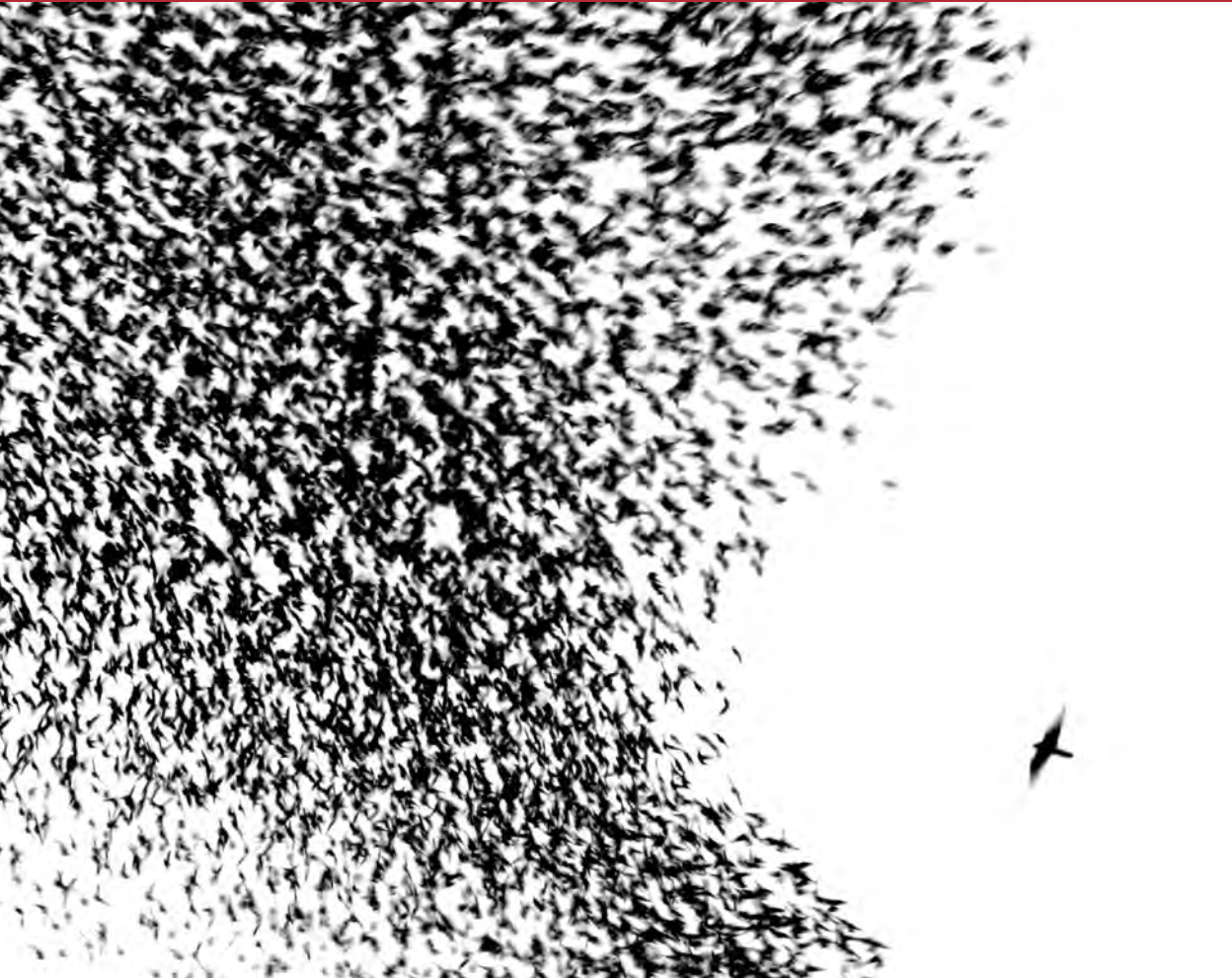


Serious Economic Crime

A boardroom guide to prevention and compliance



With contributions from leading advisers and featuring introductions from:



10

The Bribery Act 2010: implications for global businesses and individual directors

John P Rupp, Partner, Robert Amace, Counsel, and Alexandra Melia, Associate
Covington & Burling LLP

The message is stark: a commercial organisation that carries on a business or part of a business in the United Kingdom can be convicted of an offence under the UK Bribery Act 2010 if a bribe is paid on its behalf and the organisation is deemed to have failed to implement ‘adequate procedures’ to prevent bribery.

