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The UK Bribery Act 2010 – How Will It Impact the Life Sciences Industry and How Does It Compare With the US Foreign Corrupt Practices Act?

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Outline

- Keynote address – Kathleen Harris – "The UK Bribery Act 2010 and the SFO's approach to enforcement"
- Comparison of the FCPA and the Bribery Act 2010
- Essentials for an effective global anti-corruption compliance program

FCPA v the Bribery Act: Key differences - Offences and defences

FCPA	Bribery Act
Bribery of foreign government officials (including state enterprise employees, political parties, party officials, political candidates, public international organization employees)	Bribery of public and private sector individuals – includes a discrete offence of bribing a foreign public official
Only penalizes those making bribes	Accepting bribes is also punishable
Prosecutes active participation in bribery, though internal controls requirement is independent of any bribery activity	New strict liability corporate offence of failing to prevent bribery
Penalizes failure to keep books and records that accurately reflect business transactions and failure to maintain effective internal controls	No accounting offence in the Bribery Act but Companies Act 2006 includes an offence of failing to keep adequate accounting records
Consideration of compliance programmes at prosecution and sentencing stages	"adequate procedures" is the only potential defence available against failing to prevent bribery
Statutory exception for "facilitation payments" narrowly defined	Facilitation payments only permitted if local written law so permits
Reasonable and bona fide expenditure on travel, lodging and entertainment expenses permitted if directly related to promotion of product or service or to performance of government contract	No express exception for corporate hospitality or promotional activities – particular care needed when dealing with foreign public officials

FCPA v the Bribery Act: Key differences - Territorial effect and punishment

FCPA	Bribery Act
Conduct within the US by anyone	Conduct (including omissions) within the UK by anyone
Conduct outside of the US if by an issuer of US Securities or a "domestic concern" (e.g. a company organized under US law or having its principal place of business in the US) – or anyone acting on its behalf; foreign persons who commit an act in the United States in furtherance of a subject act are also covered	Conduct (including omissions) outside of the UK by persons (natural and legal) with a close connection to the UK, if that conduct would form an offence if committed in the UK. If a commercial organization "carries on a business or part of a business in the UK" then may be prosecuted for "failing to prevent" bribery even if the bribery occurs entirely outside of the UK
Up to 5 years prison sentence for bribery, 20 years for accounting offences	Up to 10 years prison sentence – accounting offences may be prosecuted under other Statutes
Criminal fine for entities up to $2m for bribery or $25m for violation of accounting provisions, or twice the benefit sought, and debarment; for individuals, fines of up to $100,000 (bribery) or $5 million (accounting offences)	Unlimited fine; additionally Serious Crime Prevention Orders, Confiscation Orders, Winding up proceedings, debarment, director disqualification and regulatory/disciplinary action
Civil penalties up to $10,000 per bribery violation or $500,000 per corporate accountancy violation	Civil Recovery Orders – no criminal conviction required (lower threshold of proof)

Compliance Essentials

Principles	Practical Impact
<u>1: Risk Assessment</u> *Regularly and comprehensively assess the nature and extent of the risks relating to bribery to which the organization is exposed*	Detailed gap analysis, taking into account risks posed to the organization not only by its own core business activities but also by procurement of premises and infrastructure (supply chain) to deliver that business; focus groups and existing staff awareness; existing control environment. Consider business counterparties and geographies in the widest sense
<u>2: Top Level Commitment</u> *The top level management are committed to preventing bribery. They establish a culture in which bribery is never acceptable. The organization's policy against bribery is clearly communicated to all levels of management, the workforce and any relevant external actors*	A public statement of the board's commitment to counter bribery in all parts of the operation. Consequences of breaching this commitment for staff and business partners. Personal involvement of top-level managers in developing a code of conduct and ensuring anti-bribery policies are published and communicated to employees, subsidiaries and business partners

Compliance essentials

Principles	Practical Impact
<u>3. Due Diligence</u> *Due diligence polices and procedures covering all parties to a business relationship, including the supply chain, agents and intermediaries, all forms of joint venture and similar relationships and all markets in which the entity does business*	Risk by geography – where your business, customers, counterparties, agents, suppliers etc. are or will be located Risks associated with a particular business line or business opportunity, e.g. establishing whether a project will be done at market prices, or has a defined legitimate objective. Track record and reputation of business partners, etc.; government links
<u>4: Clear, Practical and Accessible Policies and Procedures</u> *Policies and procedures take account of the roles of the whole work force from the owners or board of directors to all employees, and all people and entities over which the commercial organization has control*	Use staff expertise to develop policies and so secure buy-in. Embed the bribery prohibition into all decision making processes. Cover third-party payments, including political and charitable contributions, business promotional gifts, hospitality and entertainment. Adapt existing procedures such as financial and auditing controls, disciplinary procedures, performance appraisals and selection criteria. Institute procedures to facilitate whistle blowing and investigate suspected incidents

Compliance Essentials

Principles	Practical Impact
5: Effective Implementation *Ensure anti-bribery policies and procedures are embedded throughout the organization. Ensure the development of policies and procedures reflects the practical business issues that the organization and any of its staff face when seeking to conduct business without bribery*	Project plan - allocation of roles and responsibilities across the organization, milestones for delivery, including communication and training. Review, enforcement, reporting to top management. External advice and/or assurance? Revision of contractual terms with customers, staff, counterparties, etc
6 : Monitoring and Review *Institute monitoring and review mechanisms to ensure compliance with relevant policies and procedures and to identify any issues as they arise. Implement improvements where appropriate*	Who takes ownership? Accounting controls, compliance monitoring, internal audit, mechanism to appraise and react to comments, complaints and incidents. Mechanism to keep abreast of and disseminate developments in law and practice. Audit committee/Board agenda item. Regular external assurance and benchmarking?

Questions