

**12 Offences under this Act: territorial application**

- (1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.
- (2) Subsection (3) applies if —
  - (a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,
  - (b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and
  - (c) that person has a close connection with the United Kingdom.
- (3) In such a case —
  - (a) the acts or omissions form part of the offence referred to in subsection (2)(a), and
  - (b) proceedings for the offence may be taken at any place in the United Kingdom.
- (4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made —
  - (a) a British citizen,
  - (b) a British overseas territories citizen,
  - (c) a British National (Overseas),
  - (d) a British Overseas citizen,
  - (e) a person who under the British Nationality Act 1981 was a British subject,
  - (f) a British protected person within the meaning of that Act,
  - (g) an individual ordinarily resident in the United Kingdom,
  - (h) a body incorporated under the law of any part of the United Kingdom,
  - (i) a Scottish partnership.
- (5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.
- (6) Where no act or omission which forms part of an offence under section 7 takes place in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom.
- (7) Subsection (8) applies if, by virtue of this section, proceedings for an offence are to be taken in Scotland against a person.

- (8) Such proceedings may be taken—
  - (a) in any sheriff court district in which the person is apprehended or in custody, or
  - (b) in such sheriff court district as the Lord Advocate may determine.
- (9) In subsection (8) “sheriff court district” is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

### 13 Defence for certain bribery offences etc.

- (1) It is a defence for a person charged with a relevant bribery offence to prove that the person’s conduct was necessary for—
  - (a) the proper exercise of any function of an intelligence service, or
  - (b) the proper exercise of any function of the armed forces when engaged on active service.
- (2) The head of each intelligence service must ensure that the service has in place arrangements designed to ensure that any conduct of a member of the service which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(a).
- (3) The Defence Council must ensure that the armed forces have in place arrangements designed to ensure that any conduct of—
  - (a) a member of the armed forces who is engaged on active service, or
  - (b) a civilian subject to service discipline when working in support of any person falling within paragraph (a),
 which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(b).
- (4) The arrangements which are in place by virtue of subsection (2) or (3) must be arrangements which the Secretary of State considers to be satisfactory.
- (5) For the purposes of this section, the circumstances in which a person’s conduct is necessary for a purpose falling within subsection (1)(a) or (b) are to be treated as including any circumstances in which the person’s conduct—
  - (a) would otherwise be an offence under section 2, and
  - (b) involves conduct by another person which, but for subsection (1)(a) or (b), would be an offence under section 1.
- (6) In this section—
  - “active service” means service in—
    - (a) an action or operation against an enemy,
    - (b) an operation outside the British Islands for the protection of life or property, or
    - (c) the military occupation of a foreign country or territory,
  - “armed forces” means Her Majesty’s forces (within the meaning of the Armed Forces Act 2006),
  - “civilian subject to service discipline” and “enemy” have the same meaning as in the Act of 2006,
  - “GCHQ” has the meaning given by section 3(3) of the Intelligence Services Act 1994,
  - “head” means—
    - (a) in relation to the Security Service, the Director General of the Security Service,

- (b) in relation to the Secret Intelligence Service, the Chief of the Secret Intelligence Service, and
  - (c) in relation to GCHQ, the Director of GCHQ,
- “intelligence service” means the Security Service, the Secret Intelligence Service or GCHQ,
- “relevant bribery offence” means—
- (a) an offence under section 1 which would not also be an offence under section 6,
  - (b) an offence under section 2,
  - (c) an offence committed by aiding, abetting, counselling or procuring the commission of an offence falling within paragraph (a) or (b),
  - (d) an offence of attempting or conspiring to commit, or of inciting the commission of, an offence falling within paragraph (a) or (b), or
  - (e) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to an offence falling within paragraph (a) or (b).

