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# The Foreign Corrupt Practices Act & The UK Bribery Act

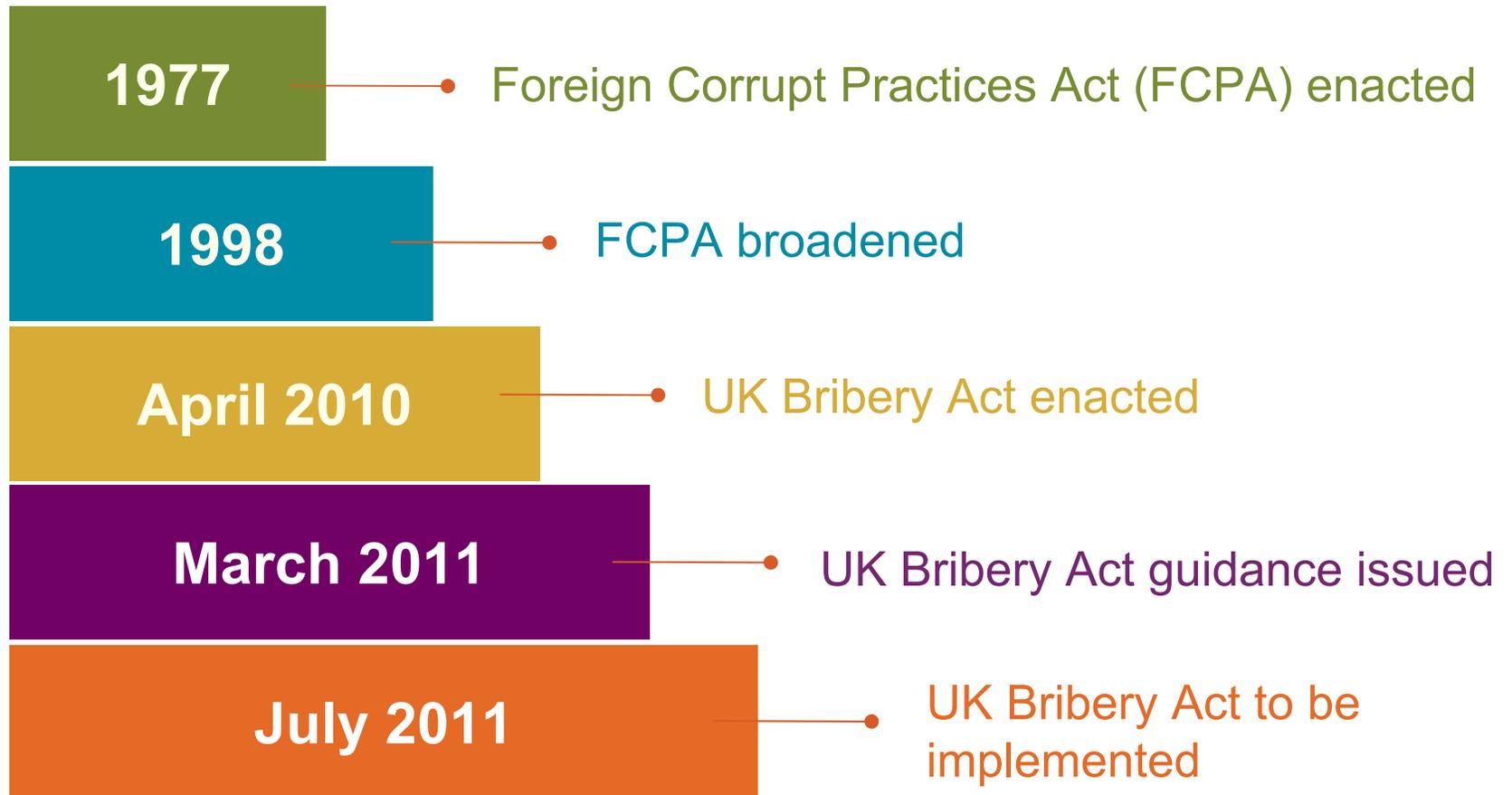
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# Topics of Discussion

