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I. Federal Awardee Performance and Integrity Information System (FAPIIS)

A. BACKGROUND

On March 23, 2010, the Federal Acquisition Regulatory Council issued a final rule amending the Federal Acquisition Regulation (FAR) and implementing the Federal Awardee Performance and Integrity Information System (FAPIIS), now set forth in FAR 9.104-6.[1] Two new FAR Clauses were also added:

- FAR 52.209-7, Information Regarding Responsibility Matters, which applies when the resultant contract value is expected to exceed $500,000;[2] and
- FAR 52.209-8, Updates of Information Regarding Responsibility Matters, which applies when the resultant contract value is expected to exceed $500,000 *and* the contractor has current active Federal contracts and grants with a total value over $10,000,000.[3]

On September 29, 2010, another final rule amending the FAR established procedures for contracting officers (COs) submitting contractor information into the Past Performance Information Retrieval System (PPIRS) and the FAPIIS module in PPIRS.[4] PPIRS is

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1. Federal Awardee Performance and Integrity Information Systems, 75 Fed. Reg. 14,059 (Mar. 23, 2010) (to be codified at 48 C.F.R. pts. 2, 9, 12, 42, & 52).

2. Solicitation Provisions and Contract Clauses, 48 C.F.R. § 9.104-7(b) (2011).

3. *Id.* § 9.104-7(c)(1)-(2).

4. Termination for Default Reporting, 75 Fed. Reg. 60,258 (Sept. 29, 2011) (to be codified at 48 C.F.R. pts 8, 12, 15, 42, & 49).

an internet-based repository of information concerning past performance under federal contracts.

B. Information Reporting and Decision-making

FAPIIS is intended to collect information from systems including PPIRS and the Excluded Parties List System (EPLS) in order to provide up-to-date information about a contractor's quality of performance and his business ethics. The EPLS identifies contractors that have been debarred and may not be awarded prime contracts or become subcontractors under a federal contract. Thus, the focus of FAPIIS is on contractor responsibility, including:

- Criminal, civil, or administrative proceedings in connection with the award or performance of a government contract;
- Terminations for default or cause;
- Determinations of non-responsibility; or
- Comparable information relating to a grant.[5]

By submitting a proposal on a federal contract over $500,000, an offeror with over $10 million in active contracts and grants represents that the information it has entered in FAPIIS is current, accurate, and complete regarding to criminal, civil, and administrative proceedings in which a determination of fault was made.[6]

Before a contract above the simplified acquisition threshold may be awarded, the CO must consider all of the information in FAPIIS.[7] When there is relevant adverse information in FAPIIS about a contractor that is not debarred or suspended, the CO must–before making a responsibility determination–promptly ask the contractor to provide additional information showing that it is responsible.[8] The CO is afforded discretion in making a responsibility determination;[9] however, the CO must document the contract file to demonstrate how information in FAPIIS was used in the determination.[10] If the requisite conditions are met, a CO's determination of non-responsibility may be entered into FAPIIS.[11]

A subsequent change in information must be reported in FAPIIS, such as a termination for default being converted to a termination for convenience, or a court or Board of Contract Appeals entering a judgment. Notably, FAPIIS will automatically notify a contractor when the government posts new information about it.[12] Further, a contractor can enter comments in FAPIIS (such as in response to a non-responsibility determination or information entered by the government), and those comments will be retained as long as the associated information is retained.[13]

5. Federal Awardee Performance and Integrity Information Systems, 48 C.F.R. § 9.104-6(c) (2011).
6. Information Regarding Responsibility Matters, 48 C.F.R. § 52.209-7 (2011).
7. 48 C.F.R. § 9.104-6(a).
8. *Id.* § 9.104-6(c)(1).
9. *Id.* § 9.104-6(b).
10. *Id.* § 9.104-6(d).
11. Determinations and Documentation, 48 C.F.R. § 9.105-2(b) (2011).
12. Updates of Information Regarding Responsibility Matters, 48 C.F.R. § 52.209-9(b)(2) (2010), *repealed by* Small Entity Compliance Guide, 76 Fed. Reg. 4191-01 (Jan. 24, 2011).
13. 48 C.F.R. § 52.209-9(b)(2).

Finally, pursuant to the 2010 Supplemental Appropriations Act,[14] all information in FAPIIS (except for contractor performance reviews) will be publicly available.

