## **Table of Contents**

```
Acknowledgments xix
Preface xxi
Overview 1
    A. The New International Norms 2
    B. The Focal Point of the New International Norms 3
    C. The OECD Convention 4
    D. The OECD Convention and Common Law Jurisdictions 6
    E. Comparing the Anti-Bribery Legal Regimes in Common Law Jurisdictions \,6\,
1. The OECD Convention 9
    1.0 Overview 9
    1.1 The Anti-Bribery Provisions 10
    1.2 Jurisdiction 11
        1.2.1 Territorial Jurisdiction 11
        1.2.2 Nationality Jurisdiction 11
    1.3 Elements of the Offense 12
        1.3.1 Any Person 12
             1.3.1.1 Juridical Entities 12
             1.3.1.2 Standard of Liability for Juridical Entities 13
        1.3.2 Intentionally 13
        1.3.3 Offer, Promise, or Give 13
             1.3.3.1 Whether Indirectly or through Intermediaries 13
             1.3.3.2 Attempt 13
             1.3.3.3 Complicit Conduct 14
             1.3.3.4 Conspiracy 14
        1.3.4 Any Undue Pecuniary or Other Advantage 14
        1.3.5 Foreign Public Official 14
```

```
1.3.5.1 Parastatals 15
             1.3.5.2 Public International Organizations 16
             1.3.5.3 Political Party, Political Party Official, or Candidate for
                    Public Office 16
        1.3.6 In Order That the Official Act or Refrain from Acting in Relation to the
             Performance of Official Duties 16
        1.3.7 In Order to Obtain or Retain Business or Other Improper Advantage 17
     1.4 Defenses 17
        1.4.1 Statute of Limitations 17
        1.4.2 Local Written Law 17
        1.4.3 Bona Fide and Reasonable Business Expenditures 18
        1.4.4 Facilitation Payments 18
        1.4.5 Duress 18
     1.5 Sanctions 18
        1.5.1 Criminal Sanctions 18
        1.5.2 Additional Civil or Administrative Sanctions 19
     1.6 Money Laundering 19
     1.7 Tax Deductibility 20
     1.8 Accounting and Record-Keeping 20
2. Australia 23
    2.0 Overview 23
    2.1 The Anti-Bribery Legislation 24
    2.2 Jurisdiction 26
        2.2.1 Territorial Jurisdiction 26
        2.2.2 Nationality Jurisdiction 27
    2.3 Elements of the Offense 27
        2.3.1 Any Person 27
             2.3.1.1 Juridical Entities 27
             2.3.1.2 Standard of Liability for Juridical Entities 28
        2.3.2 Intentionally 30
        2.3.3 Offer, Promise, or Give 30
             2.3.3.1 Whether Indirectly or through Intermediaries 31
             2.3.3.2 Attempt 32
             2.3.3.3 Complicit Conduct 32
             2.3.3.4 Conspiracy 33
        2.3.4 Any Undue Pecuniary or Other Advantage 34
        2.3.5 Foreign Public Official 34
             2.3.5.1 Parastatals 35
             2.3.5.2 Public International Organizations 36
```

```
2.3.5.3 Political Party, Political Party Official, or Candidate for
                    Public Office 36
        2.3.6 In Order That the Official Act or Refrain From Acting in Relation to the
             Performance of Official Duties 36
        2.3.7 In Order to Obtain or Retain Business or Other Improper Advantage 37
    2.4 Defenses 38
        2.4.1 Statute of Limitations 38
        2.4.2 Local Written Law 38
        2.4.3 Bona Fide and Reasonable Business Expenditures 39
        2.4.4 Facilitation Payments 39
        2.4.5 Duress 41
     2.5 Sanctions 41
        2.5.1 Criminal Sanctions 41
        2.5.2 Additional Civil or Administrative Sanctions 42
     2.6 Money Laundering 43
     2.7 Tax Deductibility 44
     2.8 Accounting and Record-Keeping 44
3. Canada 47
     3.0 Overview 47
     3.1 The Anti-Bribery Legislation 48
     3.2 Jurisdiction 49
        3.2.1 Territorial Jurisdiction 49
        3.2.2 Nationality Jurisdiction 51
     3.3 Elements of the Offense 52
        3.3.1 Any Person 52
             3.3.1.1 Juridical Entities 52
             3.3.1.2 Standard of Liability for Juridical Entities 52
        3.3.2 Intentionally 53
        3.3.3 Offer, Promise, or Give 53
             3.3.3.1 Whether Indirectly or through Intermediaries 54
             3.3.3.2 Attempt 54