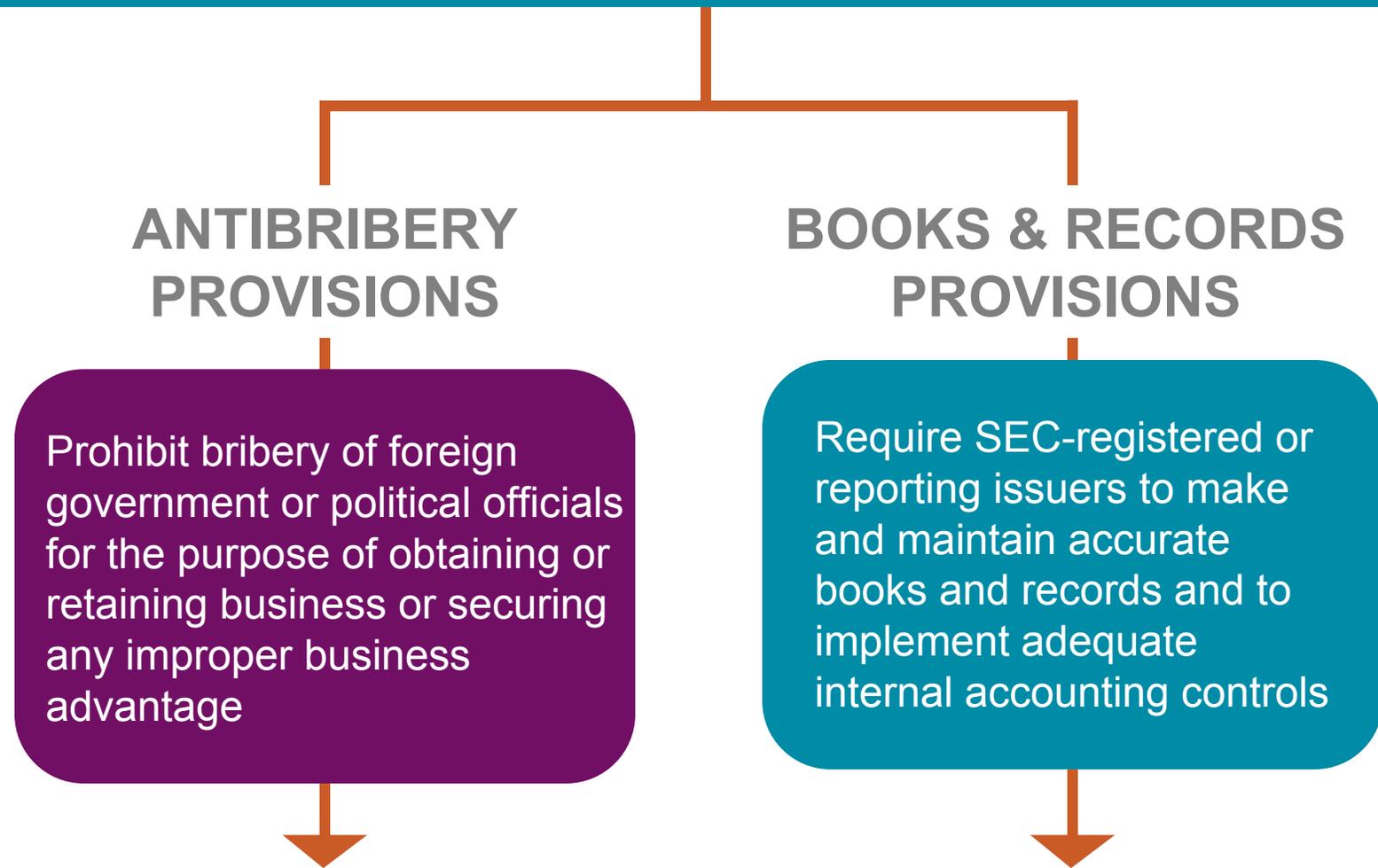
- Overview of the Foreign Corrupt Practices Act
- Overview of the 2010 UK Bribery Act
- Compliance Programs and Third-Party Due Diligence: Practical Responses in a Dynamic Enforcement Environment
- Q&A

