

# BEYOND THE FCPA: ANTI-CORRUPTION ENFORCEMENT GOES GLOBAL



JULY 22, 2010

# Agenda

- Introduction
- Presentation
  - Neill Blundell, Head of Fraud Group, Eversheds LLP
  - David Childers, President and CEO, EthicsPoint
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
  - > [www.securitiesdocket.com](http://www.securitiesdocket.com)
- Wrap-up



# Webcast Series

- Series of webcasts — every other week
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# Panel



Neill Blundell



David Childers



Bruce Carton

# Bribery & Corruption

## *The Bribery Act 2010*

Neill Blundell

Head of Fraud Group, Eversheds LLP

David Childers

President and CEO, EthicsPoint

22 July 2010

# Outline of Talk

- Bribery and corruption – why be concerned?
- Background to UK Bribery Act
- Timetable
- Key Offences
- Jurisdiction & Penalties
- FSA and Aon
- UK Bribery Act vs. US FCPA – a comparison
- Bribery Act: Are you ready?
- Adequate procedures
- Responding to the Bribery Act

# Three Things I Know...

Ever Increasing  
Regulation

Conflicting Global  
Mandates

Agencies Transitioning  
to Enforcement



# Bribery and corruption – why be concerned?

- A violation of US, UK and/or other national anti-corruption laws may result in:
  - Criminal penalties and fines for a company
  - Imprisonment and fines for a company's directors and employees
  - Disgorgement of a company's profits
  - A loss of reputation, public trust and business for a company
  - Investigation costs
  - Diversion of management

# Ramifications of breach: Siemens example

- Criminal prosecutions
  - €395m
  - \$450m DOJ
- Disgorgement of profits
  - €201m
  - \$350m SEC
- Debarment: UN
  - 6 months
- Independent monitor
  - 4 years
- Multiple investigation costs
  - 2008 - €510m
- Back taxes/interest
  - €179m
- Diversion of management
- Civil litigation

# Recent background

- Overseas Corruption Unit set up in December 2007
- New self-reporting guidelines issued by SFO
- Use of Civil Recovery Orders
  - **Balfour Beatty**: £2.25 million for failure to keep accurate records on Egyptian project (September 2008)
  - **AMEC**: £4.9 million for failure to keep accurate records in relation to Korean project (October 2009)
  - **BAE**: £30 million for failure to keep accurate records in relation to its activities in Tanzania (February 2010)

# Recent background

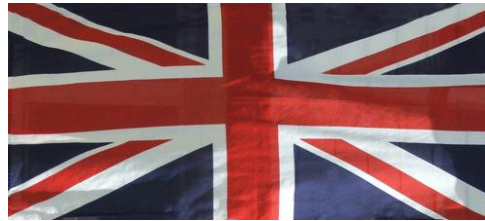
- But still some criminal prosecutions:
  - **Mabey & Johnson** pleaded guilty to overseas corruption and to breaching UN sanctions. They were fined £3.5million, ordered to pay £1.1million in confiscation and £1.4million as reparation to Ghana, Jamaica and Iraq (September 2009)
  - **Robert Dougall** (past Vice President of DePuy International) is first “co-operating defendant” jailed for overseas corruption (14 April 2010) reduced to a suspended sentence on appeal

# The Bribery Act - timetable

- Royal Assent on 8<sup>th</sup> April 2010
- In force from 6 April 2011
- Consultation period from September to December
- Guidance from MoJ on adequate procedures in relation to new corporate offence due in January 2011

# The key offences

- Active bribery
- Passive bribery
- Bribing a foreign public official
- Commercial organisation failing to prevent active bribery by employees, agents or subsidiaries
- Wider than the US Foreign Corrupt Practices Act
  - Not just overseas trading
  - Covers all trading – not just public officials
  - Facilitation payments not permitted



# Active bribery



- Giving, promising or offering a bribe
- “Financial or other advantage”
- Directly or indirectly through a third party
- Intent to **induce** a person to perform improperly a relevant function or activity
- Intent to **reward** a person for the improper performance of a relevant function or activity

# Passive bribery

- Requesting, accepting or agreeing to receive a financial or other advantage:
  - Intending that a relevant function will be improperly performed
  - As a reward for the improper performance of a relevant function
- Relevant function may be performed by another person

# Active bribery - scenarios

- A senior employee takes the finance director of a large plc (a former customer) on holiday to Florida with their families
- An agent in your distribution team in Chile requests larger commission payments to allow him to *“help secure business with tips of happiness”*
- You ignore an allegation of corrupt activity because the whistleblower is a known troublemaker with a grudge against the alleged wrongdoer