             3.3.3.3 Complicit Conduct 55
             3.3.3.4 Conspiracy 56
        3.3.4 Any Undue Pecuniary or Other Advantage 56
        3.3.5 Foreign Public Official 56
             3.3.5.1 Parastatals 57
             3.3.5.2 Public International Organizations 57
             3.3.5.3 Political Party, Political Party Official, or Candidate for
                    Public Office 58
```

```
3.3.6 In Order That the Official Act or Refrain from Acting in Relation to the
             Performance of Official Duties 58
        3.3.7 In Order to Obtain or Retain Business or Other Improper Advantage 58
    3.4 Defenses 59
        3.4.1 Statute of Limitations 60
        3.4.2 Local Written Law 60
        3.4.3 Bona Fide and Reasonable Business Expenses 60
        3.4.4 Facilitation Payments 61
        3.4.5 Duress 62
    3.5 Sanctions 62
        3.5.1 Criminal Sanctions 62
        3.5.2 Additional Civil or Administrative Sanctions 63
    3.6 Money Laundering 64
    3.7 Tax Deductibility 64
    3.8 Accounting and Record-Keeping 65
        3.8.1 Foreign Bribery Record-Keeping Offense 65
        3.8.2 Other Record-Keeping Offenses 65
4. Ireland 67
    4.0 Overview 68
    4.1 The Anti-Bribery Legislation 69
    4.2 Jurisdiction 70
        4.2.1 Territorial Jurisdiction 70
        4.2.2 Nationality Jurisdiction 70
    4.3 Elements of the Offense 71
        4.3.1 Any Person 71
             4.3.1.1 Juridical Entities 71
             4.3.1.2 Standard of Liability for Juridical Entities 71
        4.3.2 Intentionally 72
        4.3.3 Offer, Promise, or Give 72
             4.3.3.1 Whether Indirectly or through Intermediaries 72
             4.3.3.2 Attempt 73
             4.3.3.3 Complicit Conduct 73
             4.3.3.4 Conspiracy 73
        4.3.4 Any Undue Pecuniary or Other Advantage 74
        4.3.5 To a Foreign Public Official 74
             4.3.5.1 Parastatals 75
             4.3.5.2 Public International Organizations 75
             4.3.5.3 Political Party, Political Party Official, Candidate for
                    Public Office 75
```

```
4.3.6 In Order That the Official Act or Refrain from Acting in Relation to the
              Performance of Official Duties 76
        4.3.7 In Order to Obtain or Retain Business or Other Improper Advantage 76
     4.4 Defenses 76
        4.4.1 Statute of Limitations 76
        4.4.2 Local Written Law 76
        4.4.3 Bona Fide and Reasonable Business Expenses 77
        4.4.4 Facilitation Payments 77
        4.4.5 Duress 77
     4.5 Sanctions 77
        4.5.1 Criminal Sanctions 77
        4.5.2 Additional Civil or Administrative Sanctions 78
     4.6 Money Laundering 79
     4.7 Tax Deductibility 81
     4.8 Accounting and Record-Keeping 81
5. New Zealand 83
    5.0 Overview 84
     5.1 The Anti-Bribery Legislation 84
    5.2 Jurisdiction 85
        5.2.1 Territorial Jurisdiction 85
        5.2.2 Nationality Jurisdiction 86
    5.3 Elements of the Offense 87
        5.3.1 Any Person 87
             5.3.1.1 Juridical Entities 88
             5.3.1.2 Standard of Liability for Juridical Entities 88
        5.3.2 Intentionally 89
        5.3.3 Offer, Promise, or Give 90
             5.3.3.1 Whether Indirectly or through Intermediaries 90
             5.3.3.2 Attempt 91
             5.3.3.3 Complicit Conduct 91
             5.3.3.4 Conspiracy 92
        5.3.4 Any Undue Pecuniary or Other Advantage 93
        5.3.5 Foreign Public Official 93
             5.3.5.1 Parastatals 94
             5.3.5.2 Public International Organizations 95
             5.3.5.3 Political Party, Political Party Official, or Candidate for
                    Public Office 95
        5.3.6 In Order That the Official Act or Refrain from Acting in Relation to the
             Performance of Official Duties 95
        5.3.7 In Order to Obtain or Retain Business or Other Improper Advantage 96
```

```
5.4 Defenses 96
        5.4.1 Statute of Limitations 96
        5.4.2 Local Written Law 96
        5.4.3 Bona Fide and Reasonable Business Expenditures 97
