Hot Off the Press: Resetting the Global Anti-Corruption Thermostat to the UK Bribery Act

Lee G Dunst, Michael S Diamant and Teresa R Kung*

In recent years, few developments in white collar criminal law have captured the attention of general counsels as much as the focus by law enforcement authorities on overseas bribery.[1] Perhaps the clearest statement of the international community's resolve to stamp out public corruption was the 1997 Organisation of Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Convention'), which came into force in February 1999 and has been ratified to date by 38 countries, including the United States and the United Kingdom.[2] Reflecting the international expansion of corruption that has naturally attended

* Lee Dunst is a partner and Teresa Kung is an associate at Gibson, Dunn & Crutcher in New York. Michael Diamant is a senior associate in Gibson Dunn's Washington, DC office. The authors routinely counsel major multinational corporations about their anti-bribery compliance programmes, including with regard to compliance with the US Foreign Corrupt Practices Act and the UK Bribery Act.

1 David C Weiss, Note, 'The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence' (2009) 30 Mich J Int'l L 471, 484–85; Claudius O Sokenu, 'FCPA News And Insights: An Update on Recent Foreign Corrupt Practices Act and Global Anti-Corruption Enforcement, Litigation, and Compliance Developments' (2010) 1814 PLI/Corp 641, 650–51; see also Priya Cherian Huskins, 'FCPA Prosecutions: Liability Trend to Watch' (2008) 60 Stan L Rev 1447, 1447–49; Manny A Alas, 'PricewaterhouseCoopers Corruption Crackdown: How the FCPA is Changing the Way the World Does Business' (2010) 1824 PLI/Corp 247, 272.

2 OECD, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (26 Nov 2009), available at **www.oecd.org/dataoecd/4/18/38028044.pdf** (hereinafter OECD Convention); OECD, Ratification Status as of March 2009 (1 Apr 2009), **www.oecd.org/dataoecd/59/13/40272933.pdf**.

globalisation and, in particular, a massive increase of investment by the West in developing countries around the globe,[3] the OECD Convention specifically addresses the bribery of foreign public officials, that is corrupting another government's public servants.[4] Among the more interesting developments of the past year has been non-OECD Convention signatories passing or considering their own extraterritorial anti-bribery statutes. For example, the People's Republic of China has already done so,[5] and Indonesia is also considering a similar law.[6] Further, the Russian Federation – which has long held out against the OECD Convention – has finally passed legislation criminalising foreign bribery[7] and has even been invited to join the OECD Convention.[8] It is hard to imagine that in an ever-more interconnected global economy, this momentum towards governments policing the behaviour of their commercial organisations overseas will subside.

But as Transparency International's 2010 Progress Report on the enforcement of the OECD Convention details, the United States is far and away the leader in the prosecution of the extraterritorial corruption of public officials.[9] Indeed, in Transparency International's opinion, only six other countries even qualify as 'active' in their prosecution of overseas bribery.[10] This is perhaps unsurprising, as the United States, after all, had a significant head start. The US international anti-bribery law, the Foreign Corrupt Practices Act (FCPA), came into force in 1977.[11] Rather than responding

3 See Bromberg & Lowenfels on Sec Fraud § 18:16 (2nd edn, 2010), 6.

4 OECD Convention, note 2 above, 20.

5 On 25 February 2011, the legislature of the People's Republic of China (PRC) passed 49 amendments to the PRC Criminal Law, one of which criminalised the payment of bribes to non-PRC government officials and to international public organisations. Some practitioners view the amendment as the PRC's version of the FCPA. However, having just been passed, there has not yet been any interpretative guidance on it. See John M Hynes, 'China Beefs Up Its Anti-Bribery Law With Its Very Own Version Of The FCPA', Gov't Contracts L Blog (16 March 2011), **www.governmentcontractslawblog.com/2011/03/articles/fcpa/china-beefs-up-its-antibribery-law-with-its-very-own-version-of-the-fcpa**.

6 Joe Palazzolo, 'Indonesia Moves Ahead With Foreign Bribery Legislation', Wall Street J Blog (16 Mar 2011, 4:05pm), **http://blogs.wsj.com/corruption-currents/2011/03/16/indonesia-moves-ahead-with-foreign-bribery-legislation**.

7 OECD, 'OECD Welcomes Russia Introducing Law to Make Foreign Bribery a Crime' (5 May 2011), **www.oecd.org/document/36/0,3746,en_21571361_44315115_47769508_1_1_1_1,00.html**; Khristina Narizhnaya, 'Russia Signs OECD Anti-Bribery Convention', Moscow Times (26 May 2011), available at **www.themoscowtimes.com/business/article/russia-signs-oecd-anti-bribery-convention/437585.html**; Richard L Cassin, 'Coming Soon: Russia's FCPA?' The FCPA Blog (16 Mar 2011, 10:55am), **www.fcpablog.com/blog/2011/3/16/coming-soon-russias-fcpa.html**.

8 OECD, 'OECD Invites Russia to Join Anti-Bribery Convention' (25 May 2011), **www.oecd.org/document/24/0,3746,en_21571361_44315115_47983768_1_1_1_1,00.html**.

9 Transparency Int'l, Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention (3rd edn, 2010), 11 available at **www.transparency.org/publications/publications/conventions/oecd_report _2010**.

10 *Ibid.*

11 Dep't of Justice, **www.justice.gov/criminal/fraud/fcpa** (last visited 17 May 2011).

directly to any increase in foreign investment by US corporations, the FCPA followed on the heels of the Watergate inquiries in the US Congress and subsequent revelations that hundreds of US corporations routinely made illicit payments to foreign officials to secure overseas business.[12] The FCPA reflected a moral judgment about the way in which US businesses should behave,[13] but the dual enforcers of the FCPA, the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC), brought relatively few cases for the first 25 years after the passage of the FCPA. In fact, as recently as 2004, the SEC and DOJ combined for only five enforcement actions.[14] However, by 2007, the annual enforcement figure swelled to 38, and in 2010, the agencies' tally ballooned to 74.[15] With the DOJ claiming to have more than 150 active FCPA investigations open at this time,[16] little evidence suggests any change in this trend of aggressive enforcement.

The question remains: which countries will join the United States in the vanguard of anti-bribery enforcement? Clearly, Germany has significantly increased enforcement with recent high-profile prosecutions of Siemens AG, MAN AG and Ferrostaal AG, among others.[17] But all eyes in the international

12 Linda Chatman Thomsen, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (27 March 2008) (transcript available at **www.sec.gov/news/speech/2008/spch032708lct.htm**); Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices Submitted to the S Comm on Banking, Housing and Urban Affairs, 94th Cong (2d Sess 1976), reprinted in 353 Sec Reg & L Rep 36–41.

13 On signing the FCPA into law, President Carter remarked on the 'ethically repugnant' nature of corporate bribery. Presidential Statement on Signing the Foreign Corrupt Practices Act, 13 Weekly Comp Pres Doc 1909 (20 Dec 1977).

14 F Joseph Warin et al, '2010 Year-End FCPA Update', Gibson, Dunn & Crutcher (3 Jan 2011), available at **www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx**.

15 *Ibid*.

16 'Mark Mendelsohn on the Rise of FCPA Enforcement', Corporate Crime Reporter (10 Sept 2010), available at **www.corporatecrimereporter.com/mendelsohn091010.htm**; see also Richard L Cassin, 'The 2011 Watch List', The FCPA Blog (29 Dec 2010, 8:02am), **www.fcpablog.com/blog/2010/12/29/the-2011-watch-list.html**.

17 Transparency Int'l, Progress Report 2010: Enforcement of the OECD Anti-Bribery Convention (3rd edn, 2010), 33–34, available at **www.transparency.org/publications/publications/conventions/oecd_report_2010**; see, eg, Jens Hack and Christian Kraemer, 'Ex-Siemens Found Guilty in Bribery Case', Reuters, 20 Apr 2010, available at **www.reuters.com/article/2010/04/20/siemens-probe-idUSLDE63J1IN20100420**; 'German Truck Maker Hit By Bribery Allegations', Deutsche Welle, 5 May 2009, available at **www.dw-world.de/dw/article/0,,4229996,00.html**; 'Ferrostaal at Center of Probe into Nigerian Corruption Affair', Deutsche Welle, 22 Apr 2002, available at **www.dw-world.de/dw/article/0,,503022,00.html**; Jens Hack, 'Germans Target Nine Suspects in HP Bribery Probe', Reuters, 15 Apr 2010, available at **www.reuters.com/article/2010/04/15/hp-russia-idUSLDE63E1A620100415**; Leah Nylen, 'Germany Probing Pipeline Supplier After CEO Admits Bribes', 24 Aug 2010, available at **www.mainjustice.com/justanticorruption/2010/08/24/germany-probing-pipeline-supplier-vietz-gmbh-after-ceo-admits-bribes**; Stefan Nicola, 'Corrupt German NGO in Afghanistan?' United Press International, 12 Nov 2010, available at **www.upi.com/Top_News/Special/2010/11/12/Corrupt-German-NGO-in-Afghanistan/UPI-10401289586414**.

anti-bribery enforcement community are currently trained on the United Kingdom. Last year, the United Kingdom concluded a rather inglorious episode in international anti-bribery enforcement by reaching a limited settlement with BAE Systems plc (BAE) for improper conduct concerning the Tanzanian Government.[18] The most notable aspect of this prosecution was that it did not address BAE's so-called Al Yamamah contracts with Saudi Arabia.[19] In fact, it was the US DOJ, and not the United Kingdom's own Serious Fraud Office (SFO),[20] that was the key player in securing guilty pleas in this case.[21] The SFO's investigation was halted on grounds of UK national security.[22] The scandal that ensued from the Blair Government's intervention in that investigation helped to form a consensus in the United Kingdom on the need to reform its anti-bribery enforcement framework.[23] And in the waning days of the Brown Government, Parliament passed the Bribery Act 2010 ('Bribery Act').[24] Commentators quickly recognised that this law resembled the FCPA, but 'on steroids'.[25] Addressing not merely overseas public corruption, but also active and passive commercial bribery regardless of location, the Bribery Act's aggressive extraterritorial reach and lack of certain specific defences provided by the FCPA sent waves of alarm through the UK and international business community, which successfully lobbied

---

18 Press Release, BAE Systems, BAE Plc Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office (5 Feb 2010), available at **www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html**.

19 Press Release, Serious Fraud Office, BAE Systems PLC/Saudi Arabia (14 Dec 2006), available at **www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia.aspx**.

