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# A COMPARATIVE ANALYSIS OF THE FOREIGN CORRUPT PRACTICES ACT AND THE U.K. BRIBERY ACT, AND THE PRACTICAL IMPLICATIONS OF BOTH ON INTERNATIONAL BUSINESS

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## I. INTRODUCTION

Prior to 1977, bribery was considered legal in many countries worldwide.<sup>1</sup> In fact, bribery payments were often tax deductible in many of

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1. See *History of the FCPA: How a Tough U.S. Anti-Bribery Law Came to Pass*, PBS (Feb. 13, 2009), <http://www.pbs.org/frontlineworld/stories/bribe/2009/02/history-of-the-fcpa.html> (last visited Oct. 20, 2011).

these territories.<sup>2</sup> However, the general atmosphere towards bribery began to change after the United States (U.S.) explicitly proscribed the practice of bribery by enacting the Foreign Corrupt Practices Act (FCPA) in December 1977.<sup>3</sup> The FCPA was established following a Securities and Exchange Commission (SEC) investigation into illegal contributions made to President Nixon's re-election campaign.<sup>4</sup> The SEC's investigation uncovered over \$300 million of corrupt foreign payments made by over 400 U.S. companies, over 100 of which ranked in the Fortune 500.<sup>5</sup> The FCPA was created in an attempt to terminate such bribery practices and "restore public confidence in the integrity of the American business system by making it unlawful for U.S. citizens and companies to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person."<sup>6</sup>

The years following the FCPA's enactment saw a change in the general attitude towards transnational bribery; bribery and corruption became universally discouraged.<sup>7</sup> Bribery and corruption by international businesses inhibits free trade and economic development in many countries by undermining competition in these international markets.<sup>8</sup> During the 1990s, corruption was considered one of the principle impediments to economic growth and democratic accountability.<sup>9</sup> The World Bank, in a report, noted that "corruption has a negative relationship with per capita GDP, . . . lowers the quality of public infrastructure, . . . lowers public satisfaction with health care, . . . undermines the official economy, and reduces the effectiveness of development aid and increases inequality and

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2. See generally John Hatchard, *Recent Developments in Combating the Bribery of Foreign Public Officials: A Cause For Optimism?*, 85 U. DET. MERCY L. REV. 1, 4-5 (2007).

3. See generally 15 U.S.C. §§ 78dd-1, 78dd-2 (2006); Hatchard, *supra* note 2, at 4-5.

4. DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT 1.1 (Prac. L. Inst. 1998).

5. Hatchard, *supra* note 2, at 4; Todd Swanson, *Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law*, 35 GA. J. INT'L & COMP. L. 397, 402 (2007).

6. Hatchard, *supra* note 2, at 4.

7. Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 628-29 (2000) (noting that people no longer tolerated corruption and that various groups have employed extraterritorial anti-bribery laws to combat corruption); Leslie Benton et al., *Anti-Corruption*, 42 INT'L LAW 709, 717 (2008) (noting that China executed the head of the State Food and Drug Administration for approving untested medicine in exchange for money).

8. Swanson, *supra* note 5, at 399.

9. Daniel P. Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Applications of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2909-10 n.86 (2005).

poverty.”<sup>10</sup> Global nations quickly realized that corruption was not confined to only developing countries, but rather affected all participants of international markets.<sup>11</sup> International rules regulating transnational bribery are necessary to foster free and fair trading conditions for participants in today’s international markets, but the extent to which these trading conditions are regulated remains heavily debated.<sup>12</sup>

For twenty years after the FCPA’s enactment in 1977, the United States was the only country with a formal law that facilitated prosecution of domestic companies that paid bribes abroad to foreign government officials.<sup>13</sup> Eventually, other countries followed suit and ostracized foreign bribery by uniting and establishing the Organization for Economic Co-operation and Development (OECD).<sup>14</sup> On November 21, 1997, in an effort to create concrete rules to govern bribery in international business transactions, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).<sup>15</sup> Thirty-seven nations, including all of Western Europe, signed and ratified the OECD convention.<sup>16</sup> The OECD Convention:

[R]equires that each signatory prohibit the bribing of foreign officials, set criminal and civil penalties for violations, and either extradite or prosecute its nationals who are accused of bribery by another signatory . . . [i]t also contains provisions for continued monitoring of the implementation of the convention by signatories.<sup>17</sup>

Although the United Kingdom (U.K.) signed the OECD’s anti-corruption convention, its inadequate anti-bribery laws were the subject of

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10. WORLD BANK, REP. NO. 29620, MAINSTREAMING ANTI-CORRUPTION ACTIVITIES IN WORLD BANK ASSISTANCE: A REVIEW OF PROGRESS SINCE 1997, 1 (2004), available at [http://lnweb90.worldbank.org/oed/oeddoclib.nsf/24cc3bb1f94ae11c85256808006a0046/048351b876971b9285256eed006aae69/\\$FILE/anti\\_corruption.pdf](http://lnweb90.worldbank.org/oed/oeddoclib.nsf/24cc3bb1f94ae11c85256808006a0046/048351b876971b9285256eed006aae69/$FILE/anti_corruption.pdf) (last visited Oct. 20, 2011) [hereinafter OECD REP.].

11. Ashe, *supra* note 9, at 2911.

12. See generally Abiola Makinwa, *The Rules Regulating Transnational Bribery: Achieving a Common Standard*, 2007 INT’L BUS. L.J. 17.

13. See Timothy W. Schmidt, Note, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120, 1125–28 (2009).

14. *Id.* at 1126.

15. Swanson, *supra* note 5, at 406.

16. See Schmidt, *supra* note 13, at 1126.

17. *Id.* at 1127.

constant criticism by the OECD.<sup>18</sup> As a result, the OECD published a report in October 2008 extensively criticizing the United Kingdom's persistent failure to address its deficient anti-corruption and anti-bribery laws.<sup>19</sup> In response to the OECD's report, the United Kingdom enacted the U.K. Bribery Act (Bribery Act) in April 2010.<sup>20</sup> The Act came into force on July 1, 2011 and focuses on bribery in both the public and private sectors.<sup>21</sup> The Bribery Act creates new offenses that reach far beyond the scope of the United States' FCPA.<sup>22</sup>

This Note has four principal purposes. The first is to establish the background of the FCPA and the Bribery Act by discussing the events that influenced each law's creation. Second, it will examine both the FCPA and the Bribery Act in depth and illustrate their differences. Third, it analyzes the Bribery Act's global impact on international business transactions and in conjunction with the FCPA. Finally, the Note will conclude with an analysis of the likely outcome of the Bribery Act in the near future.

## II. OVERVIEW OF THE FCPA AND THE U.K. BRIBERY ACT

The FCPA is comprised of accounting provisions, which impose both accounting and recordkeeping requirements upon publicly held U.S. companies, as well as anti-bribery provisions that prohibit the bribing of foreign government officials for the purpose of obtaining or retaining business.<sup>23</sup> This Note will only discuss the FCPA's anti-bribery provisions since the Bribery Act does not address corporate accounting. The United Kingdom's Company Act of 2006 imposes requirements similar to those of the FCPA with respect to books and records.<sup>24</sup> The FCPA's anti-bribery provisions impose criminal and civil penalties; criminal regulation falls within the exclusive jurisdiction of the United States Department of Justice

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18. Swanson, *supra* note 5, at 401; Joseph Warin et al., *The British Are Coming!: Britain Changes Its Laws on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1 (2011).