        5.4.4 Facilitation Payments 97
        5.4.5 Duress 98
    5.5 Sanctions 98
        5.5.1 Criminal Sanctions 98
        5.5.2 Additional Civil or Administrative Sanctions 99
    5.6 Money Laundering 100
    5.7 Tax Deductibility 101
    5.8 Accounting and Record-Keeping 101
6. South Africa 103
    6.0 Overview 103
    6.1 The Anti-Bribery Legislation 104
    6.2 Jurisdiction 106
        6.2.1 Territorial Jurisdiction 106
        6.2.2 Nationality Jurisdiction 106
    6.3 Elements of the Offense 107
        6.3.1 Any Person 107
             6.3.1.1 Juridical Entities 107
             6.3.1.2 Standard of Liability for Juridical Entities 108
        6.3.2 Intentionally 109
        6.3.3 Offer, Promise, or Give 110
             6.3.3.1 Whether Indirectly or through Intermediaries 111
             6.3.3.2 Attempt 111
             6.3.3.3 Complicit Conduct 112
             6.3.3.4 Conspiracy 112
        6.3.4 Any Undue Pecuniary or Other Advantage 112
        6.3.5 Foreign Public Official 113
             6.3.5.1 Parastatals 113
             6.3.5.2 Public International Organizations 114
             6.3.5.3 Political Party, Political Party Official, or Candidate for
                    Public Office 114
        6.3.6 In Order That the Official Act or Refrain from Acting in Relation to the
             Performance of Official Duties 115
        6.3.7 In Order to Obtain or Retain Business or Other Improper Advantage 116
    6.4 Defenses 116
        6.4.1 Statute of Limitations 116
        6.4.2 Local Written Law 116
```

```
6.4.3 Bona Fide and Reasonable Business Expenses 117
        6.4.4 Facilitation Payments 117
        6.4.5 Duress 117
     6.5 Sanctions 117
        6.5.1 Criminal Sanctions 117
        6.5.2 Additional Civil and Administrative Sanctions 119
             6.5.2.1 Confiscation 119
             6.5.2.2 Debarment 119
    6.6 Money Laundering 120
    6.7 Tax Deductibility 121
    6.8 Accounting and Record-Keeping 122
7. United Kingdom 125
     7.0 Overview 126
    7.1 The Anti-Bribery Legislation 127
    7.2 Jurisdiction 128
        7.2.1 Territorial Jurisdiction 128
        7.2.2 Nationality Jurisdiction 129
    7.3 Elements of the Offense 130
        7.3.1 Any Person 131
             7.3.1.1 Juridical Entities 131
             7.3.1.2 Standard of Liability for Juridical Entities 132
        7.3.2 Intentionally 134
        7.3.3 Offer, Promise, or Give 135
             7.3.3.1 Whether Indirectly or through Intermediaries 135
             7.3.3.2 Attempts 135
             7.3.3.3 Complicit Conduct 136
             7.3.3.4 Conspiracy 136
        7.3.4 Any Undue Pecuniary or Other Advantage 137
        7.3.5 To a Foreign Public Official 137
             7.3.5.1 Parastatals 137
             7.3.5.2 Public International Organizations 138
             7.3.5.3 Political Party, Political Party Official, or Candidate for
                    Public Office 138
        7.3.6 In Order That the Official Act or Refrain From Acting in Relation to the
             Performance of Official Duties 139
        7.3.7 In Order to Obtain or Retain Business or Other Advantage 140
    7.4 Defenses 141
        7.4.1 Statute of Limitations 141
        7.4.2 Local Written Law 141
        7.4.3 Bona Fide and Reasonable Business Expenses 142
```

```
7.4.4 Facilitation Payments 144
        7.4.5 Duress 146
        7.4.6 Defense of Adequate Procedures Designed to Prevent Bribery 146
             7.4.6.1 Principle 1: Proportionate Procedures 147
             7.4.6.2 Principle 2: Top-Level Commitment 150
             7.4.6.3 Principle 3: Risk Assessment 152
             7.4.6.4 Principle 4: Due diligence 154
             7.4.6.5 Principle 5: Communication (Including Training) 156
             7.4.6.6 Principle 6: Monitoring and Review 158
        7.4.7 Other Defenses 160
    7.5 Sanctions 161
        7.5.1 Criminal Sanctions 161
             7.5.1.1 Deferred Prosecution Agreements 161
             7.5.1.2 Civil Recovery Orders 163
