The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption

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SUMMARY

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INTRODUCTION

"Al Yamamah" means "the dove" in Arabic.[1] This name of an ancient district in Saudi Arabia was once synonymous with peace. These days, however, the name has a different resonance. Al Yamamah is now inextricably linked in the minds of the British public with the defense contracts of that same name between the U.K. defense contractor BAE Systems PLC (BAE) and the Government of Saudi Arabia. BAE and the Saudi Government signed the contracts for a £43 billion (approximately $65 billion) arms deal in the mid-1980s, forming the U.K.'s largest-ever export deal.[2] Since then, the Al Yamamah contracts have been tainted by highly publicized allegations of bribery and corruption.[3]

On February 5, 2010, after years of controversy, BAE reached settlements with U.K. and U.S. authorities and agreed to pay fines totaling $400 million (approximately £250 million) to settle the long-running corruption allegations.[4] Tellingly, the key player in securing guilty pleas was not, as might have been expected, the United Kingdom's own corruption watchdog, the Serious Fraud Office (SFO),[5] but rather the U.S. Department of Justice (DOJ).[6] The SFO's original investigation was controversially discontinued at the behest of the British Government in 2006 on grounds of national security.[7] A barrage of global criticism ensued and the SFO ultimately prosecuted BAE for unrelated conduct,[8] while U.S.

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

2. *See id.* (noting this was the U.K.'s "largest-ever arms agreement," generating £43 billion in revenue).

3. *Id.*

4. BAE Press Release, BAE Systems PLC, BAE Systems PLC Announces Global Settlement with United States Department of Justice and United Kingdom Serious Fraud Office (Feb. 5, 2010), *available at* http://www.baesystems.com/Newsroom/NewsReleases/autoGen_1101517013.html; David Leigh, Rob Evans & Mark Tran, *BAE Pays Fines of £285m Over Arms Deal Corruption Claims*, GUARDIAN, Feb. 5, 2010, *available at* http://www.guardian.co.uk/world/2010/feb/05/bae-admits-bribery-saudi-yamamah; XE—UNIVERSAL CURRENCY CONVERTER, http://www.xe.com/ucc/ (allowing for conversion from the British pound to the U.S. dollar).

5. In April 2010, the new U.K. Government announced plans to fold the SFO into two other regulatory agencies, the Financial Services Authority and the Office of Fair Trading, to form a single economic crime enforcement agency. *See* Michael Peel, *Watchdogs Sharpen Teeth on Raft of Cases*, FIN. TIMES, May 31, 2010, *available at* http://www.ft.com/cms/s/0/00c3d35e-6cd5-11df-91c8-00144feab49a.html (discussing increased activity for the SFO and the potential creation of a super-agency). It is currently unclear whether this proposal will ultimately result in a single super-agency. Recent reports indicate that it may not come to fruition. *See* Brian Brady, *Turf Wars Prevent Whitehall Tackling Britain's Fraudsters*, INDEPENDENT, Sept. 10, 2010, *available at* http://www.independent.co.uk/news/uk/politics/turf-wars-prevent-whitehall-tackling-britains-fraudsters-2077178.html ("A senior official admitted last week that the Government had scaled down its ambitions and might have to settle for closer co-operation between existing organisations.").

6. Leigh & Evans, *supra* note 1.

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

8. Robert Verkaik & Sarah Arnott, *SFO Demands Prosecution of BAE*, INDEPENDENT, Oct. 1, 2009, *available at* http://www.independent.co.uk/news/business/news/sfo-demands-prosecution-of-bae-1795850.html.

prosecutors targeted Al Yamamah.[9] This controversy served to highlight the deficiencies in the U.K.'s anti-bribery and anti-corruption laws. Today, the United Kingdom is making a concerted effort to fortify those laws to meet international standards and ensure Britain's engagement in the global fight against corruption.

The centerpiece of this effort is the Bribery Act, which the U.K. Parliament passed earlier this year.[10] This article compares the Bribery Act to its U.S. analogue, the Foreign Corrupt Practices Act (FCPA),[11] and examines the Bribery Act's potential effect on global anti-corruption enforcement efforts. Part I provides background on the Act and addresses the parliamentary process through which it passed into law. Part II compares the Act's provisions to the key provisions of the FCPA and discusses the potential impact of the Act on businesses in the United Kingdom and worldwide. Part III describes the self-disclosure framework established by the SFO—the prosecutorial entity primarily charged with the Bribery Act's enforcement—and compares this approach to that taken by DOJ and the U.S. Securities and Exchange Commission (SEC) in enforcing the FCPA. Finally, Part IV considers the potential future of cooperation between U.K. and U.S. anti-corruption enforcement authorities.

I. PASSING THE BRIBERY ACT AND CHANGING THE UNITED KINGDOM'S APPROACH TO ANTI-BRIBERY ENFORCEMENT

Since 1977, when the FCPA was introduced in the United States in reaction to the Watergate scandal, international pressure for global anti-corruption reform has grown.[12] Although the United Kingdom, as a member of the Organisation for Economic Co-operation and Development (OECD), had joined other nations in signing a series of anti-corruption conventions,[13] the United Kingdom's inadequate anti-bribery laws were the subject of persistent criticism by various OECD Working Groups.[14] Indeed, the old anti-bribery and anti-corruption framework in the United

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9. United States v. BAE Systems PLC, No. 10-035, 2010 WL 2293412, at *41–47 (D.D.C. June 4, 2010).

10. Bribery Act, 2010, c.23 (Eng.).

11. Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. § 78dd-1 (1998).

12. Linda Chatman Thomsen, Former Director, Division of Enforcement, SEC, Remarks Before the Minority Corporate Counsel 2008 CLE Expo (Mar. 27, 2008), *available at* http://www.sec.gov/news/speech/2008/spch032708lct.htm.

13. Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter OECD Convention]; First Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1996 O.J. (C 313) 2-10, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41996A1023(01):EN:HTML; Second Protocol to the Convention on the Protection of the European Communities' Financial Interests, 1997 O.J. (C 221) 12-22, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0719(02):EN:HTML; Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173, *available at* http://conventions.coe.int/treaty/en/treaties/html/173.htm; Council of Europe, Additional Protocol to the Criminal Law Convention on Corruption, May 15, 2003, E.T.S. No. 191, *available at* http://conventions.coe.int/treaty/en/treaties/html/191.htm; European Union, Convention on the Fight Against Corruption Involving Officials of the European Communities, May 26, 1997, 37 I.L.M. 12; Council of Europe Civil Law Convention on Corruption, Nov. 4, 1999 E.T.S. No. 174; United Nations Convention Against Corruption, Dec. 11, 2003, 41 I.L.M. 37, *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

14. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT: WORKING GROUP ON

Kingdom was outdated and difficult to apply in practice. There was no comprehensive statute proscribing bribery or corruption. Rather, the applicable legal framework was a patchwork of three statutes dating from the late nineteenth century and the early twentieth century, supplemented by the common law offense of bribery.[15] Little had changed in this legal framework during the last ninety years.

In 1998, the United Kingdom ratified the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of November 1997.[16] Although the U.K. Government never conceded that its criminal laws fell short of its obligations under the Convention,[17] it acknowledged that failure to implement legal reform could call into question the United Kingdom's commitment to it.[18] The Anti-Terrorism, Crime and Security Act of 2001 included provisions criminalizing the bribing or corruption of foreign officials by U.K. nationals or companies.[19] By applying only to U.K. nationals, however, this reform ignored the actions of foreign nationals domiciled or habitually resident in the United Kingdom. This omission created the unsatisfactory situation whereby non-U.K. nationals who reside or conduct their business in the United Kingdom remained immune from prosecution for behavior that could send a U.K. national to prison.[20]

Pressure built on the British Government for its perceived lack of progress. In October 2008, the OECD published a report heavily criticizing the United Kingdom's "continued failure" to address its unsatisfactory anti-bribery and anti-corruption laws.[21] By then, however, change was already underway. After the BAE controversy, the SFO initiated a comprehensive review of its anti-corruption practices.[22] The U.K. Government referred the issue to the English Law Commission,[23] which produced a comprehensive report and a draft Bribery Bill.[24] The draft Bill proposed repeal of all existing corruption crimes in favor of four new offenses: bribing, being bribed, bribing a foreign official, and a corporation's

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BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, UNITED KINGDOM: PHASE 2BIS, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 4 (2008), *available at* http://www.oecd.org/dataoecd/23/20/41515077.pdf [hereinafter UNITED KINGDOM: PHASE 2BIS].

15. Public Bodies Corrupt Practices Act, 1889, 52 & 53 Vict. (Eng.); Prevention of Corruption Act, 1906, 5 Edw. 7 (Eng.); Prevention of Corruption Act, 1916, 6 Geo. 5 (Eng.) (in each case as amended, in particular by the Anti-Terrorism, Crime and Security Act, 2001 (U.K.)).

16. OECD Convention, Ratification Status as of March 2009, *available at* http://www.oecd.org/dataoecd/59/13/40272933.pdf (listing dates on which signatories ratified the Convention).

17. HL Hansard, 9 December 2009, Col.1086.

18. UNITED KINGDOM: PHASE 2BIS, *supra* note 14, at 7.

19. Anti-Terrorism, Crime and Security Act, 2001, § 109 (U.K.). This Act came into force on February 14, 2002.

20. THE LAW COMMISSION, REFORMING BRIBERY, 2008–09, H.C. 313, para. 2.34, *available at* http://www.lawcom.gov.uk/bribery.htm [hereinafter REFORMING BRIBERY].

21. UNITED KINGDOM: PHASE 2BIS, *supra* note 14, at 4.

22. *See infra* Part III (discussing in depth the background, implications, findings, and consequences of that review).

23. The Law Commission is a statutory, independent body created by the Law Commissions Act of 1965 to continually review English and Welsh law and to recommend reform where needed. LAW COMMISSION, http://www.lawcom.gov.uk/.

24. *See* REFORMING BRIBERY, *supra* note 20 (explaining bribery law recommendations).

negligent failure to prevent bribery.[25] The Government published the draft Bill for the purposes of pre-legislative scrutiny (during which a committee of Parliament considers a draft bill and recommends changes before the bill is introduced for passage).[26] On March 25, 2009, a Joint Committee of both Houses of Parliament heard extensive evidence on the draft Bill.[27] The Joint Committee published its findings on July 28, 2009; although it generally supported the Bill's approach, the Joint Committee made a number of proposals for amendment.[28] On November 19, 2009, the Government introduced the Bill for passage in the House of Lords.[29] The Bill contained some amendments suggested by the Joint Committee, but retained the basic structure of the Bill proposed by the Law Commission.[30] The proposed Bribery Bill completed all legislative stages in the House of Lords on February 8, 2010.[31] The only significant amendment made during this process was the removal of the negligence requirement from the corporate offense of failure to prevent bribery.

Despite the efforts of business lobbyists, which led to a wave of proposed changes and amendments and threatened to derail or weaken the Bill, the Bill continued its seemingly inexorable progress through the parliamentary process.[32] Finally, on April 7, 2010, the Bribery Bill successfully proceeded through the Third (and final) Reading in the House of Commons.[33] Remarkably, it survived its journey through the House of Commons largely intact and without substantial amendments.[34] On April 8, 2010, after the House of Lords' final consideration of the Bill and the granting of Royal Assent, the Bribery Act 2010 became law.[35] Under the current implementation schedule, the Bribery Act goes into force in April 2011.[36] In the meantime, the U.K. Ministry of Justice will satisfy its statutory obligation to issue guidance on corporate compliance with the law.[37]

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25. *See id.* (exemplifying the legislative procedure in question).

26. *Id.*

27. *See* Nick Mathiason, *Bribery Bill Finally Reaches Parliament*, GUARDIAN, Mar. 25, 2009, *available at* http://www.guardian.co.uk/business/2009/mar/25/bribery-bill-reaches-parliament (discussing the presentation of the legislation to Parliament).

28. *See* JOINT COMMITTEE ON THE DRAFT BRIBERY BILL, FIRST REPORT, 2008–09, H.L. 115-I/H.C. 430-I, *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11502.htm (displaying the report on the findings of the Joint Committee) [hereinafter JOINT COMMITTEE REPORT].

29. *See* Bill Stages—Bribery Bill [HL], 2009–10, BILLS BEFORE PARLIAMENT, http://services.parliament.uk/bills/2009-10/briberyhl/stages.html (displaying list of dates in Bribery Bill legislative process).

30. Bribery Bill, 2009, H.L. Bill [69], *available at* http://www.publications.parliament.uk/pa/cm200910/cmbills/069/10069.i-ii.html (displaying a version of the Bill as introduced to the House of Lords).

31. *See* Bill Stages—Bribery Bill [HL], 2009–10, BILLS BEFORE PARLIAMENT, http://services.parliament.uk/bills/2009-10/briberyhl/stages.html (displaying list of dates in Bribery Bill legislative process).

32. Michael Peel, *Fear over Moves to 'Derail' Bribery Bill*, FIN. TIMES, Mar. 16, 2010, *available at* http://www.ft.com/cms/s/0/c3224186-3064-11df-bc4a-00144feabdc0,s01=1.html.

33. Bill Stages—Bribery Bill [HL] 2009-10, *supra* note 29.

34. *See* Bill Stages—Bribery Bill [HL] 2009–10, *Commons Amendments*, BILLS BEFORE PARLIAMENT, http://www.publications.parliament.uk/pa/ld200910/ldbills/052/10052.1-4.html (showing amendments made in House of Commons).

35. Bill Stages—Bribery Bill [HL] 2009–10, *supra* note 29. Royal Assent is the final procedural step to enact a Bill into law and is typically a mere formality in the United Kingdom. Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 FORDHAM L. REV. 1697, 1702–03 (2006).

36. MINISTRY OF JUSTICE, BRIBERY ACT IMPLEMENTATION (July 20, 2010), *available at* http://www.justice.gov.uk/news/newsrelease200710a.htm.

37. Bribery Act, 2010, § 9.

Against this legislative backdrop, the SFO was gearing up for action. It had already significantly increased the number of officials assigned to overseas corruption matters.[38] And it adopted new strategies to combat international corruption, borrowing many of these tactics from the United States. In 2008, the SFO established a "separate work area" known as the "Anti-Corruption Domain" to investigate and prosecute cases of overseas corruption.[39] Further, it introduced a self-reporting framework to encourage better enforcement of U.K. anti-corruption laws. This framework is considered in detail in Part III of this article.

II. A STATUTORY COMPARISON OF THE BRIBERY ACT AND THE FCPA

Any attempt to explore the implications of the Bribery Act should begin with its comparison to the FCPA. The FCPA was enacted in 1977, and U.S. authorities have over time developed a massive body of enforcement precedent.[40] Further, many multinational companies already have robust FCPA compliance programs, and lawyers who specialize in international white collar crime are already intimately familiar with the U.S. statute's strictures. Therefore, the impact that the Bribery Act has on multinational corporations will be, at least in part, determined by how it differs from the FCPA.[41] Acknowledging that the Bribery Act's final effect, like any criminal law, will depend heavily on how it is ultimately enforced, Part III of this article addresses aspects of the anti-bribery enforcement regimes on both sides of the Atlantic.

Practitioners and law enforcement officials alike tend to group the FCPA's provisions into two complementary sets: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions establish a statutory prohibition on bribing foreign government officials "to obtain or retain business."[42] The accounting provisions create a regime whereby entities regulated by the SEC, regardless of their domicile, are required to (1) keep and maintain accurate books and records, and (2) establish and maintain a system of internal controls that reasonably assures that corporate assets are used only for authorized corporate purposes.[43] Both sets of provisions have criminal and civil applications—with the criminal elements falling within the exclusive jurisdiction of DOJ and civil regulation lying primarily within the SEC's purview.[44]

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38. *See* SERIOUS FRAUD OFFICE, APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION 1 (2009), *available at* http://www.sfo.gov.uk/media/28313/approach%20of%20the%20sfo%20to%20dealing%20with%20overseas%20corruption.pdf [hereinafter SFO APPROACH] (noting the establishment of the new "work area").

39. *Id.*

40. 15 U.S.C. § 78dd-2 (1998).

41. It will, of course, have an even more significant effect on U.K.-based companies that are not subject to the FCPA. Kobus Beukes, Op-Ed., *Assess Your Exposure to UK's New Bribery Act*, BUS. TIMES (Sing.), July 6, 2010.

42. U.S. DEPARTMENT OF JUSTICE, LAY-PERSON'S GUIDE TO FCPA 2, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf [hereinafter LAY-PERSON'S GUIDE].

43. 15 U.S.C. § 78m(b) (1998).

44. *See* R. Christopher Cook & Stephanie L. Connor, The Foreign Corrupt Practices Act: Enforcement Trends in 2010 and Beyond (Jones Day, 2010), *available at* http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=f0950ee5-18bb-496f-acfe-662b219a108e&RSS=true

In contrast, the Bribery Act creates four separate anti-bribery offenses: (1) bribing (section 1); (2) being bribed (section 2); (3) bribing a foreign public official (section 6); and (4) failing as a commercial organization to prevent bribery (section 7).[45] The Act does not create any positive obligations regarding corporate accounting,[46] but the United Kingdom's Companies Act 2006 (the Companies Act) already imposes requirements similar to those of the FCPA's books-and-records provision.[47] Importantly, the Bribery Act allows for an "adequate procedures" defense to the fourth offense, "[f]ailure of commercial organisations to prevent bribery."[48] Despite differences in the legal mechanisms employed by the Bribery Act and the FCPA, they may similarly influence corporate behavior. In practice, for a commercial organization to avoid violations of either the accounting provisions of the FCPA or the "failure to prevent" bribery offense of the Bribery Act, it will have to devise and maintain adequate internal anti-corruption compliance policies, procedures, and controls.[49]

The first two offenses enumerated in the Bribery Act—those of bribing and of being bribed—are as concerned with domestic bribery as they are with foreign bribery.[50] The second two—bribing a foreign public official and failing to prevent bribery—will form the basis of most foreign corruption cases pursued by U.K. authorities. Indeed, the offense of bribing a foreign public official is directly analogous to the FCPA's anti-bribery provisions.

The following discussion compares these two approaches to prohibiting the bribing of foreign officials. It then briefly describes the general bribery offenses in the Bribery Act, before turning to the most novel aspect of the new U.K. law: the corporate offense of failing to prevent bribery. It examines this crime alongside the FCPA's accounting provisions and considers a few similar implications of these distinct statutes, including their broad jurisdictional reach. Finally, this part of the article provides a brief description of the penalties associated with both statutory frameworks and then concludes by considering what aspects of the Bribery Act could spur the most significant changes in the compliance programs of multinational corporations that are already subject to the FCPA.

A. The FCPA's Anti-Bribery Provisions

The FCPA's anti-bribery provisions prohibit corruptly paying or promising to pay money or anything of value to a foreign official, foreign political party, foreign political party official, or candidate for foreign political office to influence the foreign

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(reviewing various enforcement actions and procedures of the SEC and DOJ).

45. Bribery Act, 2010, §§ 1–2, 6–7.

46. *Id.* at c. 23 (Eng.).

47. Companies Act, 2006, c. 1, § 380 *et seq.* (U.K.); 15 U.S.C. § 78m(b) (1998).

48. Bribery Act, 2010, § 7.

49. *See* Bribery Act, 2010, §7 ("[I]t is a defence for [a commercial organization] to prove that [the commercial organization] had in place adequate procedures designed to prevent persons associated with [the commercial organization] from undertaking such conduct."); 15 U.S.C. § 78m(b) (1998) (requiring organizations to have internal systems to ensure that transactions and access to assets comply with management authorization).

50. *See* Bribery Act, 2010, §§ 1–2 (the offenses do not distinguish between domestic and foreign acts).

official in the exercise of his or her official duties to assist the payor in obtaining or retaining business.[51]

1. The Provisions' Broad Reach

The FCPA's anti-bribery provisions cast a wide net. They can ensnare corporations and individuals, including any officer, director, employee, or agent of a corporation and any stockholder acting on behalf of a subject entity.[52] Individuals and firms may also be penalized if they order, authorize, or assist in violations of the anti-bribery provisions or if they conspire to violate those provisions.[53]

U.S. jurisdiction over corrupt payments to foreign officials hinges on whether the violator is an "issuer," a "domestic concern," or a foreign national or business carrying out an act "in furtherance" of this type of payment in the United States.[54] An "'issuer' is a corporation that has 'issued securities' that have been registered with the SEC in the United States pursuant to section 12 of the Securities Exchange Act of 1934 or that is "required to file periodic reports with the SEC pursuant to section 15 of the Securities Exchange Act of 1934."[55] For FCPA purposes, "issuer" includes companies that list American Depositary Receipts (ADRs) on a U.S. exchange.[56] ADRs are receipts, issued by U.S. depositary banks, that represent an interest in a foreign security.[57] Because they effectively allow U.S. investors to own and trade in foreign securities without participating in cross-border transactions,[58] ADRs are a common corporate instrument that many non-U.S. companies use as their only U.S.-listed securities. By listing on U.S. exchanges, however, foreign companies subject themselves to FCPA enforcement.

The FCPA defines a "domestic concern" as "any individual who is a citizen, national, or resident of the United States," or any business organization that has its principal place of business in the United States or that is "organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."[59] Issuers or domestic concerns may be liable under the FCPA both for acts performed in furtherance of a corrupt payment to a foreign official *within* the

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51. 15 U.S.C. §§ 78dd-1(a), (g), 78dd-2(a), (i), 78dd-3(a) (1998).

52. *Id.* § 78dd-1(a).

53. *Id.*

54. LAY-PERSON'S GUIDE, *supra* note 42.

55. 15 U.S.C. § 78c(a)(8) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

56. *See, e.g.*, THOMPSON & KNIGHT, *American Depositary Receipts and The Foreign Corrupt Practices Act*, July 14, 2010, http://www.tklaw.com/resources/documents/TKClientAlert-AmericanDepositaryReceiptsAndTheForeignCorruptPracticesAct.pdf (explaining that Technip S.A., a French company, was an "issuer" for purposes of the FCPA because its ADRs are traded on a U.S. stock exchange); *Fiat Pays $17.8 Million in Combined Fines and Penalties to Settle Iraqi Oil-for-Food Matter, Including FCPA Charges*, FCPA ENFORCEMENT, Dec. 29, 2008, http://www.fcpaenforcement.com/documents/document_detail.asp?ID=5542&PAGE=2 (explaining that Fiat became an "issuer" because its ADRs traded on U.S. stock exchanges).

57. *American Depositary Receipts*, Sec. and Exch. Comm'n, American Depositary Receipts, http://www.sec.gov/answers/adrs.htm.

58. Eugene R. Erbstoesser, John H. Sturc & John W.F. Chesley, *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 385 n. 27 (2007).

59. 15 U.S.C. § 78dd-2(h)(1) (1998).

territory of the United States and any such acts performed *outside* the United States.[60]

The FCPA's anti-bribery provisions generally do not apply directly to foreign subsidiaries of issuers or domestic concerns (even those wholly or majority-owned).[61] Before 1998, foreign companies were generally not subject to the FCPA at all, unless they qualified as issuers or domestic concerns.[62] Since the 1998 amendments to the FCPA, however, a foreign company is subject to the FCPA "if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States."[63] U.S. regulators have construed relatively minor acts, such as routing a payment through a U.S. bank account or e-mail traffic to the parent company in the United States, as "act[s] in furtherance" sufficient to trigger FCPA jurisdiction.[64] Additionally, as discussed in more detail in Part II.D.2.a below, foreign subsidiaries may be considered agents of an issuer or domestic concern parent, thereby subjecting the subsidiaries to liability.[65] Their overseas actions also may form the basis of liability for the parent issuer if the parent knew of or consciously disregarded a risk of the subsidiary's illicit payments.[66] Further, a foreign subsidiary can cause its U.S. parent to violate the FCPA's accounting provisions due to its activities outside of the United States.[67]

2. The Intent of the Payor

To violate the FCPA, the payment—or offer or promise of payment—must be corrupt.[68] If the payment is made for the purpose of inducing an official to misuse his

60. LAY-PERSON'S GUIDE, *supra* note 42.

61. *Cf.* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR LAW. REV. 1, 37–38 (1998) (describing what is required for a parent corporation to be found in violation of the FCPA for the acts of its subsidiary).

