



# Bribery & Corruption

# 2019

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# Cayman Islands

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## **Brief overview of the law and enforcement regime**

The Cayman Islands' Anti-Corruption Law (2018 Revision) (the “**Law**”) came into force on 1 January 2010 with the intent of giving effect to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as the United Nations Convention Against Corruption. The Law replaced the provisions relating to anti-corruption and bribery which previously existed under the Penal Code, and provides generally for four categories of corruption offences: Bribery (both domestic and foreign); Fraud on the Government; Abuses of Public or Elected Office; and Secret Commissions. There are also ancillary offences for failure to report an offence.

The Law also created the Anti-Corruption Commission (the “**Commission**”), which oversees the administration of the Law. The Commission comprises the Commissioner of Police, the Complaints Commissioner, the Auditor General, and two ‘appointed members’ selected by the Governor from retired members of legal practice, law enforcement or the judiciary.

### Bribery

The key bribery offences under the Law are:

(a) *Bribery of public officers and elected members of the Cayman Islands Legislative Assembly*

It is an offence for a (Cayman Islands) public officer<sup>1</sup> or member of the Legislative Assembly (“**LA**”) to, directly or indirectly, solicit, accept or obtain (or agree to accept or obtain) for themselves or another person, any loan, reward, advantage or benefit (an “**improper payment**”) with the intent to interfere with the administration of justice; procure or facilitate an offence; or protect an offender from detection or punishment. It is also an offence for any person to give or offer an improper payment to a public officer, or member of the LA, with such intent.

The penalty for bribery of a Cayman Islands public officer or member of the LA under the Law is imprisonment for a term of 14 years.

(b) *Bribery of foreign public officer*

It is also an offence if any person, in order to obtain or retain an advantage in the course of business, directly or indirectly promises, gives or offers, or agrees to give or offer, an improper payment to a foreign public officer,<sup>2</sup> save where such improper payment is either:

- (i) permitted or required under the laws of the applicable foreign country or organisation; or

- (ii) was made to pay the reasonable expenses incurred in good faith by, or on behalf of, the foreign public officer that are directly related to:
1. the promotion, demonstration or explanation of the person's products or services; or
  2. the execution or performance of a contract between the person and the foreign country for which the officer performs duties or functions.

The penalty for bribery of a foreign public officer under the Law is imprisonment for a term of up to 14 years.

Where money is paid to a foreign public officer, the Law provides that such payment is not considered an improper payment to obtain or retain an advantage in the course of business if it meets the criteria for a facilitation payment (see section below, 'Law and policy relating to issues such as facilitation payments and hospitality', for further detail).

### Fraud on the Government

It is an offence for any person who:

- (a) directly or indirectly gives, offers or agrees to give or offer an improper payment to a public officer or a member of the LA,<sup>3</sup> in connection with:
  - (i) Government business;
  - (ii) Government claims, regardless of whether the relevant public officer or member of the LA (or other such person) is in fact able to cooperate, render assistance, exercise influence or do, or omit to do, what is proposed; or
  - (iii) the appointment of any person, including himself, to an office;
- (b) has or pretends to have influence with the Government, a member of the LA or public officer, and accepts a benefit for himself in connection with:
  - (i) Government business;
  - (ii) Government claims; or
  - (iii) the appointment of any person, including himself, to an office;
- (c) when dealing with a public officer or a member of the LA, provides benefit to such person without the prior written consent of the chief officer of the relevant Government entity; or
- (d) having made a tender to obtain a contract<sup>3</sup> with the Government, provides or receives benefit in consideration for the withdrawal of their or another's tender.

The penalty for the offence of committing a fraud on the Government is a term of imprisonment of up to 10 years.

### Abuses of public or elected office

Any person who:

- (a) agrees to an appointment to, or resignation from a public office;
  - (b) consents to any such appointment or resignation; or
  - (c) receives or agrees to receive a reward or profit from the purported sale thereof,
- commits an offence liable on conviction to imprisonment for a term of up to five years.