20 See generally Bribery & Corruption, Serious Fraud Office, **www.sfo.gov.uk/bribery–corruption/bribery–corruption.aspx** (last visited 1 Jun 2011); Serious Fraud Office, Approach of the Serious Fraud Office to Dealing with Overseas Corruption (2009), 1 **www.sfo.gov.uk/media/28313/approach%20of%20.the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf** (noting the establishment of the new 'work area').

21 David Leigh and Rob Evans, 'BAE and the Saudis: How Secret Cash Payments Oiled £43bn Arms Deal', guardian.co.uk, 5 Feb 2010, available at **www.guardian.co.uk/world/2010/feb/05/bae-saudi-yamamah-deal-background**.

22 Press Release, Serious Fraud Office, BAE Systems PLC/Saudi Arabia (14 Dec 2006), available at **www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia.aspx**.

23 See Keith Corkan, 'UK Bribery Act 2010' (2011) 21(1) Emp & Indus Rel L 19; see also 'Bribery Act 2010: The UK Delays Implementation', 7 Feb 2011, available at **www.cgsh.com/files/News/3a6233be-07b7-4055-9de8-c087f71b725b/Presentation/NewsAttachment/69bf50b8-9204-4a5b-a343-c10e56314e71/ CGSH%20Alert%20Memo%20-%20UK%20Bribery%20Act.pdf**.

24 Bribery Act 2010, c 23 (8 Apr 2010), available at **www.legislation.gov.uk/ukpga/2010/23/introduction**.

25 Dionne Searcey, 'UK Law on Bribes Has Firms in a Sweat', Wall Street J, 28 Dec 2010, available at **http://online.wsj.com/article/SB10001424052748704118504576034080908533622.html**.

the Cameron Government to delay the Act's implementation.[26] Despite the delay, the Cameron Government issued detailed guidance on complying with the new law and finally implemented it as of July 2011.[27]

As more and more countries begin to craft their own extraterritorial anti-corruption laws, multinational corporations may need to implement new compliance programmes or refine existing ones to reflect the 'highest common denominator' in anti-corruption regulation across the globe.[28] Right now, that highest common denominator happens to be the Bribery Act. This article seeks to provide some guidance for multinational companies subject to both the FCPA and the Bribery Act, by comparing the legal framework underpinning each and highlighting some key differences on which corporations should focus when determining how to adjust their behaviour accordingly.

Overview

Before the United Kingdom stepped onto the anti-corruption world stage, the FCPA was the main enforcement tool. Enacted more than 30 years ago, a massive body of enforcement precedence has been built up around the FCPA, and multinational companies and the lawyers who support them have had years of experience to design corporate compliance programmes to avoid running afoul of what for practical purposes was the only anti-corruption law companies had to worry about. With the introduction of the Bribery Act, and the prospect of additional countries joining the anti-corruption bandwagon,[29] however, noble efforts at anti-corruption compliance are fast becoming a

---

26 Christopher M Matthews, 'UK Bribery Act Implementation Postponed After Complaints from Business', Main Justice, 31 Jan 2011, available at **www.mainjustice.com/justanticorruption/2011/01/31/u-k-bribery-act-implementation-postponed-after-complaints-from-business**; see Richard Tyler, 'Vince Cable Lobbied for Delay in Bribery Act', The Telegraph, 9 Feb 2011, available at **www.telegraph.co.uk/finance/yourbusiness/bribery-act/8314416/Vince-Cable-lobbied-for-delay-in-Bribery-Act.html**.

27 The Bribery Act 2010 – Guidance (Ministry of Justice 2011), available at **www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf** (hereinafter Bribery Act Guidance).

28 David M Howard and Elisa T Wiygul, 'FCPA Compliance: The Vanishing 'Facilitating Payments' Exception?', April 2010, available at **www.dechert.com/library/4-7-10-WCSL-Howard_and_Wiygul-FCPA_Compliance-The_Vanishing_Facilitating_Payments_Exception.pdf**.

29 Andrew E Kramer, 'Russia is Invited to Join OECD Anti-Bribery Pact', New York Times, 25 May 2011, available at **www.nytimes.com/2011/05/26/business/global/26bribery.html**; see also Willem Steemkamp, 'United Arab Emirates: Federal Anti-Bribery Legislation in the United Arab Emirates', Mondaq, 25 May 2011, available at **www.mondaq.com/article.asp?articleid=133360**; Austin Paul, Vidya Gopinathan and Vishal Mathew, 'Anti-Corruption Drive Gathers Storm in Bangalore', DNA, 7 Apr 2011, available at **www.dnaindia.com/bangalore/report_anti-corruption-drive-gathers-storm-in-bangalore_1529200**.

tricky and dynamic objective. The Bribery Act, representing the latest in anti-corruption legislation, now takes centre stage as legal practitioners, multinational corporations and enforcement authorities prepare for its application and anticipate how it will change compliance efforts already in place. The impact that the Bribery Act has on multinational corporations will largely be determined by how it differs from the incumbent anti-corruption regime for the multinational corporate community, which has up until now largely been the FCPA.[30]

The FCPA is typically described as being made up of two sets of provisions: the anti-bribery provisions and the two accounting provisions. The anti-bribery provisions of the FCPA make it illegal to offer, promise or provide money or anything of value to foreign government officials corruptly for the purpose of obtaining or retaining business.[31] The accounting provisions of the FCPA, on the other hand, require issuers of US securities to keep accurate books and records and to devise and maintain a system of internal accounting controls that is capable of detecting and preventing improper payments to foreign officials and that utilises accepted methods of accounting.[32]

Though the Bribery Act does not contain similar accounting provisions, it features much broader anti-bribery restrictions than does the FCPA. In addition to outlawing the provision of bribes to foreign public officials in similar, although not identical, terms as the FCPA,[33] the anti-bribery provisions in the Bribery Act extend liability to bribes perpetrated in a private, commercial setting.[34] It imposes liability for bribing (section 1)[35] and being bribed (section 2),[36] as well as for failing, as a commercial organisation, to prevent bribery (section 7).[37] These nuances and their interpretation by UK authorities will ultimately drive the alterations that multinational corporations should consider making to their pre-existing anti-corruption compliance programmes.

---

30 F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 7.

31 Foreign Corrupt Practices Act (FCPA), 15 USC §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (1998).

32 *Ibid* at § 78m(b) (1998); see also *SEC v World-wide Coin Invs, Ltd*, 567 F Supp 724, 750 (N D Ga 1983).

33 Bribery Act 2010, c 23, s 6.

34 *Ibid* at § 3(2) (defining a 'relevant function or activity' to which offences under ss 1 and 2 refer as 'any activity connected with a business,… performed in the course of a person's employment,… [or] performed by or on behalf of a body of persons (whether corporate or unincorporate[d]).').

35 *Ibid* at § 1.

36 *Ibid* at § 2.

37 *Ibid* at § 7.

Bribing foreign officials

The anti-bribery provisions of the FCPA make it illegal to offer, promise, provide or authorise the payment of money or anything of value corruptly to foreign government officials or any foreign political party, official or candidate for foreign political office, for the purpose of obtaining or retaining business.[38] Similarly, section 6 of the Bribery Act, which makes it illegal to offer, promise or give a bribe to a foreign government official with the intent to influence the performance of his or her functions as a public official to obtain or retain business or a business advantage, provides a direct analogue to the FCPA's anti-bribery provisions.[39] But the two laws' prohibitions on overseas public corruption differ in critical ways, making it important to consider how these differences may affect anti-bribery compliance.

Jurisdictional reach

The FCPA's anti-bribery provisions apply to issuers, 'domestic concerns' and foreign persons or businesses conducting acts in furtherance of a corrupt payment in the United States. Importantly, US parents of foreign subsidiaries may also face criminal liability for their subsidiaries' actions in certain situations.

Issuers

Corporations that have issued securities registered in the United States pursuant to § 12 of the Securities Exchange Act of 1934 or that are required to file periodic reports with the SEC are subject to the FCPA.[40] This includes companies that list American Depositary Receipts (ADRs), which are receipts that represent an interest in a foreign security, on a US exchange.[41] This is important to note because the stocks of most foreign companies listed in US markets are traded as ADRs.[42]

---

38 FCPA, 15 USC §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (1998).

39 Bribery Act 2010, c 23, s 6.

40 FCPA, 15 USC § 78c(a)(8) (1998). See US Dep't of Justice, 'Lay Person's Guide to FCPA' 1, 3, **www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf** (hereinafter 'Lay Person's Guide').

41 See, eg, *In re Statoil*, ASA, Order Instituting Cease-and Desist Proceedings, Exchange Act Release No 54,599 (13 Oct 2006), available at **www.sec.gov/litigation/admin/2006/34-54599.pdf**; Complaint para 7, *SEC v Fiat SpA*, 08-cv-02211 (DDC 2008).

42 US Sec and Exch Comm'n, 'American Depositary Receipts', **www.sec.gov/answers/adrs.htm** (last visited 16 Jun 2011).

Domestic concerns

A 'domestic concern' is any individual who is a citizen, national or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation or sole proprietorship with a principal place of business in the United States, or which is organised under the laws of a state of the United States, or a territory, possession or commonwealth of the United States.[43]

Issuers and individuals and organisations that qualify as domestic concerns are liable under the FCPA regardless of where the corrupt payment took place. On the other hand, foreign nationals or business organisations only face liability under the FCPA if they cause an act in furtherance of the corrupt payment to take place in the United States.

Foreign nationals or businesses carrying out an 'act in furtherance' of a corrupt payment

A foreign company or person may fall under the FCPA's anti-bribery ambit by causing, directly or through its agents, an act in furtherance of the corrupt payment to take place within the territory of the United States.[44] US enforcement authorities have traditionally asserted that even minor acts such as routing a payment through a US bank account or e-mail exchanges to the parent company in the United States may qualify as 'act[s] in furtherance',[45] but clearly some act performed while the actor is within US territory is required.[46]

---

43 FCPA, 15 USC § 78dd-2(h)(1) (1998).

44 *Ibid* at § 78dd-3(a) (1998).

45 Dep't of Justice, Response of the United States, Supplementary Questions Concerning Phase 3 OECD Working Group on Bribery, at 16 (21 May 2010), **www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf**. See also Richard M Tollan, David S Krakoff and James T Parkinson, 'Is Your Business Affected by the US FCPA? Are You Sure?', **www.mayerbrown.com/publications/article.asp?id=7391&nid=6** (last visited 16 Jun 2011).