#### **14 Offences under sections 1, 2 and 6 by bodies corporate etc.**

- (1) This section applies if an offence under section 1, 2 or 6 is committed by a body corporate or a Scottish partnership.
- (2) If the offence is proved to have been committed with the consent or connivance of—
  - (a) a senior officer of the body corporate or Scottish partnership, or
  - (b) a person purporting to act in such a capacity,
 the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly.
- (3) But subsection (2) does not apply, in the case of an offence which is committed under section 1, 2 or 6 by virtue of section 12(2) to (4), to a senior officer or person purporting to act in such a capacity unless the senior officer or person has a close connection with the United Kingdom (within the meaning given by section 12(4)).
- (4) In this section—
  - “director”, in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate,
  - “senior officer” means—
    - (a) in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate, and
    - (b) in relation to a Scottish partnership, a partner in the partnership.

#### **15 Offences under section 7 by partnerships**

- (1) Proceedings for an offence under section 7 alleged to have been committed by a partnership must be brought in the name of the partnership (and not in that of any of the partners).
- (2) For the purposes of such proceedings—



- (a) rules of court relating to the service of documents have effect as if the partnership were a body corporate, and
- (b) the following provisions apply as they apply in relation to a body corporate—
  - (i) section 33 of the Criminal Justice Act 1925 and Schedule 3 to the Magistrates' Courts Act 1980,
  - (ii) section 18 of the Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I.)) and Schedule 4 to the Magistrates' Courts (Northern Ireland) Order 1981 (S.I. 1981/1675 (N.I.26)),
  - (iii) section 70 of the Criminal Procedure (Scotland) Act 1995.
- (3) A fine imposed on the partnership on its conviction for an offence under section 7 is to be paid out of the partnership assets.
- (4) In this section "partnership" has the same meaning as in section 7.

*Supplementary and final provisions*

## 16 Application to Crown

This Act applies to individuals in the public service of the Crown as it applies to other individuals.

## 17 Consequential provision

- (1) The following common law offences are abolished—
  - (a) the offences under the law of England and Wales and Northern Ireland of bribery and embracery,
  - (b) the offences under the law of Scotland of bribery and accepting a bribe.
- (2) Schedule 1 (which contains consequential amendments) has effect.
- (3) Schedule 2 (which contains repeals and revocations) has effect.
- (4) The relevant national authority may by order make such supplementary, incidental or consequential provision as the relevant national authority considers appropriate for the purposes of this Act or in consequence of this Act.
- (5) The power to make an order under this section—
  - (a) is exercisable by statutory instrument,
  - (b) includes power to make transitional, transitory or saving provision,
  - (c) may, in particular, be exercised by amending, repealing, revoking or otherwise modifying any provision made by or under an enactment (including any Act passed in the same Session as this Act).
- (6) Subject to subsection (7), a statutory instrument containing an order of the Secretary of State under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.
- (7) A statutory instrument containing an order of the Secretary of State under this section which does not amend or repeal a provision of a public general Act or of devolved legislation is subject to annulment in pursuance of a resolution of either House of Parliament.

- (8) Subject to subsection (9), a statutory instrument containing an order of the Scottish Ministers under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, the Scottish Parliament.
- (9) A statutory instrument containing an order of the Scottish Ministers under this section which does not amend or repeal a provision of an Act of the Scottish Parliament or of a public general Act is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (10) In this section—
  - “devolved legislation” means an Act of the Scottish Parliament, a Measure of the National Assembly for Wales or an Act of the Northern Ireland Assembly,
  - “enactment” includes an Act of the Scottish Parliament and Northern Ireland legislation,
  - “relevant national authority” means—
    - (a) in the case of provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament, the Scottish Ministers, and
    - (b) in any other case, the Secretary of State.

## **18 Extent**

- (1) Subject as follows, this Act extends to England and Wales, Scotland and Northern Ireland.
- (2) Subject to subsections (3) to (5), any amendment, repeal or revocation made by Schedule 1 or 2 has the same extent as the provision amended, repealed or revoked.
- (3) The amendment of, and repeals in, the Armed Forces Act 2006 do not extend to the Channel Islands.
- (4) The amendments of the International Criminal Court Act 2001 extend to England and Wales and Northern Ireland only.
- (5) Subsection (2) does not apply to the repeal in the Civil Aviation Act 1982.