Any person who, in order to obtain or retain a contract with the Government, or as an express or implied term of such a contract, directly or indirectly provides a benefit to any person:

- (a) for the purpose of promoting the election of candidates to the LA; or
  - (b) with the intent to influence or affect the election of any candidate to the LA,
- commits an offence liable on conviction for a term of imprisonment of up to 10 years.

Any person who:

- (a) agrees to an appointment to or resignation from a public office;
  - (b) consents to any such appointment or resignation; or
  - (c) receives or agrees to receive a reward or profit from the purported sale thereof,
- commits an offence liable on conviction for a term of imprisonment of up to five years.

Further, any person who:

- (a) receives, agrees to receive, gives or procures to be given, directly or indirectly, an improper payment as consideration for cooperation, assistance or exercise of influence to secure the appointment of any other person to a public office;
- (b) solicits, recommends or negotiates in any manner with respect to an appointment to or resignation from, a public office, in expectation of a direct or indirect improper payment; or
- (c) keeps, without lawful authority, a premises for transacting or negotiating any business relating to:
  - (i) the filling of vacancies in public offices; or
  - (ii) the sale or purchase of public offices, or appointments to, or resignation from public offices,

commits an offence liable on conviction for a term of imprisonment of up to five years.

#### Secret commissions

There is also a more general offence provision relating to secret commissions that may not necessarily need to involve a public official (whether local or foreign). The section provides that any person who gives, offers, or agrees to give or offer, to an agent any improper payment in consideration of any act relating to:

- (a) the affairs or business of the agent's principal;
- (b) showing favour or disfavour towards any person in relation to the affairs or business of the agent's principal; or
- (c) with the intent to deceive an agent's principal, gives the agent a receipt, account or other writing in which the principal has an interest that:
  - (i) contains any statement that is false, erroneous or defective in any material particular; and
  - (ii) is intended to mislead the principal,

commits an offence liable upon conviction for a term of imprisonment of up to five years.

Further, any agent who demands, accepts or offers or agrees to accept any improper payment to achieve (a), (b) or (c) above, from any person, also commits an offence liable upon conviction to a term of imprisonment of up to five years.

#### Reporting offences

The Law also provides for a mandatory reporting obligation in that any person from whom an improper payment has been solicited or obtained, in contravention of any provision of the Law, is also required to make a report to the Commission or to a constable at their

earliest opportunity. Failure to do so, without reasonable excuse, is an offence liable upon conviction to a fine of up to CI\$10,000 (approximately US\$12,000) and/or imprisonment for a term of up to two years.

There are further offence provisions applicable to persons who provide false, misleading or inconsistent reports. The Law also makes it an offence to victimise a person who makes a report or disclosure to the Commission, or constable, of the bribery of a public officer or member of the LA, with a penalty of imprisonment for a term of two years. The Law defines “victimisation” as an act:

- (a) which causes injury, damage or loss;
- (b) of intimidation or harassment;
- (c) of discrimination, disadvantage or adverse treatment in relation to employment; or
- (d) amounting to threats of reprisals.

#### Inchoate offences and vicarious liability

In addition to the primary offence categories outlined above, the Law also provides for “inchoate offences”, which apply to the:

- (a) attempt, conspiracy, or incitement to commit corruption offences; and
- (b) aiding, abetting, counselling or procuring the commission of corruption offences.

The inchoate offences are liable on conviction to a fine of up to CI\$5,000 (approximately US\$6,000) and/or imprisonment for a term of up to two years.

### **Overview of enforcement activity and policy during the last year**

The Commission is supported by both the Royal Cayman Islands Police Service (the “RCIPS”) (through a dedicated Anti-Corruption Unit) and the Auditor General of the Cayman Islands in the investigation and determination of bribery and related offences under the Law. The investigative and enforcement arms of the regime are also complemented by a statutory freedom of information framework with an independent Information Commissioner and a free press.

The Commission’s capabilities have been strengthened by the provision of analytical, research and administrative support from the Commonwealth Secretariat. The Commission has adopted a multi-faceted approach to tackling corruption, which includes investigations, prosecutions and educational campaigns to improve the public’s awareness of the Law.