46 In what is likely to be the first judicial ruling on this issue, Judge Richard Leon of the US District Court of the District of Columbia granted an acquittal motion for a defendant who was charged with a violation of the FCPA on the basis of sending a purchase agreement via DHL package, from the United Kingdom to the United States, in furtherance of a corrupt scheme. Rejecting the government's argument that an 'act in furtherance' need not occur while the actor is in the United States, as long as a prior act had occurred there, Judge Leon stated that he thought a 'more cautious, conservative interpretation would be that each act has to be while in the territory of the United States'. See Mike Koehler, 'Significant dd-3 Development in Africa Sting Case', FCPA Professor Blog (9 Jun 2011), **http://fcpaprofessor.blogspot.com/2011/06/significant-dd-3-development-in-africa.html**.

US parent corporation or domestic concern via a foreign subsidiary

A US company may face liability under the anti-bribery provisions for the acts of its subsidiaries where the parent authorised, directed or controlled the activity in question.[47] The parent may also be liable if it knew about or consciously disregarded the substantial risk of the subsidiary's corrupt payments.

In the same way that the FCPA applies to foreign companies or persons when they cause an act in furtherance of a corrupt payment to take place in the United States, the Bribery Act's section 6 applies to the bribery of a foreign official 'if any act or omission which forms part of the offence takes place inside the United Kingdom'.[48] Even if the act or omission does not take place inside the United Kingdom, the Bribery Act also extends jurisdiction over any person or entity that has a 'close connection' with the United Kingdom.[49] Specifically, the following are considered to have such a close connection:

- a British citizen or other various category of a British passport holder;
- a resident of the United Kingdom;
- an entity 'incorporated under the law of any part of the United Kingdom'; and
- a Scottish partnership.[50]

At first blush, the jurisdictional reach of the FCPA appears to be broader than that of the Bribery Act. For instance, with respect to entities, the FCPA applies to all issuers, regardless of where they are located or incorporated. The Bribery Act's 'close connection' test, however, only applies to offences relating to sections 1, 2 and 6.[51] Section 7, discussed below, which makes it an offence for a 'relevant commercial organisation' to fail to prevent bribery based on a section 1 or 6 offence, suggests a much broader reach than the FCPA's anti-bribery provisions and, in fact, resembles in effect the global sweep of the FCPA's accounting provisions.[52]

---

47 Lay Person's Guide, note 40 above, 3; see also H Lowell Brown, 'Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act' (1998) 50 Baylor L Rev 1, 29–31 (describing what is required for a parent corporation to be found in violation of the FCPA for the acts of its subsidiary).

48 Bribery Act 2010, c 23, s 12(1).

49 *Ibid* at s 12(2)–(4).

50 *Ibid* at s 12(4).

51 *Ibid* at s 12(5).

52 Bribery Act 2010, c 23, s 7; see also F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 16, 28–29, 31.

Intent

To violate the FCPA's anti-bribery provisions, the payment or offer or promise of payment must be intended to induce the recipient to misuse his official position. The corrupt act, however, need not succeed in its purpose.[53] Unlike the FCPA, or sections 1 and 2 of the Bribery Act, the intent requirement under section 6 does not require that the payer act 'corruptly' or with any sort of improper purpose.[54] In other words, a person can legitimately wish to influence a foreign official by 'giv[ing]' some 'advantage' (eg a trip to visit the company's facilities in another country) and still *technically* violate section 6. This was a conscious decision made by the Joint Committee of the House of Lords and House of Commons on the Draft Bribery Bill ('Joint Committee'), largely owing to the concern that cultural norms and expectations could potentially legitimise a payment that should otherwise be considered illegal.[55] The UK Ministry of Justice added that excluding an 'improper performance' test was appropriate in this instance because the exact nature of the functions of persons regarded as foreign public officials is often too difficult to ascertain with accuracy.[56] The lack of a corrupt intent requirement in section 6 of the Bribery Act is an important matter, because its absence is more likely to sweep in legitimate conduct, with the drafters ultimately deciding to leave the matter to prosecutorial discretion.[57] The UK Government, however, has largely papered over this problem by reinterpreting section 6 as only applying to a payment designed to induce a certain action by a foreign official.[58] As discussed below, the UK Government has also stated officially that it will not prosecute individuals and corporations for certain bona fide business expenditures.[59]

---

53 Lay Person's Guide, note 40 above, 3.

54 Bribery Act 2010, c 23, s 6.

55 See Joint Committee on the Draft Bribery Bill, First Report, 2008–9, HL Bill [115-I]/HC Bill [430-I] cl 146, available at **www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11502.htm** (quoting Professor Jeremy Horder, Criminal Commissioner of the Law Commission) (hereinafter Joint Committee Report).

56 Bribery Act Guidance, note 27 above, ¶ 23.

57 See Joint Committee Report, note 55 above, ¶ 147.

58 Gibson, Dunn & Crutcher LLP, *UK Serious Fraud Office Director Alderman Visits Again with Gibson Dunn, Discusses Bribery Act Enforcement and Lays Out Engagement Strategy*, 11 January 2011, at 1, available at **www.gibsondunn.com/publications/Documents/SFODirectorAldermanVisitsAgainWithGibsonDunn-DiscussesBriberyActEnforcement.pdf** (hereinafter *SFO Visits Again with GDC*) ('In an important clarification, [Director Alderman] explained that "sensible [and proportionate] promotional entertaining expenditure is not an offense under the Act." He explained that an offense is committed "when hospitality is done so that people will be induced to act in a certain way – when the expenditure is beyond what is sensible and proportionate".' (emphasis added)).

59 Bribery Act Guidance, note 27 above, ¶¶ 26–32.

Improper conduct

The FCPA prohibits the offer, promise, provision or authorisation of the payment of money or anything of value. Therefore, even if the offer or promise is rejected, or payment is otherwise left unconsummated, the FCPA may still be breached. Furthermore, the form of payment is not limited to tangible items of economic value, but encompasses anything tangible or intangible that the recipient would find useful or valuable, including gifts, internships,[60] education,[61] personal favours,[62] meals and travel assistance.[63]

The conduct addressed by section 6 of the Bribery Act is similar to that of the FCPA's anti-bribery provisions. The specific conduct prohibited by the offence of bribing a foreign public official involves the offering, promising or giving of bribes. Although the Bribery Act criminalises the offer, promise or provision of some financial or other type of advantage, but unlike the FCPA does not expressly foreclose the *authorisation* of the provision of that advantage, the Bribery Act does criminalise the 'consent or connivance' of a 'senior officer' of a corporation with regard to the company's violation of section 6 (or sections 1 or 2).[64] The Bribery Act does not define the term 'financial or other advantage'. The Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions ('Joint Prosecution Guidance') states that 'advantage' should be understood to have its normal, everyday meaning, which should be left, as a matter of common sense, to the tribunal of fact.[65]

Foreign government official

'[F]oreign official' is defined under the FCPA as: 'any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department,

60 Deferred Prosecution Agreement at Attachment A § II(B), *United States v DaimlerChrysler China Ltd*, Docket No 10-cr-00066 (DDC 24 Mar 2010), available at **www.justice.gov/criminal/fraud/fcpa/cases/daimlerchrysler-china.html**.

61 Lucent Techs, Inc Non-Prosecution Agreement with DOJ, Appendix A, ¶ 20 (14 Nov 2007), available at **www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech.html**.

62 *Ibid*.

63 Information, at ¶¶ 12, 16, *United States v ABB Vetco Gray, Inc* (SD Tex 22 June 2004) (No 04-cr-00279), available at **www.justice.gov/criminal/fraud/fcpa/cases/abb/06-22-04abbvetco-info.pdf**.

64 Bribery Act 2010, c 23, s 14(2).

65 Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions 5 (30 Mar 2011), available at **www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf** (hereinafter Joint Prosecution Guidance).

agency or instrumentality, or for or on behalf of any such public international organization.'[66] An 'instrumentality' of a foreign government has been interpreted by the US Government to include government-owned or -controlled businesses and enterprises, whether wholly or partially owned by the government (also known as 'state-owned enterprises' or 'SOEs').[67] This interpretation is particularly important when companies conduct business in countries such as China, where state-owned enterprises are ubiquitous.[68] It means that every single employee of an SOE may be considered a 'foreign official' for the purposes of the FCPA.

The Bribery Act's definition of 'foreign public official' is similar to that for 'foreign official' in the text of the FCPA. A foreign public official under the Bribery Act is anyone:

1. who holds any kind of legislative, administrative or judicial position of a country or territory outside the United Kingdom;
2. who exercises a public function on behalf of a country or territory outside the United Kingdom or for any public agency or enterprise of that country/territory; or
3. who is an official or agent of a public international organisation.[69]

In fact, both the FCPA and the Bribery Act track the definition of foreign public official found in the OECD Convention.[70]

But while various FCPA enforcement actions have expanded the definition of 'foreign official' to encompass employees of state-owned commercial enterprises, the Bribery Act 2010 – Guidance ('Bribery Act Guidance') published by the UK Ministry of Justice goes only so far as to indicate that 'foreign public official' extends to 'officers exercising public functions in state-owned enterprises',[71] with no mention of the employees of such institutions. It remains to be seen whether the SFO will stretch the meaning of 'foreign public official', as the SEC and DOJ have for 'foreign official'.

---

66 FCPA, 15 USC §§ 78dd-1(f)(1), 78dd-2(h)(2),78dd-3(f)(2) (1998).

67 See, eg, In re Schnitzer Steel Indus, Inc, Order Instituting Cease-and-Desist Proceedings, Exchange Act Release No 54,606, 89 SEC Docket 302 (16 Oct 2006), available at **www.sec.gov/litigation/admin/2006/34-54606.pdf** (scrap metal managers at government-controlled steel mills were considered 'foreign officials').

68 See F Joseph Warin, Michael S Diamant and Jill M Pfenning, 'FCPA Compliance in China and the Gifts and Hospitality Challenge' (2010) 5 Va L & Bus Rev 33, 45 ('[T]he Chinese government is thought to own more than 70% of the country's productive wealth, and it is the majority shareholder of 31% of publicly listed companies.').

69 Bribery Act 2010, c 23, s 6(5).

70 See OECD Convention, note 2 above, 7 (stating the definition of a foreign public official); see also Bribery Act 2010, Explanatory Notes, ¶ 36, available at **www.legislation.gov.uk/ukpga/2010/23/notes/contents** (explaining the similarities between the definitions in the Bribery Act and OECD Convention).