II. Defense Trade Treaties with the United Kingdom and Australia

On September 29, 2010, the U.S. Senate ratified two bilateral defense trade treaties with the United Kingdom and Australia. The treaties,[15] signed in 2007 by former President George W. Bush, will eliminate licensing requirements for certain exports of defense articles from the United States to the United Kingdom and Australia. Similarly, no license will be required under U.K. and Australian law for certain exports of defense articles to the United States. Only transactions involving certain yet-to-be-identified projects and members of "Approved Communities" in those countries can take advantage of the changes implemented under the treaties. Although the treaties will not affect most defense trade between the United States, the United Kingdom, and Australia, these treaties may provide significant relief to exporters who have eligible transactions. Implementing arrangements accompany both treaties and provide more detail.

A new statute, The Security Cooperation Act of 2010,[16] implements the treaties into U.S. law. The statute makes conforming amendments to the Arms Export Control Act (AECA),[17] the primary statute controlling the export of U.S. defense articles and services. Similarly, the International Traffic in Arms Regulations,[18] promulgated under the authority of the AECA, will be amended to reflect the new treaties.

To be eligible for export from the United States without a license, the items to be exported must be for use in specific projects to be determined by the United States, the United Kingdom, and Australian governments.[19] The U.S. Department of Defense (DoD), the U.K. Ministry of Defence (MoD), and the Australian Department of Defence will publish the lists of projects. For projects in which the U.S. Government is the end user, license-free exports of certain eligible defense articles are permitted, provided that the U.S. Government issues a solicitation or contract stating that parties authorized for eligibility under the treaties may participate.[20] It is not anticipated that all projects in which the U.K. and Australian governments are end users will be able to receive exports from the United States license-free, and it is expected that further inter-governmental conversations will determine the specific criteria that will be used to identify the projects for which license-free shipments may be made. In addition to projects for end use by the United States, United Kingdom, and Australian governments, exporters may be able to

14. Supplemental Appropriations Act, Pub. L. No. 111-212, 124 Stat. 2340 (2010).

15. Treaty with Australia Concerning Defense Trade Cooperation, U.S.-Austl., Sept. 5, 2007, S. TREATY DOC. NO. 1110-10 [hereinafter Australia Treaty]; Treaty With United Kingdom Concerning Defense Trade Cooperation, U.S.-U.K., June 21, 2007, S. TREATY DOC. NO. 110-7, [hereinafter U.K. Treaty].

16. Supplemental Appropriations Act § 111-212.

17. Arms Export Control Act, 22 U.S.C. § 2778 (2011).

18. International Traffic in Arms Regulations, 22 C.F.R. § 120.1-.32 (2011).

19. Australia Treaty, *supra* note 15, § 3(1)(c); U.K. Treaty, *supra* note 15, § 3(1)(c).

20. Implementing Arrangement Pursuant to the Treaty Between the Government of the U.S. and the Government of the U.K. Concerning Defense Trade Cooperation, U.S.-U.K., § 3(1), Feb. 14, 2008, http://www.pmddtc.state.gov/treaties/documents/UK_Implementing.pdf [hereinafter U.K. Implementing Arrangement].

take advantage of license-free shipments to certain combined military and counterterrorism operations and cooperative security and defense programs.[21]

In addition to the requirement that an export must be made relating to an approved project, the treaties also require that the exporter and recipient must be part of an "Approved Community" of government and private entities eligible to export and/or receive defense articles license free. In the United States, the Approved Community will consist of U.S. Government entities and other entities registered with the U.S. State Department's Directorate of Defense Trade Controls as manufacturers or exporters of defense articles.[22] The U.K. Approved Community members will consist of the U.K. MoD and other U.K. Government agencies to be specified, as well as non-government entities that receive approval from the U.K. MoD for receipt of defense articles under the treaty.[23] The U.K. and U.S. governments will review and approve applications of U.K. non-governmental entities to join the approved community.[24] A variety of factors will be considered in determining an entity's eligibility for becoming a member of the Approved Community, including, *inter alia*, whether the entity is under foreign ownership or control, U.S. export licensing history with the entity, and the entity's prior compliance with U.S. and U.K. export control laws.[25] A similar process will be followed to determine Australian Approved Community members.[26]