# Antibribery Law Chronology



# Overview of the FCPA

# FCPA's Two Prongs



# Antibribery Provisions

- It is unlawful for:
  - an issuer, domestic concern, or anyone acting within the jurisdiction of the United States
  - with “corrupt intent”
  - to directly or indirectly
  - offer, pay, promise to pay, or authorize payment
  - of “anything of value”
  - to a “foreign official”
  - for the purpose of obtaining or retaining business or securing any improper advantage

# Books & Records Provisions

- Books and records
  - Must be in reasonable detail that accurately and fully reflect transactions
  - Payments, gifts, and entertainment
- Effective internal accounting controls
  - company policies and procedures
  - documentation (e.g., expense forms)
  - reporting
  - certifications
  - corrective actions

# Jurisdictional Reach

## Antibribery Provisions

- Issuers
- Domestic concerns
- Persons, including organizations, wherever located, that, while in U.S. territory, perform any act in furtherance of the prohibited conduct

## Books & Records Provisions

- Issuers
- Companies required to file reports with the SEC

# No Immunity by Doing Business Through Third Parties

- Antibribery provisions cover improper payments made to “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”
- Knowledge is established “if a person is aware of a **high probability** of the existence of such circumstance, unless the person believes that such circumstance does not exist”

# Facilitating Payments

- “Grease” payments—small bribes to facilitate *routine* government action
- Exception to the antibribery provisions
- Limited application
  - Payment by a foreign official to expedite or secure the performance of routine governmental actions
  - Applies only to nondiscretionary actions by a foreign official, such as processing government paperwork or providing routine government services

# Bona Fide Promotional Expenditures

- Affirmative defense to the antibribery provisions
- Payments related to product demonstration or promotion
  - A reasonable and bona fide expenditure
  - Directly related to the promotion, demonstration, or explanation of products or services
  - Or the execution or performance of a contract

# Travel & Entertainment Expenditures

## Must be:

- Permitted under local law
- Reasonable under circumstances
- Made directly to vendors, hotels, airlines, etc.
- Not more than the costs actually incurred
- Properly recorded in books and records

## Cannot:

- Pay to visit tourist attractions
- Pay for spouses or other family members
- Be lavish
- Provide a per diem if also paying for meals and other expenses

# Written Local Law

- Affirmative defense to the antibribery provisions
- Payments lawful under the written laws of the foreign country
  - Written laws of the foreign country must affirmatively state that the payment is legal
  - Local law has never been recognized as a defense to a payment prohibited by the FCPA

# Potential FCPA Fines and Penalties

## Corporation

- \$25 million criminal fine per violation or twice the gain/loss (books & records and internal control violations)
- Up to \$2 million per violation or twice the gain/loss (antibribery violations)
- \$10,000 civil penalty or disgorgement of gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d)

## Individual

- 20 years in prison and/or \$5 million criminal fine (books & records and internal control violations)
- 5 years in prison and/or up to \$250,000 fine per violation (antibribery violations)
- \$10,000 civil penalty or gross gain
- Alternative Fines Statute, 18 U.S.C. § 3571(d)

# The UK Bribery Act

# Overview of the UK Bribery Act 2010

- Sweeps away old law on bribery
- New offences
  - 2 “general” offences: bribery and taking a bribe
  - Bribery of foreign public official
  - Corporate offence: failure to prevent bribery
- Broad-brush, almost “principles-based” approach

# General Offences: Bribery and Taking A Bribe

- Bribery – § 1: offering, etc. an **advantage** to another person
  - intending to induce or reward **improper performance** of a **relevant function**, or
  - knowing acceptance constitutes **improper performance**
- Taking a bribe – § 2:
  - requesting, accepting, etc. an **advantage**
  - **Performing improperly** (including procuring improper performance) in anticipation of an **advantage**

# Relevant Function

- Any function or activity:
  - of a public nature
  - connected with a business
  - performed in the course of employment
  - performed by or on behalf of a body of persons
- Only captured if the person performing the function is:
  - expected to do so either (a) in good faith or (b) impartially
  - in a position of trust by virtue of performing it