71 Bribery Act Guidance, note 27 above, ¶ 22.

It seems unlikely, as the SFO also has section 1 of the Bribery Act as a tool to prosecute commercial bribery. Indeed, the Joint Prosecution Guidance indicates that the bribery of foreign public officials may be prosecuted under section 1 of the Bribery Act in appropriate circumstances; for example, where it is difficult to prove that the person bribed is a foreign public official.[72] The absence of a corrupt or improper intent requirement under section 6, however, could at some point make answering this question something other than an academic exercise.[73]

The Bribery Act also defines 'public international organisation' more broadly than does the FCPA. A public international organisation under the FCPA is:

1. an organisation that is designated by executive order pursuant to section 1 of the International Organizations Immunities Act (22 USC § 288); or
2. 'any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.'[74]

Only 83 organisations are designated as public international organisations by executive order.[75] The Bribery Act, on the other hand, defines 'public international organisation' as one whose members consist of countries or territories (or governments thereof), other public international organisations, or a mixture of any of the foregoing.[76]

Bribe's purpose

The FCPA requires that the corrupt payment be made for the purpose of obtaining or retaining business, but the business need not be with a foreign government to satisfy this requirement.[77] US courts and the DOJ interpret the phrase 'obtaining or retaining business' broadly, such that the term

---

72 Joint Prosecution Guidance, note 65 above, 8.

73 See F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 18–19, 26. Whether bribes paid to employees of state-owned enterprises are charged under s 6 or under the s 1 commercial bribery provision has serious implications for the provision of business courtesies to such employees because the enforcement of s 1 is limited to those instances where some duty of the bribe recipient is violated – an inquiry that the Ministry of Justice purposely excluded from the s 6 inquiry.

74 FCPA, 15 USC §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(A) (1998).

75 See 22 USCA § 288 (1945) (noting executive orders designating 81 public international organisations entitled to enjoy the privileges, exemptions and immunities conferred by 22 USC § 288 et seq); Exec Order No 13,259, 67 Fed Reg 13,239 (19 Mar 2002) (announcing two additional public international organisation designations).

76 Bribery Act 2010, c 23, s 6(6).

77 Lay Person's Guide, note 40 above, 4.

encompasses more than the mere award or renewal of a contract.[78] This might include: winning a bid; obtaining new or retaining existing business; reaching an agreement or signing a contract; receiving, reviewing or amending a licence or lease; reducing taxes or other financial liabilities; or obtaining confidential information.[79] As such, the facially broader requirement of section 6 of the Bribery Act – that a payer's bribe be for the purpose of 'obtaining or retaining business, *or* an advantage in the conduct of business'[80] – is likely to be largely consistent with how the FCPA is applied in practice.

Third parties

Both the FCPA and the Bribery Act prohibit payments made to third parties with knowledge that some portion of the payment will go to a foreign government official. Third parties may include, but are not limited to, joint venture partners, agents, intermediaries, suppliers and contractors.

The FCPA prohibits giving anything of value to a third party while knowing that all or a portion of that thing of value will be given to a foreign official for an improper purpose.[81] Therefore, a company may not escape liability by arguing that it was not aware that another party to whom it made payments would ultimately make all or part of the payment to a foreign official. This sort of 'head-in-the-sand' or wilful blindness defence will not work for the FCPA.[82] The law defines the term 'knowing' as either:

1. being aware of such conduct or substantially certain that such conduct will occur; or
2. consciously disregarding a 'high probability' that a corrupt payment or offer will be made.[83] As such, a person or company may be held liable for the actions of third parties, regardless of whether that third party is itself subject to the FCPA. This standard presents significant challenges for

---

78 *Ibid* 4; *United States v Kay*, 359 F 3d 738, 755 (5th Cir 2004) (holding 'that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person').

79 F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 12.

80 Bribery Act 2010, c 23, s 6(2) (emphasis added).

81 FCPA, 15 USC §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (1998); Lay Person's Guide, note 40 above, 4.

82 See F Joseph Warin, Michael S Diamant and Matthew P Hampton, 'Use of "Conscious Avoidance" Doctrine in Frederic Bourke Conviction Expands Corporate Executives' FCPA Exposure', Securities Docket (22 July 2009), available at **www.securitiesdocket.com/2009/07/22/guest-column-use-of-conscious-avoidance-doctrine-in-frederic-bourke-conviction-expands-corporate-executives-fcpa-exposure**.

83 FCPA, 15 USC §§ 78dd-1(f)(2), 78dd-2(h)(3), 78dd-3(f)(3) (1998).

> companies that must do business in foreign countries through local agents with whom it has little contact and over whom it has limited control.[84]

The Bribery Act also prohibits payments made to foreign officials either directly or through a third party. It does not, however, offer any guidance as to what is meant by 'through a third party'.[85] As a result, it is unclear, barring any guidance or precedential enforcement activity, what standard of knowledge will lead to liability for those who indirectly violate the Bribery Act through a third party.

Here, however, section 7 will ultimately render such discussions moot, at least for corporate offenders. Such entities falling under the defined category of a 'commercial organisation' are strictly liable under the Bribery Act for the acts of third parties. In fact, as discussed below, section 7 is devoted in its entirety to a corporation's liability for the acts of 'associated' persons.[86] Specifically, a 'relevant commercial organisation' is guilty of an offence under section 7 if 'a person associated' with the organisation bribes another – including a foreign official – with the intent to obtain or retain business for the organisation or to obtain or retain an advantage for the organisation in the conduct of its business.[87] An 'associated person' is defined under section 8 as 'a person who performs services for or on behalf of' a corporation.[88] Whether a person performs such services for or on behalf of a corporation depends on 'all the relevant circumstances', not merely the formal nature of the relationship between the parties.[89] Therefore, an associated person may be the corporation's employee, agent or subsidiary, or other third party performing some service for the organisation.

Exceptions and affirmative defences

The FCPA contains one exception and two affirmative defences in which conduct otherwise prohibited under the law does not constitute a punishable offence. While the Bribery Act contains no direct analogues, the Bribery Act Guidance clarifies the UK Government's corresponding positions on these issues.

---

84 See F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 12.

85 Bribery Act 2010, c 23, s 6(3).

86 *Ibid* s 7.

87 *Ibid* s 7(1).

88 *Ibid* s 8(1).

89 *Ibid* s 8(4).

Exception – facilitating payments

Facilitation (or facilitating) payments are generally described as payments that either secure or expedite the performance of a routine governmental action.[90] The OECD recommends that member countries discourage the use of small facilitation payments, recognising their general illegality and corrosive effect on 'sustainable economic development' and the rule of law.[91] While the United States continues to except facilitation payments from the scope of the FCPA, the Bribery Act considers such payments to be bribes, which are strictly prohibited.[92] This has been a particularly controversial aspect of the Bribery Act and the subject of much debate leading up to the July 2011 implementation of the Bribery Act.[93]

The FCPA does not prohibit 'facilitating or expediting payment[s]' made to a foreign official where the purpose of such payment is to 'expedite or to secure the performance of a routine governmental action' by that official.[94] It further defines a 'routine governmental action' as an action ordinarily and commonly performed by a foreign official in:

1. obtaining permits, licences or other official documents qualifying a person or entity to do business in a foreign country;
2. processing governmental papers; and
3. obtaining certain governmental services, such as power and water, police protection, phone service and mail collection.[95]

These facilitating payments are to be viewed as 'essentially ministerial' payments that 'merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action'.[96]

---

90 See Bribery Act Guidance, note 27 above, ¶ 44; FCPA, 15 USC §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998).

91 OECD Convention, note 2 above, 22.

92 Joint Committee Report, note 55 above, ¶ 130.

93 See, eg, Richard Tyler, 'FTSE 100 Seeks Guidance on "Minor Bribes" Prosecution', The Telegraph (22 Sept 2010), available at **http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/8016817/FTSE-100-seeks-guidance-on-minor-bribes-prosecution.html**; 'When a Bribe is Merely Facilitating Business', The Economist Blog (11 Jun 2011, 11:27am), available at **www.economist.com/blogs/blighty/ 2011/06/anti-bribery-laws**.

94 FCPA, 15 USC §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998); see also HR Rep No 95-640, at 7 (1977) (Congress observed that although 'payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States… they are not necessarily so viewed elsewhere in the world and… it is not feasible for the United States to attempt unilaterally to eradicate all such payments.').

95 FCPA, 15 USC §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4) (1998).

96 HR Rep No 95-640, at 7 (1977); *United States v Kay*, 359 F 3d 738, 749, 750–51, and n 40 (5th Cir 2004) (emphasising that the facilitating payments exception is narrow and that 'routine governmental action' should only be interpreted to include 'very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level foreign functionaries.').

The United States has been criticised by some for exempting facilitation payments from the ambit of the FCPA. The OECD Recommendation, along with growing criticism from the global community, has placed increasing pressure on US enforcement authorities to adopt a narrow view of the scope of the facilitating payments exception – pressure that the United States may be responding to by narrowing the practical reach of the statutory exception.[97] Indeed, it has become difficult to predict where the US authorities will draw the line between permissible facilitating payments and payments that involve discretionary action by a foreign government official. For example, in the 2008 prosecution of the Westinghouse Air Brake Technologies Corporation, some of the payments classified as 'improper' by the DOJ were payments 'to schedule pre-shipping product inspections' and 'to obtain issuance of product delivery certificates',[98] even though the payments appeared to be textbook examples of facilitating or expediting payments.[99] More than one commentator has noted that the FCPA's facilitating payment exception appears to be 'vanishing'[100] or 'illusory'.[101]

By contrast, a facilitating payment is an impermissible bribe without exception under the UK Bribery Act.[102] In its Bribery Act Guidance, the Ministry of Justice re-emphasised that such payments are illegal.[103] In practice, however, UK authorities may not actually base many prosecutions on facilitation payments. The Joint Prosecution Guidance, echoing earlier

---

97 David M Howard and Elisa T Wiygul, FCPA Compliance: The Vanishing 'Facilitating Payments' Exception?, Apr 2010, **www.dechert.com/library/4-7-10-WCSL-Howard_and_Wiygul-FCPA_Compliance-The_Vanishing_Facilitating_Payments_Exception.pdf**.

98 Press Release, Dep't of Justice, Westinghouse Air Brake Technologies Corporation Agrees To Pay $300,000 Penalty To Resolve Foreign Bribery Violations in India (14 Feb 2008), **www.justice. gov/opa/pr/2008/February/08_crm_116.html**.

99 See F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 13–14; see also In re Helmerich & Payne, Inc, Administrative Proceeding File No 3-13565, at 2, 3 (30 July 2009) (despite the fact that some of the payments were paid to 'avoid[] potential delays typically associated with the international transport of drilling parts', and 'to expedite the importation of equipment and materials', Helmerich & Payne entered into a non-prosecution agreement with the DOJ and agreed to pay a $1 million fine).