62. LAY-PERSON'S GUIDE, *supra* note 42.

63. *Id.*

64. RICHARD M. TOLLAN, DAVID S. KRAKOFF & JAMES T. PARKINSON, IS YOUR BUSINESS AFFECTED BY THE US FCPA? ARE YOU SURE? (Mayer Brown, 2009), *available at* http://www.mayerbrown.com/publications/article.asp?id=7391&nid=6.

65. Information at 2, United States v. DPC (Tianjin) Co. Ltd., No. CR 05-482 (C.D. Cal. May 20, 2005) (alleging that defendant DPC Tianjin, "a wholly-owned subsidiary" of the U.S. issuer, Diagnostics Productions Corporation ("DPC"), "*acted as an agent of DPC within the meaning of the Foreign Corrupt Practices Act*, 15 U.S.C. § 78dd-1") (emphasis added); Plea Agreement at 5, United States v. DPC (Tianjin) Co. Ltd., No. CR 05-482 (C.D. Cal. May 20, 2005) (stating that defendant DPC Tianjin agreed and stipulated to the facts alleged in the Information). Although DOJ specifically charged DPC Tianjin as an agent under 15 U.S.C. § 78dd-1, the Information also alleges that the defendant, "in the Central District of California and elsewhere . . . used electronic mail and other means and instrumentalities of interstate commerce corruptly in furtherance of an offer, promise to pay and authorization of the payment of money," Information at 6, United States v. DPC (Tianjin) Co. Ltd., No. CR 05-482 (C.D. Cal. May 20, 2005) (invoking the language of 15 U.S.C. § 78dd-3).

66. *See* Brown, *supra* note 61, at 28–34 (discussing how the original "knows or has reason to know" standard for holding parent companies accountable for their subsidiaries' actions was subsequently changed to a "no willful blindness" standard).

67. *See, e.g.*, Complaint paras. 20, 31, SEC v. Westinghouse Air Brake Techs. Corp., Civ. Action No. 08-706 (E.D. Pa. 2008) (punishing a parent company for its Indian subsidiary's bribes to Indian government officials).

68. 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

or her position, the element of corrupt intent is met.[69] As set forth below, U.K. lawmakers deliberately chose not to include the word "corrupt" or any similar description in the Bribery Act's prohibition on bribing foreign government officials.

3. The Violative Act

The FCPA's anti-bribery provisions prohibit not only actual payments, but also any offer, promise, or authorization of the provision of anything of value.[70] Thus, any offer to make a prohibited payment or gift, even if rejected, may breach the FCPA. There need not be any actual payment made or benefit bestowed.

Further, the statute does not limit "anything of value" to the payment of (or promise to pay) cash or cash equivalents.[71] The term reaches all tangible items of economic value. Even further, it can encompass anything that a recipient would find useful or interesting, including gifts, internships,[72] favors,[73] meals, education,[74] medical expenses,[75] and travel assistance.[76]

4. The Recipient of the Bribe

In accordance with its broad reach, the FCPA also defines "foreign official" expansively to include any officer or employee (including low-level employees and officials) of a foreign government or of any department, agency, or instrumentality of a foreign government, which has been interpreted to include government-owned or government-controlled businesses and enterprises.[77] The term "foreign official" also encompasses officers and employees of "public international organizations," such as the United Nations, the International Monetary Fund, and the Red Cross.[78] Other

69. 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a) (1998); *see also* H.R. REP. No. 95-640, at 7 (1977) ("The word 'corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.").

70. 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

71. Nonetheless, the majority of FCPA prosecutions to date have involved cash or cash equivalents.

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

73. *Id.*

74. Lucent Technologies Inc., Non-Prosecution Agreement, Appendix A, para. 20 (Nov. 14, 2007) *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech.html.

75. Indictment para. 23, United State v. Kozeny (S.D.N.Y. 2008) (No. 05-cr-00518), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv.html.

76. Information paras. 12, 16, United States v. ABB Vetco Gray, Inc. (S.D. Tex. June 22, 2004) (No. 04-cr-00279).

77. *See In re* Schnitzer Steel Indus., Inc., Order and Imposing Instituting Cease-and-Desist Proceedings, Exchange Act Release No. 54,606, 89 SEC Docket 302 (Oct. 16, 2006), *available at* http://www.sec.gov/litigation/admin/2006/34-54606.pdf ("foreign official" was scrap metal manager at Chinese companies wholly or partly-owned by the Chinese government).

78. 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2),78dd-3(f)(2) (1998); Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946); Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946); Exec. Order No. 12,643, 53 Fed. Reg. 24,247 (June 23, 1988).

potential bribe recipients covered by the statute include political parties, party officials, and candidates for political office.[79]

5. The Bribe's Purpose

Although the recipient of the corrupt payment (or promise or offer to pay) must be a foreign official, the business need not be with a foreign government to satisfy the business purpose requirement. U.S. prosecutors and the courts interpret "obtaining or retaining business" broadly.[80] Examples could include winning a bid, retaining existing business, reaching an agreement or signing a contract, receiving, renewing or amending a lease or license, reducing taxes or other financial liabilities, and obtaining confidential information.[81] Contributions to political candidates or political party officials that are made corruptly to obtain or retain business are also prohibited.[82]

6. The Role of Third Parties

In addition to direct payments to foreign officials, the FCPA also forbids corrupt payments to any person (e.g., third-party agents) while knowing that all or part of the payment will ultimately be given to a foreign official.[83] The term "knowing" means either being aware of such conduct or substantially certain that such conduct will occur, or consciously disregarding a "high probability" that a corrupt payment or offer will be made.[84] Because the term encompasses conscious disregard and deliberate ignorance,[85] it rules out the so-called "head-in-the-sand" defense. This "knowledge" standard presents significant compliance issues for companies doing business in countries where the use of a local agent, over whom the company has limited control and potentially limited contact, is a practical if not a legal necessity.

7. The Exception and Affirmative Defenses

There are three circumstances in which acts otherwise prohibited by the FCPA's anti-bribery provisions do not constitute an offense punishable by law:

(1) A facilitating or expediting payment made to secure the performance of a routine governmental action by the recipient;[86]

(2) Payments expressly permitted by the written laws of the host country;[87] and

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79. 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2) (1998).

80. LAY-PERSON'S GUIDE, *supra* note 42; *e.g.*, 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").

81. *E.g.*, United States v. Kay, 359 F.3d at 761 (holding that a "diminution in duties or taxes" may assist in "obtaining or retaining business").

82. 15 U.S.C. §§ 78dd-1(a)(2), 78dd-2(a)(2), 78dd-3(a)(2) (1998).

83. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (1998); LAY-PERSON'S GUIDE, *supra* note 42.

84. 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3)(B), 78dd-3(f)(3) (1998).

85. LAY-PERSON'S GUIDE, *supra* note 42.

86. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998).

(3) "Reasonable and bona fide expenditure[s], such as travel and lodging expenses . . . directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof."[88]

The first situation constitutes the statutory exception to the FCPA's anti-bribery provisions; the latter two circumstances are affirmative defenses set forth in the statute.

a. The Facilitating Payments Exception

The statutory exception provides that the FCPA's anti-bribery provisions do not apply to "facilitating or expediting" payments made to foreign officials to "expedite or to secure the performance of a routine government action."[89] This exception only covers actions that are "ordinarily and commonly performed by the official."[90] In contrast to bribes, facilitating payments are understood as those paid for "essentially ministerial" actions that "merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[91] As Congress observed, 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."[92]

The statute lists a number of examples of activities that may qualify as permissible "routine governmental actions" under the right circumstances: obtaining permits or licenses to do business in the country; processing government papers (e.g., visas or work orders); providing police protection, mail services, or scheduling inspections; providing utility services (e.g., phone, power, water); and "actions of a similar nature."[93]

Practitioners, however, debate the usefulness of the facilitating payments exception. The SEC and DOJ have construed the facilitating payments exception narrowly—if the facts suggest that the payments actually involved influencing a discretionary governmental function or obtaining a positive outcome, regulators and courts may not recognize the exception. For example, in a recent prosecution of Westinghouse Air Brake Technologies Corporation, the company entered into a settlement with the SEC and DOJ for various FCPA violations.[94] Some of the payments classified as "improper" were payments "to schedule pre-shipping product inspections" and "to have certificates of product delivery issued."[95] Even though

87. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1998).

88. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2) (1998).

89. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (1998).

90. 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4) (1998).

91. H.R. REP. NO. 95-640, at 7 (1977).

92. *Id.*

93. 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4) (1998).

94. Press Release, DOJ, *Westinghouse Air Brake Technologies Corporation Agrees To Pay $300,000 Penalty To Resolve Foreign Bribery Violations in India* (Feb. 14, 2008), http://www.justice.gov/opa/pr/2008/February/08_crm_116.html.

95. Letter from Steven A. Tyrrell, Chief of DOJ Fraud Section, to Eric A. Dubelier, Attorney for WABAC Inc., Appendix A: Statement of Facts, para. 4 (Feb. 8, 2008) (Westinghouse Air Brake

these payments facially appear to be "facilitating or expediting payments," they were not recognized as such in the settlement agreement.[96] The settlement documents never explain why these payments did not qualify for the statutory exception. A likely explanation is that, in addition to expediting these official actions, the payments could have influenced their outcome.[97] This non-routine, discretionary quality would remove them from the statutory exception's ambit. Yet in practice, as the Westinghouse matter illustrates, distinguishing true facilitating payments from those that influence an official's discretion proves quite difficult.

b. The Affirmative Defenses

The two affirmative defenses are also the topic of much discussion. Indeed, they have been the subject of numerous DOJ Opinion Procedure Releases.[98] The affirmative defenses are relatively straightforward:

(1) the payment was "lawful under the written laws and regulations" of the foreign official's country;[99]

(2) the payment was for "reasonable and bona fide expenditure[s], such as travel and lodging expenses," incurred in relation to the promotion or demonstration of the payor's products or services, or the execution or performance of a contract between the payor and the foreign official's employer.[100]

But these affirmative defenses, especially the business promotion defense, can generate great confusion. U.S. companies and issuers that promote their products to government purchasers overseas must rely on what is still a fairly limited body of interpretive guidance when providing business courtesies. As Lucent Technologies learned the hard way, these affirmative defenses have limits, and the U.S. Government will prosecute companies that step over the line and transgress the "reasonable and bona fide" restrictions.[101]

B. Bribing Foreign Officials: A Comparison of the FCPA and the Bribery Act's Section 6

Having set forth the key elements of the FCPA's anti-bribery provisions, the discussion now turns to a comparison of the FCPA's statutory framework with the Bribery Act's prohibition on bribing foreign public officials. The centerpiece of the

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Technologies Corp. Non-Prosecution Agreement).

96. *Id.*; *see also* H.R. REP. NO. 95-640, *supra* note 91 (facilitating or expediting payments to foreign officials are not prohibited foreign trade practices).

97. *See* H.R. Rep. No. 95-640, *supra* note 91, at 8 (1977) (noting that the statute excludes payments to foreign officials to perform non-discretionary actions).

98. *See, e.g.*, DOJ Opinion Procedure Release, No. 07-01 (July 24, 2007); DOJ Opinion Procedure Release, No. 07-02 (Sept. 11, 2007); DOJ Opinion Procedure Release, No. 04-03 (June 14, 2004); DOJ Opinion Procedure Release, No. 04-04 (Sept. 3, 2004) (determining not to take FCPA enforcement action against various entities based on the presence of affirmative defenses).

99. 15 U.S.C. §§ 78dd-1(c)–3(c) (1998).

100. *Id.*

101. *Id.*; DOJ Press Release, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* http://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").

Bribery Act, section 6, establishes the offense of bribing a foreign public official[102] and is most analogous to the FCPA. Specifically, section 6(1) provides that "[a] person ('P') who bribes a foreign public official ('F') is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official."[103] As mentioned in the Explanatory Notes that accompanied the Bribery Bill,[104] this provision mirrors the OECD Anti-Bribery Convention.[105] Like the FCPA, the Bribery Act requires prosecutors to prove each constituent part of section 6 when enforcing the law.[106]

1. Section 6's Jurisdictional Reach

Under pre-existing U.K. law, an individual of any nationality could be convicted of a bribery offense where any of the acts or omissions took place inside the United Kingdom—similar to the FCPA's "act in furtherance" hook. The Bribery Act retains this jurisdiction for individuals and organizations.[107] Under the old law, however, when none of the relevant acts or omissions took place inside the United Kingdom, an individual was subject to liability only if he or she was a U.K. citizen (which includes British Overseas Citizens).[108] The Bribery Act expands this jurisdiction. Importantly, this expanded jurisdiction also applies to sections 1 and 2, discussed in detail below.

The offense of bribing a foreign public official (section 6) is now governed by a "close connection" test.[109] The Act asserts U.K. jurisdiction if the person or entity has a close connection with the United Kingdom, even if the act or omission at issue does not take place in the United Kingdom.[110] A person has a "close connection with the United Kingdom" if he or she is any of the following:

a British citizen or various other categories of British passport holder;

a resident of the U.K.;

an entity "incorporated under the law of any part of the United Kingdom";

or

a "Scottish partnership."[111]

102. Bribery Act, 2010, at c. 23, §6(1).

103. *Id.* (the actual text of the Act uses the abbreviations "P" and "F").

104. *See* Sir Christopher Jenkins CB QC, First Parliamentary Counsel, *Helping the Reader of Bills and Acts*, NEW L.J. [N.L.J.] (May 28, 1999), *available at* http://www.cabinetofficegov.uk/parliamentarycounsel/bills_and_acts/explanatory_notes_article.aspx (describing what Explanatory Notes entail).

105. Bribery Act, 2010, at Explanatory Notes, para. 34.

106. OECD Convention, *supra* 13, art. I, para. 3.

107. *See* Bribery Act, 2010, § 12(1) ("An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.").

108. Anti-terrorism, Crime and Security Act, 2001, c. 24, § 109 (U.K.).

109. *See* Bribery Act, 2010, §§ 12(4), 12(2)(c) (enumerating the territorial application for offenses under the Bribery Act). This test also applies to the offense of bribing another person (§ 1) and the offense of being bribed (§ 2).

110. *Id.* § 12(2).

111. *Id.* §§ 12(1)–12(4).

Thus, a person can commit an offense under section 6 irrespective of whether the acts or omissions that form part of the offense take place in the United Kingdom.[112] On its face, this "close connection" test is far narrower than the wide jurisdictional hook that U.S. agencies enjoy when enforcing the FCPA's anti-bribery requirements against issuers. In practice, however, section 7's far more liberal jurisdictional requirements for a business's failure to prevent bribery could have a profound impact on multinational corporations. This is discussed in detail in section D below.

2. The Intent of the Payor (the "Fault Element")

The *mens rea* requirement in section 6 of the Bribery Act—referred to in the Bill's Explanatory Notes as the "fault element"—is that the payor must intend to influence the foreign public official in the performance of his or her functions *as a foreign public official*.[113] This fault requirement would include the intent "to influence a foreign public official in the performance of his or her functions as a public official, including any failure to exercise those functions and any use of his or her position, even if he or she does not have authority to use the position in that way."[114]

This intent requirement under section 6 is quite similar to the intent needed to violate the FCPA. But what is immediately noticeable is that section 6 of the Bribery Act lacks the FCPA's requirement that the payor act "corruptly."[115] As discussed above, under the FCPA, the person making, aiding, or authorizing the payment to the foreign official must have a corrupt intent to wrongfully induce the recipient to misuse his or her official position to aid the payor's business.[116] The Joint Committee considered adding the word "corrupt" or a similar descriptor to the section 6 offense, specifically to exclude legitimate commercial conduct—for example, business courtesies—from the ambit of section 6.[117] In fact, the general bribery offenses (sections 1 and 2) do feature such a requirement—the "improper performance" test, discussed below. Without such a limiting principle, section 6 could potentially sweep in legitimate conduct. Instead of qualifying the *mens rea* requirement of section 6 with an adjective like "improper" or "corrupt," the drafters ultimately decided to leave the matter to prosecutorial discretion.[118] According to the Joint Committee, the main reason for omitting a limiting descriptor was that it would raise "questions about whether cultural norms and expectations" can legitimize an otherwise illegal payment.[119] Thus, the fault element of section 6 does not require corrupt or improper intent, although it does require an intent to influence a foreign public official in his or her official capacity for the purpose of obtaining or retaining business. As discussed further below, the U.K. Government has indicated that it is unlikely to prosecute

112. *Id.* § 12(5).

113. *Id.* § 6(1), Explanatory Notes, para. 44.

114. *Id.* at Explanatory Notes, para. 44.

115. 15 U.S.C. § 78dd-1(a) (1998).

116. *Id.* § 78dd-1(a)(1)(A).

117. JOINT COMMITTEE REPORT, *supra* note 28, paras. 146–147.

118. *Id.* para. 147.

119. *Id.* para. 146 (quoting Professor Jeremy Horder, Criminal Commissioner of the Law Commission).

businesses or individuals for bona fide business expenditures, despite the absence of a "corrupt" intent element in the Act.

3. The Actus Reus (the "Conduct Element")

In terms of specific conduct (i.e., the *actus reus*), the offense of bribing a foreign public official covers the offering, promising, or giving of bribes, but not their acceptance. Section 6(3) of the Act provides the following:

> P bribes F if, and only if, (a) directly or through a third party, P offers, promises or gives any financial or other advantage (i) to F, or (ii) to another person at F's request or with F's assent or acquiescence, and (b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.[120]

That is, there must be an offer, promise, or provision of some advantage, financial or otherwise, to a foreign official, and the foreign official must request or accept that advantage.[121] Although, unlike the FCPA, section 6 does not address the *authorization* of the provision of the financial or other advantage to F, section 14 of the Bribery Act, discussed in Part II.C.4 below, criminalizes the "consent or connivance" of a "senior officer" of the corporation to the company's violation of section 6, or section 1 or 2.[122]

Interestingly, the Bribery Bill's drafters inserted the "permitted nor required" language after the Joint Committee failed to include a "reasonable belief" defense. The reasonable belief defense would have protected a payor who "mistakenly, but reasonably, believed that a foreign public official was required or permitted to accept an advantage under the official's local law."[123] Such a defense was deemed inconsistent with "the United Kingdom's international obligations and the policy aims of the draft Bill."[124] The U.K. Government's view was that the "real issue" turned on whether the foreign official was "permitted or required to be influenced by the offering," not whether the payor's belief was "reasonable."[125]

But if the "written law applicable" to a foreign official *permits* that official to be influenced in his or her official capacity, then the payor has not committed an offense under section 6. This aspect of section 6's conduct element is clearly analogous to the FCPA's affirmative defense allowing for payments that are expressly permitted by the written laws of the host country.[126] For the purposes of the Bribery Act,

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120. Bribery Act, 2010, § 6(3).

121. *Id.*

122. *Id.* § 14.

123. JOINT COMMITTEE REPORT, *supra* note 28, para. 65.

124. *Id.* para. 71.

125. MINISTRY OF JUSTICE, GOVERNMENT RESPONSE TO THE CONCLUSION AND RECOMMENDATIONS OF THE JOINT COMMITTEE REPORT ON THE DRAFT BRIBERY BILL, 2009, Cm. 7748, at 6–7, para. 8 [hereinafter GOVERNMENT RESPONSE].

126. *Compare* 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (1998) (providing for the affirmative defense that the payment was lawful under local written laws or regulations), *with* Bribery Act, 2010, at § 6(3) (stating that the payor has not committed an offense if the foreign official is permitted to be influenced under the written law).

"[w]ritten law" is the law of the relevant part of the United Kingdom that would govern the performance of the official's functions.[127] In situations where those functions would not be subject to the law of a part of the United Kingdom, the "written law applicable" would either be the "applicable rules of a public international organisation" to which the official belongs or the laws of the country where the official at issue is considered a "foreign public official."[128] The intention behind the insistence on "written law" in this provision,[129] as explained by the Joint Committee, is threefold: to "remove the potential for loopholes," to "provid[e] greater certainty to prosecutors, jurors and businesses," and to "provide an appropriately narrow gateway restricting the circumstances in which advantages can legitimately be provided to foreign public officials."[130]

4. The Recipient of the Bribe

The Bribery Act and the FCPA cover a very similar universe of prohibited bribe recipients. Section 6(5) of the Act defines "foreign public official" as an individual who:

> (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory);
>
> (b) exercises a public function—
>
> > (i) for or on behalf of a country or territory outside the United Kingdom (or subdivision of such a country or territory), or
> >
> > (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
>
> (c) is an official or agent of a public international organisation.[131]

This closely mirrors the FCPA's definition of a "foreign official," which includes "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 [such an entity]."[132] Indeed, both the Bribery Act's and the FCPA's definitions of "foreign official" track the definition provided in the OECD Convention.[133] Various FCPA enforcement actions have stretched the definition of "foreign official" to cover employees of state-owned commercial enterprises.[134] The Bribery Act's drafters may not have troubled

127. Bribery Act, 2010, at Explanatory Notes, para. 39.

128. *Id.*

129. JOINT COMMITTEE REPORT, *supra* note 28, para. 64.

130. *Id.*

131. Bribery Act, 2010, § 6(5).

132. 15 U.S.C. § 78dd-1(f)(1) (1998).

133. *See* OECD Convention, *supra* note 13, art. 1(4)(a) (stating the definition of a foreign public official); *see also* Bribery Act, 2010, at Explanatory Notes, para. 36 (explaining the similarities between the definition in the Bribery Act and OECD Convention).

134. O. Thomas Johnson, Jr., *International Law & Practice: Foreign Corrupt Practices Act*, AM. BAR ASS'N, GEN. PRACTICE, SOLO & SMALL FIRM DIV., http://www.abanet.org/genpractice/magazine/1997/spring-bos/johnson.html (explaining that "foreign official" includes "persons employed by commercial

themselves with whether "foreign public officials," like "foreign officials," should include such employees. After all, the U.K. legislation also criminalizes overseas commercial bribery. But in light of the absence of any "corruptly" or "improperly" requirement in section 6, the answer to this question could have serious implications for the provision of business courtesies to such employees—an issue explored in greater depth below.

Interestingly, the Bribery Act defines "public international organisation" as an organization whose members consist of countries or territories (or governments thereof), other public international organizations, or a mixture of any of the foregoing.[135] This is significantly broader than the definition of "public international organization" in the FCPA, which is defined as (1) "an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 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."[136] Currently, only eighty-three organizations have such designation by executive order.[137] One would expect far more organizations to fall within the Bribery Act's definition of "public international organisation."

5. The Bribe's Purpose

Section 6 of the Bribery Act requires that the payor's bribe be for the purpose of "obtaining or retaining business, or an advantage in the conduct of business."[138] This is, on its face, broader than the FCPA's requirement that the bribe be to "obtain or retain business."[139] But as the above discussion of the FCPA shows, U.S. courts and federal law enforcement officials alike have interpreted this phrase to include far more than just actually winning business from the government. For this reason, it is likely that these elements will be in accord.

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enterprises owned or controlled by foreign governments and private persons who have responsibilities similar to those of governmental employees"); Mike Johnson, *Disconnected: Another Telecommunications Company Settles an FCPA Enforcement Action*, CORP. COMPLIANCE INSIGHTS, June 30, 2010, http://www.corporatecomplianceinsights.com/2010/veraz-networks-settles-fcpa-enforcement-action/ (enforcement action against Veraz Networks for bribing government-owned Chinese telecommunications companies); U.S. Sec. and Exch. Comm'n, Litigation Release No. 21357, SEC Charges California Telecom Company with Bribery and Other FCPA Violations (2009) (enforcement action against UTStar.com, Inc., for funding trips for officials of government-controlled Chinese telecommunications companies).

135. Bribery Act, 2010, § 6(6).

136. 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(A) (1998).

137. *See* 22 U.S.C.A. § 288 (1945) (noting Executive Orders designating eighty-one public international organizations entitled to enjoy the privileges, exemptions, and immunities conferred by 22 U.S.C. § 288 *et seq.*); Exec. Order No. 13,259, 67 Fed. Reg. 13,239 (Mar. 19, 2002) (announcing two additional public international organization designations).

138. Bribery Act, 2010, § 6(2).

139. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (1998).