19. ORG. FOR ECON. COOP. AND DEV., UNITED KINGDOM: PHASE 2BIS, 5-6 (2008) (criticizing the United Kingdom); Warin et al., *supra* note 18, at 4.

20. See generally Bribery Act, 2010, c.23 (U.K.).

21. See generally Bribery Act, 2010, c.23 (U.K.); Celia Joseph, *The United Kingdom's Bribery Act 2010: Implications for Companies on a Global Basis*, (Fisher & Phillips, LLP Atlanta, Ga.) Apr. 11, 2011, <http://www.crossborderemployer.com/post/2011/04/11/The-United-Kingdoms-Bribery-Act-2010-Implications-for-Companies-on-a-Global-Basis.aspx> (last visited Aug. 5, 2011).

22. See generally 15 U.S.C. §§ 78dd-1, 78dd-2; Bribery Act, 2010, c.23 (U.K.).

23. ZARIN, *supra* note 4, at 2-1; Warin et al., *supra* note 18, at 7.

24. Warin et al., *supra* note 18, at 8.

(DOJ) and civil regulation falls within the SEC's exclusive authority.<sup>25</sup> Five elements must be met to constitute a violation of the FCPA:

- 1) The briber must be any U.S. citizen, business entity or employee of a U.S. business entity or any company listed on a U.S. stock exchange;
- 2) The bribe must be made with corrupt intent;
- 3) Payment or offer of payment must be anything of value;
- 4) The recipient must be a foreign government official; and
- 5) The bribe must have been offered or paid to obtain or retain business.<sup>26</sup>

Distinguishably, the Bribery Act creates four separate offenses:

- 1) Bribing;
- 2) Being bribed;
- 3) Bribing a foreign public official; and
- 4) Failing as a commercial organization to prevent bribery.<sup>27</sup>

The United Kingdom's Serious Fraud Office (SFO) is responsible for investigating and prosecuting the most serious cases of fraud and corruption in the United Kingdom and thus appropriately is responsible for enforcing the Bribery Act's provisions.<sup>28</sup>

#### *A. Jurisdiction: Who Falls within the FCPA & Bribery Act's Scope?*

The FCPA defines bribery as a corrupt payment or offer of payment of money or anything of value made to a foreign official in his or her capacity as such for the purposes of influencing any act or decision of that foreign official.<sup>29</sup> The FCPA establishes criminal and civil liability for such corrupt

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25. R. Christopher Cook & Stephanie L. Connor, *The Foreign Corrupt Practices Act: Enforcement Trends in 2010 and Beyond*, JONES DAY, at 2, available at <http://www.jonesday.com/files/Publication/f0950ee5-18bb-496f-acfe-662b219a108e/Presentation/PublicationAttachment/ada2352f-00b0-4240-aecf-250a23629ba8/FCPA%20Enforcement%20Trends.pdf> (last visited Aug. 5, 2011).

26. U. S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT ANTIBRIBERY PROVISIONS 2 (2004), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> (last visited Aug. 5, 2011) [hereinafter DOJ GUIDE].

27. See generally Bribery Act, 2010, c.23, §§ 1-2, 6-7 (U.K.).

28. SERIOUS FRAUD OFFICE, APPROACH OF THE SERIOUS FRAUD OFFICE TO DEALING WITH OVERSEAS CORRUPTION 1 (2009), available at <http://www.sfo.gov.uk/media/128701/approach%20of%20the%20serious%20fraud%20office%20v6.pdf> (last visited Nov. 4, 2011).

29. See generally 15 U.S.C. §§ 78dd-1, 78dd-2(2006).

payments made to foreign officials by issuers, domestic concerns, or any officer, director, employee, or agent of such issuer or domestic concern, or any stockholder acting on behalf of such issuer or domestic concern.<sup>30</sup> An issuer is a corporation that has registered its securities in the United States or who is required to file periodic reports with the SEC.<sup>31</sup> The FCPA defines domestic concern very broadly to include U.S. citizens, nationals, and residents, as well as, any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is either incorporated under the laws of a state or commonwealth of the United States, or whose principal place of business is in the United States.<sup>32</sup> Therefore, the foreign activity of private U.S. companies also falls within the FCPA's scope.<sup>33</sup> In addition, the FCPA applies to foreign national officers and directors of a U.S. company or foreign national stockholders acting on behalf of a U.S. company.<sup>34</sup> Issuers and domestic concerns may be held liable for acts occurring *within* the United States if they perform an act in furtherance of a corrupt payment to a foreign official using the U.S. mail, or means and instrumentalities of interstate commerce.<sup>35</sup> Such means or instrumentalities include wire transfers, facsimile transmissions, telephone calls, and interstate or international travel.<sup>36</sup> Foreign companies and officers, directors, employees, agents, and stockholders acting on behalf of such foreign companies, as well as foreign natural persons, can be held liable under the FCPA for acts in furtherance of foreign corrupt practices while within the United States.<sup>37</sup> Issuers and domestic concerns may also be held liable for any act in furtherance of a corrupt payment authorized by employees or agents operating entirely *outside* the United States without any involvement from personnel located within the United States.<sup>38</sup> Similarly, U.S. corporations may be held liable for the acts of their foreign subsidiaries if they authorized, directed, or controlled the activity in question.<sup>39</sup> Domestic concerns may be liable if they were employed by or acting on behalf of the

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30. 15 U.S.C. §§ 78dd-1, 78dd-2; Zarin, *supra* note 4, at 4-1; Warin et al., *supra* note 18, at 9.

31. 15 U.S.C. § 78c(a)(8) (2006); DOJ GUIDE, *supra* note 26.

32. 15 U.S.C. § 78dd-2(h)(1); Christopher L. Hall, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 294 (1994); ZARIN, *supra* note 4, at 4-3 to 4-4.

33. See generally DOJ GUIDE, *supra* note 26.

34. ZARIN, *supra* note 4, at 4-5.

35. See generally DOJ GUIDE, *supra* note 26.

36. *Id.*

37. Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 360 (2000).

38. See generally DOJ GUIDE, *supra* note 26.

39. *Id.*

foreign-incorporated subsidiary.<sup>40</sup> Furthermore, the FCPA imposes liability on foreign companies or persons if they cause, directly or through agents, an act in furtherance of the corrupt payment to take place within the United States.<sup>41</sup> In this scenario, the DOJ has indicated that there is no requirement that this particular act make use of the U.S. mails or other means or instrumentalities of interstate commerce.<sup>42</sup>

The Bribery Act has a wider extra-territorial reach than the FCPA.<sup>43</sup> The Bribery Act creates four anti-bribery offenses:

- 1) Bribing;
- 2) Being bribed;
- 3) Bribing a foreign public official; and
- 4) Failing as a commercial organization to prevent bribery.<sup>44</sup>

The first two offenses, bribing and being bribed, relate to commercial (domestic) as well as foreign bribery.<sup>45</sup> The Bribery Act refers to bribing as offering, promising, or giving a financial or other advantage to induce a person to improperly perform a relevant duty or function, to reward a person for such improper activity, or to know or believe that the acceptance of the advantage would itself be an improper performance of a duty or function.<sup>46</sup> The second offense, being bribed, prohibits requesting, agreeing to receive, or accepting a financial or other advantage while intending that a relevant function or activity be performed improperly.<sup>47</sup> The last two offenses, bribing a foreign public official and failing as a commercial organization to prevent bribery, are likely to form the basis of the majority of foreign corruption investigations pursued by U.K. enforcement authorities.<sup>48</sup> The offense of bribing a foreign public official criminalizes the act of bribing such an official with the intention of influencing that