100 See, eg, David M Howard and Elisa T Wiygul, FCPA Compliance: The Vanishing 'Facilitating Payments' Exception?, Apr 2010, **www.dechert.com/library/4-7-10-WCSL-Howard_and_Wiygul-FCPA_ Compliance-The_Vanishing_Facilitating_Payments_Exception.pdf**.

101 See, eg, Richard W Grime and Sara S Zdeb, The Illusory Facilitating Payments Exception: Risks Posed By Ongoing FCPA Enforcement Actions and the UK Bribery Act, available at **http://seclawcenter.pli.edu/wp-content/uploads/2011/05/Grime-Risks-Posed-by-Ongoing-FCPA.pdf**.

102 Joint Committee Report, note 55 above, ¶ 130.

103 Bribery Act Guidance, note 27 above, ¶ 45.

statements by the SFO,[104] allows that prosecution is unlikely for offences involving small facilitation payments.[105] Still, the SFO has indicated that while it is unlikely to prosecute isolated, low-value facilitating payments, it still expects companies to adopt a 'zero-tolerance' policy towards such expenditures, and US companies should be aware that allowing facilitation payments, or not otherwise prohibiting them, may undermine efforts to establish 'adequate procedures' as an affirmative defence to strict corporate liability under section 7 of the Bribery Act, discussed below.[106]

The Joint Prosecution Guidance provides a variety of factors that tend in favour of and against prosecution for facilitation payments. The factors tending in favour of prosecution include:

1. large or repeated payments;
2. planned payments or payments accepted as part of a standard way of conducting business, which may indicate that the offence was premeditated; and
3. payments in breach of clear and appropriate company policies on facilitation payments.

The factors tending against prosecution include:

1. payments that are small and likely to result in only a nominal penalty;
2. payments coming to light as a result of a genuinely proactive approach involving self-reporting and remedial action;
3. the company has a clear and appropriate policy articulating the procedures an individual should follow if facilitation payments are requested, and these procedures have been correctly followed; and
4. the payer was in a vulnerable position arising from the circumstances in which the payment was demanded.[107]

---

104 See Memorandum submitted by the Serious Fraud Office (June 2009), available at **www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/memo/430/ucm1402.htm** ('Facilitation payments will be unlawful… [but] small facilitation payments are unlikely to concern the SFO unless they are part of a larger pattern (when, by definition, they would no longer be facilitation payments).').

105 See Joint Prosecution Guidance, note 65 above, 8–9.

106 Gibson, Dunn & Crutcher LLP, UK Serious Fraud Office Discusses Details of UK Bribery Act with Gibson Dunn, 7 Sept 2010, available at **http://gibsondunn.com/publications/Pages/UKSeriousFraudOfficeDiscussion-RecentlyEnactedUKBriberyAct.aspx** (hereinafter SFO Discusses Bribery Act with GDC) ('The Staff stated that the SFO does not approve of any company that does not adopt a "zero-tolerance" policy regarding facilitation payments. They stated that the SFO will view a company's policies, if they allow for facilitation payments, as not constituting "adequate procedures" even if the company allows such payments because it is predominantly a US-based company.').

107 See Joint Prosecution Guidance, note 65 above, 9.

This last factor may be highly significant in practice, especially with respect to payments made to secure an essential governmental service that is being denied until a bribe is paid.

Given that US law enforcement officials have shown a tendency to 'over-enforce' and UK enforcement officials have indicated a willingness to under-enforce in this area, it appears that in practice, the two countries' enforcement approaches to facilitation payments may not be all that far off after all. Still, as a matter of best practice, because US companies may become liable under the Bribery Act for the actions of associated persons in the UK, and because not doing so may prevent a finding of adequate corporate procedures, strictly prohibiting facilitation payments is likely to be the best corporate practice.

Affirmative defences

Lawful payments under written laws. Both the FCPA and the Bribery Act provide for a limited defence where a payment was lawful under the written laws of the recipient's country. Under the FCPA, no violation occurs if the written law governing an official's conduct requires or permits him to be influenced by the offer, promise or gift.[108] This defence, however, is a very narrow one; it only applies in cases in which the written laws of the official's country *expressly* allow the payment.[109] It would not, for example, extend to payments permissible merely because local law remains silent about their legality. The DOJ recommends that companies wishing to rely on written local law to justify otherwise impermissible payments seek the advice of counsel or utilise the DOJ's Opinion Procedure.[110]

The Bribery Act, like the FCPA, does not criminalise conduct that is permitted under the written laws applicable to the foreign public official.[111] The written law applicable to the foreign public official is the law of the part of the United Kingdom where the performance of the functions a person intends to influence would be subject; the applicable written rules of a public international organisation, if the official is an agent of such; or the written laws (legislative or judicial) of the country or territory in relation to which the official is a foreign public official.[112]

Reasonable and bona fide expenditures. The FCPA expressly provides an affirmative defence for a payment to a foreign official that is for 'reasonable

108 FCPA, 15 USC §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1998).
109 *Ibid.*
110 Lay Person's Guide, note 40 above, 5.
111 Bribery Act 2010, c 23, s 6(3)(b).
112 *Ibid* s 6(7).

and bona fide expenditure[s], such as travel and lodging expenses', incurred in relation to the promotion, explanation or demonstration of the payer's products and services, or the execution or performance of a contract between the payer and the foreign official's employer.[113]

When considering whether something qualifies as a 'reasonable and bona fide' expenditure under the FCPA, one should look at its nature and the circumstances surrounding its provision. Legitimate expenditures may include paying travel and meal expenses for government officials to tour a company's facilities or sponsoring government officials' attendance at company training programmes.[114] But companies must exercise caution if they have non-routine business pending before the officials, a particular trip includes excessive leisure time or other non-business-related activities or the officials have requested the expenditure.[115]

Because section 6 of the Bribery Act does not contain a 'corrupt intent' or 'improper purpose' requirement, or the FCPA's affirmative defence for reasonable and bona fide promotional expenditures, the provision of business courtesies in the form of gifts, entertainment and travel appears to violate the statute on its face. In the Bribery Act Guidance, however, the Ministry of Justice stated that 'it is not the intention of the Act' to criminalise '[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organization, better to present products and services, or establish cordial relations'.[116] Instead, the Bribery Act Guidance makes clear that reasonable and proportionate hospitality and promotional expenditures *are* in fact permitted.

In making this clarification, the Ministry emphasised that the focus is whether there is a 'sufficient connection between the advantage and the

---

113 FCPA, 15 USC §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (1998).

114 See, eg, DOJ Opinion Procedure Release, No 08-03 (11 Jul 2008), at 3, available at **www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf**; DOJ Opinion Procedure Release, No 07-01 (24 Jul 2007), at 2, available at **www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf**; DOJ Opinion Procedure Release, No 07-02 (11 Sept 2007), at 2, available at **www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf**; DOJ Opinion Procedure Release, No 04-04 (13 Sept 2004), at 2, available at **www.justice.gov/criminal/fraud/fcpa/opinion/2004/0404.pdf**; DOJ Opinion Procedure Release, No 04-03 (14 Jun 2004), at 1, available at **www.justice.gov/criminal/fraud/fcpa/opinion/2004/0403.pdf**.

115 See, eg, DOJ Press Release, Lucent Technologies Inc Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (21 Dec 2007), available at **www.justice.gov/opa/pr/2007/December/07_crm_1028.html** (holding Lucent liable for spending 'millions of dollars on approximately 315 trips for Chinese government officials that included primarily sightseeing, entertainment and leisure').

116 Bribery Act Guidance, note 27 above, ¶ 26; see also Joint Prosecution Guidance, note 65 above, 10.

intention to influence'.[117] This will depend on either direct evidence, if available, or the totality of the evidence, taking into account all of the surrounding circumstances.[118] The Ministry explained that factors to consider include, inter alia, the type and level of advantage offered, the manner and form it is provided, the level of influence of the particular foreign government official in awarding business, the lavishness of the hospitality[119] and the standards or norms of hospitality or promotional expenditures.[120] For example, 'reasonable hospitality' in the form of football tickets and fine dining, arising out of a necessary trip for foreign officials to inspect a company's products or services, is 'unlikely to raise the necessary inferences'.[121] The same reasonable hospitality might be judged differently if the evidence showed that the trip was unnecessary because the officials could have inspected the products in their home country.

Because section 6 of the Bribery Act was drafted to omit an improper purpose or corruptly element, the Ministry must rely on this 'sufficient connection' test. But clearly, its analysis will be one of *reasonableness*. After all, to an extent, *all* business courtesies are provided with an intention to influence the recipient in order to obtain or retain business or a business advantage. For example, a highly effective plant tour could be designed to influence and do so with great success. This is not what the UK Government wants to prohibit. As reasonableness is a relatively flexible concept, it may remain unclear for some time – outside the Bribery Act Guidance's helpful hypotheticals – how this 'intention to influence' standard will truly play out in practice.

Additional offences under the FCPA and the Bribery Act

In addition to the offence of bribing a foreign official, the Bribery Act features:

1. the offence of bribing another person;
2. the offence of being bribed; and
3. the organisational offence of failing to prevent bribery.

117 Bribery Act Guidance, note 27 above, ¶ 28.

118 *Ibid.*

119 Letter from Lord Tunnicliffe, Minister in the Government Whips Office, Government Spokesperson for the Ministry of Justice, to Lord Henley (14 Jan 2010), available at **www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf** ('We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalize expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes.').

120 Bribery Act Guidance, note 27 above, ¶ 29.

121 See *Ibid* ¶ 31.

Section 1: bribing another person

Unlike the FCPA, the Bribery Act extends its reach to bribes made in the private sector, both domestically and abroad. A person is guilty of bribing another person if he, directly or through a third party, offers, promises or provides a financial advantage (or any other advantage) to another person under circumstances that reward or give rise to the improper performance of a relevant function or activity.[122] Unlike with a section 6 violation of bribing a public official, the financial advantage must induce the person to perform a relevant function or activity *improperly* or reward the person for such improper performance, or the payer must know or believe that accepting the advantage would itself constitute improper performance of the relevant function or activity.[123] Though no court has ever interpreted this provision, it appears that this section's reference to 'improper' performance mirrors the FCPA's 'corruptly' element, by requiring some level of impropriety (eg violating a duty to one's employer or in some way abusing a position of trust).