6. The Role of Third Parties

As noted above, the conduct element of section 6(3) of the Bribery Act also prohibits payments to foreign government officials made through a third party.[140] In contrast to the FCPA, the Bribery Act provides no guidance regarding the meaning of "through a third party." It is thus unclear whether the Bribery Act is broader or narrower than the FCPA in this area. As discussed in the previous section, the FCPA's third-party-payment provision's liberal knowledge standard includes those who do not themselves act with the specific intent to bribe a foreign official. The role of third parties under the Bribery Act is addressed in greater detail below during the discussion of section 7's treatment of "associated persons."

7. Exceptions and Affirmative Defenses

On its face, the Bribery Act's prohibition on bribing foreign public officials is stricter than the FCPA's in that it does not contain the same array of defenses. As noted above, the FCPA has one exception and two affirmative defenses:

- facilitating or expediting payments;
- payments expressly permitted by the written laws of the host country; and
- certain bona fide promotional expenses or expenses pursuant to the performance of a contract.[141]

The Bribery Act takes a different approach to these issues.

a. Facilitating Payments

The Bribery Act contains no exception or defense for facilitating payments. Like past U.K. law, it prohibits such payments.[142] The only facilitating payments likely to be acceptable under section 6 are those expressly allowed under a local written law.[143] The Joint Committee describes facilitating payments as "the practice of paying a small sum of money to a public official (or other person) as a way of ensuring that they [sic] perform their duty, either more promptly or at all."[144] Prima facie, therefore, the Bribery Act criminalizes the sorts of common payments currently permitted under the FCPA—payments for obtaining permits or licenses, processing government papers, or scheduling inspections. This potentially leaves U.K. companies and individuals at a commercial disadvantage vis-à-vis similarly situated companies in the United States and could significantly impact corporate compliance programs, as discussed below.

As a matter of practice, however, U.K. authorities do not plan to base many prosecutions on such payments. The Joint Committee stated that there is a "general understanding" that prosecution will be unlikely for an offense involving "such small amounts of money."[145] In other words, U.K. authorities may at their discretion

140. Bribery Act, 2010, § 6(3)(a).
141. 15 U.S.C. §§ 78dd-1(b)–(c), 78dd-2(b)–(c), 78dd-3(b)–(c) (1998).
142. JOINT COMMITTEE REPORT, *supra* note 28, para. 130.
143. *Id.* para. 131.
144. *Id.* para. 130.
145. *Id.*

decline to prosecute certain facilitating payments that are technically illegal under the Bribery Act.[146] Unsurprisingly, the SFO endorses this reliance on prosecutorial discretion.[147] But this is cold comfort to companies subject to the Bribery Act. Indeed, although the SFO staff has indicated that they are unlikely to prosecute isolated, low-value facilitating payments, they expect companies to adopt a "zero tolerance" policy toward such expenditures.[148]

b. Payments Expressly Permitted by Written Law

As discussed above in Part II.B.3, section 6 explicitly provides that no violation occurs if the written law governing the official's conduct requires or permits him or her to be influenced by the offer, promise, or gift.[149]

c. Promotional Expenses

Unlike the FCPA, the Bribery Act provides no affirmative defense for reasonable and bona fide promotional or explanatory expenses, like travel or lodging for a foreign official, or other benefits for a foreign official related to "the execution or performance of a contract with a foreign government or agency thereof."[150] Accordingly, most business courtesy expenditures provided to foreign public officials constitute a prima facie offense under the Act. Evidence presented to the Joint Committee revealed that this is a matter of concern for many corporations for which corporate hospitality is an ordinary part of doing business.[151] That the definition of "foreign public official" will not necessarily extend to employees of state-owned commercial enterprises could prove extremely helpful in this area. Those recipients may fall under the general bribery offenses (section 1 and section 2), which predicate what is and what is not permissible on whether the payment is "improper."[152] As SFO Director Richard Alderman put it, "most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct."[153] But it

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146. *See* GOVERNMENT RESPONSE, *supra* note 125, para. 18 (citing CPS POLICY DIRECTORATE, CODE FOR CROWN PROSECUTORS, Feb. 2010, *available at* http://www.cps.gov.uk/Publications/docs/code2010english.pdf, as the SFO's guide for applying prosecutorial discretion to facilitation payments).

147. *See* Memorandum submitted by the Serious Fraud Office (June 2009), *available at* http://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).").

148. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud Office Discusses Details of UK Bribery Act with Gibson Dunn*, Sept. 7, 2010, *available at* http://gibsondunn.com/publications/Pages/UKSeriousFraudOfficeDiscussion-RecentlyEnactedUKBriberyAct.aspx [hereinafter GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*] ("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.").

149. *Supra* Part II.B.3 and accompanying discussion.

150. 15 U.S.C. §§ 78dd-1(c)(2)–3(c)(2) (1998).

151. JOINT COMMITTEE REPORT, *supra* note 28, paras. 139–147.

152. Bribery Act, 2010, §§ 1, 2.

153. JOINT COMMITTEE REPORT, *supra* note 28, para. 139 (quoting SFO Director Richard Alderman).

remains unclear what relevance this reassurance has for potential section 6 offenses, as the offense of bribing a foreign public official features no "improper" test.[154]

Lord Tunnicliffe, a Government minister involved in drafting the legislation, has commented that the absence of an exception for corporate hospitality is deliberate. In a letter to Lord Henley, he stated:

> We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalise 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.[155]

Just as with facilitating payments, it will fall to prosecutors to exercise their discretion to determine whether any particular hospitality is illegitimate and thus deserving of criminal charges.

Thankfully for multinational corporations, the U.K. Ministry of Justice has indicated publicly and in conversation with the authors that it is not inclined to prosecute bona fide promotional expenditures provided to foreign public officials.[156] On September 14, 2010, it issued draft guidance on "adequate procedures" by corporations to comply with the Act—an issue discussed in further detail below in Part II.D.1.[157] It specifically stated that "[w]here the prosecution is able to establish a financial or other advantage has been offered, promised or given but there is no sufficient connection between the advantage and the intention to influence and secure business or a business advantage then section 6 is unlikely to be engaged."[158] Whether there is such a connection will be a highly fact-specific analysis, but the draft noted that "it is unlikely . . . that a routine and incidental business courtesy where the advantage involved is of small value, or where hospitality is standard, will have any impact on decision making in the context of a business opportunity of high value and therefore engage section 6."[159] Thus, this aspect of the Bribery Act may function similarly to the FCPA. However, without more explicit assurances, companies may wish to tighten their compliance programs in this area, especially if the employees of state-owned commercial enterprises are considered "foreign public officials."

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154. Bribery Act, 2010, § 6.

155. Letter from Lord Tunnicliffe, Minister in the Government Whips Office, Government Spokesperson for the Ministry of Justice, to Lord Henley (Jan. 14, 2010), *available at* http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf.

156. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148; *see also*, MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010) 22 (2010), *available at* http://www.justice.gov.uk/consultations/docs/bribery-act-guidance-consultation1.pdf [hereinafter MINISTRY OF JUSTICE] (providing guidance to organizations about the boundaries of what is likely to be prosecuted).

157. MINISTRY OF JUSTICE, *supra* note 156, at 11.

158. *Id.* at 22.

159. *Id.*

C. Sections 1 and 2 of the Bribery Act: The General Bribery Offenses

Unlike the FCPA, a significant portion of the Bribery Act deals with domestic and commercial bribery.[160] The offenses under sections 1 and 2, those of bribing and being bribed, extend the reach of the U.K. law into the private sector.[161] Further, they apply to those acting abroad, even if the act has no jurisdictional nexus with the United Kingdom, so long as the payor (for purposes of section 1) or the recipient (for purposes of section 2) has a "close connection" with the United Kingdom, as described above in Part II.B.1.[162] Again, the FCPA lacks any equivalent.

1. The Elements of the General Bribery Offenses

It is useful to consider the two general bribery offenses—the offense of bribing another person and the offense of being bribed—together, as they are linked by a common interpretative framework under the Act.

Under section 1, a person (P) is guilty of an offense where he or she offers, promises, or provides a financial advantage to another person in one of two circumstances that reward or give rise to the improper performance of a relevant function:

- In Case 1, P intends the financial advantage "to induce a person to perform improperly a relevant function or activity" or provides it "to reward a person for the improper performance of such a function or activity."[163]
- In Case 2, "P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity."[164]

In the first case, "it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned."[165] In either case, the advantage can be offered, promised, or given by the payor himself or herself, or through an intermediary.[166]

Section 2 defines the offense of bribery as it applies to the recipient or potential recipient of the bribe (R).[167] The recipient is guilty of an offense in one of four scenarios (identified as Cases 3–6 in the Act):

- In Case 3, "R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person)."[168]

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160. Bribery Act, 2010, §§ 1–5, 7–9.

161. *Id.* § 3(2) (defining function or activity to which offenses under section 1 and section 2 relate 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]).").

162. *Id.* § 12(2)–(4); *supra* Part II.B.1.

163. Bribery Act, 2010, § 1(2).

164. *Id.* § 1(3).

165. *Id.* § 1(4).

166. *Id.* § 1(5).

167. *Id.* § 2.

- In Case 4, "R requests, agrees to receive or accepts a financial or other advantage," and "the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity."[169]
- In Case 5, "R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity."[170]
- In Case 6, R or "another person at R's request or with R's assent or acquiescence" performs a relevant activity or function improperly "in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage."[171]

Thus, in all cases, there is a requirement that the ostensible recipient "requests, agrees to receive or accepts" an advantage, regardless of whether the recipient *actually* receives anything.[172] This requirement must then be linked to the "improper performance" of a relevant function or activity, discussed further below.[173] In Cases 3, 5, and 6, it does not matter whether the improper performance is by the recipient or by another person. In Case 4, the recipient's act of requesting, agreeing to receive, or accepting a financial advantage itself amounts to improper performance.

Subsection 6 of section 2 governs all of these provisions (cases 3–6) and specifies that "it does not matter whether" the recipient directly requests, receives, or agrees to accept the financial advantage or does so through an intermediary.[174] Further, subsection 6 makes clear that the advantage need not even be for the benefit of the recipient.[175]

One of the most notable aspects of the Bribery Act's criminalization of passive corruption is that the Act does not specify that the recipient must have a corrupt intent. The Bribery Act states, "In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper," and it thereby clarifies that the absence of language signifying that R intends for the activity or function to be performed improperly in cases 4, 5, and 6, is not an oversight."[176] Likewise, as to case 6, where another person performs the function or activity, it is immaterial whether that person "kn[ew] or believe[d] that the performance of the function [was] improper."[177] These provisions mark a significant and deliberate departure from the ordinary requirement of subjective fault under the pre-existing U.K. criminal law. The express intention of the Joint Committee was to "chang[e] the culture in which taking a bribe is viewed as acceptable."[178] Stating the policy decision in stern terms, the Joint Committee's report explains that these provisions will "encourage anyone who is expected to act in good faith, impartially or under a

168. *Id.* § 2(2).
169. Bribery Act, 2010, § 2(3).
170. *Id.* § 2(4).
171. *Id.* § 2(5).
172. *Id.* §§ 1, 2(4).
173. *Id.* § 2(4); *infra* Part II.C.3 (discussing improper performance test).
174. *Id.* § 2(6)(a).
175. Bribery Act, 2010, § 2(6)(b).
176. *Id.* § 2(7).
177. *Id.* § 2(8).
178. JOINT COMMITTEE REPORT, *supra* note 28, para. 46.

position of trust, to think twice before accepting an advantage for their [sic] personal gain."[179]

2. Relevant Function or Activity

Section 3 of the Act defines the fields within which bribery can take place, in other words, the "relevant function or activity" that can be improperly performed for the purposes of sections 1 and 2:

> (a) any function of a public nature,[180]
>
> (b) any activity connected with a business,
>
> (c) any activity performed in the course of a person's employment, [or]
>
> (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).[181]

This clause expressly extends the law of bribery so that it equally covers "public and selected private functions, without discriminating between the two."[182] According to the Bill's Explanatory Notes, the "functions or activities in question include all functions of a public nature and all activities connected with a business, trade, or profession."[183] The last two categories of relevant function or activity—any activity performed in the course of a person's employment and any activity performed by or on behalf of a body of persons (whether corporate or unincorporated)—are intended to capture both public and private activities. In the words of the drafters, these categories "straddle the public/private divide."[184]

Yet despite these definitions of "relevant functions," not all acts or omissions in these categories violate the Bribery Act.[185] There must be an expectation that the person performing the function is

> performing it in good faith (Condition A);[186]
>
> performing it impartially (Condition B);[187] or
>
> "in a position of trust by virtue of performing it" (Condition C).[188]

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179. *Id.*

180. "Functions of a public nature" is the same phrase that is used in the definition of "public authority" in section 6(3)(b) of the Human Rights Act of 1998, but this phrase in the Bribery Act is not subject to the same limitations as in the Human Rights Act. Human Rights Act, 1998, c. 42, §§ 6(3)(b), 6(5) (U.K.). Section 6(5) of the Human Rights Act limits the definition of a public authority in relation to a particular act. A person will not be a public authority solely by virtue of being a "person certain of whose functions are functions of a public nature," if the essential nature of the act is private. *Id.* § 6(5).

181. Bribery Act, 2010, § 3(2)(a)–(d).

182. *Id.* at Explanatory Notes, para. 28.

183. *Id.*

184. *Id.*

185. *Id.* para. 29.

186. *Id.* § 3(3).

187. Bribery Act, 2010, § 3(4).

188. *Id.* § 3(5).

According to the Joint Committee, this "reliance on a reasonable person's expectation of 'good faith', 'impartiality', and 'trust' represents a careful balance between simplicity, certainty and effectiveness" and also "takes into account the approach adopted in other countries and international anti-bribery conventions."[189]

Subsection 6 of section 3 provides that the functions or activities may nonetheless be "relevant" regardless of whether they were carried out in the United Kingdom or abroad. That is, there need not be a geographic connection between the underlying function or activity and the United Kingdom.[190]

3. The Improper Performance Test

Section 4 of the Bribery Act sets forth the "improper performance" test—specifying what type of deviation from a relevant function gives rise to a general bribery offense.[191] As noted above, this provision serves a similar function to the FCPA's "corruptly" requirement, limiting enforcement of sections 1 and 2 to those instances where some duty of the bribe recipient was violated.[192] The absence of such a requirement in section 6's prohibition on the bribing of foreign public officials is one of the most significant features of the Bribery Act.

"Improper performance" is defined as a performance or non-performance *that breaches a "relevant expectation*."[193] The Act defines "relevant expectation[s]" as expectations that a function will be performed in good faith or impartially (as per Condition A or B, above).[194] Further, a relevant expectation that a function will be performed in a certain way may arise by virtue of the functionary being in a position of trust (as per Condition C, above).[195] Importantly, under the Act an omission can also amount to improper performance.[196] Finally, if a recipient no longer engages in a given function or activity, but he or she still carries out acts related to his or her former function or activity, those acts also may be considered part of the "improper performance."[197]

To avoid confusion over whether a particular function or activity includes a "relevant expectation," the drafters of the Bribery Act expressly incorporated a reasonableness standard into the law for the purposes of sections 3 and 4.[198] This appears in section 5 of the Act. This provision defines a reasonable expectation as "what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned."[199] But if the performance of a function or activity is not governed by U.K. law, the Act requires that "any local custom or practice [must] be disregarded" when considering "reasonable

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189. JOINT COMMITTEE REPORT, *supra* note 28, para. 35.

190. Bribery Act, 2010, § 3(6)(a)–(b). This preserves the effect of § 108(1) and (2) of the Anti-terrorism, Crime and Security Act 2001 (which would be repealed by the Bill). *Id.* § 17(3) sch. 2: Repeals and Revocations.

191. Bribery Act, 2010, § 4.

192. 15 U.S.C. § 78 dd-2(a) (1998).

193. Bribery Act, 2010, § 4(1)(a)–(b) (emphasis added).

194. *Id.* §§ 4(2)(a), 3(3)–(4).

195. *Id.* §§ 4(2)(b), 3(5).

196. *Id.* § 4(1)(b).

197. *Id.* § 4(3).

198. *Id.* § 5(1).

199. Bribery Act, 2010, § 5(1).

expectation," with the exception that local customs should be considered only if "permitted or required by the written law applicable to the country or territory concerned."[200] If there were any uncertainty about the Bribery Act's lack of an FCPA-type "facilitating payments" exception for commercial bribery, this deliberate rejection of any cultural relativism clarifies the situation. The existence in local custom of different "relevant expectations" about the impartiality or good faith inherent in a particular function or activity *does not* curtail the Bribery Act's sweep. On the contrary, the law forestalls the development of any such loophole.

4. Other Provisions Relevant to Corporate Liability for the Bribery Offenses

The offenses under sections 1, 2, and 6 of the Bribery Act can be committed by any legal person.[201] For the prosecution of an individual, the Act focuses attention on the *mens rea* and *actus reus* of the person accused. Where a corporate entity is prosecuted under section 1, 2, or 6—section 7 creates a second, corporation-specific regime, described below in Part II.D.1—it is unclear whose acts and mental state will constitute the relevant acts and mental state for the offense. Under normal principles of English criminal law applicable to serious offenses with a fault element, and absent statutory language to the contrary, the existence of a crime would turn on the acts and mental states of those individuals "directing the mind and will of the company"[202]—normally its directors and senior management. Although this matter may ultimately require resolution by the courts, the Bribery Act on its face appears to incorporate this legal presumption.

The Act establishes in section 7, discussed below, a specific corporate offense that would cover bribery by a person remote from the management of the company (for example, an employee or agent).[203] Under section 7, such bribery will lead to criminal liability for the corporation itself.[204] The presence of this specific provision for corporate liability may suggest a legislative intent to forgo direct criminal corporate liability under sections 1, 2, and 6 for acts performed by a company's junior staff or agents.

Further, subsections 14(1) and 14(2) of the Bribery Act specifically provide for the liability of certain individuals under sections 1, 2, and 6 when the offense is committed by a commercial entity.[205] If an offense under section 1, 2, or 6 is committed by a "body corporate"[206] and the offense is proved to have been committed "with the consent or connivance" of "a senior officer of the body corporate," or "a person purporting to act in such capacity," that individual may be liable for the offense in addition to the commercial entity.[207] "Senior officer" means a "director, manager, secretary, or other similar officer" of the organization.[208] This

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200. *Id.* § 5(1)–(2).

201. *See id.* § 11 (distinguishing between "individual[s]" and "other person[s]" when prescribing penalties for violators of sections 1, 2, and 6).

202. Tesco Supermarkets Ltd. v. Nattrass [1971] UKHL 1, [1972] A.C. 153 [4] (on appeal from Eng.).

203. Bribery Act, 2010, §§ 7(1), 8(3).

204. *Id.* § 7(1).

205. *Id.* § 14(1)–(2).

206. *Id.* § 14(1). This also applies to a Scottish partnership. *Id.*

207. *Id.* § 14(2).

208. *Id.* § 14(4)(a). In relation to a Scottish partnership, it means a partner in the partnership. *Id.* §

provision does not apply, however, unless the senior officer or person has a close connection with the United Kingdom within the meaning of section 12, as discussed above in Part II.B.1. [209]

D. The Bribery Act's Section 7 and the FCPA's Accounting Provisions

It is section 7 of the Bribery Act that makes the new U.K. law so striking in its extraterritoriality and scope of potential criminal liability for multinational corporations. Under section 7, the Bribery Act in many ways exceeds the aggressive jurisdictional claims of even the FCPA. Section 7 makes it a criminal offense for a commercial organization to fail to prevent bribery.[210] But it also provides the corporation with a statutory defense if it shows on the balance of probabilities that it has instituted effective internal controls to prevent persons associated with it from committing bribery.[211] Although the FCPA lacks any directly analogous provisions, the FCPA's accounting provisions have similar implications—both in terms of extending the FCPA's reach and in impacting the internal controls of multinational corporations.[212]

1. Section 7's Prohibition on Failing to Prevent Bribery

Unlike section 6 of the Bribery Act, which has a relatively constrained jurisdictional reach compared to its U.S. analogue, section 7 has extraordinary territorial breadth—apparently outreaching even the long arm of the FCPA. Section 7 applies to any entity that is a "relevant commercial organisation."[213] The following qualify as a "relevant commercial organisation" under the Act:

> (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
>
> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
>
> (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
>
> (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.[214]

The inclusion of the second and fourth groups as "relevant commercial organisations" seemingly sweeps into the Bribery Act's ambit virtually all major multinational corporations—the vast majority of which conduct some business in the United Kingdom. Just as the U.S. legislators who drafted the FCPA determined that all companies that avail themselves of the United States' public capital markets need

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14(4)(b).

209. Bribery Act, 2010, § 14(3).

210. *Id.* § 7.

211. *Id.*

212. 15 U.S.C. § 78m(b)(6) (1998).

213. Bribery Act, 2010, § 7(5) (a)–(d).

214. *Id.*

to play by its rules when operating elsewhere, it appears that U.K. legislators made a similar determination with regard to all companies that avail themselves of the United Kingdom's economy. Of course, as has been oft-repeated throughout this article, the practical implications of these provisions on multinational companies will depend primarily on how the SFO chooses to exercise its enforcement authority. Although the SFO has suggested that it intends to assert broad jurisdiction under the Bribery Act,[215] the Ministry of Justice's draft guidance is silent on the jurisdictional implications of section 7, leaving open the question of what precisely it means to "carr[y] on business" in the United Kingdom.[216] Indeed, the illustrative examples contained in annex B of the guidance address only U.K.-based organizations.[217] For the time being then, it appears that the U.K. Government is content to remain mum on how it views the scope of its jurisdiction under the Act.[218]

For the corporation or partnership to violate section 7, a person "associated" with the organization must violate section 1 or 6 (regardless of prosecution for the underlying act) or otherwise be guilty of violating section 1 or 6 but for a failure to have a "close connection" with the United Kingdom.[219] In other words, the "associated person" needs to commit the underlying violative act. Associated persons include any person or entity that "performs services for or on behalf of" the organization.[220] This would include, for example, employees, agents, and subsidiaries.[221] Indeed, employees are presumed to be associated persons absent a showing to the contrary.[222] The Bribery Act further clarifies that "[t]he capacity in which [the associated person] performs services for or on behalf of [the company] does not matter,"[223] and it warns that the existence of 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.[224]

The Bribery Act's admonishments seem to echo the FCPA's third-party-payment provision,[225] which eschews the formalistic master-agent relationship in favor of a broader understanding of the interaction between two legal persons. Thus, it is possible that the SFO may determine that an "associated person" could be a distributor or even an arm's-length purchaser that resells a product.

Perhaps even more unclear is whether associated persons include individuals or entities associated with a relevant commercial organization's subsidiaries or affiliates.

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215. *See* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 (stating that the SFO intends to assert broad jurisdiction).

216. MINISTRY OF JUSTICE, *supra* note 156, at 20–21.

217. *See id.* at 24–31 (positing only U.K.-based corporations in the "Illustrative Scenarios").

218. *Id.*; *see also* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148. ("The [SFO] Staff declined to opine on specific, hypothetical fact patterns designed to test elements of the Act's jurisdictional reach. [T]hey made clear that the test for jurisdiction is simply whether the company in question carries out business in the UK.").

219. MINISTRY OF JUSTICE, *supra* note 156, at 20; Bribery Act, 2010, § 12(1)–(4).

220. Bribery Act, 2010, § 8(1).

221. *Id.* § 8(3).

222. *Id.* § 8(5).

223. *Id.* § 8(2).

224. *Id.* § 8(4).

225. 15 U.S.C. §§ 78dd-1(a)(3), 2(a)(3), 3(a)(3) (1998).

In short, is a non-U.K. subsidiary, by virtue of being owned by a "relevant commercial organisation" (e.g., one that does business in the United Kingdom), subject to—or does it subject its parent to—section 7 for the activities of persons associated with the non-U.K. subsidiary? If other entities in which a company holds an ownership interest are not only associated persons, but also qualify themselves as part of the "relevant commercial organisation," section 7's requirements could effectively extend to even the remotest corners of a global organization.