However, the Commission does not have investigative resources of its own and must largely rely on the RCIPS to investigate any claims brought to it, introducing a risk that corruption cases may be deprioritised. Additionally, the independence of the Commission has been questioned, as it includes seats for the Auditor General and the Police Commissioner. Certain observers have argued that the Commission may be more effective if its members did not already have other full-time employment and would not be confronted by a potential conflict of interest if a matter actually involved some of their staff.

As at 26 June 2018, the Commission has registered 160 reports since its inception. The Commission has 14 cases under active investigation; seven cases ‘pending’ (awaiting further or significant information); 115 which have been concluded; and 10 which have been transferred to other investigative units for action. During the most recent available reporting period of 1 July 2016 to 30 June 2017, the Commission arrested 11 persons and conducted 54 interviews and there was one person awaiting a charge ruling from the Director of Public Prosecutions.

Certainly, the most prominent recent corruption case involved charges against the former Premier of the Cayman Islands. The initial charges had included two counts of misconduct in public office, four counts of breach of trust by a member of the LA, and five counts of theft in connection with the importation of explosive substances without a legal permit, although none was made pursuant to the Law. The former Premier was cleared by a Cayman Islands jury of all 11 charges in October 2014.

More recently, in *R v Canover Norbet Watson*,<sup>4</sup> the former Chairman of the Health Services Authority in the Cayman Islands, and a member of FIFA's audit committee, Canover Watson, was convicted of four corruption and money laundering offences in February 2016. The charges related to the award of a Cayman Islands health service swipe card contract to a private company whilst Mr Watson was head of the relevant awarding authority. Mr Watson was convicted of: (a) two counts of conspiracy to defraud contrary to the common law; (b) one count of conflict of interest contrary to section 19(2) and 19(3) of the Law; (c) one count of breach of trust contrary to section 13 of the Law; and (d) one count of fraud on the Government contrary to section 11(1)(c) of the Law. In February 2016, Mr Watson was sentenced to seven years' imprisonment.

Following his conviction, Mr Watson faced confiscation proceedings under the Proceeds of Crimes Law, and in February 2018 was ordered to pay US\$1.12 million to the Cayman Islands Government over his role in the healthcare fraud.

In another, potentially more high-profile, indictment, suspended FIFA vice-president and CONCACAF president Jeffrey Webb, who has already pleaded guilty in the US over his role in FIFA's US\$150 million global racketeering and bribery scandal, has also been charged in connection with the same healthcare fraud case faced by Mr Watson. Mr Webb, although not a Government official at the time, is alleged to have been connected to one of the companies that secured the lucrative swipe card contract. Mr Webb now faces two charges of conspiracy to defraud and one charge of breach of trust, as well as conspiracy to convert criminal property. Mr Webb is currently under house arrest in the US awaiting sentencing, and it remains unclear when he may appear before a Court in the Cayman Islands.

In June 2017, the Commission, with the assistance of the RCIPS, arrested Mr Watson and a former Vice President of the Cayman Islands Football Association in connection with a corruption and money laundering probe apparently related to the same FIFA scandal. In June 2018, Mr Watson was arrested again in respect of the same probe. To date, neither Mr Watson nor the former Vice President has been charged.

## **Law and policy relating to issues such as facilitation payments and hospitality**

### Facilitation payments

The Law provides a statutory exception for limited business circumstances and/or cultural practices where facilitation payments may be allowable. Where money is paid to a foreign public officer, the Law provides that such payment is not considered an improper payment to obtain or retain an advantage in the course of business if:

- (a) the value of the payment is small;
- (b) the payment is made to expedite or secure the performance by a foreign public officer of "an act of a routine nature" that is part of the foreign public officer's duties or functions, including:
  - (i) the issuance of a permit, licence or other document to qualify a person to do business;

- (ii) the processing of official documents, such as visas and work permits;
  - (iii) the provision of services normally offered to the public, such as mail pickup and delivery, telecommunication services and power and water supply; and
  - (iv) the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration, or the scheduling of inspections related to contract performance or transit of goods; and
- (c) as soon as practicable after the payment and act of a routine nature are performed by the foreign public officer, the person making such payment makes a record of such payment or act, and the person has retained that record at all relevant times. Such a report must include:
- (i) the value for the payment;
  - (ii) particulars of the act of a routine nature that was sought to be expedited or secured by the payment;
  - (iii) the date or dates on which the payment was made and on which the act of a routine nature occurred;
  - (iv) the identity of the foreign public official; and
  - (v) the signature or other means of verifying the identity of the person making the report.