        7.5.2 Additional Civil or Administrative Sanctions 164
    7.6 Money Laundering 165
        7.6.1 The Principal Offenses 165
        7.6.2 Failing to Disclose Possible Money Laundering 165
        7.6.3 "Tipping Off" 166
    7.7 Tax Deductibility 166
    7.8 Accounting and Record-Keeping 167
        7.8.1 Record-Keeping Requirements 167
        7.8.2 Internal Company Controls 169
             7.8.1.1 Governance 170
             7.8.1.2 Structure 170
             7.8.1.3 Risk Assessment 171
             7.8.1.4 Policies and Procedures 171
             7.8.1.5 Dealing with Third Parties 172
             7.8.1.6 Staff Recruitment 173
             7.8.1.7 Quality of Oversight 173
8. United States 175
    8.0 Overview 175
    8.1 The Anti-Bribery Legislation 176
    8.2 Jurisdiction 178
        8.2.1 Territorial Jurisdiction 178
             8.2.1.1 Activities while in the Territory of the United States 179
             8.2.1.2 Extraterritorial Jurisdiction 182
       8.2.2 Nationality Jurisdiction 183
            8.2.2.1 Issuers 184
                    8.2.2.1.1 Foreign Subsidiaries 186
```

```
8.2.2.1.2 Officers, Directors, Employees, Agents, and Stockholders
                        of Issuers 187
        8.2.2.2 Domestic Concerns 188
               8.2.2.2.1 Nonprofit Organizations 189
               8.2.2.2.2 A Foreign Entity Can Be a Domestic Concern if Its Principal
                        Place of Business Is in the United States 189
               8.2.2.2.3 No Territorial Nexus to the United States Required for
                        Domestic Concerns that Are United States Persons 190
               8.2.2.2.4 Officers, Directors, Employees, Agents, and Stockholders of
                         Domestic Concerns 190
               8.2.2.2.5 The Anti-Bribery Provisions Apply Regardless of a Domestic
                        Concern's Relationship to a Party Not Subject to the
                        Anti-Bribery Provisions 191
8.3 Elements of the Offense 191
   8.3.1 Any Person 192
         8.3.1.1 Juridical Entities 192
         8.3.1.2 Standard of Liability for Juridical Entities 192
   8.3.2 Intentionally 193
   8.3.3 Offer, Promise, or Give 196
        8.3.3.1 Whether Indirectly or through Intermediaries 197
        8.3.3.2 Vicarious Liability 197
               8.3.3.2.1 Requisite Knowledge 198
               8.3.3.2.2 Imputed Knowledge 199
               8.3.3.2.3 Authorization 201
               8.3.3.2.4 Foreign Subsidiaries or Affiliates 201
               8.3.3.2.5 Successor Liability 203
        8.3.3.3 Attempt 204
        8.3.3.4 Complicit Conduct 205
        8.3.3.5 Conspiracy 206
   8.3.4 Anything of Value 207
   8.3.5 Foreign Public Official 210
         8.3.5.1 Parastatals 212
         8.3.5.2 Public International Organizations 215
         8.3.5.3 Political Parties, Political Party Officials, or Candidates for
               Public Office 216
   8.3.6 Influencing an Official Act 216
   8.3.7 Obtain or Retain Business 217
         8.3.7.1 Unfair Business Advantage 218
         8.3.7.2 Nonprofit Organizations 219
8.4 Defenses 220
   8.4.1 Statute of Limitations 220
```

```
8.4.2 Local Written Law 222
   8.4.3 Bona Fide and Reasonable Business Expenditures 222
        8.4.3.1 Whether Permitted by a Foreign Public Official's Government 223
        8.4.3.2 Reasonable Business Expenditures 223
        8.4.3.3 Vetting of Offers, Promises, or Payments 224
        8.4.3.4 Manner and Means of Payment 225
        8.4.3.5 Gifts and Charitable Contributions 226
   8.4.4 Facilitation Payments 227
   8.4.5 Duress 229
   8.4.6 Opinion Procedure 230
8.5 Sanctions 232
   8.5.1 Criminal Sanctions 232
        8.5.1.1 Sentencing Guidelines 233
       8.5.1.2 Compliance Programs 233
              8.5.1.2.1 Commitment from Senior Management and a Clearly
                      Articulated Policy against Corruption 233
              8.5.1.2.2 Code of Conduct and Compliance Policies and Procedures 233
              8.5.1.2.3 Oversight, Autonomy, and Resources 234