Of course, when such an associated person performs a violative act, a commercial organization can still overcome the presumption that it has failed to prevent bribery.[226] In defending itself against a charge under section 7, a commercial organization can assert that it maintained "adequate procedures" to prevent associated persons from committing bribery.[227] Although not explicit on the face of the Bribery Act, the burden of proof that the defendant will need to meet is the "balance of probabilities," in accordance with established case law.[228] This standard is analogous to the U.S. civil standard of the preponderance of the evidence—which means that a fact is "more likely than not."[229]

The Bribery Act does not define what procedures are "adequate." Rather, the law provides that the U.K. "Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing."[230] The Secretary of State may also periodically update this guidance.[231] In developing such guidance, the U.K. Government is liaising with a number of experts from various organizations, including Transparency International,[232] the Institute of Business Ethics,[233] and the Anti-Corruption Forum,[234] as to the substantive contours of the guidance.[235] Ultimately, it is likely that whatever procedures satisfy the FCPA's strict internal controls requirement will also satisfy whatever guidance the Secretary of State issues.

As noted above, on September 14, 2010, the U.K. Ministry of Justice released a draft of its first guidance on "adequate procedures" under the Act, as part of an eight-week consultation period. The draft guidance sets forth six general principles to inform organizations' internal control environments:

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226. *See* Bribery Act, 2010, § 7(2) (offering a possible defense to the offense).

227. *Id.* § 7(2).

228. *Id.* at Explanatory Notes, para. 50.

229. Likewise, the balance of probabilities was simply described by Lord Denning as "more probable than not." Miller v. Minister of Pensions, [1947] 2 All ER 372 (K.B.).

230. Bribery Act, 2010, § 9(1).

231. *Id.* § 9(2).

232. *See* TRANSPARENCY INTERNATIONAL UK, http://www.transparency.org.uk. Transparency International is a U.K.-based anti-corruption NGO.

233. The Institute of Business Ethics is a U.K. organization formed to encourage high standards of corporate behavior and the sharing of best practice. *See* INSTITUTE OF BUSINESS ETHICS, http://www.ibe.org.uk.

234. The Anti-Corruption Forum is "an alliance of U.K. business associations, professional institutions, civil society organizations and companies with interests in the domestic and international infrastructure, construction and engineering sectors." *See* UK ANTI-CORRUPTION FORUM, http://www.anticorruptionforum.org.uk/acf/pages/acf.php.

235. Letter from Lord Bach, Parliamentary Under Sec'y of State, to Lord Henley, House of Lords, 1–2 (Dec. 2009), *available at* http://www.justice.gov.uk/publications/docs/bach-letter-adequate-procedures-guidance.pdf.

1. Businesses should regularly assess the bribery risks that they face globally.[236]
2. Senior management should establish a culture within the organization that is intolerant of bribery, and they should ensure that the company's policy to operate without bribery is effectively communicated throughout the organization.[237]
3. Commercial organizations should employ due diligence procedures and policies covering all parties to a business relationship, including the organization's supply chain, intermediaries and agents, "all forms of joint venture and similar relationships" and "all markets in which the commercial organisation does business."[238]
4. Organizations should maintain "clear, practical, accessible and enforceable" policies and procedures that prohibit bribery and effectively reflect the functional diversity of the entity's work force, including "all people and entities over which the commercial organisation has control."[239]
5. Companies should embed their compliance policies and procedures within the business to ensure its efficaciousness.[240]
6. Commercial organizations should institute mechanisms to review and monitor their compliance with relevant anti-bribery procedures and policies.[241]

The Ministry of Justice will accept comments on the draft until November 8, 2010, and issue final guidance in early 2011.[242]

Clearly, some of these proposed requirements dovetail with the FCPA's "internal controls" provisions, although internal controls under the FCPA are a positive obligation rather than a defense. The practical—if not the legal—effect of these provisions may indeed be quite similar. Once the final guidance is published, corporations will need to assess their obligations carefully under both pieces of legislation.

2. Implications of the Accounting Provisions and the Bribery Act's "Adequate Procedures" Defense

Although the FCPA's accounting provisions differ significantly from the Bribery Act's various requirements, the Bribery Act's section 7 and its "adequate procedures" affirmative defense have similar implications for the internal controls of multinational corporations. Namely, both laws effectively require multinational corporations (issuers under the FCPA or "relevant commercial organisations" under the Bribery Act) to devise and maintain adequate anti-bribery internal controls.[243]

236. MINISTRY OF JUSTICE, *supra* note 156, at 12.
237. *Id.* at 13.
238. *Id.* at 14.
239. *Id.* at 15.
240. *Id.* at 16.
241. *Id.* at 17.
242. MINISTRY OF JUSTICE, *supra* note 156, at 5.
243. *Compare* 15 U.S.C. § 78m(b)(2) (1998) (requiring issuers to "devise and maintain a system of internal accounting controls" that functions to compare "recorded accountability for assets" with "the

Further, both the FCPA's accounting provisions and section 7 extend the anti-bribery mandate well beyond the laws' anti-bribery provisions' coverage of proscribed bribes.[244] As just described, section 7 does this by significantly loosening the jurisdictional nexus for sections 1 and 6. The FCPA's accounting provisions do this by addressing the behavior of issuer's subsidiaries that do not list their securities on U.S. exchanges.[245] Finally, it is important to bear in mind that the United Kingdom already requires its companies to maintain accurate books and records under the Companies Act.[246]

3. The FCPA's Accounting Provisions

As noted above, the FCPA has two accounting provisions: the "books-and-records" provision and the "internal controls" provision. The "books-and-records" provision requires that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets . . . ."[247] The FCPA defines "reasonable detail" as "such level of detail . . . as would satisfy prudent officials in the conduct of their own affairs."[248] This provision, which makes it much more difficult for a company to disguise improper payments, also applies to the recording of legitimate transactions.[249] One interesting challenge that this provision poses for multinational companies is how to record and describe payments to foreign officials that are permissible as facilitating payments under the FCPA, but illegal in the host country.

The "internal controls" provision requires that issuers "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that":

> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting

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existing assets at reasonable intervals and ensure that "appropriate action is taken with respect to any differences"), *with* Bribery Act, 2010, § 7(2) (providing that it is a defense to prosecution under section 7 of the Bribery Act if a commercial organization had procedures in place to prevent persons associated with that organization from engaging in conduct constituting bribery).

244. *Compare* 15 U.S.C. § 78m(b)(2) (1998) (obligating issuers to implement internal accounting controls to require that transactions are completed and assets are accessed only with proper authorization, records are kept "in accordance with generally accepted accounting principles," and existing assets are compared regularly with recorded assets to address any differences in expected and actual assets), *with* Bribery Act, 2010, § 7(2) (suggesting that commercial organizations need to implement adequate procedures to prevent bribery by persons associated with them to be fully protected from prosecution under section 7).

245. *See* 15 U.S.C. § 78m(b)(6) (1998) (requiring issuers to "in good faith . . . use [their] influence" to cause foreign subsidiaries to "maintain a system of internal accounting controls consistent with [15 U.S.C. § 78m(b)(2) (1998)]).

246. Companies Act, 2006, c. 46, § 386 (U.K.).

247. 15 U.S.C. § 78m(b)(2)(A) (1998).

248. 15 U.S.C. § 78m(b)(7) (1998).

249. *See* 15 U.S.C. §§ 78m(b)(7), 78(b)(2)(A) ("the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs").

> principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
>
> (iii) access to assets is permitted only in accordance with management's general or specific authorization; and
>
> (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences . . . .[250]

The FCPA defines "reasonable assurances" to mean the "degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[251] The SEC has clarified that such reasonableness "is not an 'absolute standard of exactitude for corporate records'" and that "while 'reasonableness' is an objective standard, there is a range of judgments that an issuer might make as to what is 'reasonable . . . .'"[252]

The accounting provisions extend the reach of the FCPA to cover entities that are not subject to the anti-bribery provisions (foreign non-issuer subsidiaries of issuers) and to address conduct that is not even otherwise substantively violative of the anti-bribery provisions. The latter point is evident from the text of the statute.[253] Nowhere does it discuss any underlying malfeasance. In noted contrast, the Bribery Act's section 7 requires the existence of underlying misbehavior, even if the United Kingdom lacks jurisdiction to prosecute it.[254]

The jurisdictional reach of the FCPA's accounting provisions is a little less obvious. Although the accounting provisions do not themselves apply directly to non-issuer subsidiaries, the failure of a subsidiary to comply with their requirements can result in the parent's violation of the FCPA.[255] The parent company may be criminally liable for violations of the accounting provisions at the corporate or subsidiary level if it "knowingly" fails to comply with them.[256] Also, it may be held civilly liable for any failures to comply with either accounting provision, regardless of its knowledge.[257]

With regard to the internal controls provision, the FCPA imposes strict civil liability on issuers for violations by entities in which the issuer holds an interest that affords it greater than fifty percent of the voting power.[258] Even when the issuer has

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250. 15 U.S.C. § 78m(b)(2)(B) (1998).

251. 15 U.S.C. § 78m(b)(7) (1998).

252. Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under § 13(a) or 15(d) of the Securities Exchange Act of 1934, 72 Fed. Reg. 35324-01, 35324 (June 27, 2007) (citations and quotation marks omitted).

253. *See*, *e.g.*, 15 U.S.C. § 78m(b)(2)(B)(ii) (1998) (requiring the recording of transactions to permit preparation of financial statements).

254. *See* Bribery Act, 2010, § 7(1) (requiring that an individual intend to "obtain or retain business . . . or . . . advantage in the conduct of business").

255. 15 U.S.C. § 78m(b)(6) (1998) (listing the requirements for an issuer to comply with 15 U.S.C. § 78m(b)(2) (1998) with respect to its subsidiaries). *See also In re* Chiquita Brands Int'l, Inc., Exchange Act Release No. 44,902, 75 SEC Docket 2308 (Oct. 3, 2001) (bringing an enforcement action against Chiquita Brands International for its wholly owned subsidiary's failure to adhere to the requirements of the accounting provisions).

256. 15 U.S.C. § 78m(b)(5) (1998).

257. 15 U.S.C. § 78m(b)(2), (6) (1998).

258. *Id.*

fifty percent or less of the voting power in the subsidiary, it may still be held liable if it fails to "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [the internal controls provision]."[259] The SEC appears to view operational control as the touchstone for liability in minority ownership situations.[260]

Similarly, for the books-and-records provision, the issuer parent may face strict civil liability for the subsidiary's failure to comply when it incorporates the subsidiary's books-and-records into its own.[261] Additionally, Exchange Act Rule 13b2-1 appears to impose strict liability for any violation of the books-and-records provision, by removing the modifier "knowingly."[262] But courts and the SEC have interpreted the rule to incorporate a reasonableness standard.[263]

Finally, a foreign subsidiary of an issuer can face FCPA liability for causing its parent to violate the accounting provisions. Just like the parent, the subsidiary is liable for knowingly causing an issuer's violation of the accounting provisions.[264] Such a prosecution for knowing conduct could be brought under 15 U.S.C. § 78m(b)(5) or an aiding and abetting theory.[265] And like the parent company, the subsidiary could also be subject to liability under Exchange Act Rule 13b2-1, which applies to *all* persons and entities, not just issuers, that cause the falsification of an issuer's books or records.[266]

Clearly, the expansiveness of these provisions—both jurisdictionally and substantively—is patently distinct from section 7 of the Bribery Act. Section 7 and the FCPA's internal controls provision could, however, have similar implications for multinational corporations. They both effectively require entities that are issuers

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259. *Id.*

260. *See*, *e.g.*, *In re* BellSouth Corp., Exchange Act Release No. 45279, 2002 WL 47167, §§ 3, 4 (Feb. 13, 2007) (subjecting BellSouth Corporation to civil FCPA liability for the actions of a subsidiary in which it owned only a forty-nine percent stake, because its degree of "operational control" afforded it "the ability to cause [the subsidiary] to comply with the FCPA's books and records and internal controls provisions").

261. *See, e.g.*, Complaint para. 16, SEC v. ITT Corp., No. 09-cv-00272 (D.D.C. Feb. 11, 2009) (alleging a violation of the books-and-records provision for "consolidat[ing] and includ[ing] in ITT's financial statements" the financial statements of a wholly owned Chinese subsidiary that made approximately $200,000 in illicit payments, which it "improperly recorded . . . as commission payments"); *In re* Dow Chem. Co., Exchange Act Release No. 55,281, 2007 WL 460872, para. 10 (Feb. 13, 2007) (imposing liability on Dow Chemical for improper payments made by a 75.7 percent-owned, fifth-tier subsidiary, "without knowledge or approval of any Dow employee," inaccurately recorded by the subsidiary and then consolidated into Dow's books and records); *In re* Monsanto Co., Exchange Act Release No. 50,978, 2005 WL 38787, para. G § 4 (Jan. 6, 2005) (imposing liability for Monsanto's consolidation of inaccurate financial records from two of its affiliates into its own books).

262. 17 C.F.R. § 240.13b2-1 (1979).

263. *See* SEC v. Softpoint, Inc., 958 F. Supp. 846, 866 (S.D.N.Y. 1997) ("[L]iability [under 13b2-1] is predicated on 'standards of reasonableness.'") (quoting Promotion of Reliability of Financial Information, Exchange Act Release No. 34-15570 (Feb. 15, 1979)).

264. *See* 15 U.S.C. § 78m(b)(5) (1998) ("No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).").

265. *See, e.g.*, Complaint paras. 47–52, SEC v. Halliburton Co., No. 09-cv-399 (S.D. Tex. Feb. 11, 2009) (charging subsidiary KBR, Inc., with aiding and abetting for "knowingly or recklessly substantially assist[ing]" its parent Halliburton Co. with violations of the accounting provisions, and charging the subsidiary itself under 15 U.S.C. § 78m(b)(5) (1998) for violating the accounting provisions).

266. 17 C.F.R. § 240.13b2-1 (1979).

(under the FCPA) or "relevant commercial organisations" (under the Bribery Act) to devise and maintain adequate internal controls. What this ultimately means for issuers is largely spelled out in the various U.S. enforcement actions. As discussed above in Part II.D.1, the U.K. Secretary of State has initiated the process of providing guidance regarding the contours of section 7's requirements.[267] Based on the draft guidance, it appears that the SFO's expectations regarding the animating principles of a corporation's internal control framework will likely mirror those of U.S. enforcement authorities.[268] Nevertheless, certain issues will remain murky until the Bribery Act takes force and U.K. enforcement actions shed light on the Act's interstices. As noted above, section 7's jurisdictional parameters—specifically their application to non-U.K. subsidiaries—are still a mystery. For example, the draft guidance offers no insight as to whether the U.K. authorities will attempt to extend liability (if any) under the Act to the actions of minority-owned overseas subsidiaries—an issue with which the FCPA deals statutorily. In such areas, section 7 could impose greater liability, although in most others it will be narrower than the internal controls provision, which of course touches many controls that do not directly involve anti-bribery compliance.

4. The U.K. Companies Act 2006

In contrast to the internal controls provision, the FCPA's other accounting provision, the books-and-records provision, lacks even a remote analogue in the Bribery Act. But the Companies Act[269] already imposes a similar duty on all U.K.-incorporated companies to keep adequate accounting records. Under the Companies Act, adequate accounting records are records sufficient:

> to show and explain the company's transactions, to disclose with reasonable accuracy, at any time, the financial position of the company at that time, and to enable the directors to ensure that any accounts required to be prepared under UK law comply with the requirements of the Companies Act (and, where applicable, Article 4 of the International Accounting Standards Regulation).[270]

Failure to do so constitutes an offense punishable by a fine and/or imprisonment.[271]

E. Penalties

The FCPA and the Bribery Act provide for largely similar penalties. Nonetheless, the real force of any such statute depends significantly on the

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267. *See* MINISTRY OF JUSTICE, *supra* note 156, at Annex B (demonstrating how the application of six anti-bribery principles might relate to a number of problem scenarios commercial organizations may encounter).

268. GIBSON, DUNN & CRUTCHER LLP, *Bribery Act 'Adequate Procedure' Draft Guidance Published*, Oct. 22, 2010, *available at* http://www.gibsondunn.com/Publications/Pages/UKBriberyAct AdequateProcedureDraftGuidance.aspx.

269. *See generally* Companies Act, 2006 (Eng.).

270. *Id.* § 386(1)–(2).

271. *Id.* § 387(3).

enforcement regime that applies it; an issue discussed in detail in Part III of this article.[272] Although the SFO may have less discretion than DOJ in determining the penalties for self-reporting violators,[273] surely it too will have a tremendous amount of power in shaping the penalties associated with the United Kingdom's new anti-bribery regime.

The FCPA provides for both criminal and civil penalties. For individuals who violate the statute's anti-bribery provisions, criminal penalties include up to five years imprisonment and a $250,000 fine or a fine totaling twice the pecuniary gain or loss resulting from the bribe.[274] Corporations and other business entities face fines of up to $2 million or twice the pecuniary gain or loss resulting from the bribe.[275] Remarkably, these penalties pale in comparison to those applied to violations of the accounting provisions. Specifically, the FCPA provides that criminal violations of the accounting provisions allow individuals to be fined up to $5 million and imprisoned for up to five years.[276] Likewise, corporations and other business entities may be fined as much as $25 million for such violations.[277] Finally, both individuals and organizations may face fines and injunctions for civil violations of the FCPA.[278]

The Bribery Act similarly allows for significant penalties against organizations and individuals, although the Bribery Act may ultimately grant regulators even broader discretion. Section 11 of the Bribery Act specifies all the penalties for violations involving the crimes of bribing, being bribed, and bribing foreign government officials, as well as the corporate crime of failure to prevent bribery (sections 1, 2, 6, and 7, respectively).[279] Unlike the FCPA, all possible penalties for Bribery Act violations are considered "criminal" in the United Kingdom.[280] The Bribery Act provides for no civil enforcement. But it does create two tracks of punishment—one for summary convictions and one for indictment convictions.[281] Summary offenses are typically less severe and may be tried in lower courts such as the Magistrate's Court (essentially the equivalent of a "misdemeanor"), while indictable offenses are more egregious and are tried in the Crown's Court.[282]

Violations of section 1, 2, or 6 on summary conviction carry a maximum fine of $5,000 or imprisonment of up to twelve months (but only six months in Northern

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272. *See infra* Part III (discussing the enforcement regimes of the FCPA and the Bribery Act).

273. *See* R v. Innospec Ltd., [2010] Southwark Crown Court, para. 26, *available at* www.millerchevalier.com/portalresource/InnospecSentencingJudgment ("It is clear, therefore that the SFO cannot enter into agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged . . . .").

274. 15 U.S.C. § 78dd-2(g)(2) (1998); 18 U.S.C. § 3571(b)(3) (1998); 18 U.S.C. § 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.").

275. 15 U.S.C. § 78dd-2(g)(1) (1998); 18 U.S.C. § 3571(b)(3), (d) (1998).

276. 15 U.S.C. § 78dd-2(g)(1) (1998); 18 U.S.C. § 3571(b)(3), (d) (1998); 15 U.S.C. § 78ff(a) (1998).

277. 15 U.S.C. § 78dd-2(g)(1) (1998); 18 U.S.C. § 3571(b)(3), (d) (1998); 15 U.S.C. § 78ff(a) (1998).

278. 15 U.S.C. §§ 78u(d), 78dd-2(g), 78dd-3(e) (1998).

279. Bribery Act, 2010, § 11.

280. *See U.S. FCPA vs. U.K. Bribery Act*, Jun. 25, 2010, *available at* http://www.transparency-usa.org/documents/FCPAvsBriberyAct.pdf (chart comparing the UK Bribery Act with the US FCPA).

281. Bribery Act, 2010, § 11(1)–(2).

282. BLACK'S LAW DICTIONARY 1187–88 (9th ed. 2009).

Ireland).[283] For conviction on indictment for violations of these same provisions, the Act provides for unlimited fines—as it specifies no maximum—and a maximum of ten years imprisonment.[284] Interestingly, when setting the financial penalties associated with violations of section 1, 2, and 6, the Bribery Act does not differentiate between juridical persons, such as corporations, and real persons.[285] Finally, the corporate offense of failing to prevent bribery (section 7) also has a presumably unlimited level of fines associated with it, as the Bribery Act sets no limit. Section 11 simply states that a person "guilty of an offence under section 7 is liable on conviction on indictment to a fine."[286]

The lack of any cap on fines could theoretically grant to the SFO more flexibility than DOJ and the SEC in meting out punishment for violations of the Bribery Act. But, as the *Innospec* decision (discussed below in Part III.D.3) amply demonstrates, U.K. judges will ultimately decide what punishments corporations and individuals suffer. [287] In contrast, U.S. regulators have tremendous flexibility in determining the ultimate financial penalties suffered by corporate offenders, as the massive fines that can accompany each violation of the accounting provisions—as well as the required disgorgement of profits—would set the theoretical cap on monies paid to the U.S. Government at a point far greater than most corporations could afford. Thus, far more important than the technicalities of either statute is the surrounding enforcement environment. Only time will tell how the SFO will enforce the Bribery Act and how that enforcement will compare to the existing FCPA enforcement regime.

F. How the Bribery Act May Affect Corporate Compliance Programs

To conclude this exploration of the differences and similarities between the FCPA and the Bribery Act, it is perhaps useful to consider which among these qualities may prove the most significant. The differences, in particular, will determine how multinational corporations already subject to the FCPA will have to adjust their corporate compliance programs to avoid running afoul of the new Bribery Act.

The key similarities are the laws' common focus on the bribery of foreign public officials, their similarly broad jurisdictional claims, and how each requires organizations to police themselves by having effective internal controls. The way in which both laws criminalize overseas bribery is actually quite similar. They both address benefits to officials that are not merely financial and criminalize offers and promises, as well as actual consummated bribes. Further, they both feature a business nexus requirement, linking the provision of the benefit to the payor's possible commercial gain.

Both laws also have remarkably aggressive jurisdictional claims, although they attain their expansive extraterritorial reach differently. The FCPA's applicability to

283. Bribery Act, 2010, § 11(1)(a)–11(4).

284. *Id.* § 11(1)(b), (2)(b).

285. *Id.* § 11(2).

286. *Id.* § 11(3).

287. R v. Innospec Ltd., [2010] Southwark Crown Court, para. 26, *available at* www.millerchevalier.com/portalresource/InnospecSentencingJudgment.

all issuers' conduct, regardless of that conduct's jurisdictional nexus, immediately extends the statute's reach around the globe. What is more, the FCPA's accounting provisions implicate the activities of foreign, non-registered subsidiaries of issuers, bringing the entire commercial organization within the statute's ambit. At its outer jurisdictional limits, the Bribery Act's section 7 criminalizes the failure of any commercial organization that conducts business in the United Kingdom to prevent commercial or public-sector bribery. As the United Kingdom has the sixth largest economy in the world, this will naturally include an extraordinary number of multinational corporations.[288] Finally, both the FCPA and the Bribery Act require such organizations to develop an effective internal control environment. In the case of the FCPA, the requirement is explicit—the internal controls provision provides that issuers must devise and maintain effective internal controls, a directive that extends well beyond controls that merely prevent bribery.[289] Organizations subject to section 7 of the Bribery Act, on the other hand, do not necessarily have to maintain an effective system of internal controls—but because of the strict liability they will face for underlying violations of sections 1 and 6 by "associated persons," they have little choice but to do so. The Bribery Act makes "adequate procedures" an affirmative defense to this crime and commits the U.K. Government to provide guidance as to the meaning of the term.[290] The effect of this aspect of the Bribery Act will therefore be similar, although unlike the FCPA, the internal controls requirement is limited to anti-bribery compliance.

For multinational corporations already subject to the FCPA and its internal controls requirements, much of this is already ingrained practice. Most of these entities already employ organization-wide anti-bribery training requirements, utilize numerous mechanisms addressing control over funds and requiring a segregation of duties for any payments that could go to government officials, and charge their internal audit functions with testing the FCPA compliance program periodically.[291] They need to focus on the Bribery Act's novel elements. The remainder of this Part addresses those distinctions between the FCPA and the Bribery Act that are most likely to cause problems for multinational corporations that already maintain FCPA compliance programs. Notably, the Bribery Act may alter the terrain for three hot-button areas of corporate FCPA compliance: business courtesies (gifts, meals, entertainment, and travel) provided to government officials, the risks posed by third-party agents and consultants, and facilitating payments. Additionally, the Bribery Act requires corporations to consider more seriously the possibility of commercial bribery harming the organization.