# Passive bribery - scenarios

- Your procurement team accept an invitation to the Monaco Grand Prix from a bidder 2 weeks before finalising your legal panel review
- A facilities manager awards a maintenance contract for your building to an old pal at Bloggs Plc. A month later Bloggs Plc offer to sponsor the manager's son through university

# Bribing a foreign public official

- Follows OECD requirements
- Active not passive bribery
- No exceptions for facilitation payments
- Belief that local law permits the payment is no defence
- FPO includes:
  - Legislative, administrative or judicial position, whether elected or appointed
  - Anyone who performs a public function
  - Official of a public international organisation



# Personal liability of directors

- For active or passive bribery or bribing a FPO
- “Consent or connivance”
  - Some of coverage is misleading
  - If the company is guilty of one of the above offences, then senior managers / directors can also be guilty if they
    - Consented or connived
    - Turned a blind eye?
    - Chose not to investigate?

# The failure to prevent offence

This is the new weapon of choice for prosecutors

- Strict liability
- Knowledge / culpability irrelevant
- Relates to active bribery or bribery of foreign public official
- By your employee, agent or subsidiary
- Bribe paid to retain or obtain business or benefit for your organisation
- Subject to adequate procedures defence

# Jurisdiction and penalties



- Applies to bribes in the UK
- Applies to bribes abroad if the individual is resident or incorporated in the UK
- Applies to the conduct of overseas agents and employees if the corporate is registered or trades in the UK
- Up to 10 years imprisonment and unlimited fine

# Globalisation of enforcement 2009

- Co-ordination between U.S. enforcement authorities and their foreign counterparts has increased dramatically
- FCPA investigations where local authorities have investigated the allegations include:

<b>Country</b>	<b><i>Investigation</i></b>	<b>Country</b>	<b><i>Investigation</i></b>
<b>Bahrain</b>	<i>Alcoa</i>	<b>Israel</b>	<i>Siemens</i>
<b>Brazil</b>	<i>Gtech</i>	<b>Italy</b>	<i>Immucor; UDI; Siemens</i>
<b>China</b>	<i>Siemens; Morgan Stanley</i>	<b>Korea</b>	<i>IBM</i>
<b>Costa Rica</b>	<i>Alcatel Lucent</i>	<b>Liechtenstein</b>	<i>Siemens</i>
<b>France</b>	<i>Halliburton; Total SA</i>	<b>Nigeria</b>	<i>Halliburton; Siemens</i>
<b>Germany</b>	<i>Bristol Meyers; Daimler; Siemens</i>	<b>Norway</b>	<i>Siemens</i>
<b>Greece</b>	<i>Siemens</i>	<b>Poland</b>	<i>Johnson &amp; Johnson</i>
<b>Hungary</b>	<i>Siemens</i>	<b>Russia</b>	<i>Siemens</i>
<b>India</b>	<i>Xerox; Dow Chem</i>	<b>Switzerland</b>	<i>Siemens</i>
<b>UK</b>	<i>BAE</i>		

# U.S. Enforcement: Past 18 months

Company	Industry	Date	Settlement
Siemens	Electronics and Electrical Engineering Products	December 2008	\$800 million
Halliburton	Oil Fields Services	February 2009	\$579 million
Control Components Inc.	Control Valve Manufacturing	April 2009	\$18.2 million
Novo Nordisk A/S	Medicine & Pharmaceutical Supplies	May 2009	\$18 million
Fiat S.p.A.	Automobile Manufacturing	December 2008	\$17.8 million
UTStarcom	Telecommunications	December 2009	\$3 million
Latin Node Inc.	Telecommunications	April 2009	\$2 million
ITT Corporation	Technology & Engineering Products	February 2009	\$1.7 million
Helmerich & Payne Inc.	Oil and Gas Exploration	July 2009	\$1.4 million
Nature's Sunshine Products	Nutritional and Personal Care Products	August 2009	\$0.6 million
Avery Dennison Corp.	Label Manufacturing and Related Services	July 2009	\$0.5 million
United Industrial Corp.	Aerospace and Defense Systems Contractor	June 2009	\$0.3 million

# Current trends in the US

- Working closely with foreign counterparts
- More multi jurisdictional cases
- Reorganisation of the SEC enforcement division with a specialised FCPA unit
- SEC's first use of a "control person" to hold US based executives responsible for corrupt payments made at foreign subsidiary level when US executives did not authorise or have knowledge of the payments
- Increased focus on individual liability – often groups of individuals from the same company and the same industry