Commercial organisations that have adopted risk-reduction measures incorporating the recommendations of the US Department of Justice and Securities and Exchange Commission under the US Foreign Corrupt Practices Act (FCPA) already will have satisfied some of the obligations imposed upon them by the Bribery Act. But procedures built on the requirements of the FCPA will not necessarily be deemed to be ‘adequate’ under the Bribery Act. The reason, in short, is that the substantive requirements of the Bribery Act go beyond those of the FCPA.

In addition to describing the jurisdictional reach of the Bribery Act, this chapter focuses on the practical steps that commercial organisations – particularly those that have built their anti-bribery compliance programmes around the FCPA – will need to consider to take advantage of the ‘adequate procedures’ defence in the Bribery Act. Also discussed will be some of the key implications for individual directors.

The jurisdictional reach of the Bribery Act

Under Section 12 of the Bribery Act, the offences of bribing another person and being bribed apply to any person or entity having a ‘close connection’ to the UK, irrespective of whether the acts or omissions forming part of the offence occur in the UK or abroad. Under the Bribery Act, UK companies, UK partnerships, other UK commercial organisations, British citizens, British nationals and individuals who ordinarily are resident in the UK are deemed to have a close connection with the UK.¹

The offences created by the Bribery Act also apply to non-UK companies, non-UK partnerships and other non-UK commercial organisations if they are carrying on a business, or part of a business, in the UK. In addition, individuals who are neither British citizens nor nationals are covered if an act or omission forming part of the offence takes place within the UK.²

Many commercial organisations will be subject to the Bribery Act because of the jurisdiction triggers described above. An even greater

number, however, will be within the Bribery Act's jurisdictional ambit because, under Section 7, they will be considered 'relevant commercial organisations' by virtue of the fact that they "carry on a business, or part of a business, in [some] part of the United Kingdom". Entities that are pursuing primarily or exclusively charitable or educational objectives – or that have a purely public function – will be deemed to be 'relevant commercial organisations' if they engage in commercial activities.

The Bribery Act does not specify what it means to carry on a business, or part of a business, in the UK. The Ministry of Justice's 'Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing' says that, ultimately, it is for the courts to decide on this. The guidance then goes on, however, to describe the UK government's 'intention' in relation to the phrase "carries on a business, or part of a business" in the UK.³

The guidance suggests that commercial organisations lacking a demonstrable business presence in the UK will not be caught by the Bribery Act. It states in that connection, rather controversially, that the UK government "would not expect" a mere listing on the London Stock Exchange or, less controversially, possession of a UK subsidiary automatically to subject a non-UK parent to the Bribery Act. It is not at all clear, however, that the Serious Fraud Office (SFO) – the lead enforcement agency for the Bribery Act – will take as limited a view of the jurisdictional reach of the Bribery Act as the Ministry of Justice.⁴

The scope of the Bribery Act

The general offences

Offence of bribing another person

Section 1 of the Bribery Act prohibits a person – whether directly or through an agent – from offering, promising or giving a financial or other advantage to another whenever he or she:

- intends the advantage to induce a person to perform a relevant function or activity improperly
- intends the advantage to reward a person for improper activity
- knows or believes that acceptance of the advantage itself would be improper.

The test for 'improper performance' involves an assessment of whether the person performing the function or activity was expected to do so in good faith or impartially or to act from a position of trust and, in turn, whether that performance was in breach of the 'relevant expectation'.

A 'relevant function or activity' can be performed in the public or private sectors and has been defined broadly to include functions or activities of a public nature, connected with a business, performed in the course of a person's employment or by or on behalf of a group of persons. Such functions or activities can be carried out abroad and do not need to have a connection with the UK.

The 'relevant expectation' is what a reasonable person in the UK would expect. Consequently, when the performance of the function or activity is not subject to UK law, local custom or practice must be disregarded unless it is enshrined explicitly in local legislation, the governing constitution or case law.

Offences relating to being bribed

Section 2 of the Bribery Act prohibits a person from requesting, agreeing to receive or accepting a financial or other advantage:

- intending, as a consequence, that a relevant function or activity will be improperly performed (whether by that person or another)
- when the request, agreement or acceptance is itself improper
- as a reward for improper performance (whether by that person or another) of a relevant function or activity.