1. Business Courtesies

The provision of business courtesies—gifts, entertainment, meals, and travel—to foreign officials has become a major focus of corporate FCPA compliance

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288. The World's Largest Economies, ECONOMYWATCH.COM, http://www.economywatch.com/economies-in-top/ (listing top ten economies by gross domestic product).

289. 15 U.S.C. § 78m(b) (1998).

290. Bribery Act, 2010, § 9.

291. *See, e.g.*, F. Joseph Warin, Michael S. Diamant & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 78 (2010) (discussing the benefits of employee training).

programs.[292] It is particularly a concern in countries, such as China and Vietnam, where many commercial enterprises are state-owned or -operated.[293] Because business courtesies are things of value under the FCPA, their provision to foreign officials directly implicates the law.[294] Indeed, many companies, including Avery Dennison Corp., Daimler AG, Lucent Technologies, Paradigm, Schnitzer Steel, Siemens AG, and UTStarcom, have been prosecuted for crossing the line in providing business courtesies to foreign officials.[295] But certain aspects of the statute do permit their provision in a number of circumstances.

First, it is important to recall that the FCPA only criminalizes things of value provided to foreign officials "corruptly." DOJ's official guidance provides that "[t]he person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his [or her] official position to direct business wrongfully to the payer or to any other person."[296] Unless the provider of the thing of value explicitly states his or her intent, the circumstances and nature of the business courtesy will inform whether the authorities would see the act as corrupt.[297] All things being equal, the lower the value of the business courtesy, the less likely such corrupt intent can be inferred. That is, a low-value item is unlikely to induce a foreign official to misuse his or her official position. Although there is no safe harbor threshold or de minimis standard for such low-value gifts, they pose a less serious compliance risk.

Second, as discussed above, the FCPA *does* provide an explicit affirmative defense for the provision of things of value that are "directly related to the promotion, demonstration, or explanation of products or services."[298] Thus, gifts with logos of the commercial enterprise and trips to tour company facilities will generally be acceptable. But, of course, all such expenditures must be "reasonable and bona fide." For example, if an organization wishes to invoke the affirmative defense, the plant inspection cannot be a pretext for a vacation and the pen stamped with the organization's logo cannot cost $1,000.[299]

Acknowledging the limitations of this affirmative defense, as well as the risk of overreliance on a "no corrupt intent" justification, the FCPA clearly carves out a significant amount of space around business courtesies provided to foreign officials.[300] A properly tailored corporate compliance program should permit multinationals to engage in routine business promotion and networking, as part of an ethical business model, without running afoul of the FCPA. Such programs generally include restrictions on the value of certain business courtesies, escalation procedures depending on the value and circumstances of the provision of the thing of value, required documentation and reconciliation of expenditures, and compliance training.

292. *Id.* at 58.
293. *Id.* at 45.
294. *Id.* at 61.
295. *Id.* at 48–55.
296. LAY-PERSON'S GUIDE, *supra* note 42.
297. 15 U.S.C. § 78u(a)(1) (1998).
298. *Id.*
299. 15 U.S.C. § 78dd-1(c) (1998).
300. 15 U.S.C. § 78u(a)(1) (1998).

This may not be the case under the strict letter of the new Bribery Act. As discussed above, the Bribery Act's prohibition on bribing foreign officials contains no "corrupt intent" or "improper purpose" requirement, unlike the FCPA and section 1 of the Bribery Act, respectively. Nor does the Act feature an affirmative defense for reasonable and bona fide demonstration, promotion, or explanation. All things of value provided to "foreign government officials" to influence them constitute prima facie violations of section 6. Thankfully for multinational corporations adjusting their anti-bribery compliance programs in the wake of the Bribery Act's passage, the Ministry of Justice's draft guidance approves "reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations."[301] The guidance clarifies that "section 6 is unlikely to be engaged" in situations where "there is no sufficient connection between the advantage [i.e., the hospitality] and the intention to influence and secure business or a business advantage."[302] In sum, although the letter of the Bribery Act appears to ban outright the provision of business courtesies to foreign government officials, the U.K. Government has published preliminary guidance suggesting that reasonable, bona fide business courtesies will be permissible. That said, it remains to be seen whether prominent multinational corporations will want to maintain policies or procedures that sanction even technical violations of criminal law.

2. Third-Party Risks

As discussed above, the FCPA's third-party-payment provision makes organizations liable for those who act on its behalf.[303] This includes employees and agents, who traditionally impute liability on their masters, as well as other third parties, such as distributors, who normally do not. Indeed, U.S. authorities have prosecuted a number of corporations for the activities of their distributors.[304] Liability under the third-party-payment provision turns on the mental state of the organization when it provides the thing of value to the third party.[305] It must "know" what the third party will do, but the mere awareness of a high probability of corrupt activity satisfies the knowledge requirement,[306] and courts have applied a willful blindness standard when assessing liability.[307]

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301. MINISTRY OF JUSTICE, *supra* note 156, at 22.

302. *Id.* In addition to the statutorily mandated "adequate procedures" guidance that will issue in early 2011, the SFO and the Director of Public Prosecutions are in the midst of developing "joint legal guidance for prosecutors." Dominic Grieve, U.K. Att'y Gen., Address Before the World Bribery & Corruption Compliance Forum (Sept. 14, 2010), available at http://www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/Attorney%20General%20World%20Bribery%20and%20Corruption%20Compliance%20forum.aspx. The U.K. Attorney General has explained that this guidance will provide prosecutors with a "clear, comprehensive and consistent guide to the law and relevant public interest considerations." *Id.* This guidance may also shed light on some of the questions raised by the evident differences between the FCPA and the Bribery Act.

303. 15 U.S.C. § 78dd-2(a)(3) (1998).

304. *See, e.g.*, Warin, Diamant & Pfenning, *supra* note 291, at 48, 52 (listing InVision Technologies and AGA Medical, both which made payments through distributors, among historical FCPA prosecutions involving China).

305. 15 U.S.C. § 78dd-2(a)(3) (1998).

306. *Id.* § 78(h)(3)(B).

307. *See, e.g.*, F. Joseph Warin, Michael S. Diamant & Matthew P. Hampton, *Use of "Conscious Avoidance" Doctrine in Frederic Bourke Conviction Expands Corporate Executives' FCPA Exposure*,

Unsurprisingly, multinational corporations have developed sophisticated internal controls to mitigate this risk. Due diligence is possibly the most important third-party risk mitigation. An effective third-party due diligence regime helps reduce risk in two ways. First, and most importantly, it will help identify risky counterparties and allow the organization to forgo the relationship or institute-appropriate compensating controls to minimize the chance of improper conduct.[308] Second, it will help reduce the risk that the organization will form and maintain relationships with third parties, while having the required culpable mental state.[309] That is, appropriate due diligence, linked to the organization's contracting controls, significantly reduces the possibility that prosecutors will be able to allege that the organization "conscious[ly] disregard[ed]" or remained "deliberate[ly] ignoran[t]" of the possibility of a corrupt payment, even if the third party *does* make such a payment.[310] Other key internal controls may include prohibitions on cash payments, a centralized procurement and contracting function, third-party anti-bribery training, contractor anti-bribery compliance certifications, and anti-corruption and audit-rights provisions in the contracts. The use and extent of all controls, including due diligence, should reasonably reflect the risks that attend the particular business relationship.

Eschewing the nuanced treatment of knowledge under the FCPA, the Bribery Act's section 7 makes organizations strictly liable for the actions of their "associated person[s]."[311] As noted, "associated person" includes agents and other third parties acting for or on behalf of the company.[312] Of course, the Bribery Act also contains an affirmative defense to section 7 violations—the existence of "adequate procedures" to prevent the underlying violative conduct.[313]

The Ministry of Justice's draft guidance on "adequate procedures" to prevent bribery by "associated persons" contemplates many of the same controls as those that many multinationals have instituted to mitigate third-party risk under the FCPA. The guidance suggests that businesses should implement "due diligence policies and procedures which cover all parties to a business relationship," including suppliers, agents, intermediaries, and joint venture partners.[314] One illustrative example attached to the draft guidance suggests that businesses may wish to "take steps to establish the background, status and qualifications of [an] agent" and review the agent's "connections to any politicians or other public officials."[315] The U.K. Government's guidance, however, does not conclusively establish what types of

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SECURITIES DOCKET, July 22, 2009, http://www.securitiesdocket.com/2009/07/22/guest-column-use-of-conscious-avoidance-doctrine-in-frederic-bourke-conviction-expands-corporate-executives-fcpa-exposure/ (commenting on an FCPA case where the jury was instructed that they did not need to find subjective knowledge of unlawful conduct).

308. Warin, Diamant & Pfenning, *supra* note 291, at 70–72.

309. *See* LAY-PERSON'S GUIDE, *supra* note 42 (informing U.S. companies of the need to exercise due diligence—along with providing examples of appropriate due diligence—to avoid being held liable for corrupt third-party-payments).

310. *Id.*

311. Bribery Act, 2010, § 7(1).

312. *Id.* § 8(1).

313. *Id.* § 7(2).

314. MINISTRY OF JUSTICE, *supra* note 156, at 14.

315. *Id.* at 25.

third-party due diligence policies and procedures will meet the Bribery Act's adequacy threshold.

It is possible that the scope of such "adequate procedures" will be broader than those required by the FCPA. There is one simple reason for this: FCPA liability turns on knowledge, while section 7 liability hinges on the *actual prevention* of such corrupt payments. Therefore, the determination of an "adequate procedure" in this area could very well be much more stringent than a control that merely ensures that the organization does not have the knowledge required for culpability under the third-party-payment provision.

3. Facilitating Payments

The area of facilitating payments is a particularly thorny one for FCPA compliance. As discussed above, many practitioners increasingly fear that U.S. regulators have simply read the exception out of the statute. As a result, more and more organizations are starting to prohibit such payments outright.[316] The Bribery Act will likely accelerate this trend. Like the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[317] the Bribery Act features no exception for expediting or facilitating payments. The Ministry of Justice's recent draft guidance emphasizes that such payments violate sections 1 and 6 of the Bribery Act.[318]

Appropriately addressing the Bribery Act's prohibition on facilitating payments will actually be an exercise in simplification for most corporate compliance policies. Recall that the distinction between an impermissible bribe and an acceptable facilitating payment under the FCPA is highly nuanced and often turns on the discretionary authority of the payment recipient. Anti-corruption compliance policies therefore commonly struggle with how to guide employees in this area. Now, they can simply state that all bribes are forbidden. Unfortunately, small "grease" payments are a way of life in many countries.[319] Thus, strictly prohibiting them may actually complicate the compliance function's task.

SFO officials have indicated that prosecution is unlikely if the payments are small, one-off payments, so long as the company identifies the expenditure through its internal procedures and clarifies the company's proscription of such payments to those involved.[320] In addition to prohibiting facilitating payments in their corporate policies, organizations subject to the Bribery Act should maintain stricter controls over cash, augment the internal audit function and focus its efforts on countries at

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316. *See* TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 2 (Oct. 2009) ("Nearly 44% of survey respondents reported that their corporations prohibit facilitation payments or simply do not address them because facilitation payments are prohibited together with other forms of bribery.").

317. OECD Convention, *supra* note 13.

318. *See* MINISTRY OF JUSTICE, *supra* note 156, at 22–23 (noting that facilitation payments—where intended to induce improper conduct—likely violate sections 1 and 6 of the Bribery Act, and that there are no exemptions for such payments, although prosecutorial discretion may be employed as justice requires).

319. Joan Keston, *'Grease Payments'—A Cost of Doing Business Overseas*, LOCALTECHWIRE, Dec. 28, 2007, http://localtechwire.com/business/local_tech_wire/opinion/story/2226239/.

320. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 ("[T]he Staff stated that there is only a remote chance that a small, one-off payment will result in prosecution (for example, a $5 payment for customs clearance)—provided that the company picks up the payment through its internal procedures and makes it clear to those involved that such payments are not acceptable.").

risk for facilitating payments, and invest more in employee education, as employees may be tempted to make such small payments out of their own pockets. The risk of a restrictive policy on facilitating payments that does not account for the reality of business in many developing countries is that it will drive non-compliance underground. But it is nevertheless what multinational corporations may be forced to do under the Bribery Act.

4. Commercial Bribery

Perhaps the most immediately evident difference between the FCPA and the Bribery Act is that the FCPA is silent about commercial bribery. In contrast, the Bribery Act leads off in section 1 by prohibiting the bribery of all persons to induce or reward improper performance.[321] This means that all entities subject to the Bribery Act must expand their anti-bribery compliance programs to address all forms of bribery. Currently, many multinational companies lavish particular attention on preventing public-sector corruption. Now, they will have to balance out their policies by discussing the risks of commercial bribery.

In reality, reorienting a compliance program to address commercial bribery may not be a major shift for some organizations. After all, the improper performance test is similar to the FCPA's corrupt intent requirement, so expanding many of the company's existing FCPA compliance controls to cover the private sector may adequately secure the entity. Further, issuers always had to worry about the accounting provisions, which have been used on numerous occasions to prosecute "bribery" that did not violate the FCPA's anti-bribery provisions.[322] And prosecutors in the United States have cleverly used the Travel Act and the federal wire fraud statute to prosecute improper payments overseas.[323] So multinational companies with some nexus to the United States always needed to worry about commercial bribery

321. Bribery Act, 2010, § 1(2)(b)(i)–(ii).

322. Perhaps the best examples of this are the prosecutions of companies for paying kickbacks under the U.N. Oil-for-Food Program. These actions did not involve illegal payments under the FCPA, as the monies did not go to individual officials. The SEC and DOJ were instead able to prosecute Oil-for-Food improprieties as violations of the accounting provisions. For instance, in its enforcement action against Textron Inc., the SEC alleged that the company's transactions were not "executed in accordance with management's authorization" because they "contravened . . . [Textron's] own internal FCPA and anti-bribery policies." Complaint para. 35, SEC v. Textron Inc., No. 07-cv-01505 (D.D.C. 2007). Textron also allegedly failed "to maintain accountability for the company's assets," in that "although Textron knew of endemic corruption problems in the Middle East, it appeared to take on faith, without adequate confirming steps, that its managers and employees were exercising their duties to manage and comply with compliance and control issues." *Id.* paras. 35, 36. Likewise, the SEC brought an enforcement action against El Paso Corp. for, among other things, a failure to institute processes for reviewing transactions and ensuring that such transactions comply with company policies and are fully documented. *See* Complaint para. 31, SEC v. El Paso Corp., No. 07-cv-899 (S.D.N.Y. 2007) ("El Paso's contract files did not even contain proof that invoices had been paid for at least thirteen shipments, there was no process for documenting commercially reasonable prices paid for oil cargos, no evidence that documents were reviewed by anyone to ensure propriety and adequacy, and inadequate explanations of why documents were missing from files.").

323. Thomas O. Gorman, *DOJ Continues to Focus on FCPA Enforcement*, LEXISNEXIS CORPORATE & SECURITIES LAW COMMUNITY, July 6, 2010, https://www.lexisnexis.com/Community/corpsec/blogs/corporateandsecuritieslawblog/archive/2010/07/06/doj-continues-to-focus-on-fcpa-enforcement.aspx; *Novo Nordisk Pays $18 Million In Penalties For Iraq Bribery*, THE FCPA BLOG, May 11, 2009, http://www.fcpablog.com/blog/2009/5/12/novo-nordisk-pays-18-million-in-penalties-for-iraq-bribery.html.

prosecutions by U.S. authorities. It is possible that many of these entities, because of their focus on bribing foreign officials, have not properly assessed or considered all of the commercial bribery risks that their business may entail overseas. Once they do, they may conclude that commercial bribery poses a much greater risk to their particular organization than did public sector corruption. After all, a corporation's interactions with private parties will often differ from those with public ones.

III. ANTI-BRIBERY ENFORCEMENT AND THE USE OF VOLUNTARY DISCLOSURE

The foregoing discussion of the Bribery Act's statutory framework implicitly attempts to project how the United Kingdom will ultimately enforce its new law. Without enforcement, any law is a dead letter. Just like the FCPA, the new Bribery Act falls into an enforcement framework that will determine its actual effect on corporations and individuals. Even the U.K. Government's guidance issued to date only hints at the potential contours of Bribery Act enforcement. Corporations, in particular, need to understand the expectations of law enforcement and its approach to investigating and punishing alleged acts of overseas bribery. Possibly the most interesting facet of international anti-corruption enforcement on both sides of the Atlantic is the use of voluntary corporate disclosure. This part of the article focuses on the self-disclosure framework recently established by the SFO[324] and compares this approach to that taken by DOJ and the SEC in enforcing the FCPA.

Part III.A provides background on the SFO and describes its development of a self-disclosure framework that shares similarities with DOJ and SEC approaches. Part III.B examines the SFO's incentives and expectations for self-reporting. Part III.C analyzes the process of self-reporting a case to the SFO, including the procedures for investigation, settlement, and monitoring. Part III.D identifies steps that companies can take beyond self-reporting to help mitigate enforcement actions by the SFO or U.S. authorities. Finally, Part III.F looks toward future enforcement activity on both sides of the Atlantic.

A. *The United Kingdom's Serious Fraud Office*

The SFO, established in 1988 pursuant to the Criminal Justice Act, "is responsible for investigating and prosecuting the most serious and complex cases of fraud and corruption in England, Wales and Northern Ireland," including investment

324. According to section 10 of the Bribery Act, a prosecution under the Act "can only be brought with the consent of the Director of one of three senior prosecution authorities[:] the Director of Public Prosecutions, the Director of the Serious Fraud Office [or] the Director of Revenue and Customs Prosecutions." Bribery Act, 2010, § 10. Prior to the Bribery Act, the SFO had jurisdiction to prosecute cases of overseas bribery, such as the Mabey & Johnson Ltd. case, pursuant to the Criminal Justice Act, 1987. The Financial Services Authority (FSA) may also prosecute overseas bribery cases pursuant to Principle 3 of the FSA's Principles for Business, which requires companies to "take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems." *See, e.g.*, Letter from U.K. Fin. Serv. Auth., Final Notice to Aon Ltd. (Jan. 6, 2009), *available at* http://www.fsa.gov.uk/pubs/final/aon.pdf (fining Aon £5.25 million for "not tak[ing] reasonable care to establish and maintain effective systems and controls for countering the risks of bribery and corruption associated with making payments to . . . overseas third parties . . . who assisted Aon Ltd in winning business from overseas clients, particularly in high risk jurisdictions").

fraud, corporate fraud, public sector fraud, and bribery and corruption.[325] Accordingly, the SFO is responsible for enforcing the provisions of the Bribery Act addressing overseas corruption.[326]

Following the Al Yamamah controversy, then-Attorney General Lord Goldsmith hired former Manhattan Assistant District Attorney Jessica de Grazia to conduct a review of how the SFO handles its investigations and prosecutions. De Grazia's report, issued in June 2008, stated that "the SFO uses significantly more resources per case than [the Southern District of New York U.S. Attorney's Office and the Manhattan District Attorney's Office] and achieves significantly less for its efforts, as measured by both its productivity (the number of defendants prosecuted) and its conviction rate."[327] She provided thirty-four recommendations to make the SFO more effective.[328]

De Grazia's report, combined with the Al Yamamah controversy, appears to have sparked change at the SFO. Former SFO Director Robert Wardle resigned in April 2008 and was replaced by Richard Alderman, a former senior investigator at HM Revenue and Customs.[329] Additionally, the British press reported that dozens of lawyers and investigators were asked to leave the SFO following de Grazia's review.[330]

On November 18, 2008, the new SFO Director Richard Alderman announced that the SFO would increase the number of its anti-corruption investigators from

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325. SIR GUS O'DONNELL, SERIOUS FRAUD OFFICE: BASELINE ASSESSMENT 4 (Dec. 2009), *available at* http://www.civilservice.gov.uk/Assets/SFO%20Capability%20Review%20web_tcm6-35130.pdf; Serious Fraud Office, *What is Fraud?*, http://www.sfo.gov.uk/fraud/what-is-fraud.aspx.

326. SFO APPROACH, *supra* note 38, at 1. A prosecution under the Bribery Act may also be brought with the consent of the Director of Public Prosecutions or the Director of Revenue and Customs Protections. Bribery Act, 2010, c. 23, § 10 (Eng.). Additionally, while the FSA was not granted jurisdiction to prosecute cases of overseas corruption under the Bribery Act, it may enforce violations of the FSA's Principles for Business that involve overseas corruption. *See* FIN. SERV. AUTH., HANDBOOK §§ 2.1.1, 3.3.1 (Sept. 2010), *available at* http://fsahandbook.info/FSA/html/handbook/ (providing that "firm[s] must take reasonable care to organise and control [their] affairs responsibly and effectively, with adequate risk management systems," which principle applies, in certain contexts, "with respect to activities wherever they are carried on"); *see also* Letter from U.K. Fin. Serv. Auth., Final Notice to Aon Limited § 2.1 (Jan. 6, 2009), http://www.fsa.gov.uk/pubs/final/aon.pdf ("During the Relevant Period, Aon Ltd breached Principle 3 by failing to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems."). This spring, the FSA warned "that many [commercial insurance broker] firms are not currently in a position to demonstrate adequate procedures to prevent bribery [under section 7 of the Bribery Act]" and, regardless of potential Bribery Act exposure, "[f]or FSA-regulated firms, [FSA's] financial crime rules and principles will remain in force." FIN. SERV. AUTH. ANTI-BRIBERY AND CORRUPTION IN COMMERCIAL INSURANCE BROKING 5, 10 (May 2010), *available at* http://www.fsa.gov.uk/pubs/anti_bribery.pdf.

327. JESSICA DE GRAZIA, REVIEW OF THE SERIOUS FRAUD OFFICE, FINAL REPORT 3 (June 2008), *available at* http://www.sfo.gov.uk/about-us/our-policies-and-publications/jessica-de-grazia-review-.aspx.

328. *Id.* at 17–28.

329. David Leigh & Rob Evans, *BAE, the SFO and the Inquiry That Refused to Go Away*, THEGUARDIAN.CO.UK, Oct. 1, 2009, http://www.guardian.co.uk/world/2009/oct/01/bae-bribery-allegation-sfo-inquiry.

330. David Leppard, *SFO Staff Gets Huge Payoffs*, SUNDAY TIMES, Feb. 1, 2009, *available at* http://business.timesonline.co.uk/tol/business/economics/article5627633.ece (noting that "[d]ozens of staff at the [SFO] have been offered early-release payoffs worth up to £240,000 after a secret Whitehall report found its work was being undermined by alleged cronyism and incompetence").

sixty-five to approximately one hundred.[331] In a demonstration of increased focus on anti-bribery enforcement that coincided with the issuance of the voluntary disclosure guidance the SFO announced the establishment of "a separate work area," the "Anti-Corruption Domain," to investigate and prosecute cases of overseas corruption.[332] Far exceeding the current personnel commitment from the U.S. Government,[333] the SFO plans on having ultimately one-hundred staff members in the Anti-Corruption Domain.[334]

Finally, in June 2010, Prime Minister Cameron appointed Justice Secretary Kenneth Clarke to serve as the United Kingdom's "international anti-corruption champion."[335] In addition to overseeing the Bribery Act's implementation for the U.K. Government, Clarke will work with the SFO and other enforcement entities to ensure a coherent approach to the prosecution of international bribery. [336]

These changes are already producing results. In July 2009, the SFO announced that it had obtained a guilty plea to overseas corruption by U.K. construction firm Mabey & Johnson Ltd (M&J), the SFO's first successful overseas corruption prosecution of a U.K. company.[337] M&J allegedly violated U.N. sanctions in Iraq and engaged in overseas bribery in Jamaica and Ghana to obtain public contracts.[338] The SFO emphasized that the prosecution arose from M&J's voluntary disclosure.[339]

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331. Press Release, Serious Fraud Office, More Resources for Anti-Corruption Work, Serious Fraud Office, (Nov. 18, 2008), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2008/more-resources-for-anti-corruption-work.aspx.