Only certain types of defense articles will be eligible for license-free export under the treaties, and so-called "dual use" items controlled under the U.S. Commerce Control List or the EU Dual Use Regulation are outside the scope of the treaty.[27] A list of ineligible defense articles is found in the respective implementing arrangements to both treaties, including, among others: classified defense articles (except in certain circumstances), defense articles not controlled on the U.K. or Australian munitions lists, articles in the annexes to the Missile Technology Control Regimes (such as rockets and unmanned aerial vehicle systems, nuclear and directed energy weapon technologies), and several others.[28] All items that are excluded from license-free export under the treaties will continue to require export licenses unless other ITAR exceptions apply.

Under the Australian treaty, all personnel eligible to receive defense articles, whether civilian or government employees, are required to be cleared at the "Restricted" level or

21. Australia Treaty, *supra* note 15, § 3(1)(a-b); U.K. Treaty, *supra* note 15, § 3(1)(a)-(b).

22. U.K. Treaty, *supra* note 15, § 5.

23. *Id.* § 4(1)(a), (d).

24. U.K. Implementing Arrangement, supra note 20, § 7(3), (6).

25. *Id.* § 7(4).

26. Implementing Arrangement Pursuant to the Treaty Between the Government of the U.S. and the Government of Australia Concerning Defense Trade Cooperation, U.S.-Austl., § 6(4), Mar. 14, 2008, http://www.pmddtc.state.gov/treaties/documents/Australia_Implementing.pdf [hereinafter Australia Implementing Arrangement].

27. Australia Treaty, supra note 15, § 3(2); Treaty with Australia Concerning Defense Trade Cooperation: List of Defense Articles Exempted from Treaty Coverage, U.S.-Austl., pt. B, item 16, Sept. 5, 2007, http://www.pmddtc.state.gov/treaties/documents/Australia_Definitions.pdf [hereinafter Australia Exempt List]; U.K. Treaty, *supra* note 15, § 3(2); Treaty with U.K. Concerning Defense Trade Cooperation: List of Defense Articles Exempted from Treaty Coverage, U.S.-U.K., pt. B, item 16, June 21, 2007, S. TREATY DOC. NO. 110-7, *available at* http://www.pmddtc.state.gov/treaties/documents/UK_Exempt.pdf [hereinafter U.K. Exempt List].

28. U.K. Exempt List, *supra* note 27; Australia Exempt List, *supra* note 27.

higher[29] and must be physically located within Australia.[30] Background checks are also required to determine whether the personnel have "significant ties" to third countries.[31] If ties are found to exist with countries proscribed under ITAR section 126.1, further screening is required before eligibility can be approved.[32] The U.K. implementing arrangement permits only U.K. military personnel and persons with a "need to know" or "Security Check" level clearance to access defense articles exported pursuant to the treaty.[33]

In addition to the United States permitting unlicensed exports of defense articles to the United Kingdom and Australia, both governments will, under certain conditions, allow members of their Approved Communities to export defense articles to U.S. Approved Community members without obtaining a specific license. A U.K. Open General Export License (OGEL) was issued on October 6, 2010, authorizing the export of certain defense articles to the United States and several other destinations.[34] The OGEL covers most, but not all, of the defense articles that would be permitted under the defense trade treaty with the United States. It is expected that this OGEL will be supplemented by additional OGELs in the future. Australia is also expected to issue approvals to permit license-free trade of certain defense articles. The implementing arrangement between the United States and Australia specifies several requirements that Australia will impose on such exports, such as marking, recordkeeping, and tracking requirements.[35] The countries have also agreed to cooperate in the enforcement of their export control laws, including by sharing information during investigations, assisting in prosecutions, and conducting end use and end user inspections.[36]

III. Final Rule on Export Control Compliance

On April 8, 2010, the DoD issued a final rule regarding compliance with U.S. export control laws and regulations in connection with defense acquisitions.[37] The rule focuses on regulations issued by the Department of State and the Department of Commerce.[38] It

29. Australia Implementing Arrangement, *supra* note 26, § 6(11)(a).

30. *Id.* § 6(11).

31. *Id.* § 6(11)(b).