There is a subjective and objective test for determining what is meant by 'improper performance'.[124] The subjective test goes to the defendant's state of mind in intending the advantage to induce a person to perform a relevant function improperly. But whether the person being bribed has done something improper also turns on whether his performance or non-performance is a breach of a relevant expectation. A relevant expectation broadly covers any activity connected to a business, public function or one's employment that he is expected to perform in good faith, impartially or otherwise involving a position of trust.[125] Whether or not that relevant expectation is breached 'is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function of activity concerned'.[126] Thus, where the performance of a function occurs in another country, local customs or practices are to be disregarded, unless codified in local written law that permits or requires the payment at issue.[127]

Section 2: being bribed

Section 2 extends the reach of the Bribery Act to both sides of a corrupt transaction and, in this way, differs fundamentally from the FCPA. A person is guilty of the offence of being bribed if:

122 Bribery Act 2010, c 23, s 1.
123 *Ibid* ss 1(2)–(3).
124 Peter Burrell, 'Anti-Corruption e-Bulletin: The Bribery Act Part 1: Commentary on the New Offences' (2010) 1883 PLI/Corp 301, 303–04.
125 Bribery Act 2010, c 23, ss 3(1)–(3).
126 *Ibid* s 5(1).
127 *Ibid* s 5(2).

1. he agrees to receive or accept an advantage, intending that he or another person improperly perform some relevant function;
2. he requests, agrees or accepts an advantage that itself constitutes improper performance of a relevant function;
3. requests, agrees or accepts an advantage as a reward for his or another's improper performance of a relevant function; or
4. he or another improperly performs a relevant function in anticipation of his request, agreement or receipt of an advantage.[128]

Other than in the first case, a person is guilty even if he does not know that this performance is improper.[129] The Joint Committee justified this approach by explaining that it would be 'an important part of changing the culture in which taking a bribe is viewed as acceptable'.[130] Similar to the first Bribery Act offence, this second offence applies broadly to encompass private commercial conduct.

The Code for Crown Prosecutors[131] sets out a number of factors tending for and against prosecution, which the Joint Prosecution Guidance highlights with respect to both sections 1 and 2 of the Bribery Act.[132] Situations that tend in favour of prosecution include:

1. a conviction for bribery is likely to attract a significant sentence;
2. offences will often be premeditated and may include an element of corruption of the person bribed;
3. offences may be committed in order to facilitate more serious offending; and
4. those involved in bribery may be in positions of authority or trust and take advantage of that position.

On the other hand, factors that tend against prosecution include situations where:

1. the court is likely to impose only a nominal penalty;
2. the harm can be described as minor and was the result of a single incident; and
3. there has been a genuinely proactive approach involving self-reporting and remedial action.[133]

---

128 *Ibid* s 2.

129 *Ibid* s 2(7).

130 Joint Committee Report, note 55 above, ¶ 46.

131 The Code for Crown Prosecutors (Feb 2010), available at **www.cps.gov.uk/publications/docs/code2010english.pdf**.

132 Joint Prosecution Guidance, note 65 above, 7–8.

133 *Ibid* 7.

Section 7: failure of a commercial organisation to prevent bribery

The Bribery Act imposes strict liability on corporations that fail to prevent bribery by a person associated with the organisation.[134] This fourth offence poses the most serious risks and challenges for multinational companies' anti-bribery compliance efforts.

The jurisdictional breadth of section 7, for starters, is wide-reaching; it includes all bodies corporate or partnerships carrying on business anywhere, but incorporated under the law of any part of the United Kingdom; and any bodies corporate or partnerships carrying on a business or part of a business in any part of the United Kingdom.[135] The inclusion of all bodies corporate carrying on a business in any part of the United Kingdom may sweep into the Bribery Act's purview virtually all major multinational corporations, as the vast majority conduct some business in the United Kingdom.[136] Still, the Bribery Act Guidance makes clear that the SFO will apply a common-sense approach to the interpretation of the phrase 'carrying on a business', such that, by way of example, a company merely listing securities on the London Stock Exchange or having a UK subsidiary does not by itself qualify as a company carrying on a business in the United Kingdom.[137]

In spite of the examples in the Bribery Act Guidance, the jurisdictional nuances of section 7 remain shrouded in mystery. Although it is helpful to know that mere ownership of a UK subsidiary is insufficient to subject a parent corporation to liability, a corporation will still not know its exposure if it holds, for instance, more than a purely passive interest in its London subsidiary. Likewise, assuming liability does extend to the parent organisation, it is unclear how far down the corporate chain to various subsidiaries strict corporate liability for failing to prevent bribery could travel. On this count, the Bribery Act Guidance provides that 'a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries'.[138] Again, determining what could constitute a business advantage for a parent company or another subsidiary leaves great room for subjectivity.

---

134 Bribery Act 2010, c 23, s 7.

135 *Ibid* s 7(5).

136 See F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 28.

137 Bribery Act Guidance, note 27 above, ¶ 36.

138 *Ibid*, ¶ 42.

Clarifying the terms of section 7, section 8 of the Bribery Act defines an 'associated' person as simply any person or entity that 'performs services for or on behalf of' the organisation, including, for example, employees, agents and subsidiaries.[139] Suggesting that the United Kingdom intends to interpret the term broadly, the Bribery Act clarifies that '[t]he capacity in which [the associated person] performs services for or on behalf of [the company] does not matter', and it warns that whether an individual or entity is an associated person 'is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship' between the company and the associated person.[140] By way of example, the Bribery Act Guidance explains that a joint venture entity does not become 'associated' with any of its members simply by virtue of benefiting indirectly from the bribe through its investment in or ownership of the joint venture.[141] On the other hand, where a joint venture is conducted through a contractual arrangement, the degree of control that a participant has over the arrangement might be a 'relevant circumstance' that will be considered in deciding whether a person who paid a bribe in the conduct of the joint venture business was in fact 'performing services for or on behalf of' a participant in the joint venture arrangement.[142]

The associated person 'bribes' another person, thus making the commercial organisation liable under section 7, if he is or would be guilty of an offence under section 1 or 6 of the Bribery Act, except that the person need not have a close connection with the United Kingdom.[143] The associated person, assuming a close connection, also need not actually be prosecuted before the corporation could itself become liable,[144] but there needs to be sufficient evidence to prove the commission of the offence to the 'normal criminal standard'.[145] Thus, a section 7 offence is not a substantive bribery offence. It is not a vicarious liability offence and does not replace or remove a company from liability for direct corporate bribery.[146] For example, if a person representing a corporation in a managerial capacity bribes someone, a corporation could potentially be charged with (1) a section 1 or 6 offence (depending, of course, on the identity of the recipient); (2) a section 7 offence standing alone; or (3) both.[147]

---

139 Bribery Act 2010, c 23, ss 8(1), 8(3).
140 *Ibid* ss 8(2), 8(4).
141 Bribery Act Guidance, note 27 above, ¶ 40.
142 *Ibid* ¶ 41.
143 Joint Prosecution Guidance, note 65 above, 10.
144 Bribery Act 2010, c 23, s 7(3)(a).
145 Joint Prosecution Guidance, note 65 above, 10.
146 *Ibid*, 11.
147 See *Ibid*.

This strict liability offence is responsible for much of the fear and consternation about the Bribery Act expressed by corporations around the world. In one respect, however, the Bribery Act is more lenient than the FCPA, which, while providing mitigation to penalties, does not furnish companies that adhere to strong anti-bribery compliance programmes with a complete defence.[148] By contrast, the Bribery Act provides such a defence. If an 'associated person' pays a bribe for the benefit of the company, a defence to criminal liability for a commercial organisation is to prove that the company had in place 'adequate procedures' designed to prevent associated persons from committing the conduct at issue.[149] The standard of proof required to prove that a commercial organisation had adequate procedures in place is a balance of probabilities,[150] which is closely equivalent to the US civil standard of the preponderance of the evidence.[151] The adequacy of procedures would be judged by the courts on a case-by-case basis.[152]

Because of the wide-reaching jurisdiction of section 7, adequate procedures compliant with UK law may be required by any organisation with a presence in the UK with respect to its worldwide operations.

FCPA's accounting provisions

Though the Bribery Act lacks any affirmative obligations regarding corporate accounting, existing UK law and the practical effect of the Bribery Act may provide a relatively close analogue to the FCPA's accounting provisions.

Books-and-records provision

The FCPA requires SEC registrants to 'make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect transactions and dispositions of the assets of the issuer', consistent with Generally Accepted Accounting Principles ('GAAP').[153] The SEC takes the position that a bribe must be described in the company's books and records as a 'bribe', not a

148 Ivonne Mena King et al, 'UK Bribery Act: Raising the Bar for Anti-Corruption Programs' (2011) 1883 PLI/Corp 351, 359 (noting that there are many critics that view the absence of a complete compliance defence as a defect of the FCPA).

149 Bribery Act 2010, c 23, s 7(2).

150 Bribery Act Guidance, note 27 above, ¶ 33.

151 F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 36.

152 Joint Prosecution Guidance, note 65 above, at 11.

153 FCPA, 15 USC § 78m(b)(2)(A) (1998).

payment, commission or 'slush fund'.[154] In this clever legal architecture, the failure to characterise improper payments accurately may compound one's liability, as corporate offenders rarely characterise improper payments correctly. If they happen to, thereby possibly foreclosing prosecution under the books-and-record provision, an anti-bribery prosecution is that much easier.

The Bribery Act lacks an accounting provision; this may be because the UK Companies Act of 2006 already imposes requirements similar to the FCPA's books-and-records provision.[155] In particular, it requires companies to keep records sufficient to show and explain their transactions, to disclose with reasonable accuracy the financial position of the company at any time and to enable the directors of the company to ensure that any accounts required to be prepared under UK law comply with the requirements of the UK Companies Act.[156]

Internal controls provision

The FCPA also requires SEC registrants to implement and maintain a system of internal accounting controls that 'provide reasonable assurances' that:

1. 'transactions are executed in accordance with management's general or specific authorisation';
2. the recordation of transactions allows for compliance with generally accepted accounting principles, and the company maintains accountability for assets;
3. 'access to assets is permitted only in accordance with management's general or specific authorisation'; and
4. 'the recorded accountability for assets is compared with the existing assets at reasonable intervals.'[157]

Though it does not contain an explicit provision directing companies to implement internal controls for the prevention of bribery, the stringency of section 7 makes the invocation of the Bribery Act's 'adequate procedures' defence[158] a near necessity for multinational corporations carrying on some level of business in the United Kingdom. Reliance on this defence will have the practical effect of causing companies to devise and maintain adequate internal controls – at least with regard to anti-corruption compliance – which the FCPA's internal controls provision already affirmatively requires SEC registrants to have, as part of its broader mandate.