It also is an offence where, in anticipation of or in consequence of a person requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person or by another person at that person's request or with that person's assent or acquiescence.

The Section 2 offence expressly applies if an agent is used to request, agree to receive or accept a bribe. It is irrelevant whether the bribe is, or will be, for the benefit of the person who requests, agrees to receive or accepts it or for another person. Neither does it matter whether he or she knows or believes that the performance of the relevant function or activity is improper.

The 'relevant function or activity' criteria and 'improper performance' test are the same as those in respect of the Section 1 offence.

Bribery of foreign public officials

Under Section 6 of the Bribery Act,⁵ an offence is committed when a person – whether directly or indirectly – offers, promises or gives any financial or other advantage to a foreign public official, or to another person at that official's request or with his or her assent or acquiescence, with the intention of:

- influencing the foreign public official in his or her professional capacity
- obtaining or retaining business or an advantage in the conduct of business, provided that the public official is not expressly permitted, as required by applicable written law, to be influenced in his or her capacity as a public official by the offer, promise or gift.⁶

For the purpose of the Section 6 offence, it is not necessary for the person offering, promising or giving an advantage to know or intend that the foreign public official might act improperly. An intention to influence is sufficient. Officials will be considered to have been 'influenced' if they fail to exercise their functions or seek to use their official position to a particular end, even if acting outside their authority when doing so.

Criminal liability of senior officers

If a commercial organisation commits any of the offences outlined above – and it is proved that the offence was committed with the consent or connivance of a director, manager, corporate secretary or other similar officer – then, under Section 14 of the Bribery Act, the senior officer can be prosecuted alongside the company. Individuals who purport to act as senior officers also may face prosecution under this provision of the Bribery Act.

The application of the Section 14 offence is, however, limited to those who have a close connection to the UK (in other words, individuals who are British citizens, British nationals or are ordinarily resident in the UK).

Failure of commercial organisations to prevent bribery

The Bribery Act creates a new offence for commercial organisations that fail to prevent bribes being paid on their behalf. The Section 7 offence will be committed if an 'associated person' bribes another person to obtain or retain business or an advantage in the conduct of business for a relevant commercial organisation.

An 'associated person' is someone who performs services for or on behalf of a relevant commercial organisation. There is a rebuttable presumption that an employee acts for or on behalf of his or her employer. In other circumstances, this issue will be determined by an assessment of all relevant circumstances, not merely on the nature of the relationship between the person and the organisation.

There is no need for a person performing services on behalf of a commercial organisation – for example, an employee, agent or subsidiary – to have been prosecuted for bribery provided they would be guilty of the offence of bribing another person or of bribing a foreign public official.

The 'adequate procedures' defence

A commercial organisation can defend itself against a charge under Section 7 if it can prove, on the balance of probabilities, that it had in place

‘adequate procedures’ designed to prevent persons performing services for or on its behalf from engaging in bribery. Unfortunately, the Bribery Act does not define the term ‘adequate procedures’.

The guidance issued by the Ministry of Justice discusses the procedures that commercial organisations ‘should consider’ adopting to combat bribery. It focuses on six high-level principles that are described as being ‘outcome focused’ rather than ‘prescriptive’ – stopping short of providing commercial organisations with a detailed recipe for creating an ‘adequate procedures’ defence. The six principles are as follows:

Proportionate procedures

The guidance states that a commercial organisation’s corruption-prevention procedures should be proportionate to the bribery risks that it faces as well as to the nature, scale and complexity of its activities. The guidance suggests that organisations should be permitted to decide whether to adopt standalone anti-corruption procedures or incorporate them into guidelines addressing particular business activities (such as managing a tender process involving a public entity, or recruiting new employees).

However, the procedures that are implemented should provide – according to the guidance – a practical and realistic means of achieving the objectives of the organisation’s anti-corruption policy.

Top-level commitment

A commercial organisation’s management – the board of directors, senior officers or owners – must be committed to preventing persons acting on the organisation’s behalf from engaging in bribery and must foster a corporate culture in which bribery is never tolerated.

Risk assessment

The guidance suggests that organisations should assess the nature and extent of their exposure to

the risk that those acting for the organisation – whether employees or others – will engage in bribery. The assessment should be ‘informed’ and ‘documented’ as well as be conducted periodically so that it accurately reflects the risks faced by the organisation as its commercial activities change over time.