# Bribery Act vs. FCPA

	<b>UK BRIBERY ACT 2010</b>	<b>US FCPA</b>
<b>Primary Offences</b>	Private Sector Bribery	Not applicable
	Bribing foreign officials	Bribing foreign officials
<b>Governance Offences</b>	Failure to Prevent Bribery	Books & Records
<b>Accessory Offences</b>	Bribery by a company: where a director, partner or similar senior manager consents or connives will be guilty of the same offence	Individuals and firms can be penalised if order, authorise or assist someone else, or conspire, to violate anti-bribery provisions
<b>Defences</b>	Adequate Procedures in respect of Failure to Prevent	Facilitation Payment
	Where foreign official: payment was lawful under written laws of foreign official's country	Payment was lawful under written laws of foreign official's country
		Payment reasonable and bona fide expenditure for promotion of products/execution of contract

# Bribery Act vs. FCPA

	UK BRIBERY ACT 2010	US FCPA
<b>Persons Covered -</b>		
Individuals	Where primary offence committed in the UK - Anyone British citizens/ordinarily resident, regardless of where offence committed	<i>"Domestic Concerns"</i> - US citizens, nationals, residents <i>"Persons other than issuers or domestic concerns"</i> - Foreign nationals who cause an act in furtherance of corrupt payments to take place within US
Corporations	All Offences regardless of where committed: incorporated in the UK Failure to Prevent: carrying on all/part of business in UK	<i>"Domestic Concerns"</i> - business entity organised under US law/having its principle place of business in US <i>"Issuers"</i> - Corporations that have securities registered in the US <i>"Persons other than issuers or domestic concerns"</i> - Foreign company which causes an act in furtherance of corrupt payments to take place within US

# Bribery Act vs. FCPA

	UK BRIBERY ACT 2010	US FCPA
<b>Persons Covered -</b>		
Agents	Offence where the act of giving or receiving is done through an agent or third party intermediary	Offence to make payments to a third party knowing that all/a portion will go to a foreign official
Subsidiaries	Failure to Prevent: includes where a subsidiary has committed the bribery offence to obtain/retain business for parent	US parent may be liable for acts of foreign subsidiaries where it authorised, directed or controlled the activity
<b>Bribe Location</b>	Worldwide	Worldwide (bribe recipient must be foreign official, so does not include officials that are US citizens/entities)

# Bribery Act vs. FCPA

	UK BRIBERY ACT 2010	US FCPA
<b>Penalties -</b>		
Individuals	10 years imprisonment and/or unlimited fine	Bribery offence : 5 years imprisonment and/or \$250,000 criminal fine and \$10,000 civil fine* Books & Records offence: 20 years imprisonment and/or a \$5,000,000 criminal fine and \$100,000 civil fine*
Corporations	Unlimited fine	Bribery offence : \$2,000,000 criminal fine and \$10,000 civil fine* Books & Records offence: \$25,000,000 fine and \$500,000 civil fine *
	Disqualification from tendering for government contracts	Disqualification from tendering for government contracts
		Disgorgement of profits
		Independent compliance monitor

# Bribery Act vs. FCPA

	<b>UK BRIBERY ACT 2010</b>	<b>US FCPA</b>
<b>Enforcement</b>	Serious Fraud Office, Overseas Anti-Corruption Unit of the City of London Police	Securities Exchange Commission, Department of Justice
	Current indications are that the Failure to Prevent offence will not be proactively regulated - only where bribery has been suspected to occur will this aspect be investigated	The SEC has indicated that it will enforce the books and records offence even where there is no jurisdictional basis for an FCPA bribery case

# Bribery Act: Are you ready?

- Eversheds Corruption Clampdown report of 700 directors and senior managers revealed:
  - 91% respondents unaware of potential for ten years imprisonment under the Act
  - 60% unaware of new offence of failing to prevent bribery
  - 45% directors admitted no systems to prevent bribery and corruption



# Adequate procedures?

- The SFO suggest the guidance will be principles based (not tick box) but will cover:
  - Senior management responsibility
  - Risk assessment
  - Policies and procedures
  - Implementation and training
  - Due diligence and business relationships
  - Monitoring and review



# Have you got adequate systems?

- An anti-corruption policy which is visible to employees
- Integrated gifts and expenses policy
- Whistleblower policy identifies bribery and corruption
- Training across organisation including Board level training
- Review of systems and controls around procurement
- Regular review by internal audit

# Have you got adequate systems?

- Conducting due diligence, as appropriate, on commercial third parties and monitoring of relationships
- Due diligence review process for mergers and acquisitions, joint ventures and agents
- Risk assessments by region, activity, product and route to market
- Board level review and ownership
- “Living the policy”
- Ask the difficult questions – don’t just implement
- Highlight risks BUT sell benefits to staff. Think ethics!



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# Questions?

# Thank You

Thank you for attending this webcast.