32. Australia Implementing Arrangement, *supra* note 26, § 6(11)(b), (12).

33. U.K. Implementing Arrangement, *supra* note 20, § 7(11).

34. Export License, Open General Export License, Military Goods, U.S.-U.K., Oct. 6, 2010, http://www.bis.gov.uk/assets/biscore/eco/ogels-current/10-1191-ogel-military-goods.pdf.

35. Australia Treaty, *supra* note 15, § 12; Australia Implementing Arrangement, *supra* note 26, § 10.

36. Australia Implementing Agreement, *supra* note 26, § 11(12).

37. Defense Federal Acquisition Regulation Support; Export-Controlled Items, 75 Fed. Reg. 18,030 (Apr. 8, 2010) (to be codified at 48 C.F.R. pts. 204, 235, 252) [hereinafter Export-Controlled Items 18,030].

38. Defense Items, Including Those on the U.S. Munitions List or Those For Other Military Use, Are Regulated Under the Export Control Regime Set Forth in the International Traffic in Arms Regulation (ITAR), 22 C.F.R. §§ 120–130 (2010), as established by the Arms Export Control Act, 22 U.S.C. § 2778 (2010) and administered by the U.S. Department of State. Commercial Items That Have Potential "Dual Use" As Defense Items, Are Regulated Under the Export Administration Regulation (EAR), 15 C.F.R. §§ 730-74 (2010), as administered by the U.S. Department of Commerce. The EAR, however, was originally created pursuant to the now-expired Export Administration Act, 50 U.S.C. §§ 2401-20 (1979) (amended 2000). The EAR was subsequently extended by Exec. Order No. 13222, 66 Fed. Reg. 44,025 (2001), pursuant to the authority granted to the President under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07 (2008).

does not address any export controls imposed by the Department of Energy, Nuclear Regulatory Commission, or Department of the Treasury.[39] The final rule satisfies statutory requirements directing the DoD to promulgate regulations requiring DoD contractors to comply with U.S. export control laws and regulations.[40] As a result of the DoD amending the Defense Federal Acquisition Regulation Supplement (DFARS), aerospace and defense contractors have begun to see a new clause dealing with U.S. export controls in their DoD prime and subcontracts.[41]

The final rule is a significant change in two ways from the interim rule issued on July 21, 2008.[42] First, in response to comments indicating a need to simplify the interim rule, there is now a single DFARS clause[43] as opposed to the two-tier structure under the interim rule.[44] Second, the new single DFARS clause is to be included in all DoD contracts[45] and is a mandatory flow-down to all subcontracts.[46]

The new DFARS clause acknowledges that contractors were already required to comply with U.S. export control laws and regulations, regardless of the presence of the clause in their contracts and subcontracts.[47] The new clause essentially creates a contractual obligation to follow the law.[48] The DoD issued the new DFARS clause as a way to increase compliance with U.S. export control laws and regulations.[49] Thus, at first blush the new DFARS clause does not seem noteworthy.

But because the new DFARS clause creates a contractual obligation, a contractor's ITAR and EAR violations are now simultaneously failures to comply with contract terms and conditions, so that a contractor in violation is potentially also subject to termination for default.[50] In addition, because the new DFARS clause simply says, "The Contractor shall comply with all applicable laws and regulations regarding export-controlled items"[51] and does not limit compliance to subject matter within the scope of the contract, it is conceivable that a contracting officer could terminate a contract for default based on a contractor's export control violation completely unrelated to the subject matter of the underlying contract. Finally, the new DFARS clause also opens the door to export control violations being raised as potential False Claims Act allegations, particularly by a *qui tam* relator.

39. *See* 75 Fed. Reg. 18,030.

40. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 890(a), 122 Stat. 3, 269 (2008).

41. *See* Export-Controlled Items, 48 C.F.R. § 252.204-7008 (2010).

42. Defense Federal Acquisition Regulation Support; Export-Controlled Items, 73 Fed. Reg. 42,274 (July 21, 2008) (codified at 48 C.F.R. pts. 204, 235, 252).

43. 48 C.F.R. § 252.204-7008.

44. *See, e.g.*, 75 Fed. Reg. 18,030; Contract Clauses, 48 C.F.R. § 204.7304 (2010).

45. 75 Fed. Reg. 18,030.

46. 48 C.F.R. § 252.204-7008(e).

47. *Id.* § 252.204-7008(c).

48. *See, e.g., id.* § 204.7303(b).