## **19 Commencement and transitional provision etc.**

- (1) Subject to subsection (2), this Act comes into force on such day as the Secretary of State may by order made by statutory instrument appoint.
- (2) Sections 16, 17(4) to (10) and 18, this section (other than subsections (5) to (7)) and section 20 come into force on the day on which this Act is passed.
- (3) An order under subsection (1) may—
  - (a) appoint different days for different purposes,
  - (b) make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act.
- (4) The Secretary of State must consult the Scottish Ministers before making an order under this section in connection with any provision of this Act which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament.

- (5) This Act does not affect any liability, investigation, legal proceeding or penalty for or in respect of—
  - (a) a common law offence mentioned in subsection (1) of section 17 which is committed wholly or partly before the coming into force of that subsection in relation to such an offence, or
  - (b) an offence under the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906 committed wholly or partly before the coming into force of the repeal of the Act by Schedule 2 to this Act.
- (6) For the purposes of subsection (5) an offence is partly committed before a particular time if any act or omission which forms part of the offence takes place before that time.
- (7) Subsections (5) and (6) are without prejudice to section 16 of the Interpretation Act 1978 (general savings on repeal).

**20 Short title**

This Act may be cited as the Bribery Act 2010.

## SCHEDULES

## SCHEDULE 1

Section 17(2)

## CONSEQUENTIAL AMENDMENTS

*Ministry of Defence Police Act 1987 (c. 4)*

- 1 In section 2(3)(ba) of the Ministry of Defence Police Act 1987 (jurisdiction of members of Ministry of Defence Police Force) for “Prevention of Corruption Acts 1889 to 1916” substitute “Bribery Act 2010”.

*Criminal Justice Act 1987 (c. 38)*

- 2 In section 2A of the Criminal Justice Act 1987 (Director of SFO’s pre-investigation powers in relation to bribery and corruption: foreign officers etc.) for subsections (5) and (6) substitute—
  - “(5) This section applies to any conduct—
    - (a) which, as a result of section 3(6) of the Bribery Act 2010, constitutes an offence under section 1 or 2 of that Act under the law of England and Wales or Northern Ireland, or
    - (b) which constitutes an offence under section 6 of that Act under the law of England and Wales or Northern Ireland.”

*International Criminal Court Act 2001 (c. 17)*

- 3 The International Criminal Court Act 2001 is amended as follows.
- 4 In section 54(3) (offences in relation to the ICC: England and Wales)—
  - (a) in paragraph (b) for “or” substitute “, an offence under the Bribery Act 2010 or (as the case may be) an offence”, and
  - (b) in paragraph (c) after “common law” insert “or (as the case may be) under the Bribery Act 2010”.
- 5 In section 61(3)(b) (offences in relation to the ICC: Northern Ireland) after “common law” insert “or (as the case may be) under the Bribery Act 2010”.

*International Criminal Court (Scotland) Act 2001 (asp 13)*

- 6 In section 4(2) of the International Criminal Court (Scotland) Act 2001 (offences in relation to the ICC)—
  - (a) in paragraph (b) after “common law” insert “or (as the case may be) under the Bribery Act 2010”, and
  - (b) in paragraph (c) for “section 1 of the Prevention of Corruption Act 1906 (c.34) or at common law” substitute “the Bribery Act 2010”.

*Serious Organised Crime and Police Act 2005 (c. 15)*

- 7 The Serious Organised Crime and Police Act 2005 is amended as follows.
- 8 In section 61(1) (offences in respect of which investigatory powers apply) for paragraph (h) substitute—
- “(h) any offence under the Bribery Act 2010.”
- 9 In section 76(3) (financial reporting orders: making) for paragraphs (d) to (f) substitute—
- “(da) an offence under any of the following provisions of the Bribery Act 2010—
- section 1 (offences of bribing another person),
- section 2 (offences relating to being bribed),
- section 6 (bribery of foreign public officials),”.
- 10 In section 77(3) (financial reporting orders: making in Scotland) after paragraph (b) insert—
- “(c) an offence under section 1, 2 or 6 of the Bribery Act 2010.”