# Improper Performance

- Performance (or failure to perform) in breach of a “relevant expectation”
  - Not in the manner expected by the relevant expectation condition (e.g., impartially)
  - Past performance may be relevant
  - Expectation based on what a reasonable person in the UK would expect
  - Local custom or practice to be ignored
    - *unless permitted or required by local written law*
    - *Constitution; legislation; written case law*

# Advantage

- Advantage may be “financial or other”
- In most cases, the recipient need not be the same as the person performing the function
- Bribery/taking bribes through a third party is covered
- The advantage need not benefit the recipient

## § 6 Offence: Bribery of Foreign Public Officials

- Bribing a foreign public official if intending to influence the official in his or her official capacity, intending to obtain/retain business or business advantage
- Broadly overlaps with § 1 offence
- But unlike § 1, does not require proof of *improper performance* or an intention to induce it

# Facilitating Payments

- No exception under the Act
- Ministry of Justice guidance: Eradication is a “long term objective that will require economic and social progress and sustained commitment to the rule of law”
- Businesses “have a role to play” through ABC procedures
- Prosecutorial discretion: joint prosecution guidance
  - Duress: danger to “life, limb or liberty”
  - Large or frequent payments
  - Compliance with organisation’s own policy
  - Self-reporting, cooperation, and remedial action

# Hospitality Payments

- Bona fide hospitality and promotional expenses are permitted where they:
  - Seek to improve the image of a commercial organisation
  - Better present products or services
  - Establish cordial relations
  - *Are reasonable and proportionate*
  - *Do not seek a financial or other advantage to influence the official in his/her official role*

## § 7 Offence: Failure to Prevent Bribery

- *Relevant commercial organisation* commits an offence if person *associated* with that organisation bribes another person intending to obtain/retain business or a business advantage for the organisation
- Strict liability offence
- Full defence if organisation can prove it had in place *adequate procedures* designed to prevent persons associated with it from undertaking such conduct

# Relevant Commercial Organisation

- UK body corporate or partnership that carries on business anywhere
- Non-UK body corporate or partnership that carries on a business, or part of a business, in the UK
  - Common sense approach, ultimately determined by courts
  - UK subsidiaries
  - UK listing

# Bribe

- Any act that would be an offence under § 1 or § 6
- Whether or not the associated person is prosecuted
- *UK connection requirement ignored for purposes of § 7 offence*

# Associated Person

- If a person “performs services” for or on behalf of an organisation, in whatever capacity
  - Non-exclusive examples: employee (presumed), agent, or subsidiary
  - May extend much further
    - *Supply chain*
    - *Joint ventures*
    - *Indirect benefit not enough in itself*
  - Determined by all relevant circumstances, not just the nature of the relationship (e.g., actual level of control)

# Adequate Procedures

1. Proportionate Procedures

2. Top-Level Commitment

3. Risk Assessment

4. Due Diligence

5. Communication (including training)

6. Monitoring and Review

# Proportionate Procedures

- Policies and effective implementation
- Proportionate to risks faced by organisation (e.g. size and nature of business)
- Guidance lists areas which policies and procedures might cover, e.g.,
  - Overall strategy and antibribery statement
  - Hospitality guidelines
  - Financial controls and decision-making process
  - Enforcement

# Top-Level Commitment

- Top-level involvement in formulating strategy
- Involvement of senior management in development/implementation
- Public statements (internal and external)
- Leadership in developing ethos
- Enforcement

# Risk Assessment

- Assessment supported at top level and appropriate resources supplied
- Ongoing assessment process
- Key risk analysis: country, sector, transaction, business opportunity, business partner
- Internal risks: proper training, remuneration structure, clarity of policies and procedures, control systems, clear ethos

# Due Diligence

- Put in place procedures to do due diligence on potential risks
  - Particularly on proposed associates
  - Proportionate to risk and type of relationship
- Ongoing monitoring may be necessary
- Recruits for key positions

# Communication

- Internal
  - Ensure that policies and procedures are understood throughout the organisation
  - Clear reporting procedures (including whistleblowing and speak-up)
  - Proportionate training
- External
  - Clear public statements/code of conduct
  - Possible training for key associated persons