### Hospitality

The Public Service Management Law (2018 Revision) concerns the narrower definition of “public officer” as the holder of any office of emolument in the public service, and includes any person appointed to act in any such office. Public officers are subject to “General Orders” which are contained within subsidiary legislation. Earlier versions of the General Orders regulated the acceptance of gifts by public officers. The specific provisions dealing with the acceptance of gifts have now been removed from the General Orders.

Public officers must be careful about receiving valuable presents (unless they are from personal friends) whether in the shape of money, goods, passages, subsidies or services or any other personal benefits.

Gifts received from foreign Governments may be accepted where to do otherwise would be viewed by the particular foreign Government as offensive, and where the public servant receives approval from the Governor of the Cayman Islands. There is no official guideline as to what constitutes a “valuable present”, but previous wording was sufficiently wide to cover any gift.

The Public Servants’ Code of Conduct is overseen by the Commission for Standards in Public Life and provides that a public servant must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) with his duties as a public servant, and must not use his official position for personal or familial gain.

As part of its regulatory handbook, the Cayman Islands Monetary Authority (“CIMA”) issues a code of conduct for the directors of the Board of CIMA and members of its management committee (“MC”), who are expected to carry out their responsibilities to the exclusion of any personal advantage. For example, Board directors and members of the MC should not accept favours, fees or gifts from regulated institutions or the institutions’ staff, professional companies or the general public, including commissions, special discounts or other forms of compensation, in order to avoid the appearance of improper influence on the performance of their official duties. All gifts received without prior notification from the sender must be

declared immediately to the Managing Director of CIMA or, in his/her absence, to the Deputy Managing Director, who will deal with the matter appropriately.

Board directors and members of the MC are required to exercise discretion in accepting hospitality from any relevant organisations and professional advisers. Routine business lunches are accepted unless they become frequent or lavish. Attendance at expensive or exclusive sporting or cultural events which might draw criticism must be declined unless circumstances have been discussed with the Managing Director of CIMA.

Members are expected to turn down any invitation when they and their partner are the only guests, or where the host's party is only six or eight, and where the price of the tickets and accompanying fare is likely to exceed CI\$100 (approximately US\$120) per head. Invitations are to be automatically refused where they could be construed to be unusual or to risk creating a sense of obligation to the host, or bias in their favour (e.g. because of the circumstances of the invitation, or cost or rarity value of the event).

### **Key issues relating to investigation, decision-making and enforcement procedures**

The Commission is given broad powers to prevent and detect corruption offences under the Law. For example, the Commission may, upon successful application to the Grand Court of the Cayman Islands, order any person to refrain from dealing with a person's bank account or other property for a period not exceeding 21 days if there is reasonable cause to believe that it relates to the proceeds or the suspected proceeds of a corruption offence. Further, the Commission may, in writing, require any person to provide information (excluding information communicated to professional legal advisers) for the purpose of clarifying or amplifying information relating to corruption offences.

Although the Attorney General must consent to the instigation of proceedings in relation to a corruption offence, a person may be arrested, charged, remanded into custody or released on bail before such consent is received.

The Law also expressly provides that, in any trial or proceedings for a corruption offence, the court, in relation to the proceeds of such an offence, shall apply the provisions of the Proceeds of Crime Law (2018 Revision).

### **Overview of cross-border issues**

Mutual legal assistance is also extensively provided for under the Law, which allows the Commission to disclose any information received in relation to corruption offences to CIMA, as well as to other designated institutions or persons. The Commission may also disclose any information to any foreign anti-corruption authority relating to conduct which constitutes a corruption offence, or would constitute a corruption offence if it had occurred in the Cayman Islands.