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Weil Alert: U.K. Bribery Act*, (Weil, Gotshal & Manges, London, U.K.), May 24, 2010, at 2, available at [http://www.weil.com/files/Publication/c1e306e1-bf27-466e-8063-756ea952cbe9/Presentation/PublicationAttachment/fbb5317d-d916-4e0f-a290-7c91588b66a1/LO\\_UK\\_Bribery\\_Act\\_2010\\_May\\_2010.pdf](http://www.weil.com/files/Publication/c1e306e1-bf27-466e-8063-756ea952cbe9/Presentation/PublicationAttachment/fbb5317d-d916-4e0f-a290-7c91588b66a1/LO_UK_Bribery_Act_2010_May_2010.pdf) (last visited Nov. 14, 2011) [hereinafter *Weil Alert: U.K. Bribery Act*].

44. Bribery Act, 2010, §§ 1–2, 6–7.

45. *Id.*

46. Bribery Act § 1; Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and the United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 441 (2010).

47. Ryznar & Korkor, *supra* note 46, at 441.

48. Warin et al., *supra* note 18, at 8.



foreign official in his or her capacity as such.<sup>49</sup> This offense is governed by a “close connection” test, which gives the United Kingdom jurisdiction if the person or entity committing the act of bribery has a close connection with the United Kingdom, even if the challenged act or omission took place outside of the United Kingdom.<sup>50</sup> British citizens, other types of British passport holders, U.K. residents, entities incorporated under any part of U.K. law, and Scottish partnerships are all treated as having a “close connection with the United Kingdom” for purposes of the Bribery Act.<sup>51</sup> The Bribery Act’s last offense of failing as a commercial organization to prevent bribery is a strict liability corporate offense.<sup>52</sup> An organization is guilty of such offense if a person associated with the organization bribes another person with the intention of obtaining or retaining business for the organization or obtaining an advantage in conducting business for the organization.<sup>53</sup> The Bribery Act is not limited to U.K. companies alone, but also applies to any company that conducts business, or part of its business, in any part of the United Kingdom, even if no part of the bribery occurred in the United Kingdom.<sup>54</sup> Under the Bribery Act, the offenses of offering a bribe, accepting a bribe, and bribing a foreign public official have a similar jurisdictional scope as the FCPA because jurisdiction is conferred when the relevant act or omission takes place within the United Kingdom, or anywhere in the world, when committed by a person closely connected to the United Kingdom.<sup>55</sup> The Bribery Act’s last offense of failing as a corporation to prevent bribery by persons associated with the corporation has a broader reach than the FCPA, because it covers both U.K. companies, as well as, companies that carry out business in any part of the United Kingdom.<sup>56</sup>

### *B. Bribery of Foreign Public Officials & Commercial Bribery*

The FCPA prohibits corrupt payments made to foreign officials, employees, or persons acting on behalf of such officials, foreign political parties, or candidates for foreign political office.<sup>57</sup> However, the FCPA

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49. Ryznar & Korkor, *supra* note 46, at 441.

50. Warin et al., *supra* note 18, at 15.

51. *Id.*

52. *See generally* 15 U.S.C. §§ 78dd-1, 78dd-2; Ryznar & Korkor, *supra* note 46, at 441.

53. Ryznar & Korkor, *supra* note 46, at 441.

54. *See generally* Bribery Act; Ryznar & Korkor, *supra* note 46, at 441.

55. 15 U.S.C. §§ 78dd-1(g), 78dd-2(i); *see generally* Bribery Act, 2010, c.23 (U.K.).

56. *See generally* Bribery Act, 2010, c.23, § 7 (U.K.).

57. ZARIN, *supra* note 4, at 4-11; Swanson, *supra* note 5, at 409.

does not prohibit bribes paid to officers or employees of private, non-governmental entities.<sup>58</sup> The FCPA defines foreign official as:

[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization<sup>59</sup>, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.<sup>60</sup>

Despite the FCPA's detailed definition of foreign official, the FCPA fails to provide any guidance as to the scope of the terms "employee" and "officer."<sup>61</sup> It is also unclear whether these terms should be determined with reference to foreign local law.<sup>62</sup> Nevertheless, U.S. enforcement authorities broadly interpret foreign officials to include both traditional government officials as well as officials of state-owned or state controlled entities.<sup>63</sup> The FCPA also prohibits payments that indirectly benefit persons committing bribery to obtain or retain foreign business.<sup>64</sup> Accordingly, any act that directly or indirectly aids in the obtaining or retaining of foreign business will fall within the FCPA's purview.<sup>65</sup>

Unlike the FCPA, the Bribery Act prohibits both public and commercial bribery.<sup>66</sup> This sweeping jurisdictional reach subjects many

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58. Eric Engle, *I Get by with a Little Help from my Friends? Understanding the U.K. Anti-Bribery Statute, By Reference to the OECD Convention and the Foreign Corrupt Practices Act*, 44 INT'L LAW. 1173, 1186 (2010); Zarin, *supra* note 4, at 4-11; Swanson, *supra* note 5, at 409.

59. 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B) (Public International Organizations refer to organizations that are designated by Executive Order or any other international organization that is designated by the President by Executive Order and includes organizations such as the International Monetary Fund, the United Nations, and the Red Cross); 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).

60. 15 U.S.C. § 78dd-2(h)(2).

61. ZARIN, *supra* note 4, at 4-12.

62. *Id.*

63. See *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1114 (C.D. Cal. 2011) (holding that the definition of "foreign officials" in the FCPA could extend to officers of state-owned utilities. The judge also noted that the inclusion of such officials was a matter of statutory construction).

64. Makinwa, *supra* note 12, at 19 (referencing *United States v. David Kay & Douglas Murphy*, S.D. Tex. 2001, where the Court determined that Congress meant to prohibit a range of payments wider than only those that directly influence the obtaining or retaining of business. The Court also added that Congress intended the FCPA to prohibit all illicit payments that are intended to influence non-trivial official foreign action in an effort to obtain or retain business).

65. Makinwa, *supra* note 12, at 19.

66. See generally Bribery Act, 2010, c.23 (U.K.).

organizations to the Bribery Act because, under the provisions of the Bribery Act, a commercial organization includes both organizations incorporated in the United Kingdom, as well as, any other organization that conducts business in the United Kingdom.<sup>67</sup> In contrast to the FCPA, the Bribery Act does not require that a bribe be made with corrupt intent, but rather makes the inducing of improper performance of a relevant function a necessary requirement for prosecution.<sup>68</sup> The Bribery Act defines a foreign public official as an individual who holds a legislative, administrative, or judicial position, whether appointed or elected, of a country or territory outside the United Kingdom.<sup>69</sup> In addition, the Bribery Act characterizes a foreign public official as an individual who exercises a public function for or on behalf of a country or territory outside the United Kingdom, for any public agency or public enterprise of that country or territory, or an official or agent of a public international organization.<sup>70</sup> The Bribery Act's definition of foreign public official closely mirrors the FCPA's definition of the same.<sup>71</sup> The definition of foreign official under the Bribery Act does not include candidates for public office, but such individuals fall within the scope of the Bribery Act's general offenses.<sup>72</sup> The wide scope of the Bribery Act's general anti-bribery offenses allows U.K. enforcement authorities to pursue cases as commercial bribery when they cannot otherwise be prosecuted based on a bribery of a government official theory.<sup>73</sup>

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67. *Id.* § 7 (the Act defines a commercial organization as  
 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, and for purposes of this section, a trade or profession is a business.);

Ivonne M. King et al., *U.K. Bribery Act: Raising the Bar For Anti-Corruption Programs*, 2011 PRAC. L. INST. 353, 357 (2011).