*Armed Forces Act 2006 (c. 52)*

- 11 In Schedule 2 to the Armed Forces Act 2006 (which lists serious offences the possible commission of which, if suspected, must be referred to a service police force), in paragraph 12, at the end insert—
- “(aw) an offence under section 1, 2 or 6 of the Bribery Act 2010.”

*Serious Crime Act 2007 (c. 27)*

- 12 The Serious Crime Act 2007 is amended as follows.
- 13 (1) Section 53 of that Act (certain extra-territorial offences to be prosecuted only by, or with the consent of, the Attorney General or the Advocate General for Northern Ireland) is amended as follows.
- (2) The existing words in that section become the first subsection of the section.
- (3) After that subsection insert—
- “(2) Subsection (1) does not apply to an offence under this Part to which section 10 of the Bribery Act 2010 applies by virtue of section 54(1) and (2) below (encouraging or assisting bribery).”
- 14 (1) Schedule 1 to that Act (list of serious offences) is amended as follows.
- (2) For paragraph 9 and the heading before it (corruption and bribery: England and Wales) substitute—

*“Bribery*

- 9 An offence under any of the following provisions of the Bribery Act 2010—
- (a) section 1 (offences of bribing another person);
- (b) section 2 (offences relating to being bribed);
- (c) section 6 (bribery of foreign public officials).”

- (3) For paragraph 25 and the heading before it (corruption and bribery: Northern Ireland) substitute—

*“Bribery*

25 An offence under any of the following provisions of the Bribery Act 2010—

- (a) section 1 (offences of bribing another person);
- (b) section 2 (offences relating to being bribed);
- (c) section 6 (bribery of foreign public officials).”

SCHEDULE 2

Section 17(3)

REPEALS AND REVOCATIONS

<i>Short title and chapter</i>	<i>Extent of repeal or revocation</i>
Public Bodies Corrupt Practices Act 1889 (c. 69)	The whole Act.
Prevention of Corruption Act 1906 (c. 34)	The whole Act.
Prevention of Corruption Act 1916 (c. 64)	The whole Act.
Criminal Justice Act (Northern Ireland) 1945 (c. 15 (N.I.))	Section 22.
Electoral Law Act (Northern Ireland) 1962 (c. 14 (N.I.))	Section 112(3).
Increase of Fines Act (Northern Ireland) 1967 (c. 29 (N.I.))	Section 1(8)(a) and (b).
Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968 (c. 28 (N.I.))	In Schedule 2, the entry in the table relating to the Prevention of Corruption Act 1906.
Local Government Act (Northern Ireland) 1972 (c. 9 (N.I.))	In Schedule 8, paragraphs 1 and 3.
Civil Aviation Act 1982 (c. 16)	Section 19(1).
Representation of the People Act 1983 (c. 2)	In section 165(1), paragraph (b) and the word “or” immediately before it.
Housing Associations Act 1985 (c. 69)	In Schedule 6, paragraph 1(2).
Criminal Justice Act 1988 (c. 33)	Section 47.
Criminal Justice (Evidence etc.) (Northern Ireland) Order 1988 (S.I. 1988/1847 (N.I.17))	Article 14.
Enterprise and New Towns (Scotland) Act 1990 (c. 35)	In Schedule 1, paragraph 2.
Scotland Act 1998 (c. 46)	Section 43.

<i>Short title and chapter</i>	<i>Extent of repeal or revocation</i>
Anti-terrorism, Crime and Security Act 2001 (c. 24)	Sections 108 to 110.
Criminal Justice (Scotland) Act 2003 (asp 7)	Sections 68 and 69.
Government of Wales Act 2006 (c. 32)	Section 44.
Armed Forces Act 2006 (c. 52)	In Schedule 2, paragraph 12(l) and (m).
Local Government and Public Involvement in Health Act 2007 (c. 28)	Section 217(1)(a). Section 244(4). In Schedule 14, paragraph 1.
Housing and Regeneration Act 2008 (c. 17)	In Schedule 1, paragraph 16.

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