332. SFO APPROACH, *supra* note 38, at 1.

333. Most estimates place the current combined DOJ, FBI, and SEC investigation and prosecution resources at fewer than fifty individuals. In August 2009, however, the SEC Director of Enforcement explained that the SEC planned to create a national specialized FCPA enforcement unit that would be "more proactive in investigations, work[] more closely with [the SEC's] foreign counterparts, and take[] a more global approach to [FCPA] violations." Robert Khuzami, Dir., Div. of Enforcement, U.S. Sec. and Exchange Comm'n, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm. Additionally, the SEC recently appointed Cheryl J. Scarboro, an eighteen-year veteran of the SEC, as head of the Enforcement Division's new Foreign Corrupt Practices Act Unit. Press Release, U.S. Sec. and Exchange Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-5.htm. Similarly, DOJ has indicated that it has "begun discussions with the Internal Revenue Service's Criminal Investigation Division about partnering with [DOJ] on FCPA cases around the country" and begun "pursuing strategic partnerships with certain U.S. Attorney's Offices throughout the United States where there are a concentration of FCPA investigations." Lanny A. Breuer, Asst. Att'y Gen., U.S. Dep't of Justice Criminal Div., Prepared Address at the 22nd Nat'l Forum on the Foreign Corrupt Practices Act 6 (Nov. 17, 2009), http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

334. SFO APPROACH, *supra* note 38, at 1.

335. Press Release, Ministry of Justice, Kenneth Clarke to be International Anti-corruption Champion (June 15, 2010), *available at* http://www.justice.gov.uk/news/newsrealease150610a.htm.

336. *Id.*

337. *See* Press Release, Serious Fraud Office, Mabey & Johnson Ltd Sentencing (Sept. 25, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey--johnson-ltd-sentencing-.aspx [hereinafter Mabey & Johnson Sentencing] (noting that M&J pleaded guilty to charges of conspiracy to commit corrupt acts in Jamaica and Ghana, and violating U.N. sanctions imposed on Iraq).

338. Prosecution Opening Note, Regina v. Mabey and Johnson Ltd., No. T2009 7513 [2009] Southwark Crown Court; *see also* Mabey & Johnson Sentencing, *supra* note 337.

339. Mabey & Johnson Sentencing, *supra* note 337.

M&J's sentence obligated it to pay a total penalty of £6.6 million and retain an independent monitor.[340]

In October 2009, the SFO announced that it had obtained a Civil Recovery Order of nearly £5 million against AMEC PLC, an international engineering and project management firm, for the "receipt of irregular payments . . . associated with a project in which AMEC is a shareholder."[341] Similar to M&J, the AMEC case resulted from a voluntary disclosure by the corporation and, as part of the resolution, AMEC agreed to "appoint an independent consultant to review [its ethics, compliance and accounting standards] and report their [sic] findings to the SFO."[342]

B. *Self-Reporting Incentives and Expectations*

Although the recent improvements to the SFO will allow it to initiate and execute many of its own investigations, it will undoubtedly still rely significantly on voluntary disclosures from corporations. Indeed, similar to the approach of U.S. authorities,[343] the SFO encourages corporations to identify, investigate, and monitor cases of foreign corruption.[344] Although U.S. prosecutors claim that a majority of FCPA cases under investigation do not come from voluntary disclosure,[345] thirty-four of the forty-nine FCPA enforcement actions taken against U.S. companies between 2004 and 2009 resulted from voluntary disclosures.[346] In a world of limited resources and a seemingly endless supply of prosecution targets,[347] it is unsurprising that voluntary disclosures will play a major role in any enforcement regime.

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340. *Id.* Although M&J agreed to a total sum payable as part of its plea bargain with the SFO, the court has discretion as to the sentence under English law.

341. Press Release, Serious Fraud Office, SFO obtains Civil Recovery Order against AMEC PLC (Oct. 26, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx.

342. *Id*.

343. SFO Director Richard Alderman has explained that in attempting to introduce "a system whereby companies who discover corrupt payments and come and disclose this voluntarily to [the SFO] will receive an appropriate response," he "learned a lot from the US system." Richard Alderman, Director of the SFO, Tackling Corruption–Working Smarter, Address at the International Association of Anti-Corruption Authorities, Oct. 4, 2008, *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2008/tackling-corruption---working-smarter.aspx.

344. *See* Richard Craig Smith et al., *Recent International Anti-Corruption Enforcement Efforts & Compliance Guidance*, FULBRIGHT & JAWORSKI, Dec. 14, 2009, http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=4271&site_id=494 (listing new factors the SFO will use in assessing civil and criminal penalties).

345. *See* Mark Mendelsohn, former Deputy Chief of the DOJ Criminal Division's Fraud Section, Practice Guide to the Foreign Corrupt Practices Act, Panel Discussion Sponsored by D.C. Bar Corporation, Washington, D.C. (Sept. 24, 2009) (estimating that less than one-third of DOJ's current open FCPA investigation caseload came from voluntary disclosures); *see also* Breuer, *supra* note 333, at 3 ("Although many of these [FCPA] cases come to us through voluntary disclosures, which we certainly encourage and will appropriately reward, I want to be clear: the majority of our cases do not come from voluntary disclosures.").

346. The authors have been collecting a data report on FCPA cases since 2004. Their data have been compiled for the authors' personal use and review. F. JOSEPH WARIN & MICHAEL S. DIAMANT, FCPA RESOLUTIONS STATISTICAL DATA (on file with author) [hereinafter FCPA DATA].

347. *See* Dionne Searcey, *Breuer: Beware, Execs*, *The DOJ Will Take Your Fancy Cars*, WALL ST. J. LAW BLOG (Nov. 17, 2009, 4:57 PM), http://blogs.wsj.com/law/2009/11/17/breuer-beware-execs-the-doj-wants-your-fancy-cars/ (reporting Mark Mendelsohn's statement that the "DOJ currently has 130 ongoing

1. Encouragement to Self-Report

On July 21, 2009, the SFO issued guidance entitled "Approach of the Serious Fraud Office to Dealing with Overseas Corruption" that encourages corporations to self-report overseas corruption and establishes procedures for voluntary disclosure, self-investigation, and post-settlement monitoring.[348] It states that "the benefit to the corporate [of self-reporting] will be the prospect (in appropriate cases) of a civil rather than a criminal outcome as well as the opportunity to manage, with [the SFO], the issues and any publicity proactively."[349] U.K. law permits civil settlement, and this will be an added incentive as an alternative to criminal prosecution under the Bribery Act.[350] Although the SFO further emphasizes that it intends to settle voluntarily disclosed cases civilly "wherever possible," it does not give an "unconditional guarantee that there will not be a prosecution of the corporate."[351] An exception to the SFO's inclination to settle cases civilly is when "[b]oard members of the corporate had engaged personally in the corrupt activities, particularly if they had derived personal benefit from this."[352]

Besides highlighting the benefits of voluntary disclosure, the SFO indicates that "the failure to self report [is] a negative factor."[353] If the SFO learns about an undisclosed corruption issue, it will assume "that the corporate has chosen not to self report" and therefore "[t]he prospects of a criminal investigation followed by prosecution and a confiscation order are much greater . . . ."[354] Interestingly, Director Alderman has stated that the SFO expects that companies will self-report conduct within the scope of the Bribery Act even if the conduct occurs before April 2011, when the Act goes into force.[355]

To date, the only two corporate SFO overseas corruption enforcement actions, the M&J and AMEC cases, resulted from voluntary disclosure.[356] Thus, while this may signal some impact of the voluntary disclosure regime, it is far too early to assess whether the SFO's encouragement will have its full desired effect, especially when compared to the U.S. regime, which saw eleven corporate FCPA enforcement actions resolved in 2009, of which seven (sixty-four percent) involved voluntary disclosures.[357]

FCPA investigations").

348. SFO APPROACH, *supra* note 38, at 1.

349. *Id.* A criminal conviction of a corruption-based offense would lead to mandatory debarment pursuant to Article 45 of the EU Public Sector Procurement Directive of 2004.

350. *See* Proceeds of Crime Act 2002, c. 5, §§ 240–45 (describing civil recovery rationale and process).

351. *Id.* at 4.

352. *Id.*

353. *Id.* at 8.

354. *Id.* at 9; GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, supra note 148.

355. *See* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 (clarifying that the "'report now or expect worse consequences later' standard will apply equally to companies that elect not to report an instance of violative conduct that would fall within the scope and jurisdictional contours of the Act but for the fact that the events occurred prior to the Act coming into force").

356. Mabey & Johnson Sentencing, *supra* note 337; Press Release, Serious Fraud Office, SFO obtains Civil Recovery Order against AMEC PLC (Oct. 26, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx.

357. Cases involving voluntary disclosures included IIT Corp., Latin Node, Inc., United Industrial Corp., Control Components, Inc., Avery Dennison, Helmerich & Payne, Inc., and Nature's Sunshine Products. The four corporate FCPA cases that were resolved that did not originate from voluntary disclosures included Halliburton/KBR, Novo Nordisk A/S, AGCO Corp., and UTStarcom, Inc.

Another complicating factor for the SFO is its limited ability to enter into criminal plea agreements in exchange for cooperation. Earlier this year, the SFO suffered two setbacks in this area. First, in the Innospec prosecution (discussed further below), the sentencing judge, while accepting the company's plea, sharply challenged the SFO's power to enter into plea agreements with cooperative entities: "I have concluded that the director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again."[358] Then, in April 2010, a judge rejected the cooperation agreement that the SFO forged with Robert John Dougall, the former vice president of Depuy International Ltd., and sentenced Dougall to twelve months in prison.[359] Although an appeals court reversed this sentence, it chastised the SFO: "Responsibility for the sentencing decision in cases of fraud or corruption is vested exclusively in the sentencing court (or on appeal, from that court, to the Court of Appeal Criminal Division). There are no circumstances in which it may be displaced."[360]

Despite the greater power that U.S. enforcement authorities have in crafting plea agreements, the benefits of self-reporting remain far from clear, in part because U.S. enforcement authorities have not issued FCPA-specific guidance on the benefits of voluntary disclosure. The 2003 Memorandum from then-Deputy Attorney General Larry Thompson (the Thompson Memorandum) and the 2006 Memorandum by then-Deputy Attorney General Paul McNulty (the McNulty Memorandum) emphasized the importance of a corporation's "timely and voluntary disclosure of wrongdoing" to the Government's charging decision.[361] Former Deputy Attorney General Mark Filip's 2008 Memorandum (Filip Memorandum) modified some of DOJ's policy defining cooperation—for example, with respect to privilege—

Additionally, a total of twenty-six DOJ and fourteen SEC cases were brought in 2009 alone. GIBSON, DUNN & CRUTCHER LLP, *2009 Year-End FCPA Update*, Jan. 4, 2010, *available at* http://www.gibsondunn.com/Publications/Pages/2009Year-EndFCPAUpdate.aspx [hereinafter GIBSON, DUNN & CRUTCHER LLP, *2009 Year-End FCPA Update*]. Just midway through 2010, DOJ has already brought more cases than it did in 2009 (twenty-seven), and the SEC has brought nine cases. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year FCPA Update*, July 8, 2010, *available at* http://gibsondunn.com/publications/Pages/2010Mid-YearFCPAUpdate.aspx [hereinafter GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*].

358. Nick Clark, *Judge Attacks SFO Deal with Innospec*, INDEPENDENT, Mar. 27, 2010, *available at* http://www.independent.co.uk/news/business/news/judge-attacks-sfo-deal-with-innospec-1928636.html.

359. Press Release, Serious Fraud Office, British executive jailed for part in Greek healthcare corruption (Apr. 14, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/british-executive-jailed-for-part-in-greek-healthcare-corruption.aspx.

360. R v. Dougall, [2010] EWCA Crim 1048 (appeal taken from Eng. and Wales Court) (U.K.), para. 25. On the other hand, the SFO reports that "in the vast majority of cases where [plea agreements] have been employed, there have been no judicial issues." *See also* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 (noting further that "the SFO remains committed to plea negotiations").

361. *See* Memorandum from Larry D. Thompson, Deputy Att'y Gen., Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.justice.gov/dag/cftf/corporate_guidelines.htm (stating that a "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents" is a factor influencing the decision whether to bring charges); Memorandum from Paul McNulty, Deputy Att'y Gen., Principles of Federal Prosecution of Business Organizations (Dec. 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (stating that prosecutors must consider a corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents").

but nonetheless emphasized the importance of a corporation's timely and voluntary disclosure of violations.[362]

In various speeches, DOJ attorneys have been more explicit in emphasizing the benefit of voluntarily disclosing FCPA violations. Then-Assistant Attorney General Alice S. Fisher stated in October 2006 that a company will receive a "real benefit" from voluntary disclosures (but noted that "nothing is off the table when you voluntarily disclose").[363] Current Assistant Attorney General Lanny A. Breuer has stated that "a company will receive meaningful credit for [voluntary] disclosure and . . . cooperation" and that "the Department's commitment to meaningfully reward voluntary disclosures and full and complete cooperation will continue to be honored in both letter and spirit."[364]

Similarly, the SEC has indicated that voluntary disclosure, cooperation with the SEC, and the existence of compliance procedures influence the SEC's decision regarding the initiation of an enforcement action or civil proceedings.[365] In 2007, then-SEC Associate Director (and current FCPA Enforcement Chief) Cheryl Scarboro suggested that companies will receive a real benefit from the SEC for voluntarily disclosing violations.[366] On January 13, 2010, the SEC announced a new initiative "to encourage individuals and companies to cooperate and assist in investigations."[367] The "new cooperation tools" for SEC enforcement matters include cooperation agreements, deferred prosecution agreements (DPAs), and non-prosecution agreements (NPAs).[368] Additionally, the SEC identified four factors that it will evaluate when considering how to credit cooperation by individuals: (1) "[t]he assistance provided by the cooperating individual," (2) "[t]he importance of the underlying matter in which the individual cooperated," (3) "[t]he societal interest in ensuring the individual is held accountable for his or her misconduct," and (4) "[t]he

362. *See* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.00 (effective Aug 28, 2008), *available at* http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf (stating "while a corporation remains free to convey non-factual or 'core' attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so").

363. Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks of Alice S. Fisher, Assistant Attorney General, U.S. Department of Justice at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006) (transcript available at http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf).

364. Breuer, *supra* note 333.

365. *See* SEC. AND EXCH. COMM'N, REPORT OF INVESTIGATION PURSUANT TO §21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (THE "SEABOARD REPORT"), EXCHANGE ACT RELEASE NO. 44,949 (Oct. 23, 2001) (citing several factors, including voluntary disclosure, which influence their decision to pursue enforcement action); *see* Robert Khuzami, Dir. of Enforcement, Sec. and Exch. Comm'n, Remarks Before the N.Y. City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), (transcript available at http://www.sec.gov/news/speech/2009 spch080509rk.htm) (stating that the SEC is contemplating creating a "Seaboard" report for individuals to incentivize the cooperation of corporate officers and employees).

366. Breuer, *supra* note 333; Cheryl Scarboro, Assoc. Dir. of Enforcement, Sec. and Exch. Comm'n, Address to the 22nd Nat'l Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009).

367. Press Release, Sec. and Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, (Jan. 13, 2010), *available at* http://www.sec.gov/news/press/2010/2010-6.htm [hereinafter SEC Initiative]; DIV. OF ENFORCEMENT, SEC. AND EXCH. COMM'N, ENFORCEMENT MANUAL at 123–40 (Jan. 13, 2010) [hereinafter ENFORCEMENT MANUAL].

368. SEC Initiative, *supra* note 367; *see also* ENFORCEMENT MANUAL, *supra* note 367, at 123–40.

appropriateness of cooperation credit based upon the risk profile of the cooperating individual."[369]

Thus, U.S. authorities encourage cooperation and indicate that a company that voluntarily discloses a potential FCPA violation will be better situated than one that finds itself being investigated having not disclosed the conduct. But unlike the SFO, which has stated that it will reward voluntary disclosure with civil rather than criminal enforcement actions, substantial questions exist about just how tangible any benefits corporations receive from U.S. enforcement authorities actually are[370]—especially when the decision not to disclose wrongdoing could avoid enforcement altogether.

A review of recent corporate FCPA enforcement actions illustrates that the treatment accorded voluntary disclosures is difficult to quantify. For example, from 2004 through 2009, approximately twenty-one percent of voluntary disclosure cases have been resolved with DPAs compared to forty-four percent of non-voluntary disclosure cases.[371] Similarly, twenty-seven percent of voluntary disclosure cases have been resolved through NPAs versus twenty-five percent of non-disclosure cases.[372] Overall, during those five years, sixteen voluntary disclosure cases (forty-eight percent) were settled through DPAs or NPAs while eleven non-disclosure cases (sixty-nine percent) were settled through DPAs or NPAs.[373] Because information about "no action" determinations is not publicly available, however, it is difficult to assess the benefit of self-disclosure empirically and the actual benefits may be underestimated. Regardless, it remains challenging for a company to anticipate the consequences of disclosure to either U.K. or U.S. authorities, although the U.K. authorities hold out more hope of a purely civil settlement. The decision to report to U.S. authorities is complicated further because the SEC and DOJ share responsibility for enforcing the FCPA and therefore may initiate separate investigations and make separate decisions about the weight to give a voluntary disclosure and whether to bring an enforcement action.[374]

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369. SEC Initiative, *supra* note 367; *see also* ENFORCEMENT MANUAL, *supra* note 367, at 123–40.

370. A recent attempt to quantitatively analyze the benefits of self-disclosure has generated debate on this issue. *See* Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements* (July 15, 2010), *available at* http://ssrn.com/abstract=1650925 (finding that the ratio between bribes and fines in forty cases dating from 2002 to 2009 "reveal[s] that there does not appear to be a benefit to voluntary disclosure").

371. FCPA DATA, *supra* note 346.

372. *Id.*

373. *Id.*

374. *See*, *e.g.*, Aruna Viswanatha, *General Electric to Pay $23 Million to Settle FCPA Charges*, MAIN JUSTICE, (July 27, 2010), *available at* http://www.mainjustice.com/2010/07/27/general-electric-to-pay-23-million-to-settle-fcpa-charges/ (discussing an instance in which when DOJ and SEC reached very different resolutions for the same conduct); *see also* Mike Koehler, *General Electric Settles Iraqi Oil for Food Matter*, FCPA PROFESSOR BLOG (July 27, 2010, 12:48 PM), http://fcpaprofessor.blogspot.com/2010/07/general-electric-settles-iraqi-oil-for.html ("The GE enforcement action is also an outlier of sorts in that it is merely a[n] SEC enforcement action with no parallel DOJ enforcement action . . . . So much for substantively similar conduct being resolved in a similar fashion.").

2. Disclosure Expectations

Recent remarks by Director Alderman suggest that the SFO may have more stringent self-reporting expectations than DOJ. Alderman recently warned that self-reporting is "not something [companies] can dip in and out of as they please . . . they need to come forward every time something rotten turns up rather than wait for something they consider really serious before they make the call."[375] He further stressed that one of the SFO's first questions to a company "will be whether the company has had similar issues in the past."[376] If the company has not voluntarily reported past issues, Alderman "will not be pleased" and will "investigate whether the decision-makers are criminally liable for the cover-up."[377]

In contrast, DOJ has suggested that a corporation "can responsibly not report" FCPA issues in limited circumstances.[378] Specifically, Mark Mendelsohn, former Deputy Chief of DOJ's Fraud Section, stated in 2007 that a company can responsibly deal with an FCPA issue and not tell DOJ about it if the company:

> has good controls in place; it trains people; it trains them regularly; it tests its controls regularly so it can be satisfied that they are in place and working; it has appropriate disciplinary policies in place and utilizes them; it thoroughly investigates the matter and gets to the bottom of the issue and is satisfied it has done it; [and] it understands how its controls were circumvented in this case and why it is not a broader problem.[379]

Similarly, Assistant Attorney General Breuer recently recognized that the decision whether to make a voluntary disclosure is "sometimes [a] difficult question . . . [Breuer] grappled with as a defense lawyer."[380]

Additionally, SFO Director Alderman has asserted that failing to self-report "turns a problem that is not the personal problem of Board members into one that definitely is" and can "bring about personal criminal liability on the part of Board members."[381] If the SFO in fact brings criminal enforcement actions against board members for failing to report corruption issues, this would constitute a significant difference between the U.K. and U.S. regimes. While a corporate control group in the United States may face civil liability, such as the case against the CEO and CFO

375. *Alderman: No Second Chances in SFO Reporting*, TIMES ONLINE, Nov. 10, 2009, *available at* http://timesonline.typepad.com/law/2009/11/alderman-no-second-chances-in-sfo-self-reporting.html.

376. *Id.*

377. *Id.*

378. GIBSON, DUNN & CRUTCHER LLP, CHALLENGES IN COMPLIANCE AND CORPORATE GOVERNANCE 26 (Jan. 17, 2008), *available at* http://www.gibsondunn.com/publications/Documents/Webcast-CorpCompliance4thAnn-Slides.pdf (quoting Mark Mendelsohn, former Deputy Chief Fraud Section, DOJ (Oct. 17, 2007)). But an issuer nonetheless may have an obligation to disclose pursuant to the securities laws apart from the FCPA, such as the Sarbanes-Oxley Act of 2002.

379. *Id.*

380. Breuer, *supra* note 333, at 4.

381. Richard Alderman, Director of Serious Fraud Office, Combating Corruption and Bribery: the SFO perspective, Speech at the Anti-Corruption and Bribery Conference (Nov. 18, 2008), *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2008/combating-corruption-and-bribery-the-sfo-perspective.aspx.

of Nature's Sunshine Products,[382] the FCPA's criminal provisions do not apply to board members not directly involved with the underlying violation.[383]

C. The Self-Reporting Process

After voluntarily disclosing to the SFO, DOJ, or SEC, a company typically begins a three-step process. First, the company usually conducts an internal investigation into the corruption issue. Waiver of attorney-client privilege and work-product protection, which differs under U.K. and U.S. law, is a key issue at the investigation stage. Second, the company reports its findings to the enforcement authority and negotiates a resolution of the issues. The criteria used by the SFO to decide whether to pursue a civil or criminal settlement of a case differs significantly from the U.S. FCPA enforcement regimes. Finally, all three enforcement agencies frequently require the self-reporting company to retain an independent compliance monitor for several years.

1. The Investigation

Unlike the SEC and DOJ, the SFO informs organizations what they can expect following the disclosure of a potential violation. "Very soon after the self report and the acknowledgement of a problem,"[384] the SFO seeks to establish the following:

- that the board is "genuinely committed to resolving the issue and moving to a better corporate culture";
- that the company is "prepared to work with [the SFO] on the scope and handling of any additional investigation [the SFO] consider[s] to be necessary";
- that the company will "be prepared to discuss resolution of the issue on the basis, for example, of restitution through civil recovery, a programme of training and culture change, appropriate action where necessary against individuals and at least in some cases external monitoring in a proportionate manner" following the conclusion of an investigation;
- that the company understands that "any resolution must satisfy the public interest and must be transparent . . . almost invariably involv[ing] a public statement"; and

382. *See*, *e.g.*, Complaint, S.E.C. v. Nature's Sunshine Products, Inc., No. 2:09cv0672 (D. Utah July 31, 2009), http://www.sec.gov/litigation/complaints/2009/comp21162.pdf (naming CEO and COO as defendants and requesting payment of civil money penalties in complaint alleging failure to disclose undocumented cash payments to foreign customs officials).

383. *See* 15 U.S.C. § 78dd-2(g)(2)(A) (1998) ("Any natural person that is an officer, director, employee, or agent of a domestic concern . . . who *willfully violates* [the FCPA] shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.") (emphasis added), § 78dd-2(g)(2)(B) ("Any natural person that is an officer, director, employee, or agent of a domestic concern . . . who violates [the FCPA] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.").

384. If a case falls under both U.S. and U.K. jurisdiction, the SFO expects to be notified at the same time as DOJ. SFO Approach, *supra* note 38, at 3.