68. Bribery Act, 2010, c.23, § 1 (U.K.).

69. *Id.* § 6(5).

70. *Id.*; Bribery Act § 6(6) (defines public international organisation as an organisation whose members are countries or territories, governments or countries or territories, other public international organizations, or a mixture of any of the above).

71. 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-1(f)(1)(A); Warin et al., *supra* note 18, at 18.

72. *See generally* Bribery Act, 2010, c.23 (U.K.).

73. *Id.*

*C. What Constitutes a Bribe Under the FCPA and the Bribery Act? – “Anything of Value”*

The FCPA prohibits the payments of gifts or “anything of value” to influence a foreign official.<sup>74</sup> The FCPA does not define the term “anything of value,” but the term “has been broadly construed by Federal courts interpreting criminal statutes to include both tangible and intangible benefits which an official subjectively believes to be of value.”<sup>75</sup> However, the FCPA gives no indication whether the term extends to payments given to a third party for whose welfare the official is interested, but rather focuses on whether there is any intent or expectation that the official will personally benefit from the thing of value.<sup>76</sup> On the other hand, the Bribery Act considers a bribe to be any financial or other advantage.<sup>77</sup>

*D. Exceptions: Facilitation or “Grease” Payments*

The FCPA creates an exception to its anti-bribery provisions that allows for any facilitating or expediting payments to be made to a foreign official, political party, or party official in order to expedite or secure the performance of a routine governmental action.<sup>78</sup> These exclusive payments are commonly referred to as “facilitating payments” or “grease payments.”<sup>79</sup> Routine governmental action refers to general bureaucratic tasks that foreign officials ordinarily perform.<sup>80</sup> Notably, the FCPA’s definition of a facilitation payment expressly excludes any foreign official’s decision to award new business to, or continued business with, any particular party.<sup>81</sup> The 1977 House Report differentiates facilitation payments from acts of bribery by distinguishing between payments that “cause an official to exercise other than his free will in acting or deciding or influencing an act or decision” and payments that “merely move a

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74. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

75. See *United States v. Schwartz*, 785 F.2d 673, 679 (9th Cir. 1986) (interpreting thing of value under 18 U.S.C. § 1954 broadly to include tangible and intangible items); *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974) (treating testimony of a witness as something of value). See generally *United States v. Crozier*, 987 F.2d 901 (2d Cir. 1993) (considering loans and promises of future employment as things of value); *United States v. McDade*, 827 F.Supp. 1153, 1174 (E.D. Pa. 1993) (characterizing a college scholarship and sports equipment as things of value).

76. See generally 15 U.S.C. §§ 78dd-1, 78dd-2; ZARIN, *supra* note 4, at 4-25 to -26.

77. Bribery Act § 1; Ryznar & Korkor, *supra* note 46, at 441.

78. 15 U.S.C. § 78dd-1(b).

79. Monty Raphael & Ben Summers, *At Last the United Kingdom Confronts Bribery: Will the Draft Bribery Bill be Enough to Silence Its Critics?*, 10 BUS. L. INT’L 242, 243 (2009).

80. 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A); Hall, *supra* note 32, at 300.

81. 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B); Hall, *supra* note 32, at 300; Raphael, *supra* note 78, at 243.

particular matter toward an eventual act or decision or which do not involve any discretionary action.”<sup>82</sup> Gratuity paid to a customs official to expedite the processing of a customs document is characterized as a facilitation payment in the legislative history.<sup>83</sup> It is important to note, as well, that the Senate Report also reaffirmed that the exception is meant to apply only to “grease payments.”<sup>84</sup>

The Bribery Act, on the other hand, contains no exception for facilitation payments.<sup>85</sup> The only facilitation payments likely to be acceptable are those expressly allowed by law.<sup>86</sup> Consequently, the Bribery Act prohibits the types of payments currently permitted under the FCPA.<sup>87</sup> As a result, U.K. companies and individuals are potentially placed at a commercial disadvantage compared to similarly situated companies in the United States.<sup>88</sup> The differences in these two laws could considerably impact organizations’ corporate compliance programs, as the two are disjointed in this regard.<sup>89</sup> However, the SFO has asserted that they do not anticipate many prosecutions on facilitation payments.<sup>90</sup> It is important to bear in mind that the SFO will have full discretion to pursue investigations according to the Bribery Act’s prohibition against facilitation payments.<sup>91</sup> Although the authorities indicate a low probability of enforcement towards these types of payments, companies are still expected to ultimately adopt a zero tolerance policy.<sup>92</sup>

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82. H.R. REP. NO. 95-640, at 8 (1977); Andrew B. Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 365 (2010).

83. H.R. REP. NO. 95-640, at 8 (1977); Spalding, *supra* note 81, at 365.

84. S. REP. NO. 95-114, at 10 (1977); Spalding, *supra* note 81, at 365 (noting that the 1977 House Report demonstrates a degree of cultural sensitivity to differing cultural norms surrounding conduct that in the United States is considered bribery); For a thorough discussion on the history behind the facilitation payments exception, see Jon Jordan, *The OECD’s Call for an End to “Corrosive” Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 889–894 (2011).

85. See generally Bribery Act, 2010, c.23 (U.K.).

86. *Id.*

87. See generally MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE 19 (2011), available at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf> (last visited Aug. 5, 2011) [hereinafter BRIBERY ACT GUIDANCE]. (Noting that “[e]xemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing ‘culture’ of bribery and have the potential to be abused.”); Warin et al., *supra* note 18, at 20.

88. Warin et al., *supra* note 18, at 20.

89. *Id.*

90. *Id.*

91. *Id.* at 20–21.

92. *Id.* at 21.

*E. Affirmative Defenses*

The FCPA creates two affirmative defenses to its anti-bribery provisions.<sup>93</sup> The first affirmative defense asserts that the payment of a gift, or promise of anything of value is lawful if the written laws and regulations of the foreign official's country permit such payments.<sup>94</sup> To fall within its limits, the conduct must be *explicitly* permitted under the written laws and regulations of the foreign country.<sup>95</sup> The simple absence of a law prohibiting the conduct is not sufficient.<sup>96</sup> The second affirmative defense asserts that the payment, gift, or promise of anything of value is lawful if it was a reasonable and bona fide expenditure, such as travel and lodging expenses, and was directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency.<sup>97</sup> However, the FCPA's legislative history makes it clear that "any payments made with 'corrupt intent' would not be considered bona fide expenses and would fall outside the purview of permissible activity."<sup>98</sup> Several useful guidelines that can help minimize FCPA concerns for the payment of travel and lodge expenses for government customers are as follows:

- 1) The expenditure should be for a bona fide and legitimate business purpose;
- 2) The expenditure should be directly related to the promotion, demonstration or explanation of a product or service, or the execution or performance of a contract;
- 3) The U.S. company should follow a rule of reasonableness in determining the level of service and hospitality;
- 4) There should be no question that the foreign official's government is unaware of the travel;
- 5) The payment of travel and lodging expenses should be permissible under local law and government customers regulations and guidelines;
- 6) The selection of the officials going on the business trip should generally be by the government customer;

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93. 15 U.S.C. §§ 78dd-1(c), 78dd-2(c).

94. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1); Hall, *supra* note 32, at 300.

95. ZARIN, *supra* note 4, at 5-9.

96. H.R. REP. NO. 100-418, at 922, 100th Cong., 2d Sess. (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1955.

97. 15 USC. §§ 78dd-1(c)(2), 78dd-2(c)(2).

98. H.R. REP. NO. 100-418, at 922 100th Cong., 2d Sess. (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1955; ZARIN, *supra* note 4, at 5-6.

7) To the extent practical, the U.S. company should avoid making direct payments to a foreign official:

a) Where practical, the company should directly pay the government agency an agreed-upon per diem for each attendee. The government agency would then be directly responsible to pay each attendee's per diem living expense;

b) Where practical, all travel expenses should be paid directly to the service providers, upon receipt of appropriate invoices;

c) Where direct payments are unavoidable, the U.S. company should reimburse the foreign official only upon receipt of appropriate invoices and confirmation that the expense has in fact been paid by the official;

8) The itinerary and budget for the trip should be reviewed and approved by a senior manager outside of the sales department;

9) Expenses incurred by the customer for side trips or stopovers for the pleasure of the customer should not be paid or reimbursed by the U.S. company;

10) Expenses generally incurred for spouses and family members should not be paid or reimbursed, except in exception situations and subject to review by legal counsel;

11) The books and records should accurately record all expenditures.<sup>99</sup>

The Bribery Act contains no similar defense to the FCPA's business promotion expenditures defense.<sup>100</sup> This has raised questions amongst commentators as to whether the Bribery Act may result in prosecutions for payments that would be considered lawful under the FCPA.<sup>101</sup> Nevertheless, guidance from the United Kingdom's Ministry of Justice (MOJ) suggests that reasonable and proportionate promotional expenditures will not be prosecuted.<sup>102</sup> However, unlike the FCPA the Bribery Act

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99. ZARIN, *supra* note 4, at 5-7 (noting that the affirmative defense is not limited to travel and lodging expense; but rather, it applies to any reasonable and bona fide expenditure incurred by or on behalf of a foreign official when the expenditure is directly related to the promotion, demonstration, or explanation of products or the execution or performance of a contract).

100. See generally Bribery Act, 2010, c.23 (U.K.).

101. BRIBERY ACT GUIDANCE, *supra* note 86, at 12.

102. *Id.* (Noting that "bona fide hospitality and promotional, or other business expenditure which seeks to improve that image of a commercial organization, better to [sic] present products and services, or establish cordial relations, is recognized as an established and important part of doing business and it is not the intention of the Act to criminalize such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar

provides an explicit affirmative defense to companies that can demonstrate that they had adequate procedures in place geared towards preventing bribery.<sup>103</sup>

#### F. Penalties

Corporations and individuals face potential civil and criminal penalties if they violate the anti-bribery provisions of the FCPA.<sup>104</sup> The DOJ prosecutes criminal matters arising under the FCPA while the SEC prosecutes civil matters arising under the same.<sup>105</sup> Individuals prosecuted under the FCPA's anti-bribery provisions face a maximum of five years imprisonment, criminal fines of up to \$100,000, and civil penalties of up to \$10,000 per violation, as well as restitution and forfeiture.<sup>106</sup> The individual's employer or principal is prohibited from paying these fines.<sup>107</sup> FCPA violators also face suspension or revocation of the benefits of conducting business in the United States.<sup>108</sup> In criminal prosecutions, corporations and other business entities face hefty fines of up to two million dollars per violation.<sup>109</sup> Under the Alternative Fines Act, these fines may be much higher.<sup>110</sup> Where the offense resulted in pecuniary gain or loss, the

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business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes."); Michelle Shapiro, *FCPA + UK Bribery Act = Greater Global Exposure*, COMPLINET.COM (Jan. 28, 2011) <http://www.complinet.com/dodd-frank/news/analysis/article/fcpa-uk-bribery-act-greater-global-exposure.html> (last visited Aug. 5, 2011).

103. See generally Bribery Act, 2010, c.23, § 7(2) (U.K.).

104. DOJ GUIDE, *supra* note 21.

105. *Id.*; For a detailed discussion on current FCPA enforcement, see Jon Jordan, *Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery*, 7 N.Y.U. J. L. & BUS. 845, 853–856.

106. 15 U.S.C. § 78dd-2(g); DOJ GUIDE, *supra* note 21 (The SEC may bring civil actions for fines of up to \$10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the FCPA's anti-bribery provisions. In addition, the SEC has discretion to impose additional fines that do not exceed the greater of the gross amount of the pecuniary gain to the defendant as a result of the violation. Individuals and companies that violate the FCPA's anti-bribery provisions may have their import/export licenses revoked or denied).

107. 15 U.S.C. § 78dd-2(g)(3); Jacqueline L. Bonneau, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 382 (2011).

108. U. S. DEP'T OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS RISK MANAGEMENT 28 (2d ed., 2011), available at [http://www.oig.doc.gov/pdfs/Fighting\\_Global\\_Corruption.pdf](http://www.oig.doc.gov/pdfs/Fighting_Global_Corruption.pdf) (last visited Nov. 6, 2011) [hereinafter DOS CORRUPTION REPORT]; Ryznar & Korkor, *supra* note 46, at 431.

109. DOJ GUIDE, *supra* note 21; ZARIN, *supra* note 4, at 8–4.

110. 18 U.S.C. § 3571; DOJ GUIDE, *supra* note 21; DOS CORRUPTION REPORT, *supra* note 107, at 28.



actual fine may be up to twice the amount of the benefit the defendant sought to obtain by making the corrupt payment.<sup>111</sup>

Penalties under the Bribery Act are much stricter than penalties under the FCPA.<sup>112</sup> Corporations running afoul of the Bribery Act face unlimited fines as well as civil confiscation actions arising pursuant to the Proceeds of Crime Act of 2002 to recover profits or gains recognized from the bribe.<sup>113</sup> In addition, individuals face a maximum of ten years imprisonment and unlimited fines, while company directors face potential disqualification under the Company Directors Disqualification Act of 1986.<sup>114</sup> Unlike the FCPA, which imposes both criminal and civil liabilities on individuals, the Bribery Act imposes only criminal liability on individuals violating its provisions.<sup>115</sup> Under the Bribery Act a company, or its directors, may also be barred from participation in public sector contracts in the European Union.<sup>116</sup>

### G. Compliance

The FCPA does not create a compliance defense to corporate liability, but U.S. enforcement authorities have indicated that in making charging and disposition decisions related to FCPA violations, they consider whether, and to what extent, a company had a preexisting and effective compliance program in place.<sup>117</sup> The Federal Sentencing Guidelines also indicate that a court will consider an effective compliance program when deciding whether to mitigate the penalties imposed on a company for FCPA violations.<sup>118</sup> When companies encounter FCPA issues, they must be able

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111. 18 U.S.C. § 3571(d); DOJ GUIDE, *supra* note 21.