154 See, eg, Complaint paras 32-33, *SEC v IBM Corp*, No 11-cv-00563 (D DC 2011), available at **www.sec.gov/litigation/complaints/2011/comp21889.pdf**; Complaint paras 21, 24, 27, *SEC v Akzo Nobel NV*, No 07-cv-02293 (D DC 2007), available at **www.sec.gov/litigation/complaints /2007/comp20410.pdf**.

155 Companies Act 2006, c1, s 380 et seq (UK); FCPA, 15 USC § 78m(b) (1998).

156 See generally Companies Act 2006 (UK).

157 FCPA, 15 USC § 78m(b)(2)(B) (1998).

158 Bribery Act 2010, c 23, s 7.

Penalties

The FCPA provides for both civil penalties, imposed by the SEC (and in some instances, DOJ), and criminal penalties, imposed exclusively by the DOJ.[159] Different penalties apply depending on whether the defendant is an individual or a corporation. In a criminal conviction, individuals who violate the statute's anti-bribery provision may face up to five years' imprisonment and a $250,000 fine, or a fine totalling twice the pecuniary gain or loss resulting from the bribe at issue.[160] Corporations face much steeper penalties, with fines ranging up to $2 million or twice the pecuniary gain or loss resulting from the bribe.[161] Criminal violations of the accounting provisions of the FCPA, on the other hand, yield even greater penalties. Individuals who violate these provisions face up to $5 million in fines and up to five years' imprisonment.[162] Corporations may be fined as much as $25 million for criminal violations of the same provisions.[163] Both individuals and business entities are subject to civil penalties consisting of fines and injunctions.[164] And these statutorily provided penalties may only represent a fraction of the losses suffered by an entity facing an FCPA prosecution, as most will encounter a number of collateral consequences.[165]

By contrast, all penalties resulting from violations of the Bribery Act are considered criminal in nature, as the Bribery Act does not provide for civil enforcement.[166] Under the Bribery Act, however, one can be punished under either a less severe 'summary conviction' (essentially equivalent to a misdemeanour under US criminal law)[167] or an 'indictment conviction', for

159 Lay Person's Guide, note 40 above, 5.

160 FCPA, 15 USC § 78dd-2(g)(2) (1998); 18 USC § 3571(b)(3) (1998); 18 USC § 3571(d) (1998) ('If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.').

161 *Ibid* § 78dd-2(g)(1) (1998); 18 USC § 3571(b)(3), (d) (1998).

162 *Ibid* § 78dd-2(g)(1) (1998); 18 USC § 3571(b)(3), (d) (1998); FCPA, 15 USC § 78ff(a) (1998).

163 *Ibid* § 78dd-2(g)(1) (1998); 18 USC § 3571(b)(3), (d) (1998); FCPA, 15 USC § 78ff(a) (1998).

164 *Ibid* §§ 78u(d), 78dd-2(g), 78dd-3(e) (1998).

165 See F Joseph Warin, Michael S Diamant and Veronica S Root, 'Somebody's Watching Me: FCPA Monitorships and How They Can Work Better' (2011) 13 U Pa J Bus L 321, 325–26 ('Following the discovery of a potential FCPA problem, the responsible company will conduct an internal investigation and take appropriate remedial steps. This usually entails a significant expenditure of money on attorneys' fees, the appropriation of employee time, and even the permanent loss of employees who must be terminated for improper behavior. Once the scandal becomes public, other collateral consequences may include a decline in reputation or goodwill, a drop in stock price, lawsuits by investors or others, suspension or debarment from government contracting, and various tax law problems.').

166 Bribery Act 2010, c 23, s 11.

167 F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 36.

more egregious offences tried in the Crown Court.[168] A summary conviction of a corporation or an entity can lead to fines of up to $5,000 or up to 12 months' imprisonment for individuals.[169] An indictment conviction can lead to up to ten years' imprisonment for individuals, while fines imposed on an individual or entity for an indictment conviction are not specified in the Act and are therefore without limit.[170] Still, it is important to note that whether or not an offence may be prosecuted hinges on whether the Director of Public Prosecutions, the Director of the SFO or the Director of Revenue and Customs Prosecutions consents to it, which turns on whether that official is personally satisfied that a conviction is more likely than not, and that a prosecution is in the public interest.[171]

Because of the role that UK courts play in reviewing prosecution decisions by law enforcement authorities, judges may be the ultimate arbiters of punishment for violations of the Bribery Act.[172] For example, in the *Innospec* decision, US regulators and the SFO reached a 'global settlement' with the company relating to criminal proceedings in both jurisdictions.[173] In considering the settlement, a UK judge stated that the SFO 'cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged' and that 'save in minor matters… the imposition of a sentence is a matter for the judiciary'.[174] In contrast, regulators in the US have tremendous flexibility to determine the ultimate financial penalty imposed on corporate offenders. And without doubt, it is the enforcement environment, rather than the technicalities of the statutes themselves, that will have the greatest impact on the ultimate penalties individuals and corporations will face for violations of the respective statutes.[175]

168 Bribery Act 2010, c 23, s 11; *Black's Law Dictionary* (9th edn, 2009), 1187–88.

169 Bribery Act 2010, c 23, ss 11(1)(a), 11(2)(a).

170 *Ibid* ss 11(1)(b), 11(2)(b).

171 Bribery Act 2010, c 23, s 10; Bribery Act 2010 – Quick Start Guide, at 3 (hereinafter Bribery Act Quick Start Guide).

172 SFO Visits Again with GDC, note 58 above, 3 ('Director Alderman told the participants that in the United Kingdom, the SFO's assertion of jurisdiction, or its interpretation of other provisions of the Bribery Act, can be challenged in court even before a resolution is reached, as early as when the SFO notifies a corporation that it wants to begin an investigation. According to Director Alderman, using a mechanism called "judicial review", companies, as well as other third parties, including non-governmental organisations and media outlets, can challenge the SFO's actions by arguing that a prosecutor has acted unlawfully or in a manner that is disproportionate or unreasonable.').

173 *R v Innospec Ltd*, (2010) Southwark Crown Court, ¶ 10, available at **www.millerchevalier.com/portalresource/InnospecSentencingJudgment**; SFO Discusses Bribery Act with GDC, note 106 above.

174 *Ibid* ¶¶ 26–27, available at **www.millerchevalier.com/portalresource/InnospecSentencingJudgment**.

175 F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 37.

Practical implications of the Bribery Act for multinational corporations

In an increasingly global marketplace, it is important that multinational corporations keenly observe the regulatory landscape to identify possible new risks, including extraterritorial anti-corruption legislation, such as the UK Bribery Act. The Bribery Act marks the most recent significant change to the worldwide anti-corruption enforcement effort, which heretofore has been led in large part by the FCPA. As the Bribery Act only recently came into force,[176] the most meaningful differences between the FCPA and the new UK law have not yet revealed themselves through enforcement actions and judicial interpretation. Enforcement activity will ultimately provide greater clarity to multinational corporations already subject to the FCPA about how to adjust their compliance programmes to avoid running afoul of what one academic observer christened the 'hopeful monster'.[177] Until then, however, an examination of the law's plain language and the Ministry of Justice's interpretative guidance suffices to provide multinational companies with a preparatory blueprint for building or reforming their anti-corruption compliance programmes.

To begin, it is worth recognising that the Bribery Act alone should not force a US issuer with an already robust FCPA-compliance programme to change its anti-corruption policies and procedures dramatically. The FCPA's internal controls provision already mandates an appropriate control environment, and the anti-bribery provisions cover most (but not all) activities that would violate section 6 of the Bribery Act. Additionally, local bribery laws already criminalise passive and active commercial bribery. There are, however, four areas where the clear divergence between the FCPA and the Bribery Act may require meaningful adjustments in an existing effective FCPA compliance programme. These four key areas are:

1. business courtesies;
2. facilitating payments;
3. risks posed by third parties as 'associated person[s]'; and
4. overseas commercial bribery.[178]

---

176 Bribery Act Guidance, Foreword, note 27 above, 2.

177 Eric Engle, 'I Get By With a Little Help From My Friends? Understanding the UK Anti-Bribery Statute, By Reference to the OECD Convention and the Foreign Corrupt Practices Act' (2010) 44 Int'l Law 1173, 1183.

178 Note that at least one multinational company has publicly announced adapting its compliance procedures to comply with the Bribery Act. Samuel Rubenfeld, 'Lockheed Martin Gets Into Step With Bribery Act With New Policy', Wall Street J Blog (8 Jun 2011, 10:15am), **http://blogs.wsj.com/corruption-currents/2011/06/08/lockheed-martin-gets-into-step-with-uk-bribery-act-with-new-policy**. Lockheed Martin's policy bans facilitation payments as well as commercial bribery, neither of which conduct was heretofore illegal under the FCPA or banned under Lockheed's old compliance policy. See Lockheed Martin, Compliance with the Anti-Corruption Laws (16 Jun 2011) (on file with SEC), available at **http://sec.gov/Archives/edgar/ data/936468/ 000119312511159455/dex991.htm**.

Business courtesies

The provision of business courtesies to foreign officials is already restricted somewhat under the FCPA, but the Bribery Act may require slight, although certainly not dramatic, revisions to gift and entertainment policies to ensure full compliance. Unlike the FCPA, the Bribery Act's section 6 does not contain a 'corrupt intent' or 'improper purpose' requirement, nor does it include an affirmative defence for reasonable and bona fide promotional expenditures. This makes the Bribery Act theoretically more likely to capture legitimate conduct. But statements by the UK Government should give multinational corporations comfort that, in practice, it will probably not be much more restrictive than the FCPA.

Business courtesies may span the spectrum from company-branded pens to Wimbledon tickets. Having one policy to govern all such courtesies would be neither a practical nor an effective way to address the fact-specific exercise of approving such a broad range of possibilities. Instead, it may be useful when drafting an anti-bribery policy to specify distinct procedures for different categories of business courtesies, such as (1) travel and lodging; (2) meals and drinks; (3) entertainment; and (4) gifts.