Due diligence

The guidance urges commercial organisations to mitigate their bribery risk by adopting a proportionate and risk-based approach to the due diligence they undertake in relation to those who act on their behalf.

Communication

The guidance advises that bribery prevention policies and procedures should be “embedded and understood throughout the organisation”. That goal should be achieved, according to the guidance, by communicating those policies to employees, business partners and others who act for the organisation through training and other means. It is likely that the manner in which a commercial organisation chooses to communicate its policies will depend on the nature of the risks that it faces, the organisation’s size, as well as the scale and nature of its activities.

The guidance also urges commercial organisations to provide a secure, confidential and accessible means for employees and others to request advice, suggest improvements to the bribery prevention regime and raise any compliance concerns.

Monitoring and review

The guidance states that a commercial organisation should monitor and review its bribery prevention policies and procedures periodically – or engage an external expert to conduct such an exercise – to evaluate the effectiveness of its bribery prevention programme and enable the identification and implementation of enhancements that are required to improve the effectiveness of the organisation’s controls.

Corporate hospitality and other business expenditures

Concern had been expressed in some quarters that the offences created by the Bribery Act would have the effect of criminalising the provision or acceptance of corporate hospitality. The guidance emphatically rejects that concern, endorsing instead ‘reasonable’ and ‘proportionate’ hospitality that seeks to improve the organisation’s image, present its products and services or establish cordial business relations. The guidance goes on to state that “it is not the intention of the Bribery Act to criminalise such behaviour”.

In determining what is reasonable and proportionate, the guidance proposes taking into account “all of the surrounding circumstances”, including “the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding business”. It states that “the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditures provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return”.

While much of the advice in the guidance is already part of the compliance mantra, commercial organisations that are subject to the Bribery Act should ensure that their policies and procedures on gifts and corporate hospitality are compliant with the principles described above.

Facilitation payments

Facilitation payments will remain a criminal offence under the Bribery Act. While acknowledging the problems faced by commercial organisations in some parts of the world and in certain sectors, the guidance reiterates that there is no exemption – either in the Bribery Act or the laws that it has replaced – for facilitation payments. It cites the OECD’s position that such payments are corrosive and that exemptions create artificial distinctions that are “difficult to enforce,

undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing ‘culture’ of bribery and have the potential to be abused”.

When a commercial organisation or individual has no alternative but to make a payment to “protect against loss of life, limb or liberty”, the guidance states that “the common law defence of duress is very likely to be available”. Further, it stresses that it is a matter for prosecutorial discretion whether to pursue an organisation for offering or making a facilitation payment.

Dealing with differential treatments of facilitation payments in the FCPA and the Bribery Act will be vexing for many commercial organisations. Demands for the payments are, of course, a fact of life in many countries – and a refusal to acquiesce to such demands can, in some circumstances, prevent a commercial organisation from doing business in such countries. Fortunately, both the guidance and senior officials at the SFO have recognised that fact. The SFO has announced as a consequence a nuanced policy on the making of facilitation payments while describing a series of steps that commercial organisations subject to the Bribery Act should take to reduce and ultimately eliminate the making of facilitation payments.⁷

Penalties

The Bribery Act increases the maximum penalties that can be imposed for the commission of a bribery offence to:

- ten years’ imprisonment, coupled with an unlimited fine, for an individual
- an unlimited fine for a commercial organisation.

The UK courts increasingly are prepared to impose custodial sentences on corporate officers who become involved in corruption. For example, in passing sentence in the case of Charles Forsyth, David Mabey and Richard Gledhill, former

executives at engineering firm Mabey & Johnson, Judge Rivlin QC stated: “When a director of a major company plays even a small part [in a bribery scheme], he can expect to receive a custodial sentence.”⁸

The decision of Lord Justice Thomas in *R v Immospec Ltd* (2010) also demonstrated the serious view of corruption taken by the UK courts. In his sentencing remarks, Lord Justice Thomas characterised the corruption of foreign government officials or ministers as “at the top end of serious corporate offending both in terms of culpability and harm”.

He went on to state that while there may be reason for differentiating between the US and UK in the custodial penalties imposed for corruption, “there is every reason for states to adopt a uniform approach to financial penalties for corruption ... so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state”.