# Monitoring and Review

- Monitor and evaluate policies and procedures
- Adapt to changing risks
- Adopt systems for internal/external review and feedback
- Reports for top-level management

# Jurisdictional Reach

## General Offences and § 6

- Any act forming part of offence occurs in UK
- Any act occurring outside of the UK if acts would constitute an offence in UK and are committed by person with “close connection” with UK (citizens, residents, and UK corporations)

## § 7 Corporate Offence

- UK corporation or partnership
- Non-UK companies carrying on business in UK
- Acts of associated person constituting bribery may take place anywhere, i.e., *the “close connection” requirement does not apply*

# Penalties

## General Offences and § 6

- individuals: 10 years imprisonment or unlimited fine
- other persons: unlimited fine

## § 7 Corporate Offence

- unlimited fine

## Offences May Trigger

- automatic ban on tendering for public procurement contracts
- recovery/confiscation order: all proceeds of crime

# Comparison to FCPA

- Extends to private person– to–private person bribery
- No carve-out for facilitation payments
- No formal advisory service
- Broader jurisdictional reach
- No discretion on imposition of public procurement ban
- Current uncertainties in UK regarding plea bargaining
  - Serious Organised Crime Act: implications for self-reporting

# Compliance Programs and Third-Party Due Diligence: Practical Responses in a Dynamic Enforcement Environment

# Components of an Effective Antibribery Compliance Program Remain the Same

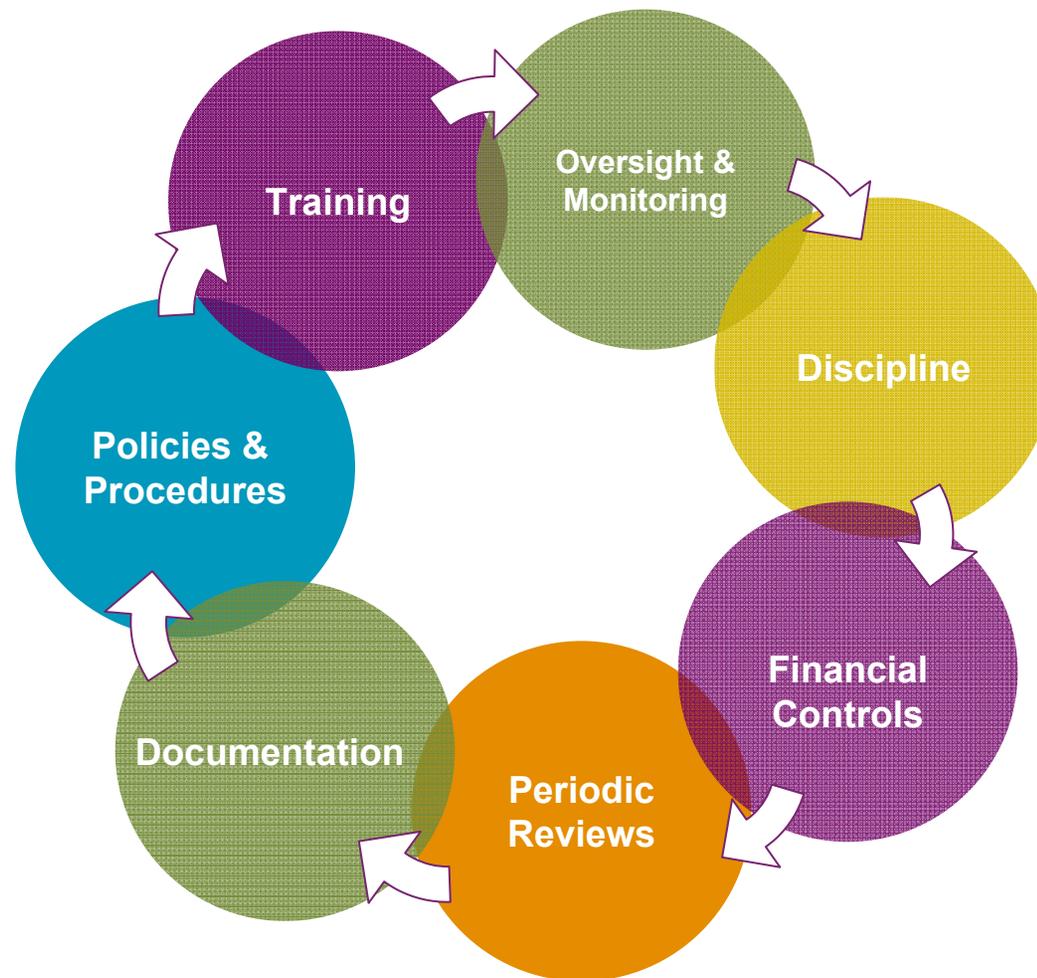
## U.S. Sentencing Guidelines

- Code of Ethics
- Effective response to allegations
- Remediation and corrective action
- Management oversight
- Compliance officer
- Reports to the board
- Communication and training
- Monitoring, auditing, and reporting

## UK Bribery Act Principles

- Proportionate procedures
- Top-level commitment
- Communication and training
- Risk assessment
- Due diligence
- Monitoring and review

# Components of an “Effective” Compliance Program



# Some Important Differences

- Books and records offenses
- The significance of adequate procedures
- Jurisdictional reach
- Facilitation payments

# Books and Records Offenses

- Books and records offenses are not covered by the UK Bribery Act
- But UK Bribery Act guidance encourages mitigation of bribery risk through “financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure”

# The Significance of Adequate Procedures

- FCPA: Business organization can be held responsible based on principles of respondeat superior
- UK Bribery Act:
  - Organization could be liable if a very senior person (e.g., a managing director) commits a bribery offense