The Law also makes offences extraditable and an offence occurs if the conduct:

- (a) was committed wholly or partly within the Cayman Islands;
- (b) was committed wholly or partly on board a Cayman-registered ship or aircraft (wherever located); or
- (c) was committed wholly outside the Cayman Islands and the alleged offender:
  - (i) is a person with Caymanian status;
  - (ii) is a resident of the Cayman Islands; or
  - (iii) is a body corporate incorporated by or under a Cayman law.

The territorial provisions of the Law are much more extensive than any predecessor legislation, as corruption offences are deemed to be offences for which extradition may be granted, pursuant to existing Cayman Islands extradition laws and treaties. Moreover, corruption offences involving cross-border transactions and/or entities in different jurisdictions can also give rise to complex conflicts-of-law questions.

Although not Cayman Islands law, it is noted that certain provisions of the United Kingdom Bribery Act 2010, which came into force in July 2011, have extraterritorial effect in certain British Overseas Territories, including the Cayman Islands.

For example, the offences of active or passive bribery (in the public or private sector) apply to acts committed overseas (where the act or omission would have been an offence, if done or made in the UK), provided the offender has a close connection with the UK. A close connection includes a British citizen, a British Overseas Territories citizen (which may include many Cayman Islands citizens), an individual ordinarily resident in the UK, or a body incorporated in any part of the UK. Furthermore, an offence of failing to prevent bribery (by not having adequate procedures) applies to companies, wherever incorporated, which conduct part of their business in the UK.

### **Corporate liability for bribery and corruption offences**

While the offences under the Law are primarily directed to individuals, where an offence is proved to have been committed by a body corporate with the consent, connivance of, or be attributable to any neglect on the part of any director, manager, secretary or similar officer, including any person purporting to act in such a capacity, both the body corporate and the individual person shall be liable.

### **Proposed reforms / The year ahead**

In addition to continuing to work in conjunction with the RCIPS Anti-Corruption Unit and the Auditor General to detect and expose corruption, the Commission has stated that it will continue to take an active role in public awareness campaigns with other institutions and associations with similar or complementary objectives.

The minutes of the meeting of the Commission on 14 June 2018 record that the Commission has collated in draft form possible amendments to the Law and interim measures, which could be adopted as procedural policies. The minutes also show that an extraordinary meeting of the Commission is due to be held to discuss and recommend such amendments to the Cayman Islands Government. However, as at the time of writing (September 2018), that meeting had not yet been held and the possible amendments had not been published.

\* \* \*

### **Endnotes**

1. A “public officer” includes a person holding public office, judge, magistrate, arbitrator, umpire, assessor, jury member, Justice of the Peace, or member of statutory body, tribunal or commission of enquiry.
2. A “foreign public officer” includes: (i) employee/officer of a foreign government body; (ii) contract worker for a foreign government body; (iii) person appointed under foreign law, custom or convention; (iv) member of the executive, judiciary,

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magistracy or legislature; (v) employee, officer, contractual worker for a public international organisation; and (vi) authorised intermediary of a foreign public officer.

3. Including members of their families or any other person to their benefit.
4. (Unreported) Indictment No. 0049/2015, 5 February 2016.

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Martin Livingston oversees Maples and Calder's Regulatory & Financial Services group and is an industry-recognised specialist in all aspects of regulatory, licensing, risk management, information disclosure and anti-money laundering matters. He regularly assists clients in their relationship with the Cayman Islands Monetary Authority, Tax Information Authority and other government agencies. Martin also advises on a range of regulatory aspects including licence applications and cross-border conduct of business advice, financial services terms and conditions, mandatory reporting and information exchange (including the Foreign Account Tax Compliance Act, the Common Reporting Standard and other tax or regulatory information exchange mechanisms), duties of confidentiality, sanctions, anti-corruption and bribery, as well as anti-money laundering and combating of terrorist financing advice. Martin is a regular speaker and author on regulatory law matters.

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