There is a real possibility that commercial organisations convicted under the Bribery Act will face mandatory exclusion from competing for government contracts within the European Union. The Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 currently require companies convicted of, among other things, a corruption offence to be automatically and permanently debarred from competing for public contracts across the EU. Companies convicted of the corporate offence of failing to prevent bribery also may face exclusion, although this is discretionary.

Implications for insurance coverage

Companies and senior managers who routinely purchase director and officer liability insurance (D&O) should talk with their underwriter to ensure that their policies provide cover for any investigations, prosecutions or civil claims that may arise under the Bribery Act. Absent such discussions, commercial organisations may well find their D&O insurance does not cover bribery-related offences.

When D&O cover is obtained, it should address the possibility of a company’s senior officers being found liable under Section 14 of the Bribery Act for consenting or conniving in the commission of a bribery offence.

Consideration also should be given to addressing the corporate offence of failing to prevent bribery. If a commercial organisation cannot prove that it had adequate procedures to prevent bribery, the directors may face civil claims by shareholders alleging a failure of corporate governance.

Underwriters are likely to respond to increased demand for D&O policies that insure against breaches of the Bribery Act by requiring commercial organisations to have implemented adequate compliance procedures before the policies can be issued or renewed. The absence of such procedures will, at the very least, increase the premiums demanded by underwriters. There also is a possibility that coverage would not be available at all.

Moving beyond the FCPA

Because the FCPA does not cover commercial bribery, many companies subject to the FCPA have not developed procedures that combat behaviour other than the bribery of foreign public officials.

So far as commercial bribery is concerned, the questions that will be presented include, among many others, whether more lavish hospitality can be provided to a representative of another business entity than to a government official. In relation to facilitation payments, many such companies have stopped well short of prohibiting them. Policies and procedures containing such limitations will be, almost by definition, inadequate under the Bribery Act.

Commercial organisations that are subject to the Bribery Act will need to grapple, sooner rather than later, with the practical implications of extending their anti-bribery policies and procedures to cover commercial bribery and deal appropriately with facilitation payments. Failing to do so will leave an organisation at risk of not being able to rely upon the ‘adequate procedures’ defence in the Bribery Act.

Serious Economic Crime: Notes and references

Chapter 10. The Bribery Act 2010: implications for global businesses and individual directors

(1) British citizenship is typically acquired by birth in the UK to a parent who is a British citizen, whereas British nationality can be conferred in a variety of circumstances and is generally held by persons connected with former British colonies. Individuals from the following overseas territories who rightly can be categorised as British nationals will be subject to the Bribery Act: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands and dependencies, Gibraltar, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena and dependencies, Hong Kong, Turks and Caicos Islands, and St Christopher and Nevis.

(2) The UK includes England, Wales, Scotland and Northern Ireland. It does not include Jersey, Guernsey or the Isle of Man. It also does not include the British overseas territories.

(3) The guidance sets out the Ministry of Justice's interpretation of various provisions of the Bribery Act. However, that interpretation is not binding on either the Serious Fraud Office or the courts.

(4) For example, the Director of the SFO has stated that the SFO will not be impressed with "overly technical interpretations" of the Bribery Act that have been crafted to evade the UK's jurisdiction. *The Daily Telegraph*, "SFO takes tough line on bribery by foreign companies", published March 31, 2011.

(5) Under Section 6, 'foreign public official' means: (a) an official who holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK; (b) an official who exercises a public function for or on behalf of a country, territory or public agency/enterprise outside the UK (for example,

professionals working for public health agencies or officers exercising public functions in state-owned enterprises); or (c) an official or agent of a public international organisation (such as the United Nations or the World Bank).

(6) Written law encompasses: (a) UK law if the official is subject to UK law; (b) the written constitution, legislation or case law of the official's country or territory; or (c) in the case of an official of a public international organisation, the organisation's written rules.

(7) When considering the activities of a company that continues to make small facilitation payments, the SFO has said that it will be looking to see whether: (a) the company has a clear issued policy regarding such payments; (b) written guidance is available to relevant employees as to the procedure they should follow when asked to make such payments; (c) such procedures are being followed by employees; (d) there is evidence that all such payments are being recorded by the company; (e) there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded; and (f) the company is taking what practical steps it can to curtail the making of such payments.