  - Organization also could be liable for acts of an “associated person,” but adequate procedures is a complete defense

# Adequate Procedures

- Given the significance of “adequate procedures,” the organization should review its antibribery compliance programs in light of the six principles:
  - Proportionate procedures
  - Top-level commitment
  - Risk assessment
  - Due diligence
  - Communication (including training)
  - Monitoring and review

# Jurisdictional Reach

- FCPA: Issuers, domestic concerns, offenses committed in the United States
- UK Bribery Act:
  - §§ 1, 2, and 6: Persons with a close connection with the UK, offenses committed in the UK
  - § 7: “Relevant commercial organisation” (incorporated or formed in the UK, carries on a business or part of a business in the UK irrespective of place of incorporation or formation”

# Jurisdiction Reach

- Organizations should review their antibribery compliance programs in light of jurisdictional reach of the FCPA and the UK Bribery Act
- Particularly, non-U.S. organizations

# Facilitation Payments

- FCPA: Exception to prohibition against bribery
- UK Bribery Act
  - No exception for facilitation payments
  - Could trigger § 1, 6, or 7 offenses
  - Common law defense of duress may be applicable where payment is necessary “to protect against loss of life, limb or liberty”
  - Prosecutorial discretion

# Facilitation Payments

- Some U.S. companies already prohibit facilitation payments or require high-level approval
- Organizations should review their antibribery compliance programs in light of the UK Bribery Act's prohibition

# Continued Focus on Third-Party Representatives

- Due diligence and monitoring of third-party representatives is increasingly important
- Third-party representatives create significant FCPA risk
- More than 50% of FCPA prosecutions involve liability on the use of agents and representatives
- Third-party representatives can be “associated persons” under § 7 of the UK Bribery Act
- Under the UK Bribery Act Principle 4, organizations are encouraged to take “a proportionate and risk-based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks”

# Third-Party Representatives and Associated Persons



# Risk-Based Approach

- **Understand** how the third party was identified or recommended
- **Know** your business partners, agents, and consultants
- **Know** your exposure to, or contacts with, foreign government officials (including employees of state-owned businesses)
- **Understand** the services to be provided and how the payment will be made
- **Conduct** a “red-flag” analysis

# Going Forward

- Risk assessment
- Reassess compliance programs
- Communication and training
- Policies toward facilitation payments
- Focus on third-party relationships

# Q&A



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