112. Compare 15 U.S.C. § 78dd-2(g) with Bribery Act, 2010, c.23, § 11 (U.K.).

113. Proceeds of Crime Act, 2002, c.29, § 6 (2002) (U.K.); Toby Duthie & David Lawler, *The United Kingdom Bribery Bill*, 26 CONST. L.J. 146, 149 (2010).

114. See generally Company Directors Disqualification Act, 1986, c.46 (1986) (U.K.); Timothy Ashby, *The New U.K. Bribery Act: A Legal Minefield for CEOs*, CHIEF EXEC. (May 6, 2011), <http://chiefexecutive.net/the-new-uk-bribery-act-a-legal-minefield-for-ceos> (last visited Aug. 5, 2011) (noting that the Bribery Act holds senior executives and directors personally liable for failing to prevent bribery being committed by employees, agents, or subsidiaries doing business on their behalf).

115. See Bribery Act, 2010, c.23, § 11 (U.K.).

116. Shapiro, *supra* note 101.

117. See 15 U.S.C. § 78dd-1; 18 U.S.C. § 3553(b).

118. 18 U.S.C. § 3553(b); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, 1(4)(b) (2010); Michael T. Gass et al., *Corporate FCPA Compliance Programs: A Necessity In Today's Aggressive Enforcement Environment*, EAPDLAW.COM, Mar. 28, 2006, at 1–2, available at [http://www.eapdlaw.com/files/News/605faaa2-2fc3-49eb-ba81-1b005ec9675c/Presentation/NewsAttachment/1394a9e9-8fbf-44e6-bf17-9ed992347ce5/Client%20Advisory\\_Corporate%20FCPA%20Compliance%20Programs.pdf](http://www.eapdlaw.com/files/News/605faaa2-2fc3-49eb-ba81-1b005ec9675c/Presentation/NewsAttachment/1394a9e9-8fbf-44e6-bf17-9ed992347ce5/Client%20Advisory_Corporate%20FCPA%20Compliance%20Programs.pdf) (last visited Aug. 5, 2011).

to demonstrate the practicality of their compliance programs.<sup>119</sup> Companies conducting international business should establish a standalone FCPA compliance policy.<sup>120</sup> A company should not rely on a few paragraphs addressing international bribery and corruption in its General Standards of Business Conduct as this would be entirely insufficient to mitigate the company's exposure to FCPA violations.<sup>121</sup> The DOJ has indicated that, ideally, a company's compliance program should be comprehensive and should typically include the following:

- 1) A clearly articulated corporate policy against violations of the FCPA and foreign anti-corruption laws and the establishment of compliance standards and procedures to be followed by all directors, officers, employees, agents, and all business partners involved in business transactions, representation, or business development or retention in a foreign jurisdiction that are reasonably capable of reducing the possibility that these laws will be violated;
- 2) The appointment of a Chief Compliance Officer who shall report to the CEO of the company and to the Audit Committee of the Board of Directors and be responsible for implementation and oversight of the company's compliance policies and procedures;
- 3) The effective communication to all directors, officers, employees, agents and business partners of the company's compliance policies, standards, and procedures regarding the FCPA, by requiring regular training concerning the requirements of the FCPA and annual certification of compliance with the FCPA;
- 4) An effective reporting system, including a "Hotline," for directors, officers, employees, agents, business partners, and third parties to report suspected violations of the compliance program or other suspected illegal conduct under the FCPA;
- 5) An appropriate disciplinary procedure designed to address violations or suspected violations of the FCPA,

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119. Amy Hatcher, *The Latest Surge in Anti-Corruption Enforcement: What Looms on the Horizon for Global Businesses and Their Leadership*, ETHISPHERE (May 25, 2010), <http://ethisphere.com/the-latest-surge-in-anti-corruption-enforcement-what-looms-on-the-horizon-for-global-businesses-and-their-leadership/> (last visited Aug. 5, 2011).

120. Stephen Clayton, *Top Ten Basics of Foreign Corrupt Practices Act Compliance for the Small Legal Department*, ASSOC. OF CORP. COUNSEL (June 1, 2011), <http://www.acc.com/legalresources/publications/topten/SLD-FCPA-Compliance.cfm> (last visited Aug. 5, 2011).

121. *Id.*

the foreign anti-corruption laws, or the company's compliance code;

6) Extensive due diligence requirements pertaining to the company's agents and business partners, including the maintenance of complete due diligence records at the company;

7) Clearly articulated corporate procedures designed to ensure that substantial discretionary authority is not delegated to individuals that the company knows, or should know, through the exercise of due diligence, have a propensity to engage in illegal or improper activities;

8) A system to review and to record, in writing, actions relating to the retention of any agents or subagents and all contracts or payments related thereto;

9) The inclusion in all agreements, contracts, and contract renewals, with all agents and business partners of provisions:

i) Setting forth anti-corruption representations and undertakings;

ii) Relating to compliance with the FCPA and foreign anti-corruption laws;

iii) Allowing for periodic internal and independent audits of the books and records of the agent or business partner to ensure compliance with the company's policies and procedures; and

iv) Providing for termination of the agent or business partner as a result of any breach of the FCPA or foreign anti-corruption laws.<sup>122</sup>

Considering U.S. enforcement authorities' current aggressive FCPA enforcement, a comprehensive FCPA compliance program will undoubtedly be invaluable in protecting U.S. companies operating overseas.<sup>123</sup> Unlike the FCPA, the U.K. Bribery Act offers a compliance defense to corporate liability, where a company will not be subject to prosecution if it had adequate procedures in place, which were designed to prevent persons associated with the company from engaging in the type of conduct that precipitated the prosecution.<sup>124</sup> The term "adequate procedures" was left undefined in the Act itself. However, the U.K. Secretary of State, Kenneth Clarke, published guidance that outlines six

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122. DOJ Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 04-02, at 2-3 (July 12, 2004), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0402.pdf> (last visited Aug. 5, 2011).

123. See generally Cook & Connor, *supra* note 25.

124. See Bribery Act, 2010, c.23, § 7(2) (U.K.).

principles that commercial organizations should employ when implementing their policies and procedures.<sup>125</sup> The principles mentioned are as follows:

- 1) Proportionate procedures;
- 2) Top-level commitment;
- 3) Risk assessment;
- 4) Due diligence;
- 5) Communication (including training); and
- 6) Monitoring and review.<sup>126</sup>

The U.K. authorities have indicated that the adequacy of a firm's procedures will be evaluated based on these six principles.<sup>127</sup> The Guidance also suggests that these principles are not prescriptive, but rather are intended to be flexible in order to apply to a wide variety of circumstances.<sup>128</sup> The first principle suggests that a company's procedures to counter bribery should be proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organization's activities.<sup>129</sup> These procedures should also be clear, practical, accessible, and effectively implemented and enforced.<sup>130</sup> The guidance notes that a company's level of risk will be linked to the size of the organization to some extent, but that size will not be the exclusive determinant of such risk.<sup>131</sup> The second principle asserts that companies must demonstrate a top-level commitment to preventing bribery by persons associated with them.<sup>132</sup> This type of commitment can be reflected in effective formal statements that demonstrate a commitment to engaging in honest and transparent business, as well as a commitment to zero tolerance towards bribery.<sup>133</sup> An articulation of the business benefits of rejecting bribery is also an effective way to demonstrate a company's top-level commitment to preventing bribery.<sup>134</sup> The third principle suggests that companies should conduct an informed assessment of the nature and extent of their exposure

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125. BRIBERY ACT GUIDANCE, *supra* note 86, at 20.