49. 75 Fed. Reg. 18,030.

50. *See, e.g.*, Contract Terms & Conditions—Commercial Items, 48 C.F.R. § 52.212-4(m) (2010), Default (Fixed-Price Supply & Service), 48 C.F.R. 52.249-8(a)(1)(iii) (2010), Default (Fixed-Price Research & Development) 48 C.F.R. 52.249-9(a)(1)(iii) (2010).

51. 48 C.F.R. § 252.204-7008(b).

IV. The U.K. Bribery Act 2010

One major legal issue for those involved in aerospace and defense has been anti-bribery laws. The U.K.'s new anti-bribery law, the Bribery Act 2010 (Act), received royal assent on April 8, 2010 and is scheduled to take effect in April 2011.[52] The Act strives to enhance global competition, especially in high-value transactions and large-scale public procurements, by deterring and punishing bribery and creating an expectation that bribes will not be offered—at least by those with connections to the United Kingdom. The Act is the U.K. counterpart to the U.S. Foreign Corrupt Practices Act (FCPA), but its provisions go beyond those in the FCPA. In a nutshell, the Act addresses both sides of a bribery transaction by making it an offense either to provide a bribe or to receive one.

A. Statutory Elements

1. *Bribing Another Party*

Providing a bribe occurs when, either directly or through a third party, one offers, promises, or gives a financial or other advantage to induce or reward improper performance (i.e., active bribery).[53] Thus, the bribery transaction does not have to be completed to constitute an offense. The mere offer is enough. Furthermore, in contrast to the FCPA, the Act criminalizes private-sector bribery in addition to the bribery of public officials, with the latter being addressed specifically in its own section below.

2. *Being Bribed*

Receiving a bribe occurs when one requests, agrees to receive, or accepts a financial or other advantage to induce or reward improper performance (i.e., passive bribery).[54]

3. *Expectation Test*

The test for determining whether there was improper performance of a bribe is based on what a reasonable person in the U.K. would expect proper performance to be, regardless of where in the world the offense actually occurred. What is required or permitted by applicable local written law may be considered in the analysis, though local custom or practice must be disregarded.[55]

4. *Bribery of Foreign Public Officials*

It is a separate offense under the Act to provide a bribe to a foreign public official, such as one holding a legislative, administrative, or judicial position, in order to influence that person in his or her official capacity.[56]

52. Bribery Act, 2010, c. 23 (U.K.).
53. Bribery Act, 2010, c. 23, § 1 (U.K.).
54. *Id.* § 2.
55. *Id.* § 5.
56. *Id.* § 6.

5. *Failure to Prevent Bribery*

The Act requires a commercial organization, which may take the form of a partnership or a body corporate (either being referred to hereinafter as a "company"), to prevent anyone associated with it from providing a bribe. The association between a company and the person providing a bribe is broadly construed to include employees, agents, and subsidiaries, at a minimum.[57] Nevertheless, it is an affirmative defense for a company to prove that it had in place "adequate procedures" designed to prevent bribery.[58] Whether a company's policies and procedures are adequate to prevent bribery is a determination that must be made on a case-by-case basis. Accordingly, policies and procedures must be carefully drafted, effectively implemented, and attentively followed.

6. *Penalties*

A company convicted under the Act is subject to an unlimited fine, and a convicted individual is subject to an unlimited fee and imprisonment for up to ten years.[59]

B. Significant Issues

1. *Extra-Territorial Application and Jurisdiction*

Under the Act, U.K. courts will have jurisdiction over any offense committed in the United Kingdom and any offense committed outside the United Kingdom by a British national or resident, U.K. corporation, or Scottish partnership. Additionally, if a company carries out its business in whole or in part in the United Kingdom, then U.K. courts will have jurisdiction no matter where the offense was committed.[60]

2. *Hospitality and Business Promotions*

The reasonable provision of hospitality or a business courtesy of nominal value is unlikely to constitute an offense under the Act; however, care must be taken because hospitality and promotional items and activities could potentially be used to induce or reward improper performance.

3. *Facilitation Payments*

Because the Act does not exempt facilitation payments, small "grease payments" made to facilitate routine government action may represent a bribery offense. The Act thus differs from the FCPA, which contains an express exception for payments made to facilitate routine government action.