According to the Bribery Act Guidance, to secure a conviction the prosecution must prove that there is a 'sufficient connection between a [financial or other advantage] and the intention to influence and secure business or a business advantage'.[179] The Bribery Act Guidance indicates that travel and accommodation costs may not even amount to a 'financial or other advantage', let alone one with a sufficient connection to the intent to influence to qualify as violative conduct.[180] A good rule of thumb for determining whether travel and accommodation costs will amount to 'a financial or other advantage', for example, might be to ask whether the cost would otherwise be borne by the relevant foreign government or the foreign official himself.[181]

As noted above, what constitutes a 'financial or other advantage' appears to turn on a fact-specific reasonableness inquiry. The Bribery Act Guidance indicates that the ultimate decision 'will depend on the totality of the evidence which takes into account all of the surrounding circumstances'.[182] But it does offer some examples that can be used as benchmarks by a corporation. For instance, before approving the provision of any entertainment or gift to a foreign official, a corporation

179 Bribery Act Guidance, note 27 above, ¶ 28.
180 *Ibid* ¶ 27.
181 *Ibid* ¶ 27.
182 *Ibid* ¶ 28.

should consider whether the gift or entertainment 'better… present[s] [its] products and services' or assists it in establishing 'cordial relations',[183] the type and level of advantage offered, the manner and form in which it is provided, the level of influence of the particular foreign government official in awarding business, the lavishness of the hospitality[184] and the standards or norms of hospitality or promotional expenditures.[185]

Ultimately, the Bribery Act Guidance sets forth standards that closely resemble those already employed by US prosecutors who scrutinise business courtesies provided pursuant to the affirmative defence. Although it is not apparent on the face of the Bribery Act, this relative convergence between the two laws should make life easier for multinational corporations.

Facilitating payments

The Bribery Act's prohibition against facilitation payments presents a challenge for corporations that allow such expenditures under the FCPA's potentially significant statutory exception. Indeed, the Bribery Act and FCPA may form a double-edged sword here, as a corporate policy responding to the Bribery Act and prohibiting facilitating payments might, instead of halting the practice, drive them underground, violating both of the FCPA's accounting provisions.[186]

Although the impact of this new restriction on some high-risk business should not be minimised, enforcement actions and judicial interpretation of the FCPA's facilitating payments exception have significantly curtailed this practice to the point where an estimated 75–80 per cent of US companies have decided to ban or severely limit their use.[187] In fact, even before the passage of the Bribery Act, practitioners were recommending that their

183 *Ibid* ¶ 26.

184 Letter from Lord Tunnicliffe, Minister in the Government Whips Office, Government Spokesperson for the Ministry of Justice, to Lord Henley (14 Jan 2010), available at **www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf** ('We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalize expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes.').

185 Bribery Act Guidance, note 27 above, ¶ 29.

186 See F Joseph Warin, Charles Falconer and Michael S Diamant, 'The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption' (2010) 46 Tex Int'l LJ 1, 42–43.

187 David M Howard and Elisa T Wiygul, FCPA Compliance: The Vanishing 'Facilitating Payments' Exception, April 2010, available at **www.dechert.com/library/4-7-10-WCSL-Howard_and_Wiygul-FCPA_Compliance-The_Vanishing_Facilitating_Payments_Exception.pdf**.

clients completely eliminate facilitating payments.[188] Now, with the Bribery Act's implementation, many companies still utilising the exception are working to eliminate these payments.

Importantly, the SFO has indicated that this process of eliminating facilitating payments need not occur overnight.[189] But companies that still utilise facilitating payments need to have a 'plan' for their elimination and make this plan a 'high priority'.[190] Richard Alderman, Director of the SFO, recently cautioned, however, that if a company is 'resolute' on continuing to make facilitating payments, then he 'will prosecute'.[191] In an exclusive statement made to the authors of thebriberyact.com website, the SFO recently disclosed the six-step procedure that it will use when evaluating the activities of a company that continues to make small facilitation payments after 1 July 2011:[192]

1. the SFO will consider whether the company has a clear issued policy regarding such payments;
2. the SFO will consider whether written guidance is available to relevant employees as to the procedure they should follow when asked to make such payments;
3. the SFO will consider whether such procedures are being followed by employees;
4. the SFO will consider if there is evidence that all such payments are being recorded by the company;
5. the SFO will consider if 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
6. the SFO will consider whether the company is taking what practical steps it can to curtail the making of such payments.

The authors of thebriberyact.com added in summary that 'if the answers to these questions are satisfactory then the corporate should be shielded from prosecution'.[193] Of course, companies will have to wait and see how the SFO

188 *Ibid.*

189 Director Alderman recently stated that while he wants to see that companies are 'committed to zero tolerance', he understands that they may need a 'transition period between the time the Act takes effect and the time they are fully compliant.' SFO Visits Again with GDC, note 58 above, 4.

190 *Ibid.*

191 *Ibid.*

192 Barry Vitou and Richard Kovalevsky, Exclusive: Facilitation Payments After July 1st: A Six Step Solution, thebriberyact.com (9 Jun 2011), **http://thebriberyact.com/2011/06/09/exclusive-facilitation-payments-after-july-1st-a-six-step-solution**.

193 *Ibid.*

applies these principles, which adds to the uncertainty surrounding the continued use of facilitating payments.

The Bribery Act Guidance suggests some additional affirmative steps that multinational companies should take to deal with seemingly unavoidable facilitating payment demands.[194] In addition to the more obvious measure of communicating its prohibition of facilitating payments to all employees, agents and other third parties who might interface with foreign government officials on the company's behalf,[195] organisations should make it a policy to inform those demanding payment that compliance with the demand would amount to an offence under UK law, request receipts from and the identification details of any officials making a demand, and tell any such official that the company will inform the UK embassy of the incident.[196]

Third-party risks and adequate procedures

The stringency and jurisdictional breadth of the Bribery Act's section 7 pose an acute challenge to the compliance programmes of multinational corporations. Section 7, in contrast to the nuanced approach of the FCPA, imposes strict liability on corporations for actions of 'associated person[s].' Under the Bribery Act, the UK Government will not have to establish that the company authorised or even should have known that its business partner would be likely to engage in corrupt conduct. Of course, a corporation can escape liability if it has 'adequate procedures' mitigating the risk of such corrupt activities. In this way, the Bribery Act's section 7 effectively shifts the burden from the government (to show knowledge on the part of the organisation) to the company (to show adequate procedures).

Section 9 of the Bribery Act requires the Secretary of State to publish guidance concerning 'adequate procedures' that relevant commercial organisations can implement to prevent persons associated with them from bribing others, with the requisite intent to obtain or retain business or an advantage in the conduct of business for the organisation.[197] Although the Bribery Act Guidelines broadly cover virtually all aspects of an effective compliance programme, certain of the six principles presented in the guidance focus particularly on third party risks.

---

194 Bribery Act Guidance, note 27 above, Appendix A, Case Study 1.

195 *Ibid.*

196 *Ibid.* The Ministry of Justice recognises in the Bribery Act Guidance that commercial organisations may face problems in eradicating facilitation payments, and views the objective as a long-term one, which will require 'economic and social progress and sustained commitment to the rule of law… where the problem is most prevalent'. *Ibid* ¶ 46.

197 Bribery Act 2010, c 23, s 9.

Most pertinently, the Bribery Act Guidance provides that businesses should apply a proportionate and risk-based approach in performing due diligence on parties who perform or will perform services for or on behalf of the company, in order to mitigate identified bribery risks.[198] The Bribery Act Quick Start Guide helpfully suggests that someone who merely supplies goods to a company probably does not perform services for or on its behalf.[199] In lower-risk situations, such as engaging a third party to provide information technology services, businesses may decide that there is no need to conduct much in the way of due diligence. The Bribery Act Quick Start Guide suggests that in these situations, it may be sufficient for the company to satisfy itself that the people performing the services on the company's behalf are genuine and trustworthy.[200] In higher-risk situations, such as selecting an intermediary to assist in establishing a business in a foreign market, greater due diligence may be required.[201] Such due diligence may include conducting direct inquiries of the proposed business partner (eg asking for a CV or background information, financial statements, accounts or references), indirect investigations and general research. Continued monitoring of the counterparty may also be required.

Other aspects of the Bribery Act Guidance also touch on the organisation's relationship with third parties. For instance, when discussing the need for communication of anti-bribery principles to associated persons, the Ministry of Justice observed that external communications of anti-corruption compliance policies to business partners can include information on anti-bribery procedures and controls, sanctions for violations of the policies and rules governing recruitment, procurement and tendering.[202] It also recommended training new agents[203] and advised that it may also be appropriate to require other business partners, particularly those presenting significant corruption risks, to undergo training.[204] Additionally, the Bribery Act Guidance notes that companies may encourage their business partners to provide anti-bribery training themselves.[205]

Of course, as a threshold question, all measures taken to mitigate the risk associated with third parties and to establish adequate procedures should flow from the organisation's risk assessment. As the Bribery Act Guidance recommends, a proper anti-corruption risk assessment should examine

198 Bribery Act Guidance, note 27 above, at Principle 4 – Due Diligence.
199 Bribery Act Quick Start Guide, note 171 above, 6.
200 *Ibid.*
201 Bribery Act Guidance, note 27 above, Principle 4 – Due Diligence, Commentary 4.3.
202 *Ibid* Principle 5 – Communication, Commentary 5.4.
203 *Ibid* Principle 5 – Communication, Commentary 5.6.
204 *Ibid* Principle 5 – Communication, Commentary 5.7.
205 *Ibid.*

business partnership risk, as certain relationships, such as those with joint venture partners or intermediaries interacting with foreign officials, may involve greater risk.[206]

Commercial bribery

Whereas the FCPA is silent about commercial bribery, section 1 of the Bribery Act prohibits the bribery of *all persons* to induce or reward improper performance. This applies to both foreign and domestic conduct, and has the potential in certain contexts to be a more significant risk than public-sector bribery. Companies should consider how acute these risks are – particularly overseas where they may not have assessed the risk before – and whether their current policies and procedures should be balanced to account for the Bribery Act's focus on this issue. For instance, if the company's standard anti-corruption training focuses heavily on overseas public corruption, the company should consider revising the training to include a warning about the bribery of *any* individual, whether public or private, domestically or internationally. Likewise, corruption risk assessments need to focus greater attention on the risks posed by commercial bribery.

Conclusion

Much like the rise of globalisation itself, extraterritorial anti-corruption regimes designed to police business across borders appear destined only for further growth and development. It is perhaps unsurprising that the original global power, the United Kingdom, is poised to join the United States, today's superpower, in aggressively punishing bribery abroad. What impact the Bribery Act may ultimately have in the battle against international corruption remains to be seen. But it is clear today that prudent multinational corporations should act without delay to begin closing the gaps between their current FCPA-centric compliance programmes and the demands made by the new UK law.

206 *Ibid* Principle 3 – Risk Assessment, Commentary 3.5.