126. *Id.* at 20–31.

127. *Id.* at 20; Matt T. Morley, Robert V. Hadley, & Laura Atherton, *U.K. Bribery Act: What Non-U.K. Companies Need to Know* (K & L Gates, Pittsburgh, Pa.), Mar. 31, 2011, available at <http://www.klgates.com/uk-bribery-act-what-non-uk-companies-need-to-know-03-31-2011/> (last visited Nov. 6, 2011).

128. BRIBERY ACT GUIDANCE, *supra* note 86, at 20.

129. *Id.* at 21.

130. *Id.* at 21.

131. *Id.* at 21.

132. *Id.* at 23.

133. BRIBERY ACT GUIDANCE, *supra* note 86, at 23.

134. *Id.* at 23.

to potential external and internal risks of bribery on their behalf by persons associated with them.<sup>135</sup> U.K. enforcement authorities encourage companies to create procedures that will accurately identify and prioritize their risks.<sup>136</sup> A company's assessment should be reevaluated periodically as the company's business evolves and such assessment should be consistently documented.<sup>137</sup> Particular attention should be paid to the types of external risks that a company may encounter.<sup>138</sup> The country or sector in which an organization operates may pose a distinct type of risk for that organization.<sup>139</sup> Similarly, certain types of transactions or business opportunities and certain kinds of business relationships may also pose unique risks to the organization.<sup>140</sup> The fourth principle suggests that companies should develop due diligence procedures that are proportionate to the companies' risks.<sup>141</sup> The Guidance notes that due diligence procedures are a form of bribery risk assessment as well as a means of mitigating risk.<sup>142</sup> The Guidance also suggests that considerable care be exercised when entering into certain business relationships that are particularly difficult to modify or terminate.<sup>143</sup> The fifth principle expresses the need for bribery prevention policies to be embedded and understood throughout an organization through internal and external communication and training that demonstrates the organization's commitment to preventing bribery by person's associated with it.<sup>144</sup> Training should be proportionate to the organization's risks and should raise awareness about the threats of bribery and the ways in which such bribery may be addressed.<sup>145</sup> The sixth principle suggests that companies should develop ways of monitoring and evaluating the effectiveness of their bribery prevention procedures, and these procedures should be modified where necessary.<sup>146</sup> Companies should consistently review their policies and procedures in light of governmental changes in countries in which they operate, negative press reports, or incidents of bribery experienced by the company.<sup>147</sup>

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135. *Id.* at 25.

136. *Id.*

137. *Id.*

138. BRIBERY ACT GUIDANCE, *supra* note 86, at 26.

139. *Id.*

140. *Id.*

141. *Id.* at 27.

142. *Id.*

143. BRIBERY ACT GUIDANCE, *supra* note 86, at 27.

144. *Id.* at 29.

145. *Id.* at 30.

146. *Id.* at 31.

147. *Id.*

### III. IMPACT OF THE BRIBERY ACT

#### *A. How Will the Bribery Act Impact Doing Business With the United Kingdom?*

Considerable fuss has been made about the Bribery Act and its impending impact, primarily because compliance with the FCPA will not necessarily equal Bribery Act compliance.<sup>148</sup> The Bribery Act has been characterized as the strictest anti-corruption legislation to date.<sup>149</sup> However, the Bribery Act's force will largely depend on the SFO's prosecutory appetite.<sup>150</sup> The SFO has encountered problems in the past with regards to its ineffective criminal enforcement, and has been highly criticized for its low conviction rates in comparison to the DOJ and SEC.<sup>151</sup> The SFO's director, Richard Alderman, stated that the SFO is not interested in pursuing "decent" companies conducting business under difficult circumstances, but asserted that the SFO would assist organizations in resolving issues with "minimum fuss."<sup>152</sup> The SFO has encouraged companies to self-report when they have evidence of or suspect misconduct by their employees.<sup>153</sup> The Bribery Act utilizes broad language and gives the SFO tremendous discretion, but it remains to be seen whether the SFO will take advantage of this discretion.<sup>154</sup> Currently, the United States is the global leader in enforcing anti-corruption legislation but this could change very quickly if the SFO commits to adamantly enforcing the United Kingdom's new law.<sup>155</sup>

Legal analysts have indicated their expectation that the SFO will aggressively prosecute individuals and organizations that run afoul of the

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148. Shapiro, *supra* note 101.

149. *Id.*; Weil Alert: *U.K. Bribery Act*, *supra* note 43; Ashby, *supra* note 113.

150. Warin et al., *supra* note 18, at 36.

151. *Id.* at 4.

152. Jonathan Russell, *The SFO Needs A Big Scalp if Bribery Act is to be Feared*, TELEGRAPH (U.K.) (July 1, 2011), <http://www.telegraph.co.uk/finance/comment/8609414/The-SFO-needs-a-big-scalp-if-Bribery-Act-is-to-be-feared.html> (noting that the SFO will be going after big companies, with big pockets that are capable of engaging in big acts of bribery).

153. PETER WILKINSON, THE 2010 U.K. BRIBERY ACT: ADEQUATE PROCEDURES 79 (Transparency Int'l U.K., July 2010), available at <http://www.transparency.org.uk/publications/adequate-procedures/120-adequate-procedures/download> (last visited Aug. 5, 2011).

154. *The United Kingdom's Bribery Act 2010 and other Recent Anti-Corruption Enforcement Activity in the United Kingdom*, (Chadbourne & Parke, LLP New York, N.Y.), May 3, 2010, at 1, available at <http://www.chadbourne.com/files/Publication/b428aea0-6774-459d-b38c-69c70124d271/Presentation/PublicationAttachment/be805ef7-f4a2-4c27-b517-77b2ab7205a4/UKBriberyAct.pdf> (last visited Aug. 5, 2011).

155. Michelle Duncan et al., *A Comparison of the US Foreign Corrupt Practices Act and the UK Bribery Act*, PAULHASTINGS.COM, Oct. 2010, at 1, available at <http://www.paulhastings.com/assets/publications/1750.pdf> (last visited Aug. 5, 2011).