              8.5.1.2.4 Risk Assessment 234
              8.5.1.2.5 Training and Continuing Advice 234
              8.5.1.2.6 Incentives and Disciplinary Measures 234
              8.5.1.2.7 Third-Party Due Diligence and Payments 235
              8.5.1.2.8 Confidential Reporting and Internal Investigation 235
              8.5.1.2.9 Continuous Improvement: Periodic Testing and Review 236
              8.5.1.2.10 Mergers and Acquisitions: Pre-Acquisition Due Diligence
                        and Post-Acquisition Integration 236
       8.5.1.3 Deferred Prosecution and Non-Prosecution Agreements 236
       8.5.1.4 Monitors 237
       8.5.1.5 Criminal Penalties for Retaliation or Obstructing an Investigation 239
   8.5.2 Additional Civil or Administrative Sanctions 239
        8.5.2.1 Civil Sanctions 239
       8.5.2.2 Deferred Prosecution and Non-Prosecution Agreements 240
       8.5.2.3 Monitors and Independent Compliance Consultants 241
       8.5.2.4 Administrative Sanctions 242
              8.5.2.4.1 Suspension or Debarment 242
              8.5.2.4.2 Loss of Export Privileges 243
8.6 Money Laundering 243
   8.6.1 Principal Money Laundering Offenses 244
   8.6.2 Forfeiture 245
8.7 Tax Deductibility 246
8.8 Accounting and Record-Keeping 246
```

```
8.8.1 Scope and Jurisdiction 247
             8.8.1.1 Subsidiaries 247
             8.8.1.2 Individuals and Non-Issuer Entities 249
             8.8.1.3 Accomplices 249
        8.8.2 Record-Keeping Provisions 250
             8.8.2.1 Falsification of Books and Records 251
                   8.8.2.1.1 Rule 13b2-1 251
                   8.8.2.1.2 No Materiality Requirement 253
                   8.8.2.1.3 Zero Tolerance for Falsifying Records 254
                   8.8.2.1.4 Facilitation Payments 254
             8.8.2.2 Material Misrepresentations or Omissions to Auditors 255
        8.8.3 Internal Accounting Controls Provisions 256
             8.8.3.1 Elements of an Internal Control System 257
             8.8.3.2 Broad Reach of Internal Accounting Control Provisions 260
             8.8.3.3 Relationship with Compliance Programs 261
             8.8.3.4 Heightened Obligations under Sarbanes-Oxley 263
        8.8.4 Criminal and Civil Liability under the Accounting and Record-Keeping
             Provisions 263
             8.8.4.1 Criminal Liability 263
             8.8.4.2 Civil Liability 265
                   8.8.4.2.1 Subsidiaries 266
                   8.8.4.2.2 Aiding and Abetting 266
        8.8.5 Control Person Liability 267
        8.8.6 Sanctions 268
             8.8.6.1 Criminal Violations 268
             8.8.6.2 Civil Violations 268
Appendices 269
Appendix I —OECD Convention: 269
    Part A: OECD Convention 269
    Part B: Commentaries to the OECD Convention 276
Appendix II — Australia: 283
    Part A: Criminal Code Act 1995 - Division 70 283
    Part B: Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 -
            Explanatory Memorandum 292
Appendix III — Canada: 309
    Corruption of Foreign Public Officials Act 309
```

```
xviii Table of Contents
Appendix IV — Ireland: 313
    Part A: Prevention of Corruption Act 1906 Revised 313
    Part B: Prevention of Corruption (Amendment) Act 2001 Revised 316
Appendix V —New Zealand: 327
    Crimes Act 1961: Bribery of Foreign Public Official 327
Appendix VI —South Africa: 330
    Prevention and Combating of Corrupt Activities Act of 2004 330
Appendix VII — United Kingdom: 360
    Part A: Bribery Act 2010 360
    Part B: Bribery Act 2010: Explanatory Notes 372
    Part C: Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious
            Fraud Office and The Director of Public Prosecutions 386
    Part D: Bribery Act 2010: Guidance for Commercial Organisations 397
Appendix VIII —United States: 426
    Part A: Foreign Corrupt Practices Act 426
    Part B: Record-Keeping Regulations 445
    Part C: Reporting on Internal Controls 447
    Part D: Foreign Corrupt Practices Act Opinion Procedure 454
INDEX 459
```