(8) On February 10, 2011, a jury at Southwark Crown Court found two former directors and a sales manager of Mabey & Johnson guilty of inflating the contract price for 13 steel modular bridges to provide over £360,000 in bribes to the Iraqi government of Saddam Hussein. Mabey & Johnson had pleaded guilty to breaching UN sanctions – along with separate corruption offences in Jamaica and Ghana – and was sentenced in September 2009.

Covington & Burling LLP

265 Strand, London WC2R 1BH

Tel +44 20 7067 2000

Web www.cov.com

Robert Amaee

Counsel

Email ramaee@cov.com

Robert Amaee, a lawyer in Covington & Burling's London office, advises companies and individuals on issues arising under the UK Bribery Act, the US Foreign Corrupt Practices Act and various country-specific anti-corruption laws. This work includes conducting risk assessments, helping design and strengthen compliance programmes, developing and delivering tailored training programmes, leading internal investigations and, when necessary, interacting with enforcement authorities.

Dr Amaee is the former Head of Anti-Corruption and Head of Proceeds of Crime at the UK Serious Fraud Office. He was responsible for the operational delivery of the SFO's anti-corruption cases, from investigation and prosecution to confiscation of criminal assets, and had strategic oversight of and involvement in negotiations that led to civil settlements in the cases of Johnson & Johnson/De Puy, MW Kellogg/KBR and Macmillan Publishers.

Dr Amaee represented the SFO on the Attorney General's Working Group on the Prosecutors' guidance to the Bribery Act and the OECD Prosecutors' Forum, and served as the SFO's Head of International Assistance.

Prior to joining the SFO, he practised as a criminal barrister and holds a PhD in medical research.

Alexandra Melia

Associate

Email amelia@cov.com

Alexandra Melia is an Associate in the London office of Covington & Burling. Ms Melia's practice encompasses a wide range of contentious and quasi-contentious matters, including internal corporate investigations, litigation before the English courts and arbitral proceedings. She also advises clients on the design, implementation and evaluation of global compliance programmes.

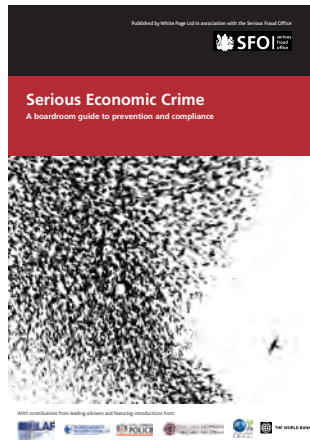
John P Rupp

Partner

Email jrupp@cov.com

During his nearly 40 years at the firm, John Rupp has advised on compliance matters, including assisting companies in revising their compliance policies and procedures, and structuring and undertaking internal investigations involving trade control issues, bribery, money laundering and accounting irregularities.

Mr Rupp routinely interacts with senior enforcement officials in multiple jurisdictions on anti-bribery and money laundering matters. He also has written extensively on such issues. Earlier in his career, Mr Rupp spent several years at the US DOJ. More recently, he has chaired several international anti-bribery conferences, has presented extensively at such conferences and has taught courses on anti-bribery and money laundering issues.



Published by White Page Ltd in association with the Serious Fraud Office, Serious Economic Crime's primary purpose is to give board-level readers in the UK and international businesses informed commentary on the impact of UK anti-fraud and anti-corruption legislation. As the scope of this legislation continues to expand and interact more with the legislation in other jurisdictions, so the landscape for best-practice compliance and fraud prevention has become increasingly complex. The wealth of expert insights from lawyers, accountants and specialist anti-fraud consultants in this publication's 36 chapters is therefore an invaluable resource.

This publication is written as a general guide only. It should not be relied upon as a substitute for specific legal or other professional advice. Professional advice should always be sought before taking any action based on the information provided. Every effort has been made to ensure that the information in this guide is correct at the time of publication. The views expressed in the articles contained in this publication are those of the authors. They do not necessarily reflect the views of the Serious Fraud Office and should not be taken as endorsed by the Serious Fraud Office. The publishers and authors bear no responsibility for any errors or omissions contained herein.

To view the book in which this chapter was published, to download iPad and Kindle-compatible editions and/or to order hard-copy versions, please go to www.seriouseconomiccrime.com

whitepage