57. *Id.* § 7.
58. *Id.* § 13.
59. *Id.* § 11.
60. *Id.* § 12.

4. *Prosecutorial Discretion*

The decision to pursue a suspected bribery offense is within the discretion of the prosecuting authorities. Key considerations will include the sufficiency of the evidence and whether prosecution is in the public interest.[61] At best, this portion of the Act affords flexibility in equitable and just application of the Act, and at worst, the possibility of disparate enforcement.

C. The "Adequate Procedures" Defense: Six Principles for Bribery Prevention

On September 14, 2010, the Ministry of Justice published draft guidance (Guidance) concerning how a company should prepare and implement appropriate bribery prevention policies and procedures.[62] Recognizing that such policies and procedures will vary widely, the Guidance sets out six general principles applicable to businesses of all types and sizes and in all market sectors. The six principles are similar to the guidance on effective compliance and ethics programs promulgated by the U.S. Sentencing Commission.

1. *Risk Assessment*

A company should comprehensively assess its exposure to bribery risk on a regular basis. These risks may differ from one company to another for various reasons, such as size or industry, for example, and evolve over time. After performing a risk assessment, a company should understand the nature and extent of the bribery risks facing its market sector, including transaction risk, country risk, and business relationship risk exposure, such as through a joint venture, subsidiary, or third-party relationship. Based on the risk assessment results, a company should tailor its bribery prevention efforts accordingly.

2. *Top-Level Commitment*

A top-level commitment to prevent bribery in all aspects of business operations should be communicated internally and externally, as appropriate, and it should be effectuated through a company code of conduct and bribery prevention policies. Moreover, every level of the organization from the top down should share a commitment to a culture of integrity and zero tolerance for bribery.

3. *Due Diligence*

Before establishing a relationship with an individual or business enterprise, a company must perform its due diligence. For example, a company should gather and evaluate available information about parties with whom it plans to do business. It should take steps to ensure transparency and ethical standards in its related business dealings, such as by delineating policies and procedures to ensure compliance with the Act, and having standards in place concerning why, when, and to whom funds may be released.

61. *Consultation on Guidance About Commercial Organizations Preventing Bribery (Section 9 of the Bribery Act 2010)*, Ministry of Justice (U.K.), (2010).

62. *Id.*

4. *Clear, Practical, and Accessible Policies and Procedures*

After completing its risk assessment and due diligence, a company will be in a better position to draft effective bribery prevention policies and procedures. Such policies and procedures should be clear, practical, enforceable, and accessible internally and externally, as appropriate. Topics worthy of attention may include political and charitable contributions, gifts, hospitality and promotional efforts, advice on relevant laws and regulations, reporting requirements and non-retaliation policy, and guidance for responding to a demand for a bribe or facilitation payment or when an incident of bribery is reported or alleged.

5. *Effective Implementation*

A company's bribery prevention policies and procedures must be implemented effectively–a "paper program" will not suffice. Therefore, a suitable person must be responsible for such implementation. Policies and procedures, including in regard to reporting mechanisms, must be appropriately communicated internally and externally. Training programs must be prepared and accomplished. Monitoring and auditing controls must be established, and policies and procedures must be reviewed, evaluated, and revised, as required.

6. *Monitoring and Review*

Finally, a company must ensure that its policies and procedures are being followed, that issues are being identified and addressed as they arise, and that improvements are made accordingly.

D. Conclusion

By enacting the Act, the United Kingdom joins the growing number of countries that have made serious commitments to combating bribery and related corruption in international business transactions. These commitments and the substantial resources being devoted to criminal and other enforcement efforts create substantial risks for companies operating in the international arena. The draft Guidance from the U.K. Ministry of Justice provides sensible principles for all companies exposed to the risks of international transactions. One concern that cannot be overlooked, though, is how U.K. prosecutors will treat voluntary disclosures made to U.S. authorities under the FCPA. The Act does not impose self-reporting obligations. Of course, it is possible that making a voluntary disclosure to and cooperating with U.K. authorities could help to avoid prosecution, or at least merit more favorable treatment. But it is conceivable that an FCPA disclosure could result in the United States and the United Kingdom separately prosecuting a company based on the same operative facts. Plainly, companies doing business in the international marketplace must heed the Act and be mindful of potentially increased exposure to prosecution and penalties.