- that the company will "work with regulators and criminal enforcement authorities, both in the UK and abroad, in order to reach a global settlement . . . ."[385]

The SFO has a "very strong preference . . . that all investigative work . . . be carried out by the [corporation's] professional advisers."[386] "[D]ocument recovery and analysis will be a very significant issue in any investigation" and "[e]lectronic searches will be needed."[387] Additionally, the SFO expects the corporation to discuss the scope of its internal investigation and to provide regular updates.[388] Although it has observed that the corporation will bear the cost of an investigation,[389] the SFO stated that "[c]learly no report will ever cover every issue that could possibly be raised" and professes that it is "anxious not to put disproportionate cost on the corporates."[390]

DOJ has similarly stressed that cooperating corporations may be expected to share relevant information and evidence. In practice, this means that corporations often conduct internal investigations at their own cost as a necessary element of the voluntary disclosure.[391] For instance, the recent settlement of civil FCPA charges against oil services provider NATCO Group Inc. shows how a voluntary disclosure in the United States often requires the company to expand its internal investigation at significant cost.[392] In that matter, NATCO, which discovered problems in Kazakhstan during a routine audit, "expanded its investigation to examine . . . other worldwide operations, including Nigeria, Angola, and China, geographic locations with historic FCPA concerns."[393]

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385. *Id.*

386. Letter from Richard Alderman, Dir. U.K. Serious Fraud Office, to Marcus A. Asner, Arnold & Porter LLP 2 (Dec. 7, 2009), *available at* http://www.arnoldporter.com/resources/documents/FINAL_ASNER_LETTER.pdf [hereinafter Alderman Letter].

387. SFO Approach, *supra* note 38, at 5.

388. *Id.*

389. *Id.*

390. Alderman Letter, *supra* note 386, at 2.

391. *See, e.g.*, Principles of Federal Prosecution of Business Organizations, *supra* note 362, at 7 ("In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives . . . . [A] corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.").

392. *See* NATCO Group Inc., Exchange Act Release No. 61325 (Jan. 11, 2010), *available at* http://www.sec.gov/litigation/admin/2010/34-61325.pdf ("NATCO undertook numerous remedial measures . . . [t]he company also . . . established new due diligence procedures regarding the vetting and retention of third-party intermediaries; increased staffing in its global compliance department, including the appointment of a full-time Chief Compliance Officer; . . . improved its FCPA compliance training worldwide, investing heavily in software to assist in enhancing internal controls and compliance; and restructured its internal audit function and enhanced its monitoring and auditing process for the compliance program.").

393. *Id.* at 4. The voluntary FCPA investigation that Avon Products, Inc., initiated in 2008 has also increased dramatically in its geographic scope and, presumably, in cost. *Compare Avon Statement on Voluntary Disclosure*, Int'l Bus. Times, Oct. 20, 2008, *available at* http://www.ibtimes.com/prnews/20081020/ny-avon-disclosure.htm (disclosing investigation into issues in China), *with* Ellen Byron, *Avon Bribery Probe Expands to Four Units*, WALL ST. J., May 1, 2010, *available at* http://online.wsj.com/article/SB10001424052748703871904575215913745075480.html (stating that the investigation "has expanded beyond China into four other international units").

2. Privilege

The concept of waiver of privilege differs between U.S. and U.K. law, and the SFO and U.S. enforcement authorities may expect cooperating corporations to disclose different types of information. SFO Director Alderman stated that the SFO expects to see the report of the internal investigation and "any notes of interviews during the course of the investigation."[394] But he qualified this by noting that he "cannot foresee the SFO wanting to review "the advice that lawyers are giving to the corporate on the investigation, the types of remediation to be offered and any issues regarding the conduct of the negotiations."[395]

In the United States, DOJ's view on privilege has changed substantially in the past few years. Pursuant to the McNulty Memorandum and the Thompson Memorandum, DOJ viewed waivers of the attorney-client privilege and work-product protection as indicia of authentic cooperation.[396] The McNulty Memorandum also permitted prosecutors to request waiver of attorney-client or work product protections if "there is a legitimate need for the privileged information to fulfill their law enforcement obligations."[397] By 2008, however, Congress began to express concern about DOJ's policies. Senator Arlen Specter introduced legislation that would ban DOJ from seeking attorney-client waivers in corporate investigations, and the U.S. House of Representatives actually passed similar legislation.[398] On June 26, 2008, Senate Judiciary Committee Chairman Patrick Leahy revealed that he had met with Deputy Attorney General Mark Filip to discuss his concerns about DOJ's approach to corporate attorney-client privilege and stated that he expected prompt action from DOJ.[399]

On August 28, 2008, then-Deputy Attorney General Mark Filip published the Filip Memorandum, which substantially modifies DOJ's policy defining cooperation. According to the Filip Memorandum, "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection."[400] The Memorandum emphasizes that prosecutors "should not ask for such waivers and are directed not to do so."[401] But just as the SFO notes that it needs to see the report of any internal investigation and "any notes of interviews during the

394. Alderman Letter, *supra* note 386, at 3.

395. *Id.*

396. *See, e.g.*, Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to the U.S. Attorneys, Heads of Dep't Components (Dec. 12, 2006), *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (stating that "[w]aiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation . . . [but] a company's disclosure of privileged information may permit the government to expedite its investigation . . . [and] may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.").

397. *Id.*

398. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007).

399. Lawrence Hurley, *Leahy Reveals Discussions with DOJ Over McNulty Memo*, WASHINGTON BRIEFS (June 28, 2008, 3:34 p.m.), http://washingtonbriefs.blogspot.com/2008/06/leahy-reveals-discussions-with-doj-over.html.

400. Principles of Federal Prosecution of Business Organizations, *supra* note 362, at 9.

401. *Id.*

course of the investigation,"[402] the Filip Memorandum provides that a corporation may need to provide factual information—possibly including information obtained in an internal investigation—to obtain cooperation credit.[403]

The Filip Memorandum does not apply to the SEC. The SEC may ask for a waiver of privilege with the approval of the Director or Deputy Director of Enforcement.[404] According to the Seaboard Report, the SEC will consider a company's self-reporting of misconduct and the disclosure of "the results of its review . . . [with] sufficient documentation" in assessing cooperation.[405] Additionally, the Seaboard Report states that "[i]n some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission."[406] Parties' legitimate assertion of attorney-client privilege or work product protection, however, "will not negatively affect their claim to credit for cooperation."[407]

D. Resolution

Following an investigation, there are a variety of ways in which the enforcement authorities may resolve a case, including declining to take action. And as highlighted by M&J's guilty plea in July 2009 and the subsequent charging of David Mabey, the former chief of M&J, nearly six months later, the resolution of corporate enforcement actions may differ substantially from enforcement decisions regarding individuals included in the corporate conduct.[408]

1. Resolution with the Company

In perhaps the most striking contrast with DOJ, the SFO has an expressed preference for civil settlements of self-reported cases. According to Director Alderman, the SFO will weigh the following questions when determining whether to treat a self-reported case as a criminal or civil matter:

- How serious is the wrongdoing?
- Is this an isolated incident or have there been other examples of this?

402. Alderman Letter, *supra* note 386, at 3.

403. Principles of Federal Prosecution of Business Organizations, *supra* note 362, at 9; *See also United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008) (on the same day the Filip Memorandum was issued, the Second Circuit held a company's decision not to pay their employees' legal fees—based on pressure from DOJ—violated the employees' Sixth Amendment rights).

404. ENFORCEMENT MANUAL, *supra* note 367, at 99–100 ("The staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director or Deputy Director. A proposed request for a privilege waiver should be reviewed initially with the Assistant supervising the matter and that review should involve more senior members of management as appropriate before being presented to the Director or Deputy Director." (emphasis omitted)).

405. Report of Investigation Pursuant to § 21(a) of the Securities Exchange Act of 1934, *supra* note 365.

406. *Id.* at n.3.

407. ENFORCEMENT MANUAL, *supra* note 367, at 100.

408. *See, e.g.*, Michael Peel, *Ex-Mabey Chief to Face Graft Charges*, FIN. TIMES, Jan. 14, 2010, at 6 (using company confessions to prosecute individual executives).

- Is it systemic and part of the established business practice of the group?
- Have continuing Board members derived personal profit from the wrongdoing?
- Had the group been given warnings that its processes were inadequate?
- Did it fail to report within a reasonable time?
- Was the report detailed and complete?[409]

This is a major difference between the U.K. and U.S. enforcement regimes, as U.S. authorities have *not* expressed a preference for civil settlements of self-reported cases. In fact, at least eight of the approximately thirty-three corporate voluntary disclosure enforcement actions in the United States between 2004 and 2009 involved a guilty plea.[410] An additional seven corporate voluntary disclosure enforcement actions in that time period involved DPAs.[411] Moreover, U.S. authorities have not issued guidance articulating the criteria that they apply in deciding whether to deal with a self-reported case criminally or civilly.

In cases where the SFO does not seek criminal sanctions, it will consider the following settlement terms:

- "restitution by way of civil recovery to include the amount of the unlawful property, interest and our costs,"
- "monitoring by an independent, well qualified individual nominated by the corporate and accepted by [the SFO]" that is "proportionate to the issues involved,"
- "a programme of culture change and training agreed with [the SFO],"
- "discussion, where necessary, and to the extent appropriate, about individuals," and
- "a public statement agreed by the corporate and the SFO . . . to provide transparency so far as possible for the public."[412]

Because of the SFO's limited corporate prosecution track record, it is difficult to assess and compare the approaches of the U.S. and U.K. regimes to monetary penalties and other settlement terms. As noted, M&J paid a total penalty of £6.6 million and agreed to retain an independent monitor,[413] and AMEC PLC paid nearly £5 million pursuant to a Civil Recovery Order.[414]

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409. Alderman Letter, *supra* note 386, at 1.

410. FCPA DATA, *supra* note 346.

411. *Id.*

412. SFO Approach, *supra* note 38, at 6; *see also* Richard Alderman, Director of the SFO, Tackling Corruption—Working Smarter, Address at the International Association of Anti-Corruption Authorities (Oct. 4, 2008), *available at* http://www.sfo.gov.uk/about-us/our-views/speeches/speeches-2008/tackling-corruption---working-smarter.aspx ("[I]t would be permissible to restrict the territories in which an offending company could operate or to limit the types of goods and services a company could offer.").

413. Mabey & Johnson Sentencing, *supra* note 337.

414. Press Release, Serious Fraud Office, SFO Obtains Civil Recovery Order Against AMEC PLC (Oct. 26, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-plc.aspx.

The SFO has indicated that some voluntary disclosure cases have been closed without the SFO taking any action.[415] Director Alderman noted that such cases involved "special circumstances" and the companies paid "suitable remediation to the countr[ies] involved."[416] Alderman emphasized that these cases "will remain comparatively rare because there is a very strong public interest in this jurisdiction in publicity for the settlement and for the involvement of a [j]udge including a judge in our civil courts agreeing to a civil recovery order."[417]

Similarly, DOJ has represented that "despite rumors to the contrary, [DOJ does] decline prosecution in appropriate cases."[418] Assistant Attorney General Breuer stated that DOJ "recognize[s] that there will be situations in which guilty pleas or criminal charges are not appropriate" and is "mindful of the direct impact on the company itself, as well as the numerous collateral consequences that often flow from these charging decisions."[419] Breuer emphasized that DOJ's attorneys are "sophisticated" and "understand the challenges and complexities involved in doing business around the globe."[420] But voluntary disclosures that do not result in prosecutions—on either side of the Atlantic—are "dogs that don't bark," and so understanding and comparing the prosecutors' approach to them is virtually impossible.

2. Prosecution of Individuals

In contrast to its preference for civil enforcement actions against corporations that self-report, the SFO states that "[t]here are no guarantees" for criminal investigations of individuals employed by the self-reporting entity and that it will "assess the position of individuals on their merits."[421] The questions that the SFO will ask in evaluating individual conduct include the following:

- how involved were the individuals in the corruption (whether actively or through failure of oversight)?
- what action has the company taken?
- did the individuals benefit financially and, if so, do they still enjoy the benefit?
- if they are professionals should [the SFO] be working with the appropriate Disciplinary Bodies?
- should [the SFO] be looking for Directors' Disqualification Orders?

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415. Alderman Letter, *supra* note 386, at 3.
416. *Id.*
417. *Id.*
418. Breuer, *supra* note 333.
419. *Id.*
420. *Id.*
421. SFO Approach, *supra* note 38, at 4; *see also* Richard Alderman, Director of Serious Fraud Office, Combating Corruption and Bribery: the SFO perspective, Speech at the Anti-Corruption and Bribery Conference (Nov. 18, 2008), *available at* http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2008/combating-corruption-and-bribery-the-sfo-perspective.aspx (asserting that the SFO will "want to consider whether to commence [its] own investigation [of individuals] (leading possibly to prosecution) irrespective of what we do in respect of the corporate").

- should [the SFO] think about a Serious Crime Prevention Order?[422]

Although the SFO obtained no convictions of individuals for overseas corruption in 2009, in December of that year it brought the Dougall prosecution for allegedly making illegal payments and/or other inducements to Greek public healthcare professionals.[423] Additionally, in January 2010, the SFO announced that it planned to charge David Mabey, the former chief of M&J, with false accounting and breach of U.N. sanctions in Iraq[424] with regard to the corrupt business practices at M&J (to which the company pleaded guilty in July 2009).[425]

U.S. enforcement authorities have aggressively prosecuted individuals for FCPA violations, and in 2009, more individuals were tried and criminally convicted for FCPA violations (four) than in any other year.[426] Assistant Attorney General Breuer contends that this "is no accident."[427] He recently explained that the "prosecution of individuals is a cornerstone of [DOJ's] enforcement strategy . . . . Put simply, the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations."[428]

The trend appears likely to continue in 2010. On January 19, 2010, DOJ indicted twenty-two executives and employees from military/law enforcement product companies for allegedly attempting to bribe foreign officials to obtain business.[429] Significantly, the investigation involved the use of undercover law enforcement officials to detect the alleged FCPA violations.[430] Further, on April 19, 2010, a U.S. federal court sentenced a former executive of Ports Engineering

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422. SFO Approach, *supra* note 38, at 4.

423. Press Release, Serious Fraud Office, Former Vice President of DePuy International Ltd. Charged with Corruption (December 1, 2009), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/former-vice-president-of-depuy-international-ltd-charged-with-corruption.aspx.

424. Michael Peel, *Ex-Mabey Chief to Face Graft Charges*, FIN. TIMES, Jan. 14, 2010, at 6, *available at* http://www.ft.com/cms/s/0/d2208ebe-00ac-11df-ae8d-00144feabdc0.html.

425. Prosecution Opening Note, Regina v. Mabey and Johnson Ltd., No. T2009 7513, para. 17 [2009] Southwark Crown Court, *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/maybey--johnson-ltd-sentencing.apsx; Mabey & Johnson Sentencing, *supra* note 337.

426. Frederic Bourke was convicted of conspiracy to violate the FCPA and sentenced to one year imprisonment for his alleged participation in a business partnership engaged in a bribery scheme in Azerbaijan. Congressman William Jefferson received a thirteen year prison sentence following his conviction for conspiracy, although Jefferson was acquitted on the substantive FCPA count, and the verdict form did not specify which alleged objects of the conspiracy served as the basis for the guilty verdict. Finally, two Hollywood firm executives, Gerald and Patricia Green, were tried and convicted in September 2009 of nine substantive FCPA counts and one conspiracy count for allegedly bribing the former head of the Thai Tourism Authority in exchange for Thai government contracts. Additionally, four former executives of Control Components, Inc., were indicted in April 2009 and are scheduled for trial in November 2010 for alleged FCPA violations. Christopher M. Matthews, *Justice Racks up More FCPA Convictions*, MAIN JUST., Sept. 14, 2009, *available at* http://www.mainjustice.com/justanticorruption/2009/09/14/justice-wracks-up-more-fcpa-convictions/; Breuer, *supra* note 333.

427. Breuer, *supra* note 333.

428. *Id.*

429. Ashby Jones, *FCPA Goin' Prime Time: Huge Bribery Sting Leads to Arrest of 22*, WALL ST. J. LAW BLOG (Jan. 19, 2010, 5:55 PM), http://blogs.wsj.com/law/2010/01/19/fcpa-goin-prime-time-huge-bribery-sting-leads-to-arrest-of-22.

430. *Id.*

Consultants Corporation to eighty-seven months in prison, the longest term of incarceration imposed to date in an FCPA case.[431]

3. Independent Compliance Monitorships

Both enforcement regimes consider appointment of a monitor to be an important settlement term. In U.S. enforcement actions from 2004 through 2009, twenty-three of the thirty-nine companies (fifty-nine percent) that entered into a resolution of FCPA violations with the SEC or DOJ received a compliance monitorship as a term of their agreement with the Government.[432] In the first half of 2010, fifty-seven percent of corporate FCPA settlements required the retention of monitors. Assistant Attorney General Breuer recently emphasized that "corporate monitors continue to play a crucial role and responsibility in ensuring the proper implementation of effective compliance measures and in deterring and detecting future violations."[433]

The SFO may be following suit on this front, as M&J received a monitor as a condition of settlement.[434] But significant differences exist between the two regimes, particularly in regard to the amount of guidance provided by the enforcement authorities concerning the selection of a monitor and the scope of a monitor's responsibilities. In cases where the SFO determines that a monitor is necessary, it will impose "light touch monitoring" to help "the Board carry out its commitment to the anti-corruption culture."[435] The SFO has indicated that it would expect "the Board to come to [the SFO] with proposals about a monitor they [sic] would like to work with," "would regard it as no job of the SFO to impose a particular monitor against the wishes of the Board," and would "expect to be able to reach agreement on the scope of the monitoring needed."[436]

In contrast to this general guidance from the SFO, DOJ has promulgated detailed guidelines regarding the selection process for an external monitor, the scope of a monitor's responsibilities, and other issues. A memorandum issued by then-Acting Deputy Attorney General Craig S. Morford (Morford Memorandum) on March 10, 2008, provides the relevant guidance.[437] First, the Morford Memorandum requires the creation of a "standing or *ad hoc* committee in the Department component or office where the case originated to consider monitor candidates," prohibits individual prosecutors from "mak[ing], accept[ing], or veto[ing] the selection of monitor candidates unilaterally," and requires that the Office of the

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431. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*, supra note 357.

432. F. Joseph Warin, Michael S. Diamant, & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. (forthcoming early 2011).

433. Breuer, *supra* note 333.

434. Mabey & Johnson Sentencing, *supra* note 337. AMEC also agreed to appoint an independent consultant to review its ethics, compliance and accounting standards and report his or her findings to the SFO. Press Release, Serious Fraud Office, SFO Obtains Civil Recovery Order Against AMEC PLC (Oct. 26, 2009) *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/sfo-obtains-civil-recovery-order-against-amec-pkc.aspx.

435. Alderman Letter, *supra* note 386, at 2.

436. *Id.*

437. Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components and U.S. Attorneys (Mar. 7, 2008), para. 3, *available at* http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

Deputy Attorney General approve all monitors.[438] A monitor may not have "an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality" and must be prohibited from employment or affiliation with the corporation for at least one year from the date of the end of the monitorship.[439]

Second, the Morford Memorandum defines the scope of the monitor's responsibilities. The Memorandum states that the monitor is "an independent third-party, not an employee or agent of the corporation or of the Government" and therefore the corporation may not seek or obtain legal advice from its monitor.[440] Instead, the monitor's purpose is to "assess and monitor a corporation's compliance with those terms of the agreement that are specifically designed to address and reduce the risk of reoccurrence of the corporation's misconduct."[441] The corporation has the responsibility for designing and maintaining its compliance program, "subject to the monitor's input, evaluation and recommendations."[442] Additionally, the Morford Memorandum notes that the monitor's role is to analyze ongoing compliance efforts and not to "investigate historical misconduct."[443]

Perhaps moving toward the SFO's "light touch" approach, DOJ has recently begun to permit self-monitoring in select cases. On July 30, 2009, Helmerich & Payne, Inc. (H&P) settled FCPA charges with the SEC and DOJ for allegedly improper payments to customs officials in Argentina and Venezuela.[444] H&P paid a $1 million criminal fine to DOJ and disgorged $375,681.22 in illicit profits and prejudgment interest to the SEC.[445] Significantly, DOJ agreed to allow H&P to self-monitor and report on the implementation of its improved compliance policies without requiring the retention and oversight of an external compliance monitor.[446] Speaking at a conference in November 2009, Assistant Attorney General Breuer explained that H&P's "forward leaning, pro-active, highly cooperative approach" to DOJ's investigation influenced DOJ's decision to allow H&P to self-monitor.[447] On December 31, 2009, UTStarcom, Inc., settled FCPA charges with DOJ and the SEC,

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438. *Id.* DOJ remains keen on ensuring the qualifications of monitors. *See, e.g.*, Jeremy Pelofsky, *BAE Says US Agrees to Extend Time to Hire Monitor*, REUTERS, June 3, 2010, *available at* http://in.reuters.com/article/idINN0324269720100603?feedType=RSS&feedName=everything&virtualBrandChannel=11709 (describing DOJ's rejection of three monitor candidates proposed by BAE).

439. Morford, *supra* note 437, at 3.

440. *Id.* at 4–5.

441. *Id.* at 5.

442. *Id.*

443. Morford, *supra* note 437, at 6. More recently, DOJ supplemented the Morford Memorandum by defining the role DOJ can play in resolving disputes between the monitor and the company being monitored. Memorandum from Gary G. Grindler, Acting Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components U.S. Attorneys (May 25, 2010), *available at* http://www.justice.gov/dag/dag-memo-guidance-monitors.html.

444. Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009) (cease and desist order), *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf; Letter from Steven A. Tyrrell, Chief, Fraud Section, Crim. Div., U.S. Dep't of Justice, to Kimberly A. Parker, Wilmer Cutler Pickering Hale and Dorr LLP (July 28, 2009), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-29-09helmerich-agree.pdf.

445. Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649, at § IV(ii) (July 30, 2009) (cease and desist order), *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf.

446. Breuer, *supra* note 333.

447. *Id.*

paying a $1.5 million criminal fine and a $1.5 million civil penalty to the respective agencies.[448] Similar to H&P, UTStarcom was permitted to self-monitor and report on its implementation of improved compliance policies.[449]

The SFO has not publicly opined about the possibility of self-monitoring. But SFO Director Alderman has stated that "[n]ot all cases will require a monitor," such as instances of a "one off lapse in an ethical corporate with a very strong anti-corruption culture, particularly if the corporate has shown [the SFO] that this was picked up and remedied by its own processes."[450]

Finally, both regimes recognize the costs of imposing a monitor on a company. The SFO stated that it would like to "ensur[e] that the monitoring process strikes the right balance between assuring the public that the corporate is genuinely committed to the new anti-corruption culture while not imposing disproportionate burdens on the corporate."[451] Consistent with this policy, M&J's sentence provided for a first year monitoring cost of up to £250,000.[452] Assistant Attorney General Breuer similarly has acknowledged that "[i]n appropriate cases, we will also continue to insist on a corporate monitor, mindful that monitors can be costly and disruptive to a business, and are not necessary in every case."[453] The SEC and DOJ, however, have not limited the fees charged by independent compliance monitors.

The recent Innospec enforcement action not only sheds light on current U.S. attitudes toward FCPA monitors, but does so in the context of an enforcement action arising out of parallel U.S. and U.K. prosecutions. Innospec, an international chemical company with principal offices in both the United States and England, was investigated for improper payments in Iraq and Indonesia.[454] Pursuant to a plea agreement with U.S. regulators, Innospec consented to entry of a court order in federal court "without admitting or denying" the SEC's allegations.[455] As part of that plea agreement, Innospec agreed to hire a compliance monitor for three years.[456] Perhaps further supporting U.S. regulators' trend to a "light touch" approach, presiding U.S. District Judge Ellen Segal Huvelle pointedly criticized some monitorships: "It's an outrage, that people get $50 million to be a monitor."[457] Judge Huvelle went further, adding that she was "not comfortable, frankly, signing off on something that becomes a vehicle for someone to make lots of money."[458] While

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448. Press Release, Department of Justice, UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China para. 4 (Dec. 31, 2009), *available at* http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html.

449. *Id.*

450. Alderman Letter, *supra* note 386, at 2.

451. *Id.*

452. Mabey & Johnson Sentencing, *supra* note 337.

453. Breuer, *supra* note 333.

454. Press Release, U.S. Sec. and Exch. Comm'n, SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian Officials para. 6 (Mar. 18, 2010), *available at* http://www.sec.gov/news/press/2010/2010-40.htm.

455. *Id.* para. 14.