Bribery Act.<sup>156</sup> These analysts also surmise that companies that currently have aggressive anti-bribery systems in place should be able to effectively adapt to the Bribery Act.<sup>157</sup> In enforcing the Bribery Act, and before commencing an investigation, the SFO will likely attempt to establish a pattern of conduct that demonstrates an organization's failure to alter its procedures to comply with the Bribery Act.<sup>158</sup> One attorney indicated that the Bribery Act would not be a "game changer" for most companies that have been subject to the FCPA, but companies that have been remiss in anti-bribery compliance may have reasons to be concerned.<sup>159</sup> It is essential to note that the SFO intends to aggressively pursue foreign companies listed in the United Kingdom despite the MOJ's assertion that a listing in itself would not give rise to Bribery Act liability.<sup>160</sup> Although the SFO does not conduct sector-wide investigations the organization has warned that it plans to work closely with the foreign authorities that do conduct such investigations, in particular the DOJ and the SEC.<sup>161</sup> The SFO has also expressed its intention to combat bribery by utilizing the United Kingdom's money laundering laws.<sup>162</sup> Rigid implementation of the Bribery Act's provisions will likely cause many companies to terminate various foreign relationships in an effort to avoid prosecution.<sup>163</sup> A recent Dow Jones State of Anti-Corruption Compliance Survey indicated that more than 55% of companies delay or avoid working with global business partners because they are fearful of noncompliance with anti-bribery regulations.<sup>164</sup>

*B. How Do Facilitation Payments Affect a Company's Ability to do Business in a Foreign Country?*

The Bribery Act's prohibition on facilitation payments could make it impossible to do business in some countries if the officials of these foreign

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156. Michael Connor, *New U.K. Bribery Law Could Have International Impact*, BUSINESS-ETHICS (Jan. 6, 2011), <http://business-ethics.com/2011/01/06/1525-new-uk-bribery-law-could-have-international-impact/> (last visited Aug. 5, 2011).

157. *Id.*

158. *Our Top 5 Predictions For the 1st Year of the Bribery Act*, BRIBERYACT.COM (July 1, 2011), <http://thebriberyact.com/2011/07/01/our-top-5-predictions-for-the-1st-year-of-the-bribery-act/> (last visited Aug. 5, 2011) [hereinafter *Our Top 5 Predictions*].

159. Connor, *supra* note 155.

160. *Our Top 5 Predictions*, *supra* note 157.

161. *Id.*

162. *Id.*

163. *Dow Jones Risk & Compliance, Dow Jones State of Anti-Corruption Compliance Survey*, DOW JONES (Mar. 11, 2011), <http://www.dowjones.com/pressroom/SMPRs/DJACCSurvey2011.html> (last visited Aug. 5, 2011).

164. *Id.*

countries refuse to provide services absent the payment of bribes.<sup>165</sup> This prohibition has created much concern for organizations in light of the SFO's statement that it intends to rigorously enforce that particular provision.<sup>166</sup> However, the SFO has expressed that it is unlikely to prosecute persons or entities that make small payments to compel routine, non-discretionary government action, unless these payments are part of a larger pattern, or are systemic of a wider lack of adequate procedures.<sup>167</sup> The SFO's ultimate plan is to completely phase out facilitation payments, but it recognizes that the process may take a few years.<sup>168</sup> In light of such leniency towards small facilitation payments, the U.K. authorities will expect companies to consult with them if issues arise, as this would demonstrate to the authorities that these companies are working towards zero tolerance in the near future.<sup>169</sup> The conflict between the FCPA, which excludes facilitation payments from the scope of its prohibitions, and the Bribery Act would likely force organizations to follow the higher U.K. standard and incur higher costs in order to remain compliant with the Act while doing business with the United Kingdom.<sup>170</sup>

### C. What Industries Will Be Most Affected By the Bribery Act?

Research conducted by Ernst & Young based on the analysis of FCPA bribery convictions illustrates ten sectors that are most vulnerable to the Bribery Act.<sup>171</sup> These sectors, listed in order of vulnerability, are as follows:

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165. Bonneau, *supra* note 106, at 401; WILKINSON, *supra* note 152, at 29 (explaining that the prohibition on facilitation payments results in adverse consequences because in some markets it is impossible to travel or get business done without these types of payments. In addition, the article states that apart from the legal risks of facilitation payments, a practice of making such payments can make a company more vulnerable to bribery as it sends a message to employees and business partners of inconsistency in no-bribery policies as well as creates a dependency among public officials to rely on these facilitation payments).

166. Bonneau, *supra* note 106, at 401.

167. *When a Bribe is Merely Facilitating Business*, ECONOMIST (June 11, 2011), <http://www.economist.com/blogs/blightly/2011/06/anti-bribery-laws> (last visited Nov. 6, 2011) (SFO director, Richard Alderman, notes that banning facilitation payments may be impractical. He also notes that it may be unrealistic for small firms to implement zero-tolerance policies on bribes and still be able to do business in the shadier parts of the world) [hereinafter *When a Bribe is Merely Facilitating Business*]; WILKINSON, *supra* note 152, at 11.

168. *When a Bribe is Merely Facilitating Business*, *supra* note 166.

169. *Id.*

170. Bonneau, *supra* note 106, at 401.

171. *Oil and Gas Sector Most at Risk From Investigation Under the U.K. Bribery Act, Warns Ernst & Young* (Ernst & Young London, U.K.), May 9, 2011, <http://www.ey.com/UK/en/Newsroom/News-releases/Assur---11-5-9---Oil-and-gas-sector-most-at-risk-from-investigation-under-the-UK-Bribery-Act> (last visited Aug. 5, 2011).



- 1) Oil and Gas;
- 2) Life Sciences;
- 3) Consumer Products;
- 4) Technology;
- 5) Real Estate;
- 6) Automotive;
- 7) Telecoms;
- 8) Asset Management;
- 9) Banking and Capital Markets;
- 10) Government and Mining Metals.

Ernst & Young's Fraud Investigations and Dispute Services' (FIDS) director, David Lister, stated:

[Although the oil and gas sector] is the most "at risk" sector in terms of the number of prosecutions that are likely to be incurred, there is no suggestion that individuals and companies within the oil and gas sector are intrinsically more corrupt than their counterparts in other sectors. Rather, it is the nature and locations of their businesses that exposes them to additional risk.<sup>172</sup>

Lister also added that the FCPA data is a good indicator of potential Bribery Act prosecutions because the DOJ and the SFO commonly share information.<sup>173</sup> The pharmaceutical industry is another industry that will likely fall under the Bribery Act's radar.<sup>174</sup> U.K. enforcement authorities have mentioned this industry as a potential target under the new law, indicating the DOJ's recent probe into this industry as the likely reason.<sup>175</sup>

#### IV. CONCLUSION

Bribery is no longer an acceptable form of doing business. Such a notion is a thing of the past, yet bribery remains a threat to both developed and developing countries. The FCPA and the Bribery Act are designed to abate the threats that stunt economic development in many countries. For many years, the United States led the crusade on eradicating bribery and corruption from the global economy through rigid FCPA enforcement. The

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172. *Id.*

173. *Id.*

174. Patrick Gilfillan, *The Bribery Act and the Pharmaceutical Industry: Is Big Pharma in Big Trouble?*, BRIBERYLIBRARY.COM (July 8, 2011), <http://www.briberylibrary.com/gifts-hospitality/the-bribery-act-and-the-pharmaceutical-industry-is-big-pharma-in-big-trouble/> (last visited Oct. 20, 2011).

175. Dionne Searcey, *U.K. Law on Bribes Has Firms in a Sweat*, WALL ST. J., Dec. 28, 2010, at B1.

United Kingdom, on the other hand, came under constant scrutiny for its relaxed enforcement attitude towards bribery. The United Kingdom eventually responded to this scrutiny; the response was deafening. Organizations worldwide can be assured that the United Kingdom will use its new Bribery Act powers to improve its long-standing reputation as an ineffective enforcer. Organizations should familiarize themselves with every provision of the Act and adjust their practices accordingly. U.K. authorities will have tremendous discretion to prosecute bribery, and organizations should be prepared for their scrutiny.