456. *Id.*

457. Christopher M. Matthews, *Judge Blasts Compliance Monitors at Innospec Plea Hearing*, MAIN JUSTICE (Mar. 18, 2010, 7:45 PM), http://www.mainjustice.com/2010/03/18/judge-blasts-compliance-monitors-at-innospec-plea-hearing/ (suggesting that Judge Huvelle was referring to a $52 million monitoring contract that was given by current New Jersey Governor Chris Christie to former U.S. Attorney General John Ashcroft in 2007).

458. *Id.*

Judge Huvelle ultimately accepted Innospec's plea, her comments during the plea hearing may suggest a trend toward lower-cost, less-intrusive monitorships in the U.S. context. Further, as will be discussed in Part IV below, the Innospec enforcement action serves as a harbinger of future cooperative enforcement actions between the United States and the United Kingdom.

E. Best Practices

Besides promptly self-reporting overseas corruption issues to the relevant authority, companies can take two other precautions to mitigate subsequent enforcement actions. First, a company may seek an opinion of the SFO or DOJ regarding prospective conduct. Second, and more generally, a company can adopt recommended compliance policies and procedures.

1. Opinion Procedure

In the United States, a company may "obtain an opinion of the Attorney General as to whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present [FCPA] enforcement policy."[459] Although these opinions are made publicly available, only a party that joins in the request may authoritatively rely on it. Since the inception of the FCPA, DOJ has issued fifty-one opinions, including three in 2008, one in 2009, and three in 2010.[460]

For example, on August 3, 2009, DOJ issued its only opinion of the year in response to a submission from a U.S. medical device company.[461] The company inquired whether it could donate one-hundred sample devices, along with any necessary accessories and support (valued at approximately $1.9 million) to ten government medical centers in a foreign country at the request of a senior foreign government official.[462] The company represented that the foreign country planned to purchase some of the devices, but first wanted to evaluate them.[463] Among other conditions designed to reduce corruption risks, the company asserted that the patients who would receive the sample devices would be selected, based on economic need, by a working group of healthcare professionals in the country, including a physician who had received FCPA training.[464] In FCPA Opinion Procedure Release No. 2009-01, DOJ concluded that the company's proposed donation fell "outside the scope of the FCPA in that the donated products will be provided to the foreign government, as opposed to individual government officials, for ultimate use by patient recipients selected in accordance with specific guidelines."[465]

459. 28 C.F.R. § 80.1 (1992).

460. *See* DOJ Opinion Procedure Releases, http://www.justice.gov/criminal/fraud/fcpa/opinion/ (collected U.S. DEP'T OF JUSTICE Opinion Procedure Releases organized by year, specifically Foreign Corrupt Practices Act No. 10-03, 10-02, 10-01, 9-01, 8-03, 8-02, 8-01).

461. DOJ Opinion Procedure Release, No. 09-01 (Aug. 3, 2009), at 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

Similar to DOJ, the SFO now offers to provide opinions regarding potential foreign corruption issues. At least initially, the SFO stated that it would provide opinions regarding potential corporate acquisitions where the acquiring company discovered overseas corruption issues in a proposed acquiree during the course of due diligence.[466] The SFO represented that it might be able to assure that it would not take any enforcement action if the acquiring company took the appropriate remedial action identified by the SFO. But in cases where "the corruption is long lasting and systemic," the SFO may still consider a criminal investigation.[467] More recently, SFO staff explained that the SFO "envisions any opinions it issues as not commenting on particular facts, but rather providing more general advice on best practice."[468] The staff noted, however, that the SFO is willing to "review and discuss in detail draft guidance prepared by companies."[469] The SFO staff also noted it would consider other views regarding the opinion procedure.[470]

Thus, at least two major differences exist between DOJ's and the SFO's opinion procedures. First, the SFO currently circumscribes its opinion procedure to macrocosmic "best practices" guidance. Second, the SFO has not yet issued any guidance detailing the process for requesting and obtaining an opinion. And to date, the SFO has not issued any opinions.[471]

2. Compliance Policies

Both the U.K. and U.S. authorities have outlined compliance policies and procedures for companies to adopt. As discussed above, the Ministry of Justice recently released draft guidance on "adequate procedures" that provided six general qualities of an effective anti-bribery compliance program. In its current form, the guidance is "not prescriptive" and "do[es] not propose any particular procedures in themselves."[472] It remains to be seen what final form it will take. Similarly to the Ministry of Justice draft guidance, the U.S. guidance, as set forth in the United States Sentencing Guidelines (U.S.S.G.), addresses anti-corruption compliance generally, without prescribing specific measures.[473] In contrast with the draft guidance and the U.S.S.G., the SFO's guidance on self-reporting, released last year, suggests with somewhat greater specificity policies and procedures to deal directly with foreign corruption. But it remains unclear whether the SFO will incorporate these older guidelines into its understanding of "adequate procedures" for purposes of section 7 of the Bribery Act. Much like the adequate procedure defense, the U.S.S.G.'s guidance provides a tangible benefit—a three-point reduction in a company's U.S.S.G. "culpability" score.[474]

According to the SFO's commentary, examples of procedures that the SFO will "look for" include the following:

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466. SFO Approach, *supra* note 38, at 7.

467. *Id.*

468. GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148.

469. *Id.*

470. *Id.*

471. But, as noted, the SFO did not announce until July 21, 2009, that it would provide opinions. SFO Approach, *supra* note 38, at 7.

472. MINISTRY OF JUSTICE, *supra* note 156, at *Annex A*.

473. U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.2, 8C2.5 (2009).

474. *Id.* § 8C2.5(f).

- a clear statement of an anti-corruption culture fully and visibly supported at the highest levels in the corporate.
- a Code of Ethics.
- principles that are applicable regardless of local laws or culture.
- individual accountability.
- a policy on gifts and hospitality and facilitation payments.
- a policy on outside advisers/third parties including vetting and due diligence and appropriate risk assessments.
- a policy concerning political contributions and lobbying activities.
- training to ensure dissemination of the anti-corruption culture to all staff at all levels within the corporate.
- regular checks and auditing in a proportionate manner.
- a helpline within the corporate which enables employees to report concerns.
- a commitment to making it explicit that the anti-bribery code applies to business partners.
- appropriate and consistent disciplinary processes.[475]

The SFO also emphasizes in its guidance that it will "be looking closely at the culture within the corporate to see how well the processes really reflect what is happening in the corporate."[476]

Under the U.S.S.G., a "culpability" score is calculated for an organization convicted of a criminal offense. If the organization "had in place at the time of the offense an effective compliance and ethics program [as defined by the Guidelines]" the organization's culpability score will be reduced.[477] According to U.S.S.G. § 8B2.1, an organization has "an effective compliance and ethics program" if it "exercise[s] due diligence to prevent and detect criminal conduct [and] otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[478] To satisfy these two criteria, the organization must at least do the following:

- "establish standards and procedures to prevent and detect criminal conduct";
- ensure that the organization's governing authority is "knowledgeable about the content and operation of the compliance and ethics program and . . . exercise[s] reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program";
- assign "[s]pecific individual(s) within high-level personnel . . . overall responsibility for the compliance and ethics program";
- assign "[s]pecific individual(s) within the organization . . . day-to-day operational responsibility for the compliance and ethics program," require

475. SFO Approach, *supra* note 38, at 7.

476. *Id.*

477. SENTENCING GUIDELINES, *supra* note 473, § 8C2.5.

478 *Id.*, § 8B2.1.

those individuals to "report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program," and give those individuals "adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority";

- "use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew, or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program";
- "take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program";
- "take reasonable steps . . . to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct[,] . . . to evaluate periodically the effectiveness of the organization's compliance and ethics program; and . . . to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation";
- "promote[] and enforce[] consistently throughout the organization [the compliance program] through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct";
- "take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program"; and
- "periodically assess the risk of criminal conduct and . . . take appropriate steps to design, implement, or modify each requirement . . . to reduce the risk of criminal conduct identified through this process."[479]

In addition to the U.S.S.G., companies subject to U.S. jurisdiction may look to DOJ's FCPA Opinion Release No. 04-02, which highlights key components of an FCPA compliance program.[480] According to Release No. 04-02, an investment group (requestors) made a request relating to an acquisition of companies and assets from ABB Ltd.[481] After signing a preliminary agreement relating to the acquisition, the requestors engaged separate counsel to conduct an FCPA compliance review of the acquired businesses, and approximately nine months later, two of the acquired businesses (ABB Vetco Gray, Inc., and ABB Vetco Gray (UK) Ltd.) entered guilty pleas to violations of the FCPA and settled SEC enforcement actions.[482] Among

479. *Id.* § 8B2.1.

480. DOJ Opinion Procedure Release, No. 04-02 (July 12, 2004), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf.

481. *Id.*

482. *Id.*

other precautions that the requestors represented they would take, such as continuing to cooperate with DOJ and SEC investigations and ensuring that employees who made unlawful or questionable payments were disciplined, they represented that they would require that the newly acquired entities "adopt a rigorous anti-corruption compliance code . . . that is designed to detect and deter violations of the FCPA and foreign anti-corruption laws."[483] The release states that the compliance code would consist of the following elements:

> (A) A clearly articulated corporate policy against violations of the FCPA and foreign anti-bribery laws and the establishment of compliance standards and procedures to be followed by all directors, officers, employees, and all business partners, including, but not limited to, agents, consultants, representatives, and joint venture partners and teaming partners, involved in business transactions, representation, or business development or retention in a foreign jurisdiction (respectively, "Agents"; and "Business Partners") that are reasonably capable of reducing the prospect that the FCPA or any applicable foreign anti-corruption law of [the] Compliance Code will be violated;
>
> (B) The assignment to one or more independent senior [newly acquired entity] corporate officials, who shall report directly to the Compliance Committee of the Audit Committee of the Board of Directors, of responsibility for the implementation and oversight of compliance with policies, standards, and procedures established in accordance with [the] Compliance Code;
>
> (C) The effective communication to all shareholders' representatives directly involved in the oversight of [the newly acquired entity] ("Shareholders") and to all directors, officers, employees, Agents, and Business Partners of corporate and compliance policies, standards, and procedures regarding the FCPA and applicable foreign anti-corruption laws, by requiring (i) regular training concerning the requirements of the FCPA and applicable foreign anti-corruption laws on a periodic basis to all Shareholders, directors, officers, employees, Agents, and Business Partners and (ii) annual certifications by all Shareholders, directors, officers, employees, including the head of each [newly acquired entity] business or division, Agents, and Business Partners certifying compliance therewith;
>
> (D) A reporting system, including a "Helpline"; for directors, officers, employees, Agents, and Business Partners to report suspected violations of the Compliance Code or suspected criminal conduct;
>
> (E) Appropriate disciplinary procedure to address matters involving violations or suspected violations of the FCPA, foreign anti-corruption laws, or the Compliance Code;
>
> (F) Clearly articulated corporate procedures designed to assure that all necessary and prudent precautions are taken to cause [the newly acquired entity] to form business relationships with reputable and qualified Business Partners;

483. *Id.*

> (G) Extensive pre-retention due diligence requirements pertaining to, as well as post-retention oversight of, all Agents and Business Partners, including the maintenance of complete due diligence records at [the newly acquired entity];
>
> (H) Clearly articulated corporate procedures designed to ensure that [the newly acquired entity] exercises due care to assure that substantial discretionary authority is not delegated to individuals whom [the newly acquired entity] knows, or should know through the exercise of due diligence, have a propensity to engage in illegal or improper activities;
>
> (I) A committee consisting of senior [newly acquired entity] corporate officials to review and to record, in writing, actions relating to (i) the retention of any Agent or subagents thereof, and (ii) all contracts and payments related thereto;
>
> (J) The inclusion in all agreements, contracts, and renewals thereof with all Agents and Business Partners of provisions: (i) setting forth anti-corruption representations and undertakings; (ii) relating to compliance with foreign anti-corruption laws and other relevant laws; (iii) allowing for internal and independent audits of the books and records of the Agent or Business Partner to ensure compliance with the foregoing; and (iv) providing for termination of the Agent or Business Partner as a result of any breach of applicable anti-corruption laws and regulations or representations and undertakings related thereto;
>
> (K) Financial and accounting procedures designed to ensure that [the newly acquired entity] maintains a system of internal accounting controls and makes and keeps accurate books, records, and accounts, and;
>
> (L) Independent audits by outside counsel and auditors, at no longer that three-year intervals, to ensure that the Compliance Code, including its anti-corruption provisions, are implemented in an effective manner.[484]

Based on these representations, DOJ stated that it "does not presently intend to take an enforcement action against the requestors or their recently-acquired entities for violations of the FCPA committed prior to their acquisition."[485] DOJ cautioned, however, that "[a]lthough the Department views the Requestors' representation concerning a compliance program to be significant precautions against future violations of the FCPA, the Department's opinion should not be deemed to endorse any specific aspect of the Requestors' program."[486] Additionally, as with all DOJ FCPA Opinion Releases, the release does not bind parties that did not join the request.[487]

In keeping with the prescriptive guidance of Opinion Release No. 04-02, DOJ's DPAs typically include a section setting forth the "minimum . . . elements" of an effective anti-corruption control framework.[488] The standard set of minimum

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484. *Id.*

485. DOJ Opinion Procedure Release, No. 04-02, *supra* note 480.

486. *Id.*

487. *Id.*

488. Deferred Prosecution Agreement, Attachment C, United States v. Technip S.A., Crim. No. H-10-439 (5th Cir. June 28, 2010); Deferred Prosecution Agreement, Attachment C, United States v. Daimler AG, No.1:10-cr-00063 (D.C. Cir. Mar. 22, 2010); Deferred Prosecution Agreement, Attachment

requirements contained in DPAs closely track the elements delineated in Opinion Release No. 04-02.[489] Notably, in more recent DPAs, DOJ has mandated that the entity conduct "[p]eriodic testing" of the entity's compliance policies and procedures "to evaluate their effectiveness in detecting and reducing violations of the FCPA," other anti-corruption laws, and the entity's policies.[490]

F. An Upward Trajectory

In the United States, FCPA enforcement increased dramatically during the past six years. Between January 1, 2006, and June 30, 2010, U.S. enforcement authorities brought 162 cases[491]—more than the entire number of prosecutions brought between 1977 and 2005.[492] The acceleration of prosecutorial activity is even more remarkable: in 2004, DOJ only brought two cases and the SEC brought three cases; in 2009, DOJ brought twenty-six cases and the SEC brought fourteen cases.[493] By the midpoint of 2010, DOJ had initiated twenty-seven cases and the SEC nine.[494]

The promulgation of the SFO's voluntary disclosure guidelines—modeled partly on the U.S. regime—and establishment of the "Anti-Corruption Domain" work area may position the United Kingdom to see a similar growth in overseas corruption prosecutions in the next few years. Moreover, as discussed above, the passage of the Bribery Act expanded the United Kingdom's anti-corruption enforcement toolkit and will almost certainly drive an increase in global enforcement. As identified in this article, substantive differences exist between the two approaches and, therefore, it is imperative for global corporations to examine the U.K. regime as well as the U.S. regime when contemplating future disclosures involving foreign corruption and, more generally, in their approach to complying with the Bribery Act and the FCPA.

IV. FUTURE TRANSATLANTIC COOPERATION

What can companies expect the global regulatory and enforcement framework to look like in the next few years? There will clearly be large multinational corporations whose multi-jurisdictional structures will bring them within the jurisdictional ambit of both the FCPA and the Bribery Act. Indeed, even before the advent of the Bribery Act, U.S. and U.K. authorities had increased their efforts at

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C, United States v. Willbros Group, Inc., Crim. No. H-08-287 (5th Cir. May 14, 2008); Deferred Prosecution Agreement, United States v. York Int'l Corp., Crim. No. 07-00253, at 8–10 (D.C. Cir. Oct. 1, 2007).

489. Deferred Prosecution Agreement, Attachment C, United States v. Willbros Group, Inc., Crim. No. H-08-287 (5th Cir. May 14, 2008).

490. Deferred Prosecution Agreement, Attachment C, United States v. Technip S.A., Crim. No. H-10-439 (5th Cir. June 28, 2010) (requiring "[p]eriodic testing of the compliance code, standards, and procedures to evaluate their effectiveness in detecting and reducing violations of the FCPA, . . . other applicable anti-corruption laws, and [the entity's] policy against such violations"). *See also* Deferred Prosecution Agreement, Attachment C, United States v. Daimler AG, No.1:10-cr-00063 (D.C. Cir. Mar. 22, 2010).

491. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*, *supra* note 357.

492. Stephen Fishbein & Danforth Newcomb, *Compliance Advisers Reduce FCPA Risk*, CORPORATE COUNSEL, May 26, 2010, http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202458742540.

493. GIBSON, DUNN & CRUTCHER LLP, *2009 Year-End FCPA Update*, *supra* note 357.

494. GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year Update*, *supra* note 357.

transatlantic cooperative enforcement.[495] The enactment of the Bribery Act will only add to this trend's forward momentum. Moreover, the new Bribery Act may serve as an international signal—prodding states that consider themselves international economic forces, such as China, Japan, and the countries of the European Union, to ramp up their anti-corruption efforts. A recent spate of anti-corruption enforcement actions highlights the future of transatlantic cooperation.

The investigation into BAE eventually led to guilty pleas on both sides of the Atlantic.[496] Although the SFO did not explicitly prosecute the Al Yamamah contracts, the U.K. regulator did enter a settlement agreement with BAE regarding its activities in Tanzania.[497] In the press release, citing the "ground breaking global agreement," Director Alderman declared: "I am very pleased with the global outcome achieved collaboratively with DOJ. This is a first and it brings a pragmatic end to a long-running and wide-ranging investigation."[498] Even though the SFO's handling of the Al Yamamah investigation may have brought criticism and pressure upon the office, the BAE enforcement action is most likely a harbinger of U.S. and U.K. cooperation in anti-corruption efforts.

Another recent corruption-related investigation—into Alstom, a multinational power and transportation conglomerate—confirms the SFO's increased enforcement efforts.[499] On March 24, 2010, the SFO arrested three Alstom officials in connection with corrupt overseas payments.[500] According to the press release, the investigation involved close cooperation with U.S. and Swiss authorities.[501] SFO Director Alderman again emphasized that the SFO is "working closely with other criminal justice organizations across the world" to tackle global corruption.[502] As discussed above, these efforts are likely to continue increasing, especially in light of the enactment of the Bribery Act and the continued publicity garnered by these corruption investigations.

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495. *See supra* Part I and accompanying discussion (describing the impetus for the passage of the Bribery Act).

496. *BAE Pleads Guilty*, FCPA BLOG (Mar. 1, 2010, 5:43 PM), http://fcpablog.squarespace.com/blog/2010/3/1/bae-pleads-guilty.html; Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-209.html.

497. Press Release, Serious Fraud Office, BAE Sys. PLC (Feb. 5, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-systems-plc.aspx.

498. *Id.*

499. Sandra Laville & Rob Evans, *Three Directors of Rail Engineering Firm Alstom Held in Bribery Investigation*, GUARDIAN, Mar. 25, 2010, at 10, *available at* http://www.guardian.co.uk/business/2010/mar/24/alstom-directors-bribery-dawn-raids.

500. Press Release, Serious Fraud Office, Dirs. of ALSTOM Arrested in Corruption Investigation Following Raids on Nine Props. (Mar. 24, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/directors-of-alstom-arrested-in-corruption-investigation-following-raids-on-nine-properties.aspx.

501. *Id.*; *see* Graeme Brown, *Searches Continue in Alstom Corruption Probe*, BIRMINGHAM POST, Mar. 25, 2010, *available at* http://www.birminghampost.net/news/west-midlands-news/2010/03/25/searches-continue-in-alstom-corruption-probe-65233-26112494/ (describing global cooperation between anti-corruption agencies).

502. Graeme Brown, *Searches Continue in Alstom Corruption Probe*, BIRMINGHAM POST, Mar. 25, 2010; Amir Efrati, *Bribe Case Focuses on Negotiator for Alcoa*, WALL ST. J., Apr. 6, 2010, *available at* http://online.wsj.com/article/SB10001424052702303912104575163883462666928.html (recent investigation into the multinational metal company Alcoa Inc. further highlights the cooperation between U.S. and U.K. authorities; "[p]rosecutors in Washington and London [have been] sharing information . . . .").

Similarly, the much-publicized Innospec enforcement action, discussed above, highlights how multinational corporations can face liability on both sides of the Atlantic, sometimes in the form of parallel enforcement actions.[503] As mentioned, Innospec reached a settlement for making improper payments to the Iraqi regime as part of the United Nation's Oil for Food Program.[504] The settlement involved agreements with the SEC, DOJ, and SFO.[505] According to former U.S. Deputy Attorney General George Terwilliger, the most "striking" aspect of the Innospec enforcement action is the "level of interaction and cooperation it shows between enforcement authorities with different jurisdictions, both internationally and within the U.S."[506] Terwilliger goes further, perhaps implicitly referencing the Bribery Act and predicting an increase in such cooperative investigations "[a]s we see more teeth put into the enforcement of anti-corruption laws by other nations . . . ."[507] SEC Enforcement Division Director Robert Khuzami further emphasized the point, noting that "law enforcement authorities within the United States and across the globe are working together to aggressively monitor violators of anti-corruption laws."[508] The enactment of the Bribery Act will provide additional "teeth" to the United Kingdom's enforcement regime, and the rising tide of transatlantic corruption investigations is not likely to ebb.

Despite the dramatic evidence of increased and cooperative enforcement, the limited ability of the SFO to enter into plea agreements with cooperators, discussed above, may put a wrinkle into the transatlantic enforcement web. In response to the SFO's settlement with Innospec, Senior Judge and deputy head of criminal justice Lord Justice Thomas sharply criticized the "DOJ-like" settlement.[509] Lord Justice Thomas argued that the settlement was too lenient and that the SFO did not have the "power to enter into the arrangements made."[510] The extent of the SFO's power to reach settlement agreement remains in question, but more importantly, Lord Justice Thomas's comments suggest that U.K. and U.S. anti-corruption cooperation will not necessarily be completely glitch-free. This potential tension is an area that will undoubtedly unfold quickly in the coming year, especially in light of the enactment of the United Kingdom's Bribery Act.[511]

Given this landscape, it seems clear that cooperation between states will increase. Not only is it efficient for regulators in multiple jurisdictions to coordinate their efforts against multi-jurisdictional corruption, it is in the interest of justice that

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503. *See* GIBSON, DUNN & CRUTCHER LLP, *2010 Mid-Year FCPA Update* (July 8, 2010), http://www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx (describing a parallel enforcement action in January, 2010).

504. Press Release, Sec. & Exch. Comm'n, SEC Charges Innospec for Illegal Bribes to Iraqi and Indonesian Officials (Mar. 18, 2010), *available at* http://www.sec.gov/news/press/2010/2010-40.htm.

505. Melissa Klein Aguilar, *Innospec Settlement Shows Latest FCPA Thinking*, COMPLIANCE WEEK, Apr. 6, 2010, *available at* http://www.complianceweek.com/article/5874/innospec-settlement-shows-latest-fcpa-thinking.

506. *Id.*

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *Cf.* GIBSON, DUNN & CRUTCHER LLP, *UK Serious Fraud*, *supra* note 148 ("The Staff stated that the SFO anticipates that in the next two years, precedents for multi-jurisdictional cases involving plea negotiations will emerge.").

multinational companies are not investigated and punished repeatedly in different countries for the same underlying wrongdoing. The case against Siemens proved that cross-jurisdictional cooperation can work.[512] It is clear that the new regime in the United Kingdom will form alongside a concurrent commitment in the United States to increasing resources in this area. According to Mark Mendelsohn, former Deputy Chief of DOJ's Fraud Section, cases will soon grow "substantially," perhaps by as much as fifty percent in the next few years.[513]

But the regulators do not expect to act alone. Both the SFO and DOJ intend that companies themselves will play a more aggressive role in combating corrupt behavior. "Companies—individually and collectively and in collaboration with countries—need to adopt stricter standards."[514] The collaboration between companies and enforcement agencies will likely be the scene of the most interesting developments.

512. David Hechler, *DOJ Unit That Prosecutes FCPA to Bulk Up 'Substantially,'* CORPORATE COUNSEL, Feb. 26, 2010, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202444478279.

513. *Id.*

514. *Id.*